



**West Build General Contractors Ltd v Njeru (Suing as the Legal Representative  
and/or Administrator of the Estate of Michael Mutembei Ntwiga – Deceased)  
(Civil Appeal E025 of 2021) [2023] KEHC 20714 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20714 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT CHUKA  
CIVIL APPEAL E025 OF 2021  
LW GITARI, J  
JULY 21, 2023**

**BETWEEN**

**WEST BUILD GENERAL CONTRACTORS LTD ..... APPELLANT**

**AND**

**ANNLITA WANJA NJERU (SUING AS THE LEGAL REPRESENTATIVE AND/  
OR ADMINISTRATOR OF THE ESTATE OF MICHAEL MUTEMBEI NTWIGA  
– DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal against the judgment of the Chuka CMCC No. 20 of 2020.
2. The suit in the lower court related to a fatal road traffic accident which occurred on or about the 7<sup>th</sup> September, 2019 along Chuka-Kaare road. The deceased person was riding his motor cycle registration number KMDM 333W Captain Make when his motor cycle fell into a ditch and/or trench that had been negligently and recklessly left open, unattended and/or uncovered by the Appellant’s servants, employees, and/or agents in their course of constructing, grading, and/or repairing the road and as a consequence whereof, the deceased sustained fatal injuries. The Respondent herein ths prayed for the Appellant to be held liable for general damages under the Law and Reform Act and Fatal Accident Act; special damages of Kshs. 48,000/=; and costs and interest of the suit.
3. The issue of liability was settled by consent of the parties on 10<sup>th</sup> September, 2020. It was agreed that same be at the ration of 70:30 in favour of the Respondent against the Appellant. Consequently, the trial court made the following award in the impugned judgment:
  - a. Pain and Suffering – Kshs. 40,000/=
  - b. Loss of expectation – Kshs. 100,000/=



- c. Loss of dependency – Kshs. 1,920,000
  - d. Special damages – Kshs. 48,000/=
  - e. Less double entitlement – Kshs. 100,000/=
- Total – Kshs. 2,088,000 less 30%
- Net Total – Kshs. 1,405,600
- Plus costs and interests
4. Aggrieved by the said judgment, the Appellant instituted this Appeal vide the Memorandum of Appeal dated 2<sup>nd</sup> November, 2021 which raises the following nine (9) grounds of appeal:
- a. That the learned trial magistrate erred in law and facts in failing to consider that the facts in the authority relied on in the making the award on loss of dependency of Kshs. 1,920,000/= were so dissimilar to the facts relating to the Respondent’s case thereby resulting in a miscarriage of justice in so doing.
  - b. That the learned trial magistrate erred in law and in fact in failing to consider the vagaries and imponderables of life in applying a multiplier of 16 years.
  - c. That the trial magistrate erred in law and fact in applying a multiplicand of Kshs. 15,000/= despite the fact that neither was the same proved as the deceased’s monthly earning nor reasonable grounds for the same being applied.
  - d. That the learned trial magistrate erred in law and in fact in making a finding that the deceased was a butcher despite the fact that the same had neither been pleaded in the Plaintiff’s Pleint nor been proved.
  - e. That the learned trial magistrate erred in fact and in law by awarding inordinately high general damages to the Respondent.
  - f. That the learned trial magistrate erred in law and fact in awarding Kshs. 48,000/= special damages by failing to consider that the receipts produced by the Respondent did not bear the mandatory stamp duty revenue stamp.
  - g. That the learned trial magistrate erred in fact and in law by failing to consider the Appellant’s submissions and authorities on quantum hence arriving at an erroneous decision.
  - h. That the learned trial magistrate erred in fact and in law by awarding damages that were inordinately high to constitute a miscarriage of justice in the circumstances of the case.
  - i. That the learned trial magistrate’s judgment on quantum was wholly not supported in law by evidence tendered in court by the parties.
5. The Appellant thus prays for the appeal be allowed. The setting aside of the award of Kshs. 1,920,000/= as general damages for loss of dependency and the same be assessed afresh in line with case law. Secondly, the Appellant prays for the setting aside of the award of Kshs. 48,000/= as special damages. Finally, the Appellant prays to be awarded costs of the case in the subordinate court as well as costs for this appeal.
6. The appeal was canvassed by way of written submissions.



