



**Mbidyo v Wambua & another (Suing as the Personal Representatives  
of the Estate of Leonard Wambua Nzioka) (Civil Appeal E010 of 2022)  
[2023] KEHC 23569 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23569 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E010 OF 2022  
TM MATHEKA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**FELISTUS WANGO MBIDYO ..... APPELLANT**

**AND**

**FLORENCE MUTINDA WAMBUA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH NGESA NZIOKA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF  
LEONARD WAMBUA NZIOKA**

**JUDGMENT**

**Introduction**

1. The respondents 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 Leonard Wambua Nzioka pursuant to a fatal road accident, involving motor vehicle KCE 185J, on 16/11/2020 (material day) along the Machakos-Kitui road at Mikuyuni area. They also prayed for special damages, costs of the suit and interest.
2. The appellant filed a statement of defence, denied each and every allegation of fact in the plaint and called for strict proof of the claim. She averred that if at all an accident happened on the material day as claimed; it was wholly and or substantially contributed to by the deceased.
3. After the preliminaries; the matter proceeded for hearing and judgment was delivered on 15<sup>th</sup> January 2022. The learned trial magistrate found the appellant 100% liable and assessed damages as follows;
 

Pain & suffering.....kshs 20,000/=

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



Loss of dependency.....kshs 1,440,000/=

Special damages.....kshs 128,600/=

Total kshs 1,688,600/=

4. Aggrieved by the award, the appellants filed this appeal on the following grounds;
  - a. The learned magistrate erred and misdirected himself in law, principle and facts when he misapprehended and misunderstood the applicable principles and the law in assessing loss of dependency thereby arriving at an award that is so manifestly and inordinately high as to constitute an entirely erroneous estimate of the damages in the circumstances of the case.
  - b. The learned trial magistrate erred in law and fact in arriving at a decision that was against the weight of evidence on record and weight of law and as a result he arrived at an erroneous decision.
  - c. The learned trial magistrate erred in law and fact by taking into account irrelevant and extraneous factors in adopting an income that is not supported by evidence hence he reached an erroneous verdict on loss of dependency.(emphasis added)
5. Directions were taken that the appeal be canvassed through written submissions.

### **The Appellant's Submissions**

6. With regard to loss of dependency, she submits that the plaintiffs did not produce any documentation to prove that the deceased earned anything close to the alleged income of between kshs1,000 and 2,000 per month. She relies on the case of Retco East Africa Limited –vs- Josephine Kwamboka Nyachaki & another [2021] eKLR where the court opined that;

“A boda boda rider’s wage if not known, can be discerned from the law and the approach by courts has been to resort to the minimum wage prevailing at the time of the deceased’s death. I am persuaded that the trial magistrate acted on a wrong principle by adopting a multiplicand of Kshs.20, 000/= when the same was not proven. In my considered view, the trial magistrate should have resorted to the minimum wage as is the practice. I accept the multiplicand of Kshs. 5,744.20/= proposed by counsel for the Appellant as the same is the applicable minimum wage as per the Legal Notice No.117 of 2015,The Regulation of Wages (General)(amendment)order 2015.”
7. Consequently, she submits that the trial magistrate erred in law by adopting Kshs 30,000/= as the monthly income in the absence of any evidence to that effect.
8. The appellant is not opposed to the ratio of 2/3 adopted by the trial court.
9. With regard to the multiplier, she acknowledges that the mandatory age of retirement is 60 years but contends that; the vicissitudes of life nowadays and the nature of business that the deceased was involved in would impede him from working for 6 years. She submits that a multiplier of 3 years is enough.
10. According to the appellant, the award for loss of dependency should therefore be calculated as follows;  
 $5,744.20 \times \frac{2}{3} \times 12 \times 3 = 137, 860.80/=$ .
11. The appellant submits that the award for loss of expectation of life is conventional and should not be disturbed.



## Respondents' Submissions

12. The respondents submit that the point of contention in this appeal is whether the award for loss of dependency is manifestly high or unjustified. They have relied inter alia on the case of Catholic Diocese of Kisumu –vs- Sophia Achieng' Tete [2004] eKLR for the submission that; an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case in the first instance.
13. They have also relied on the case of Savana Saw Mills –vs- George Mwale Mwandomo [2005] eKLR for the submission that award of general damages is a discretion of the trial court and an appellate court will be slow to interfere with such discretion unless the same is exercised on wrong principles of law.
14. With regard to the call for proof of deceased's income, they submit that the deceased operated a boda boda and it is not always that proof of income must be by production of documents. They have relied inter alia on the case of Jacob Ayiga Maruja & Anor -vs- Simeon Obayo [2005] eKLR where the Court of Appeal stated;

“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”
15. Accordingly, they submit that the testimonies of PW1 and 2 proved the deceased's earnings and the appellant did not offer any evidence to challenge it.
16. With regard to the proposed multiplier of 3 years, they submit the appellant has failed to show how the trial court may have misapprehended the evidence and no explanation has been given as to why she opposes the trial court's finding.
17. They submit that should this court deem it fit to interfere with the award on loss of dependency, it should implore the use of the global sum approach. They have relied on the following cases;
  - i. Bon Ton Ltd –vs- Beatrice Kananga suing as the administrator of the estate of Richard Olembi Ochenga [2018] eKLR where a motor cycle rider was awarded kshs 800,000/=.
  - ii. Oyungi Judith & Anor –vs- Fredrick Odhiambo & 3 Others [2014] eKLR where a motor cycle rider was awarded a global sum of kshs 700,000/=
  - iii. Ann Kanja Kithinji (Suing as the legal representative of the estate of Patrick Koome & 2 Others –vs- Jacob Kirari & Anor [2018] eKLR where the court made a award of kshs 1,000,000/= for loss of dependency.
  - iv. Pelea Stores & Anor –vs- Nthambi (Sued as the legal representative of the estate of Benson Muchangi Njue-Civil Appeal E48 of 2021 KEHC 511[KLR] where the court awarded a global sum of Kshs 1,000,000/= to a motor cycle rider.



