



**Wambua & another v Mutua & another (Suing as the Legal Administrators
of the Estate of Samson Wambua Mutua - Deceased) (Civil Appeal
E092 of 2021) [2023] KEHC 18569 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18569 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E092 OF 2021
TM MATHEKA, J
JUNE 14, 2023**

BETWEEN

NICHOLAS MWILU WAMBUA 1ST APPELLANT

CATHERINE KAMENE MATHEKA 2ND APPELLANT

AND

JOYCE WAYUA MUTUA 1ST RESPONDENT

SHARLEAN KAMANTHE MUSAU 2ND RESPONDENT

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF SAMSON
WAMBUA MUTUA - DECEASED**

*(Appeal against the judgment by Honourable B. Ireri (SPM) in the Senior
Principal Magistrate's Court in Makindu Civil Case No.112 of 2021)*

JUDGMENT

1. The appeal herein is on quantum.
2. The parties entered into a consent judgment on liability at 70%:30% in favour of the appellants.
3. The matter before the lower court was a claim for damages arising out of accident that occurred on 10th June 2020 where Samson Wambua Mutua (deceased) was a rider on motor cycle registration No KMFD 487P (Skygo) was hit by motor vehicle registration No KCG 66H Isuzu P/up DMAX along Mombasa-Nairobi highway. As a result he sustained fatal injuries.
4. The plaintiffs brought a suit seeking damages under the *Fatal Accidents Act* and the *Law Reforms Act*. It was pleaded that the deceased was 26 years at the time of death and was earning Kshs 30,000/= per month as a businessman.



5. In the impugned judgment the learned trial magistrate on 06th December 2021 awarded the following:-
Loss of expectation of life Kshs 100,000/=Pain and suffering Kshs 100,000/=Loss of dependency Kshs (20,000x12x30x 2/3)4,800,000/=Special damages Kshs 26,375/=Total Kshs 3,518,463/=
6. The only issue is whether this court should disturb the award on damages.
7. I am guided by the principles set out in *Selle & another v Associated Motor Boat Co. Ltd* (1968) EA 123 on the mandate of the 1st appellate court.
8. On the question on whether or not this court can interfere with the awards by the learned trial court, the parties cited *Jane Chelagat Bor v Andrew Otieno Onduu* (1988-1992) 2 KAR 288 and *Kemfro Africa Ltd t/a Meru Express service & Gathogo Kanini v AM Lubia & another* (1982 – 1988) 1 KAR 777, where it was held that The court must be satisfied that either the trial magistrate in assessing damages took into account an irrelevant factor and left out relevant factors, or the amount is so inordinately low or so inordinately high that it is a wholly erroneous estimate of the damage.
9. On pain and suffering the appellant relies on two cases where the Judges awarded Kshs 20,000/= and one stated that the trend for this award runs from Kshs 10,000/= to 100,000/=. See :-
 - i. [*Kimunya Abednego alias Abednego Munyao v Zipporah S. Musyoka*](#)
 - ii. [*EMK & another v EOO*](#) (2018) eKLR.
10. The appellant submits that the award be reduced to Kshs 20,000/=.
11. On Loss of Expectation of Life: The appellant cites [*EMM & another v Joseph Njuguna Kuria & another*](#) [2016] eKLR where the deceased was aged 26 years and the court awarded Kshs 70,000/= for loss of expectation of life.
12. On Loss of Dependency; The appellants are aggrieved that the learned trial magistrate applied a multiplicand of Kshs 20,000/= yet he had no proof in evidence that the deceased was a businessman as testified to by the plaintiff and the pleadings. The applicant proposes the minimum wage of Kshs 7,240/95 as per legal notice No 2 of 2019. It is submitted that the multiplier of 30 years was in excess citing [*Munyi Omar Haji & another*](#) (2004) eKLR – where the deceased was 27 years old, at death and the court awarded a multiplier of 10 years. The appellant suggests 15 years. They have no issue with special damages.
13. The respondent's submissions are mainly to urge the court not to disturb the damages as awarded.
14. It is argued that the deceased did not die instantly and must have gone through some pain hence the Kshs 100,000/= for pain and suffering is justified (see Odunga J. (as he then was in [*Joseph Kivati Wambua v SMM & another \(suing as the legal representatives of the Estate of EMM \(deceased\)\)*](#) Court of Appeal No 42 of 2018.)
15. On loss of expectation of life the respondents cite – [*Lucy Wambui Kahoro v Elizabeth Njeri Obuong*](#) (2015) eKLR where the learned Judge refused to interfere with the award of Kshs 100,000/=.
16. On loss of dependency, it is argued that the learned trial magistrate did consider the wages for unskilled labour was of the view that it was not applicable in his view because it had been proved that the deceased was a businessman.
17. In discouraging this court from interfering with the learned magistrate's decision, the respondents cite [*Kiruga v Kiruga & another*](#) (1988) KLR 348 that where the decision may be either way the appellate court Judge should leave it as decided by the subordinate court.



