Bashaeb Brothers Limited v Sichenga & another (Suing as the Personal Representatives of the Late Japhet Odinga Monde) (Civil Appeal E026 of 2024) [2025] KEHC 13401 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13401 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E026 OF 2024

HI ONG'UDI, J

SEPTEMBER 19, 2025

BETWEEN

BASHAEB BROTHERS LIMITED ..... APPELLANT

AND

ZEDEKIAH SICHENGA ..... 1ST RESPONDENT

SARAH OLESI ..... 2ND RESPONDENT

SUING AS THE PERSONAL REPRESENTATIVES OF THE LATE JAPHET ODINGA MONDE

(Being an appeal from the Judgment delivered on 19th January 2024 by Hon. Y. Barasa (Principal Magistrate) in Naivasha CMCC No. E408 of 2022)

JUDGMENT

1. The appellant was the defendant in the lower court while the respondents were the plaintiffs. The respondents vide the plaint dated 27th June 2022 sued the appellant claiming damages under the *Fatal Accidents Act*, damages under the *Law Reform Act*, special damages and costs of the suit plus interest from the date of the Judgment or from the date of filing the suit.

2. The facts of the case were that on 23rd March 2022 or thereabout the deceased was lawfully walking along but completely off Naivasha-Maai Mahiu road at Oasis area when the appellant by itself, servant, agent and/or employee so negligently drove, managed and/or controlled motor vehicle registration number KCQ 660 A/ZF 9113 as a result of which he was knocked down and subsequently died.

3. The parties selected a test suit in which the appellant was held 100% liable. The appellant and respondents subsequently recorded a consent on liability at 80:20 in favour of the respondents.

4. After a full hearing the court in its Judgment delivered on 19th January, 2024, awarded kshs. 50,000/= for pain and suffering, kshs. 100,000/= for loss of expectation of life, kshs. 5,032,000/= for loss of dependency and kshs. 155,950/= as special damages all subject to 20% contributory negligence. The respondents were also awarded costs of the suit plus interest.

5. The appellant being aggrieved by the whole judgment lodged this appeal dated 12th April, 2024 setting out the following grounds: -

    i. That the learned trial magistrate erred in fact and in law by failing to appreciate the evidence; oral and documentary as presented.

    ii. That the learned magistrate erred in fact and in law in awarding a sum of Ksh 50,000/= for pain and suffering.

    iii. That the learned magistrate erred in fact and in law in adopting a dependency ratio of 2/3 for an unmarried person.

    iv. That the learned magistrate erred in fact in finding that the deceased was survived by a wife.

    v. That the learned Magistrate erred in fact and in law in awarding an excessive and exorbitant sum of Ksh 5,032,000/= for loss of dependency.

    vi. That the learned magistrate erred in fact and in law in awarding the sum of Ksh 100,000/= in funeral expenses that was not proved.

    vii. That the learned magistrate erred in fact and in law by not putting into consideration the cardinal interest of justice of ensuring that he appreciated submissions and authorities of both parties.

6. The Appeal was canvassed by way of written submissions.

Appellant's submissions

7. The same were filed by Obura Mbeche & Co. Advocates and are dated 19th July 2024. Counsel gave a brief background of the case and identified five (5) issues for determination.

8. The first issue is whether the trial Magistrate erred in law and fact in awarding kshs. 50,000/= for pain and suffering. Counsel submitted that the said award was excessive in the circumstances and that no post mortem report or certificate was produced in court. Further, that the police abstract and the burial permit indicated that the deceased died on the date of the accident. He placed reliance on the decision in M'inoti & another (suing as Legal Representatives of the Estate of Charles Kithinji Ringera-Deceased) v Gitonga & another (Civil Appeal E143 of 2022) [2024] KEHC 3180 (KLR) where the Appellate Court upheld the award of Ksh.10,000/= as no evidence was adduced on how long the deceased suffered before he died.

9. The second issue is whether the trial Magistrate erred in law and in fact in adopting a dependency ratio of 2/3 for an unmarried person. Counsel submitted that the ratio of 2/3 was inappropriate, especially for an unmarried person. That the standard dependency ratio in similar cases often ranged between 1/3 to 1/2, reflecting the portion of income reasonably expected to be used for the dependents' benefit. Further, that it was the evidence of PW1 that the deceased catered for his son and mother who had adult children earning their own livelihoods. Thus, dependency ought to have been proven. He urged the court to adopt a dependency ratio of 1/2.