### **Appellant's Submissions**

7. It is the Appellant's submission that the trial court's award of quantum was erroneous and excessive. That the Respondent's evidence on quantum was not subjected to any discernible standard of assessment and that the trial court merely awarded compensation without making reference to any legal authorities or any of the Appellant's submissions and authorities relied upon. It was thus the submission by the Appellant that the impugned decision ought to be set aside and thereafter this Court reassess the evidence on record and makes a fresh decision on the quantum.
8. Under the specific heads and relying on various authorities which this Court has considered, it was the Appellant's submission that the appealed judgment should be set aside and the same be substituted with the following award:
  - a. Special damages – Nil
  - b. General damages for pain and suffering – Kshs. 100,000/=
  - c. General damages for loss of expectation of life – Kshs. 100,000/=
  - d. General damages for loss of dependency – Kshs. 347,568/=
  - e. Less double entitlement – (Kshs. 100,000/=)  
Sub-total – Kshs. 247,568/=
  - f. Less deceased's 30% contributory negligence – (Kshs. 74, 270.4)  
Total – Kshs. 173,297.6/=
  - g. Costs for Chuka CMCC No.20 of 2020 and this appeal to the Appellant.

### **Respondent's Submissions**

9. It is the Respondent's submission that the nine (9) grounds of appeal raised can be distilled into two issues. First, whether by failing to file a decree together with the record of appeal renders the appeal fatally defective. Secondly, whether the award made was inordinately high. On the first issue, it was the Respondent's submission that the Appellant filed an incomplete record of appeal dated 1<sup>st</sup> April, 2022 and without leave of this Court. The Respondent urged this Court to find that this appeal is incomplete and unmerited on the basis that the Appellant failed to file a certified copy of the decree.
10. On the issue of quantum of damages, it was the Respondent's submission that under the head of pain and suffering, the appealed judgment should be set aside and substituted with an award of Kshs. 50,000/=. The Respondent further submitted that under the heads of loss of expectation of life, loss of dependency and special damages, the award given by the trial court ought to be upheld. Finally, the objected with the reasoning of double entitlement in the appealed judgment stating that there is no requirement in law or otherwise for the court to engage in a mathematical deduction of an award for loss of expectation of life from the award under lost dependency. The Respondent thus prayed for the appealed judgment to be set aside and substituted with the following awards:
  - a. General damages for pain and suffering – Kshs. 40,000/=
  - b. General damages for loss of expectation of life – Kshs. 100,000/=
  - c. General damages for lost dependency – Kshs. 1,920,000/=
  - d. Special damages – Kshs. 48,000/=



Total – Kshs, 2,108,000/=

Less 30% contribution – Kshs. 1,475,000/=

- e. Respondent to bear the costs of this appeal and costs for Chuka CMCC No.20 of 2020
- f. All awards to attract interest at court rates from the date of filing this appeal.

### **Issues for Determination**

- 11. From the grounds of appeal and the rival submissions of the parties, it is clear that the main issues for determination by this Court are:
  - a. Whether the present appeal is complete; and if it is,
  - b. Whether the damages awarded to the Respondent were excessive in the circumstances of this case.

### **Analysis**

- 12. As a first appellate court, the duty of this Court is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses firsthand. This duty was stated in the case of *Selle & another –vs- Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

- 13. Guided by the above authority, I shall now analyse the issues pending determination by this court as highlighted above.

### **Competence of the appeal**

- 14. Vide the Respondent’s written submissions filed on 26<sup>th</sup> January, 2023, the Respondent took a preliminary point of law to oppose the appeal on the ground that the same was incomplete as the Appellant failed to attach a decree to the record of appeal. In this regard, the Respondent has called this Court’s attention to the holdings in the cases of: *Titus Muiruri Doge v. Kenya Cannery Limited* [1990] eKLR; *James Obere Ockotch v. E.A. Building Society & Others* C.A. 2 of 1996; *Republic v. District Commissioner Machakos* CA 121 of 1992; and *Mwangi Karanja v. Dominic Karanja* [2018] eKLR. All these authorities have a similar holding that failure to attach a decree to the record of appeal renders it incomplete and therefore unmerited.



15. Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010 provides as follows-

- “(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:
- (a) the memorandum of appeal;
  - (b) the pleadings;
  - (c) the notes of the trial magistrate made at the hearing;
  - (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
  - (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
  - (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.” (emphasis added).

16. From a reading of Order 42 rule 13 (f) of the Rules it is clear that it is not a mandatory requirement for an Appellant to include both the judgment and the decree of the lower court in the Record of Appeal. The use of the conjunction "or" means that an Appellant can attach either the judgment or the decree or both.

17. In the case of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR, this Court held that:

“The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.”

