



**Kisilu & another v Wambua & another (Suing as the Personal  
Representatives of the Estate of Samson Musyoka Wambua) (Civil Appeal  
E020 of 2020) [2023] KEHC 19920 (KLR) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19920 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E020 OF 2020  
TM MATHEKA, J  
JULY 10, 2023**

**BETWEEN**

**DANSON KISILU ..... 1<sup>ST</sup> APPELLANT**

**JANE WAMBUA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**AGNES MUTINDI WAMBUA ..... 1<sup>ST</sup> RESPONDENT**

**SAMMY WAMBUA MUKEKU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF  
SAMSON MUSYOKA WAMBUA**

*(Being an Appeal from the Judgment of Hon. J.N.Mwaniki (SPM) in the Senior Principal  
Magistrate's Court at Makueni, Civil Case No.96 of 2018, delivered on 25th November 2020)*

**JUDGMENT**

1. Sammy Wambua Mukeku & Agnes Mutindi Wambua (Suing as the personal representatives of the estate of) Samson Musyoka Wambua filed a suit in the lower Court seeking general damages under the Law Reform Act (LRA) and the Fatal Accidents Act (FAA) on behalf of the Estate of Samson Musyoka Wambua pursuant to a fatal road accident on 30/10/2016 (material day) along the Wote-Makindu road. They also prayed for special damages, costs of the suit and interest.
2. The appellants filed a joint statement of defence, denied each and every allegation of fact in the plaint and put the plaintiff to strict proof of the claim. They averred that if at all an accident happened in the manner pleaded on the material date, then it was wholly or partially due to the negligence of



the deceased. After the preliminaries; the matter proceeded for hearing and judgment was eventually delivered. The learned trial magistrate found the appellants 100% liable and assessed damages as follows;

Pain & suffering..... Kshs. 30,000/=

Loss of expectation of life.....Kshs. 100,000/=

Loss of dependency.....Kshs. 1,200,000/=

Special damages..... Kshs . 34,990/=

Total.....Kshs 1,364,990/=

3. Aggrieved by the award, the appellants filed this appeal and listed the following 6 grounds;
  - a. That the learned trial magistrate erred in law and fact by finding liability at 100% against the appellant despite overwhelming evidence to the contrary.
  - b. That the honorable learned magistrate erred in law and fact in awarding the amount of Kshs 1,200,000/= without any justification, which amount is excessive.
  - c. That the honorable learned magistrate erred in law and fact in awarding Kshs 90,000/= for pain and suffering.
  - d. That the honorable learned magistrate erred in law and fact in awarding Kshs 74,990/= as special damages with the same not being proved.
  - e. That the award of damages by the learned magistrate was excessive and an erroneous estimate of the damages that may be awarded to the respondent considering the circumstances of the case before the subordinate court and the weight of precedent in similar circumstances.
  - f. That the learned magistrate erred in law and fact in disregarding crucial evidence in arriving at his decision based on only partial evidence.
4. Parties took directions to canvass the appeal by way of written submissions which were filed by their respective counsel.

### The Appellant's Submissions

5. On liability the appellants submit that there is no dispute that an accident happened on the 30<sup>th</sup> October 2016 involving the motor vehicle registration no. KBL xxxZ driven by the appellant's driver and the deceased's motorcycle registration no. KMDJ xxxB, however that the respondents failed to discharge their duty of proving all the elements of negligence as alleged. That they did not establish the nexus between their negligence and the accident. That the respondents did not witness the accident and the police confirmed that the matter was still pending under investigations. They relied on *Kiema Mutuku v Kenya Cargo Handling Services Ltd* (1991) 1 KAR 258, cited in *Mbugu David & Anor v Joyce Gathoni Watbena & Anor* (2016) eKLR. The court held that;

“There is as yet no liability without fault in the legal system in Kenya and a respondent must prove negligence against the appellant where the claim is based on negligence.”
6. They relied on the case of *Donoghue v Stevenson* (1932) AFR 1 for the submission that the elements of negligence that there be a duty of care to the respondent, the duty is breached and that the respondent suffered as a result of that breach They acknowledge that they owe a duty of care to all road users but contend that there was no demonstration of how it was breached and the nexus between that breach and the injury suffered. They relied on the *Statpack Industries v James Mbithi Munyao* [2005]



eKLR to the effect that a plaintiff was required to establish the connection between his injuries and the negligence of the defendant.

