# Supeet (Suing as the administrator of the Estate of Alex Sirere Supeet - Deceased) v Hussein & another (Civil Appeal E571 of 2022) [2024] KEHC 15783 (KLR) (Civ) (10 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15783 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E571 OF 2022**

**JM OMIDO, J**

**DECEMBER 10, 2024**

**BETWEEN**

**SINKOOI OLE SUPEET (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ALEX SIRERE SUPEET - DECEASED) .......................................... APPELLANT**

**AND**

**ABDIKADIR KOSAR HUSSEIN .................................................. 1ST RESPONDENT**

**LAYMU TRANSPORTERS LIMITED ...................................... 2ND RESPONDENT**

***(Being an Appeal from the Judgement and Decree of Hon. S. Muchungi, Senior Resident Magistrate delivered on 1st July, 2022 in Nairobi Milimani CMCC No. E10070 of 2021)***

## JUDGMENT

1. This judgment determines the Appellant's appeal filed on 27th July, 2022 vide the Memorandum of Appeal of even date. This appeal relates only to the issue of quantum, particularly damages under the *Fatal Accidents Act*, Cap 32 Laws of Kenya, to wit the head of loss of dependency.

2. The Appellant who was the plaintiff before the trial court presented the suit as the Administrator of the Estate of Alex Sirere Supeet ("the Deceased") and pleaded that the Deceased was fatally injured following a road traffic accident that occurred on 7th April, 2021. The accident occurred while the Deceased was riding motor cycle registration number KMEY 15oQ along North the Eastern Bypass where his motor cycle collided with motor vehicle registration number KCJ 503T.

3. The issue of liability was settled by the consent of the parties which was recorded on 11th April, 2022 and duly adopted in its terms by the trial court; at 30% against the Plaintiff and 70% against the Defendants jointly and severally.

4. On quantum, the learned trial Magistrate, Hon. Selina Muchungi proceeded to assess damages. With regard to the head of damages under the *Fatal Accidents Act*, the trial court stated as follows:

> " As for loss of dependency under the *Fatal Accidents Act*, Section 4 of the *Fatal Accidents Act* (sic) provides that an action under this Act is for the benefit of the family of the deceased.
>
> Subsection (1) provides that every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was caused.
>
> Though the Plaintiff stated that the deceased was married, he failed to lead any form of evidence to prove this allegation. Though he said the deceased had four children, he again failed to produce any form of evidence to prove the existence of the children. The Plaintiff told this court that he is a brother of the deceased. Under the *Fatal Accidents Act*, he is not one of the beneficiaries of the deceased's estate. He failed to prove the necessary element of dependency. There is thus no basis upon which the court can make an award under this limb."

5. With that, the trial court went ahead and disallowed the Plaintiff's claim for loss of dependency under the *Fatal Accidents Act*. It is that finding in the trial court's judgment that gave rise to this appeal where the Appellant now complains that:

   i. That the learned Magistrate erred and misdirected herself on the Law in failing to award the Plaintiff any sum for loss of dependency under the *Fatal Accidents Act* as sought in the plaint where there was clear evidence before her that the deceased had dependants.

   ii. That the learned trial Magistrate erred in law and fact in failing to take into account the authorities cited by the Plaintiff in the submissions whilst assessing damages payable under the *Fatal Accidents Act*.

   iii. That the learned Magistrate erred in fact and in law in failing to appreciate as against the law and weight of evidence that the Deceased had four children who are all minors and all dependent on the Deceased.

   iv. That the learned Magistrate erred in law and in fact in failing to consider the totality of the submissions filed on behalf of the Appellant.

   v. The learned trial Magistrate erred in law by failing to exercise her discretion judiciously.

6. As observed above, the appeal is against quantum of damages only. The appeal was admitted to hearing on 21st June, 2024. This court gave directions that the appeal be canvassed by way of written submissions and both sides complied by filing their respective submissions.

7. A first appellate court is mandated under Section 78 of the *Civil Procedure Act* to re-evaluate the relevant evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.

8. This court is therefore empowered to subject the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the

witnesses first hand. This duty was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 in which Sir Clement De Lestang observed that:

> "This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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."

9. Going to the trial court's record, the Appellant (the Plaintiff in the lower court), presented the suit, a tortious liability claim, vide a plaint dated 16th July, 2021, seeking the following reliefs against the Respondents (the Defendants in the lower court):

    a. General damages under the *Law Reform Act* and the *Fatal Accidents Act*.

    b. Special damages of Ksh.15,373/-.

    c. Costs of the suit.

    d. Interests on (a), (b) and (c) above.

    e. Any other orders that this Honourable Court may deem fit.