18. In this case, the Appellant attached to the record of appeal the Memorandum of Appeal, as well as the pleadings, submissions, and certified proceedings in the lower court. The Appellant also attached the judgment delivered by the trial court on 8<sup>th</sup> October, 2021. There is however no decree that has been attached to the record of appeal. In my view, the record of appeal is complete as this Court is able to determine the issues raised from the aforesaid bundle of documents that has been attached to the Appellant’s record of appeal. The failure to attach the decree is not a sufficient ground to strike out the appeal as the availability of the judgment is sufficient to sustain the determination of the appeal. For this reason, I shall now move to the main issue in this appeal which is on whether the quantum of damages awarded by the trial court was excessive.

### **Quantum**

19. It is not in dispute that the victim herein sustained fatal injuries and the parties consented on liability at the ratio of 70:30 in favour of the Respondent herein.



20. In the case of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR, the Court of Appeal held as follows with regards to the grounds that can justify an interference by an appellate court with the finding of the trial court on the award of damages–

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court 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 low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that: ‘An appellate court will not disturb an award of damages unless it is so 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.’ (Emphasis added).

21. A similar position was held in the Court of Appeal in the case of *Bashir Ahmed Butt V Uwais Ahmed Khan* [1982-88] KAR 5 where the court held that:

“An appellate Court will not disturb an award of damages unless it is so 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.”

22. Guided by the above authorities, which are binding to this Court, and noting that the parties consented for the Respondent’s statement and list of documents be produced as the Respondent’s evidence in chief and exhibits respectively, I shall now consider the award of damages made under the following heads.

### **Pain and Suffering**

23. Under this head, the Appellant had proposed an award of Kshs. 10,000/= while the Respondent had proposed an award of Kshs. 100,000/=. The trial court awarded a sum of Kshs. 40,000/=. The deceased died on the same day and this was noted by the trial court. His pain and suffering was therefore not prolonged before death. In the circumstances, it is my view that the trial court’s award of Kshs. 40,000/= under this head is fair and reasonable and should be upheld.

### **Loss of expectation of life**

24. The Appellant proposed an award of Kshs. 100,000/=. The same proposal was preferred by the Respondent and the trial court did award the sum of Kshs. 100,000/= under this head. Being the conventional amount under this head, and there being no disputes on the same, the said amount should be upheld.



## Loss of dependency

25. This is a claim under the *Fatal Accidents Act* (Cap 32 of the Laws of Kenya). The court is obligated to consider the multiplicand, the multiplier and the dependency ratio to arrive at the loss to be compensated under this head. The extent of dependency is a question of fact to be established in each case.
26. The formula for assessment of the above loss was ably stated by Ringera J, in *Beatrice Wangui Thairu -vs- Hon. Ezekiel Bangetuny & Another Nairobi HCC No. 1638 of 1988 (UR)* – that:
- “The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature.”
27. Other than the above formula, some courts have opted to apply the global awards. For purposes of this appeal, the Ringera J formula that comprised of the income, the multiplicand and the multiplier is applicable as this is the formula that was submitted on by the parties and adopted by the trial court.

## Multiplicand

28. The Respondent submitted that at the time of his death, the deceased was aged 46 years old and left behind a widow and three (3) children who were school going. Further, that the deceased was a butcher. The Respondent thus proposed the adoption of 20 years as a multiplier, Kshs. 15,000/= per month as the multiplicand and 2/3 as the dependency ratio. This led to a proposal of Ksh. 2,400,000/= as the award under this head.
29. On the other hand, the Appellant submitted that no sufficient evidence was provided by the Respondent on the earnings of the deceased. That the Respondent ought to have known the source of income of his deceased husband and that in the circumstances, the proposal by the Respondent under this head ought to be treated as mere allegations. The Appellant proposed the adoption of the minimum wage of Kshs. 7,241/= as the deceased’s monthly income and the multiplicand to be used in this case.
30. In the impugned judgment, the trial court noted that there was indeed no proof of income that was produced in support of the figure proposed by the Respondent. It thus held that an award of Kshs. 15,000/= as the deceased’s monthly earnings was reasonable.
31. On the deceased’s income, it is true that no proof was tendered to support the claim by the Respondent that the deceased was a butcher. However, it is now trite that it is not always that proof of income must be by production of documents. Makau J in *David Kimathi Kaburu -vs- Gerald Mworobia Murungi*



(Suing as legal representative of the estate of James Mwenda Mworobia (deceased) (2004) eKLR held that;

“The court is alive of the fact that in Kenya Society, that most of the individual’s earnings need not be proved by production of documents such as banking statements or payment vouchers or pay slips. Further to the above with modern technology in whichever payments are to be offered through use of mobile phones or by cash without requirement of payments by cheques.....is not necessary to produce documentary proof...”