7. They submit that the case was not proved on a balance of probability and should be dismissed/ even if the court was to find the Respondents responsible then the deceased was largely to blame for the accident.
8. On quantum, the appellants submit that the deceased died on the same day hence the award should be reduced to 10,000/=. They rely on the case of *John Mureithi Kariuki v George Mwangi* [2012] eKLR where the court stated that;

“I have considered that the deceased died on the same day of the accident. He must have suffered considerable pain while undergoing treatment. I will award kshs 10,000/= for pain and suffering.”

9. They have urged the court to adopt the conventional figure of kshs 70,000/= for loss of expectation of life. They submit that the amount was awarded in the case of John Mureithi Kariuki (*supra*) and *Caroline Anne Njoki Mwangi v Paul Ndung'u Muroki* (2004) eKLR.
10. They have relied on section 4 of the *Fatal Accidents Act* for the submission that actions under the Act are brought for the benefit of the deceased's spouse, parent or child.
11. As for loss of dependency, they submit that the lifespan in Kenya has reduced by a big margin. They rely on the case of *Mary Kerubo Mabuka (Suing as the legal representative of the estate of Ritab Moraa Gichana) v Newton Mucheke Mburu & 3 others* [(2006) eKLR where the court held that;

“...however, this court is not oblivious of the fact that the average standard of living has plummeted due to increased incidences of poverty, HIV/AIDS pandemic and road traffic accidents. This has resulted in reduction of the life expectancy on an average Kenyan.”

12. They submit that the deceased was aged 30 years old and a multiplier of 20 years should be applied in this case.
13. They propose a dependency ratio of one third (1/3) for the reason that the deceased was survived by his parents and had no wife and children. They rely on the case of *David Kajogi M'mugaa v Francis Muthomi* [2012] eKLR where the court held;

“The deceased in this appeal was at the time of his death aged 23 years as per death certificate. He was not married and was survived by his father, mother and his young siblings. His father at the time of death of the deceased was 52 years and his mother 48 years..... The deceased had no documentary evidence in support of his earnings. There is no doubt the deceased had earnings from sale of his crops from the farm but for sure, no one would say how much was the deceased earnings. It is a mere speculation. As to the deceased wages, and as submitted by learned counsel, it would be reasonable to allow the minimum wage as allowed by law. I would compute this at Kshs. 5,000/= per month as it may have been in or around 2008. The deceased would have thus supported his parents with a portion of this wage. I would apply 1/3 to this amount.”

14. As for multiplicand, they submit that the court should use the minimum wage regulation as per the time the deceased died. They submit that the minimum wage as at 30/10/2016 was kshs 5,844/=. Their calculation is therefore; 5,844/= x 20 years x 12 months x 1/3 = 467,520/=.



15. They concede that special damages of kshs 34,990/= were specifically pleaded and proved.

### **Respondents' Submissions**

16. On liability, the respondents submit that the appellants' witness confirmed the occurrence of the accident and his testimony was contradictory as to the actual and or clear circumstances of the occurrence. They have urged the court not to disturb the finding on liability.
17. On quantum, they submit that the trial court awarded damages that were proportional and in accordance with past decisions and evidence. They have relied inter alia on the following cases;

*Gichebu v Morton & Anor* (2005) 2KLR 333 where it was stated that;

“In order to justify reversing the trial Judge on the question of the amount of damages, it was generally necessary that the Court of Appeal should be convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the appellant was entitled.”