10. With regard to the claim under the *Fatal Accidents Act*, the Appellant pleaded as follows under paragraph 8 of the plaint:

> " 8. The Plaintiff avers that the Deceased's Estate has suffered loss and damages for which they claim under the *Law Reform Act* and the *Fatal Accidents Act*:
>
> Particulars of dependants:
>
> a). Yieyio Ewe Sirere - Wife.
>
> b). SS - Child.
>
> c). NS - Child.
>
> d). NS - Child.
>
> e). DS - Child.

11. The Appellant testified before the lower court and adopted the contents of his statement dated 16th July, 2021 as his testimony in chief. He stated that the Deceased, who met his demise at the age of 39, was his brother and was married to two wives and was a father to SS, NS, NS and DS.

12. The Appellant further stated in his statement that the Deceased worked as a bodaboda operator, earning Ksh.30,000/- monthly and wholly supported his family by "paying school fees for his children, buying food, clothing, giving cash and paying bills whenever the need arose."

13. Upon being cross examined, the Appellant told the trial court that the Deceased did not have the certificates of birth for his children, who were all under the age of majority.

14. I have perused the Memorandum and Record of Appeal, the submissions filed by the parties and the record of the trial court from the record and material before me, I deduce the issue for this court. From

determine to be whether the trial magistrate erred in dismissing the claim for loss of dependency under the *Fatal Accidents Act* on the ground that the Appellant failed to prove the claim by failing to present evidence that the Deceased had dependants.

15. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of Price & another v Hidler [1996] KLR 95 as follows:

> " The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

16. Further, in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

> " ...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.
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> It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:
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> > "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."

17. There is also the authority of Mbogo & Another v Shah [1969] EA 93, where it was held, inter alia, that:

> " An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."

18. From the burial permit and certificate of death that the Appellant produced as exhibits, the trial court was able to determine with certainty the age at which the Deceased met his demise, which was 39. The Appellant however did not present proof of earnings by the Deceased.

19. The question that abounds is whether the Appellant proved that the Deceased had dependants. Dependency is a matter of fact to be proved by evidence. It is upon the party who brings a claim seeking damages under the head of loss of dependency to adduce evidence to prove the claim.

20. As can be seen from the passage above that I have drawn from the judgement of the trial court, the Appellant stated that the Deceased was married and had four minor children and that he wholly provided for his family. Although the Appellant did not provide documentary evidence of the existence of the Deceased's family, it is to be noted that the Respondents did not controvert the oral evidence of the Appellant that there were such dependants as they (Respondents) did not call any witnesses to offer evidence to the contrary.

21. On this, I agree with the observation made by Njuguna J. in the case of Karuku v Kariuki & another (Suing as Personal Representatives and Administrators of John Muriuki Muceke - Deceased) (Civil Appeal E093 of 2022) [2023] KEHC 24803 (KLR) (3 November 2023) (Judgment) that:

> " On the first issue, dependency is a matter of fact and should be proved through evidence. PW1 and PW2 both stated that the deceased was living with and taking care of PW1 prior to her death. They stated that the deceased took PW1 through school and has been living with her and her child for about 12 years until the time of the accident. This evidence was not controverted at trial as the appellant did not testify, neither did he call any witnesses. When the court is faced with a matter of fact, it is imperative that evidence be adduced by the party alleging the facts and, in this case, on a balance of probabilities. In my view, the respondents discharged the burden of proof as required to the satisfaction of the court. Additionally, the respondents produced a limited grant of letters of administration ad litem for purposes of this suit. This means that the respondents were rightly appointed as administrators of the estate of the deceased."

22. The jurisprudence that emerges from the above decision is that in a claim for loss of dependency, oral evidence on the existence of dependants is sufficient where the same is uncontroverted. It is to be remembered that in civil suits, a fact can be proved by way of oral evidence and the standard of proof is on a balance of probabilities.

23. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J. (as he then was) in William Kabogo Gitau v George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

24. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the

probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

25. My finding, taking guidance from the decisions above is that the Appellant indeed proved on a balance of probabilities, through oral evidence that the Deceased had dependants who included one or two spouses and four minor children.

26. But as we have seen above, this was a case in which the Deceased's age was known but there was no proof of his earnings, although the court was informed that he was a bodaboda operator.