## Duty of Court

18. 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.
19. I have considered the evidence on record, the rival submissions and the authorities cited by each side. The issues for determination are whether the award for loss of dependency was based on extraneous and irrelevant evidence, and whether the award was erroneous.

## Analysis

20. The award of damages is 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.
21. Further and as correctly submitted by the respondents, an appellate court will not disturb an award simply because it would have awarded a different figure if it had tried the case in the first instance.
22. It was pleaded that the deceased was working as a boda boda rider earning between kshs 1,000/= and 2,000/= per day. The deceased's wife, PW1, reiterated this averment in her evidence in chief and cross examination. PW2 was Patrick Mutanda Musa and a colleague to the deceased. He testified that he was the chairman of boda boda and had been in the business for a long time. That they used to make Kshs 1,000/= on a bad day. On cross examination, he said that boda boda operators do not keep books to show income.
23. The learned magistrate used the multiplier approach and adopted Kshs 1,000/= per day as the multiplicand hence making it Kshs 30,000/= per month.
24. There are other cases other than *Retco East Africa Ltd (supra)*, where the court upheld the use of a minimum wage as a multiplicand where monthly income could not be ascertained.; see *Melbrimo Investment Company Limited –vs- Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR* and *Caleb Juma Nyabuto –vs- Evance Otieno Magaka & another [2021] eKLR*.
25. On the other hand we have cases where the earnings of a deceased person were unknown, and the global award/sum approach was adopted; See *Moses Mairua Muchiri –vs- Cyrus Maina Macharia (Suing as the Personal representative of the estate of Mercy Nzula Maina (Deceased) [2016] eKLR* and *Eston Mwirigi Ndege –vs- Patrick Gitonga [2018] eKLR*,
26. In this particular case, PW1 and 2 testified that the deceased earned a minimum of ksh 1,000/= per day. It is true that the lived reality of many hustlers in the in the informal sector do not keep books of accounts. The boda boda rider will earn his money according to the number of passengers he gets and the distances he travels. The ‘stage’ matters because of how much huma traffic there may be. These days there are Boda boda Saccos. It is time they began to assist heir members to keep records. For some areas local running may be 50 shillings per person. If he takes just 10 persons that is Ksh 500. If he goes



beyond the usual distances he could earn more. Hence it is not difficult with oral evidence to establish what a boda boda rider earns on a daily basis.

27. In this PW1 simply stated that her deceased husband used to earn between 1000 and 2000 shillings per day. However she did not elaborate when she said that he used to provide for the family on those earnings. The boda boda chairman did not also elaborate on how he arrived at the ksh 1000 day. One would have expected him to provide more evidence to support the statement. Without any other evidence it would be difficult to sustain the finding that the deceased earned ksh 1000 per day or even to base his earnings on the said evidence.
28. Similarly the appellant's proposition to apply the minimum wage using the 2015 Legal Notice on minimum wage would totally be unfair. This is because this matter was heard and determined in 2021. There must be other legal notices on minimum wage bill subsequent to the 2015 one. I reject that proposal.
29. In the circumstances I find that the learned trial court did not have sufficient evidence oral or otherwise to support the daily earnings of ksh 1000 per day. It is on this basis that I arrive at the conclusion that the it would be prudent to interfere with the findings of the trial court.
30. In this I am not a lone ranger. See Moses Maina Waweru –vs- Esther Wanjiru Githae (Suing as the Personal Representative of the Estate of the Late David Githae Kiririo Taiti [2022] eKLR where the appellate court reduced a global award of 2 million to 800,000/= for a deceased who was 68 years old and was survived by a widow and adult children; Dora Mwawandu Samuel (Suing on her behalf and on the behalf of the Estate of Samuel Muweliani Jumamosi (Deceased) –vs- Shabir M. Hassan [2021] eKLR where the court awarded a global sum of Kshs. 400,000/= for a deceased farmer who was 59-year-old and was survived by 11 dependent children. In yet another case of Rishi Hauliers Limited vs Josiah Boundi Onyanacha [2015] eKLR the appellate court reduced a global award of kshs 800,000/= to 500,000/= for a deceased who was 50 years old and was survived by 5 children under the age of 18 years.
31. In this case and on the foregoing cases and the prevailing circumstances, I find that the global sum approach would have been justified.
32. The appeal is merited. The same is allowed. The judgment entered by the trial court for loss of dependency is set aside and substituted with the sum of Kshs 700,000/.

## Conclusion

Judgment be and is hereby entered as follows;

Pain & suffering..... Kshs 20,000/=

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

Loss of dependency.....Kshs 700,000/=

Special damages.....Kshs 128,600/=

Total Kshs 948,600

The award will attract interest at court rates from the date of the judgment of the subordinate court (15<sup>th</sup> January 2022)

Right of Appeal 30 days

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023**



.....

**MUMBUA T MATHEKA**

**JUDGE**

CA Nelima

Appellant's Advocates

Ms. Mwangangi for appellant

Ms Kwamboka hb for Ms Mulonde for Respondent

Ms Mwangangi- we apply for 30 days stay of execution.

Court: Application granted.

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