*Mary Khayesi Awalo & Anor v Mwilu Malungu & Anor* (1999) eKLR where the Court stated;

“As regards the income of the deceased, there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court's opinion, that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

18. They submit that after hearing the witnesses, considering the pleadings and exhibits, the trial court acted on correct principles of law and exercised discretion thus arrived at a sound and reasoned judgment.

### **Duty of Court**

19. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
20. Having looked at the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;
- a. Who was to blame for the accident and to what extent?
  - b. Should the quantum of damages be disturbed?

### **Analysis**

21. On liability the only eyewitness in this matter was Joseph Kyalo. He did not testify but his statement was adopted by consent on 23<sup>rd</sup> September 2019. In the statement dated 30/10/2019, he recalled that on 30/10/2016, he was riding a motor cycle towards Wote town. At kwa Munyasya junction, motor vehicle registration number KBL xxxZ passed him at high speed and hit a motor cyclist ahead who wanted to turn to the right. The motor cyclist was taken to Makueni Referral Hospital by good Samaritans but was pronounced dead on arrival. He blamed the driver for driving at a high speed, overtaking dangerously, not being careful and driving in a zig zag manner.



22. The driver of KBL xxxZ was DW 1. He adopted his statement dated 28/06/2019 in which he stated that on the material day, he was driving along Wote-Makindu road at 60 Km/h. The weather and tarmac road were clear. He saw an oncoming motor cyclist ahead of him and just as they were about to meet, the cyclist suddenly turned to join a feeder road on DW 1's left. DW1 tried to swerve to the left side, to avoid a collision but due to the short distance, they collided on his (DW1) lane and the vehicle was damaged on the front bumper, right wing. He was not charged with any offence in relation to the accident.
23. On cross examination, he said that it was about 4pm and he was travelling from Kathonzweni towards Wote. That the rider emerged on the right side towards Makindu and he never saw him emerging. That he only saw him at a short distance of about 5 meters. That he braked but it was too late. He also tried to swerve to the left side. He also stated that the rider was speeding at between 60 and 80 kilometers per hour.
24. The fact that an accident occurred on the material day, involving motor vehicle registration number KBL xxxZ and motor cycle registration number KMDJ xxxB, is not in dispute. It is also not in dispute that the rider was fatally injured. The appellants have argued that the learned trial magistrate erred by finding them 100% liable.
25. The evidence of the eye witness is that the motorcyclist wanted to turn to the right when the collision occurred. The driver says the cyclist was riding on his (the cyclists' lane and suddenly turned to join a feeder road on the driver's left. Evidently there was a collision between the two m/vehicles Each of the sides blames the other for the evidence. Was there clear evidence that it is one and not the other who was wholly to blame for the accident? From the evidence on record it would appear that each of the two did contribute to the collision. The evidence points to some contribution to the accident by the motor cyclist. This is because the witness says he wanted to turn. How did he know what the oncoming cyclist wanted to do? He must have seen him turning at the same time the m/vehicle overtook him and that is how he witnessed the collision.
26. It is not in dispute that the accident happened and a collision occurred between the m/cycle and the appellant's m/vehicle out of which the deceased sustained fatal injuries. The fact that the appellant drove a m/vehicle which the considered the more dangerous machine if out of control is sufficient that the respondent's driver owed other road users including the deceased a duty of care to control the said m/vehicle. Of course the m/cyclist also had a duty to be careful on the road and with respect to other road users as well. In the circumstances I am of the view there was contribution on the part of the deceased which I asses at 10%.

#### **Whether the quantum of damages should be disturbed.**

27. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In *Butt -vs Khan* (1977)1KAR it was held that;

“An appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.