32. Persuaded by the above authority, I take the view that it is not always necessary to prove earnings by production of documents. Accordingly, I opine that the sum adopted by the trial court of Shs.15,000/= per month is reasonable.

### **Multiplier**

33. The Respondent proposed the use of 11 years as the multiplier. The Respondent cited the case of Tobias Odoyo Oburu v. Callen Kwamboka Okemwa & another (suing as the legal representatives of Obed Okemwa Obwoye) (Deceased) [2018] eKLR where the court used 13 years as the multiplier and the case of Ann Njoki Njenga v. Umoja Floor Mills & Another [2006] eKLR where the deceased was aged 36 years and the court used a multiplier of 14 years.
34. On the other hand, the Responded proposed the use of 20 years as the multiplier although they did not cite any authorities for their proposal.
35. In the end, the trial court found that the use of 16 years as the multiplier was adequate in the circumstances of this case.
36. It is not disputed that the deceased in this case died at the age of 46 years. Looking at decisions of persons who were close to the deceased’s age at the time he died, this Court will be in a position to ascertain if the multiplier adopted was reasonable.
37. In the case of Pius Waswa Onyandi (Suing as the Administrator of the Estate of the Zaitun Nafula Javan Deceased) v Mohamed Hassan & another [2021] eKLR the deceased was aged 46 years old and the court adopted a multiplier of 12 years. In arriving at this award, the said court considered the following precedents:
- “ 39. In the case of Richard Macharia Nderitu v Philemon Rotich Langas [2013] eKLR, the court applied a multiplier of 10 years in the instance of a 47-year-old deceased person. In Patricia Mona & Another v Samuel OPott Omondi & Another [2014] eKLR, a multiplier of 9 years was applied for a deceased who was 47 years old. 40. In the case of Nelly Nduku Mutua (suing as the legal representative of the estate of James Mutua Makenzi – deceased) v Africa Line Transport Co. Limited & another [2019] eKLR, the court adopted a multiplier of 10 years for a deceased who was aged 48 years. In the most recent case of Crop Africa Limited v Joseph Murangiri [2020], the court adopted a multiplier of 11 years for a 47-year-old deceased person.”
38. In this appeal, the Appellant submitted that the use of 12 years as the multiplier would be fair and just in this case. In concurrence with the finding in the case of Pius Waswa Onyandi (supra), I am in agreement with the Appellant’s submission that the adoption of 12 years would be fair in this case.



## Dependency Ratio

39. The Appellant has proposed for the use of  $\frac{1}{2}$  as the dependency ratio while the Respondent maintains the use of  $\frac{2}{3}$ . The Appellant concedes that the deceased had children who were dependent on him although points out that one of children is an adult and is expected to develop financial independence. Considering that it has been proved that the deceased had a family that was dependent on him, it is my view that the trial court's use of  $\frac{2}{3}$  as the dependency ratio was fair and just in the circumstances.
40. Having considered all the factors under the head of loss of dependency above, the resulting calculation can be tabulated as follows:

"Kshs.15,000/- x 12 months x 12 years x  $\frac{2}{3}$  = Kshs. 1,440,000/="

## Special damages

41. On special damages, it is the Appellant's submission that the award of Kshs. 48,000/= by the trial court under this head was not strictly proved by strict application of evidentiary rules and that the copies of receipts should not have been accepted at the close of pleadings. On the other hand, the Respondent maintains that the award of Kshs. 48,000/= was proved and should be upheld.
42. Filed together with the Plaint is a receipt totaling 16,000/= for funeral expenses which was produced by consent of the parties. The sum of Kshs. 30,000/= for legal expenses and Kshs. 2,000/= was in my view not strictly proved. As such, I opine that an award of Kshs. 16,000/= was strictly pleaded and proved.

## Conclusion

43. The upshot of the foregoing, in my view is that the Appellant's appeal should succeed in part by setting aside the award of the trial court and substitution it with the following award:
- General damages for pain and suffering – Kshs. 40,000/=
  - General damages for loss of expectation of life – Kshs. 100,000/=
  - General damages for lost dependency – Kshs. 1,440,000/=
  - Special damages – Kshs. 16,000/=
- Total – Kshs, 1,596,000/=
- Less 30% contribution – Kshs. 1,117,200/=
- Respondent to bear the costs of this appeal and costs for Chuka CMCC No.20 of 2020
  - All awards to attract interest at court rates from the date of filing this appeal.

**Dated, signed and delivered at Chuka this 21<sup>st</sup> day of July, 2023.**

**L.W. GITARI**

**JUDGE**