27. Faced with such situations, some courts have attempted to employ the multiplier/multiplicand method which ultimately poses a challenge for the obvious reason that the earnings of the Deceased are known. Other courts have applied the same method and used the minimum wage as the multiplicand, which in my view would only be apt in a case where it is proved that the Deceased was employed. How then is the court to determine the claim under the *Fatal Accidents Act* where the Deceased was not formally employed and his earnings are not known?

28. The answer to this question is opportunely to be found in the authority of Mary Khayesi Awalo & another v Mwilu Mulungi & another [1999] eKLR in which Nambuye J. (as she then was), took guidance from and quoted the case of Mwanzia v Ngalali Mutua v Kenya Bus Service & another Nku HCCA No.15 of 2003 [2007] eKLR in which Ringera J. (as he then was) expressed himself as follows;

> "The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

29. There is also the decision of the High Court (C. Kariuki, J.) of David Mbuba & another v Victoria Mwongeli Kimwalu & another [2018] eKLR, where the court dealt with a scenario in which there was no proof of earnings by the Deceased in a claim under the *Fatal Accidents Act*. The court held as follows:

> "The multiplier approach was not suitable in the current case for the simple reason that the deceased's earnings were not proved. It is clear that the Learned Trial Magistrate applied the correct principles and relied on relevant authorities in deciding to use the global approach."

30. In the same breath, the court in Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, held as follows-

> "It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

31. In Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as the administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR where the court was dealing with a similar issue, it was held as follows:

> " In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.
>
> The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

32. Embracing the enlightenment from the decisions above, it is instructive that the jurisprudence provided is that where the earnings of a Deceased cannot be ascertained like was in the case before the lower court, the multiplier/multiplicand formula is not apt and the court ought to apply the global sum approach.

33. The deceased was survived by his wife/wives, and minor children who were fully dependent on him, which are factors the court must consider.Section 4(1) of the *Fatal Accidents Act* provides that the actions brought by virtue of the provisions of the Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. As the persons who were listed in the plaint as the Deceased's dependants were his spouse and children, they were entitled to benefit under the said provision of statute.

34. In the case of Ainu Shamshi Hauliers Limited v Moses Sakwa & Another (Suing as the Administrators of the estate of Ben Siguda Okach (Deceased) [2021] eKLR a global sum of Ksh 2,000,000/= was awarded for the death of a 40-year-old man who left behind a 29-year-old wife and two young children aged 6 and 4 years.

35. In MNM & another v Solomon Karanja Githinji [2015] eKLR, H. P. G. Waweru J. awarded a global sum of Kshs 3,000,000/- for loss of dependency where the deceased died at 46 years while in good health and left behind a spouse and four children.

36. In the case of Ndeti & another (Suing on their own behalf and as administrators of the estate of Gerald Ndeti Mutua (Deceased)) v Mwangangi & another (Civil Appeal E282 of 2021) [2022] KEHC 15732 (KLR) (Civ) (28 November 2022) (Judgment) the court (Janet Mulwa J.) made an award of Ksh.2,500,000/- for a Deceased who was 48 years old and left behind three school going children.

37. What I get from the above authorities, is that while the court makes a global award on the basis of comparable trends in decided cases the court must also, on a case to case basis, take into account other factors such as the age at which the Deceased met his demise, his health at the time and the number of dependants that he left behind. The list is not exhaustive.

38. I take guidance from the above cases particularly on the awards made. Guided by the principles that in awarding damages, the same should not be so inordinately high or low as to represent an entirely erroneous award, while considering the young, productive age at which the Deceased met his death, and further considering that he had a family that depended on him, I think that a global amount of Ksh.3,200,000/= would aptly compensate the deceased's estate.

39. Being of the foregoing findings, I reach the conclusion that the learned trial Magistrate fell into error in dismissing the Appellant's claim for loss of dependency.

40. In the result, I will allow the appeal only to the extent that I set aside the trial court's order dismissing the Appellant's claim under the Fatal Accident's Act under the head of loss of dependency and substitute the same with a global sum of Ksh.3,200,000/- under the said head. The award is to be subjected to the agreed consent on liability which then yields a net sum of Ksh.2,240,000/-.

41. Finally, when the court makes an award under the *Fatal Accidents Act* it must, in accordance with Section 4(1) thereof, apportion the amount awarded to each dependant of the deceased. I therefore direct that the Appellant to file the necessary application for consideration before the lower court in due course.

42. The Respondents shall bear the costs of the appeal.

43. Orders accordingly.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 10TH DAY OF DECEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**

For The Appellant: Mr. Nyakweba For Mr. Mugendi.

For The Respondents: Ms. Muthoni.

Court Assistant: Ms. Njoroge.