### **Award under Law Reform Act**

28. On pain and suffering, PW2 was the one who took the deceased to the hospital after the accident. His statement indicates that the man was declared dead before entering the emergency room. The death certificate (P.Ex 2) confirms that indeed the deceased died on the same day. It is trite that the consideration to be borne in mind while awarding damages under this head is the length of time that a person suffers before succumbing to injuries.
29. I find relevance in the words of Majanja J. in *Sukari Industries Limited v Clyde Machimbo Juma*; Homa Bay HCCA NO. 68 of 2015 [2016] eKLR where he stated that;
- “5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years...”
30. Further, in *Retco East Africa Limited v Josephine Kwamboka Nyachaki & another* [2021] eKLR the court stated that;
- “In this case where the deceased died 30 minutes after the accident an award of Kshs. 100,000/= for pain and suffering is not only fair but reasonable as the court is also enjoined to consider passage of time and inflation. Kshs. 10,000/= proposed by the appellant is what was awarded in the eighties and the nineties. The award under that head is upheld.”
31. Accordingly, the award of Kshs 30,000/= is within an acceptable range and I find no reason to interfere with the trial courts discretion.
32. With regard to the award for loss of expectation of life, the appellants contend that the conventional figure of Kshs 70,000/= should be awarded. However, we have a myriad of cases where ksh 100,000/= has been awarded as a conventional figure. In *Hyder Nthenya Musili & Another v China Wu Yi Limited & another* [2017] eKLR, the learned Judge observed that ‘The conventional award for loss of expectation of life is Kshs. 100,000/=’
33. Similarly, in the case of *Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased))* [2022] eKLR the court upheld an award of Kshs 100,000/=.
34. It is my considered view that the award of Kshs 100,000/= is the conventional reasonable about.

### **Award under the Fatal Accidents Act**

35. With regard to the multiplicand, it was pleaded that the deceased was a motor cycle rider with an income of kshs 2,000/= per day. The deceased’s father testified that the deceased was a boda boda operator and farmer. In his statement which he adopted as evidence in chief, he indicated that the deceased would provide them with food, clothing and money for upkeep.
36. The appellants and respondents had proposed the use of multiplier approach in the trial court but the learned magistrate dismissed it for the reason that it cannot be applied in cases where earnings have not been proved.



37. There are persuasive authorities such as; *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the Personal representative of the estate of Mercy Nzula Maina (Deceased))* [2016] eKLR and *Eston Mwirigi Ndege v Patrick Gitonga* [2018] eKLR where the common thread was that where the earnings of a deceased person were unknown, a global award/sum ought to be adopted.
38. We also have other persuasive authorities such as *Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased))* [2022] eKLR and *Caleb Juma Nyabuto v Evance Otieno Magaka & another* [2021] eKLR where the honorable Judges upheld the use of a minimum wage as a multiplicand where monthly income could not be ascertained.
39. Evidently, we have two schools of thought from the High Court on how dependency should be assessed in cases where earnings cannot be ascertained. Since the assessment of damages is an exercise of discretion, the trial magistrate cannot be faulted for preferring the global award approach over the multiplier approach.
40. I have noted that the appellants' proposal in the trial court was that an award of kshs 808,560/= would be reasonable for loss of dependency. In this appeal however, their proposal has come down to 467,520/=. On the other hand, the respondents' proposal in the trial court was kshs 2,400,000/= for loss of dependency.
41. In our case, the dependants of the deceased were his parents since he was not married and I have looked at awards made in comparable cases. In *Attorney General v Savinah Francis (suing as the personal representative of the Estate of) Peter Musee Muema & another* [2020] eKLR, the court (Ong'udi J) awarded Kshs 1,249,740/= for loss of dependency for an unmarried deceased aged 29 years.
42. The award of Kshs 1,200,000/=for loss of dependency cannot be said to be inordinately high.
43. As indicated earlier, the award of kshs 34,990/= for special damages was conceded.
44. Hence the appeal is only partially successful in that the contribution by the deceased is assessed at 10%.
45. Judgment is there for entered for the respondent against the appellant for the sum of Ksh 1,228,491 which is (1,364,990 less 10% contribution (1,364,990 x 10/100) plus costs and interest from the date of the judgment in the court below.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 10TH DAY OF JULY 2023**

.....

**MUMBUA T MATHEKA**

**JUDGE**

Court Assistant Mwiwa

MNM Advocates LLP N/A

Advocates for the appellants

Thomas Geoffrey Onyancha N/A

Advocate for the Respondents