Analysis and Determination

18. I have carefully considered the authorities cited and the evidence on record. It is not in dispute that the deceased died at 26 years old. He died two days after the accident. The appellant argues that there is no evidence on record that the deceased complained that he was in pain and that he was unconscious at that time. This issue was not raised at the hearing and cannot be the subject of appeal. The appellant could have sought the evidence of an expert to deal with those very fine issues. As it is, I find no reason to interfere with the award on pain and suffering.
19. The authorities cited speak to awards for loss of expectation of life and the range is up to Kshs 100,000/= . This was a 26 years old man described as a businessman. In my view the sum awarded is within the normal awards and there is no reason to interfere with it.
20. With respect to loss of dependency, I have noted from the record that the learned trial magistrate did not ignore the submissions on the unskilled labour wage, he considered it. I have noted even from the certificate of death the deceased was described as a businessman. I have perused the record however and I do not see any evidence to support the income stated in the pleadings or determined by the learned trial magistrate. The mother to the deceased said the deceased was running a cereal store but did not produce any evidence to support the same. His wife also said that the deceased was doing business but did not say what business he was running hence other than the pleading that the deceased was earning Kshs 30,000/= per month the respondents produced no evidence to support the said income.
21. Neither did the respondent produce evidence of comparative earnings of persons in the alleged line of business. Hence I am in agreement that the learned trial court did not have evidence to establish that even if the deceased was running a cereal shop he was earning Kshs 20,000/= a month.
22. In such circumstances courts have gone to the minimum wage provisions to find a justifiable standard to use for income. Taking the fact that the deceased worked in a cereals shop it would not be in order to just lump him with the unskilled labour. Looking at the submissions of the appellant on the Legal Notice on wages minimum in 2018, the close equivalent would be shop assistant whose earnings were pegged at Kshs 13,925/30.
23. Other than that I find no reason to interfere with multiplier as the retirement age 60 years for civil servants and could be more for a businessman.
24. In the end the appeal partially succeeds and the following are the final orders: Judgment be and is hereby entered for the respondent against the appellant in the following terms;
 - a. Liability at 70%:30% in favour of the respondent
 - b. Loss of dependency Ksh $13,925.30 \times 12 \times 30 \times 2/3 =$ Kshs 3,342,072
 - c. Loss of expectation of life Kshs 100,000/=
 - d. Pain and Suffering Kshs 100,000/=
 - e. Special damages Kshs 26,375/=

Kshs 3,568,447/=

Less 30% Kshs 1,070,534/10

Total Kshs 2,497,912/90
25. The respondent will have costs and interest at court rates.



DATED AND SIGNED AND DELIVERED VIA EMAIL 14TH JUNE 2023.

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MUMBUA T. MATHEKA

JUDGE

CW Githae & Company Advocates for the Appellant

Thomas Geoffrey Onyancha & Co, Advocates for the Respondents