10. He placed reliance on the decision in Dickson Taabu Ogutu (suing as the legal representative of the estate of Wilberforce Ouma Wanyama v Festus Akolo & Another [2020] eKLR where the Court of Appeal held as follows:

> " The onus was on the appellant to prove that their aged parents were indeed dependent on the deceased and the extent of loss they have suffered considering the fact that at the time of the hearing the appellant, also their son, had a job at the County Governor's office. We reiterate the holding in Albert Kubai Mbogori v Violet Jeptum Rahedi [2017] eKLR;
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> "The degree of dependency on the deceased's income is a 2 matter of fact. In Boru v Onduu [1982-1988] KAR 299, the Court expressed that;
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> "The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation."

11. See also; Dismas Muhami Wainarua v Sopon Kasirimo Maranta (suing as administrator and or personal representatives of the estate of Partinini Supon (deceased) [2021] eKLR and JWN v Kassam Hauliers Limited [2020] eKLR.

12. The third issue is whether the trial Magistrate erred in law and in fact in finding that the deceased was survived by a wife. Counsel submitted that PW1, the deceased's brother during his testimony noted that the deceased had a son but did not mention whether he had a wife. Thus, the trial court erred in finding that the deceased had a wife.

13. The fourth issue is whether the trial Magistrate erred in awarding an excessive and exorbitant sum of kshs 5,000,000/= for loss of dependency. Counsel submitted that the said award was disproportionate and not in line with the principles governing the assessment of damages for loss of dependency. She stated that parties adopted by consent a multiplicand of Ksh18,500/=.

14. Counsel further submitted that the dependency ratio of 2/3 as adopted by Court was not reflective of the actual dependents, in this case the son. He added that the court in adopting a multiplier of 26 years did not reflect on the harsh nature of life and work that the deceased engaged in. He urged the court to adopt the multiplier of 24 years as was in the case of Simon Karanja Mirungu (deceased) v. Zacharia Nyambura Karanja [2017] eKLR, where the deceased was 34 years, and a multiplier of 24 was adopted. See also; Sidi Kazungu Gohu (legal representative of the Estate of George Yongo Katana) v Fatuma Abdi Mohamed & Another [2021] eKLR

15. Lastly, is whether the trial Magistrate erred in awarding kshs 100,000/= in funeral expenses without sufficient proof. Counsel submitted that the said award was not specifically pleaded in the plaint or supporting documents. The principle of specifically pleading special damages requires that the plaintiff explicitly states the amount claimed and provides a detailed breakdown of the expenses incurred. The absence of such specific pleading undermines the legitimacy of the award. Reference on this was made on the decision in Harun Kaburu M'kiara v BWM (suing as the legal representative & administrator of Estate of the KM (deceased) [2020] eKLR.

Respondent's submissions

16. The same were filed by Gekong'a & Company Advocates and are dated 25th January 2025. Counsel identified quantum as the only issue for determination, and submitted that the sum of Kshs.50,000/= as awarded by the trial court under the limb of pain and suffering was not inordinately excessive. He

placed reliance on the decision in Francis Wainaina Kirungu (suing as personal representative of the Estate of John Karanja Wainaina (deceased) v Elijah Oketch Adellah [2015] eKLR where the deceased died a few hours after the occurrence of the accident and an award of kshs. 50,000/= was granted.

See also; Beatrice Mukulu Kang'uta & Another v Silverstone Quarry Limited & Another [2016] eklr

17. On loss of dependency, counsel submitted that the deceased died at the age of 26 and was in extremely good health. That at the time of his death he was a machine operator working with Akshar plastic manufacturers earning an income of Kshs.18,500/= per month (P. Exh.24). Thus, the trial court in its judgment adopting a multiplier of 34 years was reasonable in the circumstances of the case. He placed reliance on the decision in Charles Karuru Ndungu v Winfred Wanjiru Gitau [2018] eklr where the court held as follows;

> " Regarding the multiplier, it is not disputed that the deceased was 28 years old at the time of her demise. In arriving at the multiplier of 32 years, the leamed trial magistrate considered the deceased's age, the fact that she was in good health prior to the accident and the retirement age of 60 years....."

18. He further placed reliance on the decision in Chania Shuttle v Mary Mumbi [2017] eKLR and submitted that the trial Magistrate cannot be faulted for having adopted a ratio of 2/3.

19. On special damages, counsel submitted that the respondents claim for special damages Kshs. 264,175/ = was specifically pleaded and proved to the required standards plus costs of the suit. However, the trial court erred in its judgment by indicating that there were no receipts adduced for funeral expenses. That the same were produced as P. Exh.8 and P. Exh.19. He thus urged the court to dismiss the Appeal with costs.

Analysis and determination

20. This being a first appellate court, I am guided by the dictum in the case of Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

21. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by both parties, I find the issue for determination to be whether the award on quantum was inordinately high, since liability had been agreed on by the parties.

22. It is trite law that an award of quantum is a discretionary exercise by the trial court. A superior court on appeal will only interfere with that discretion if it finds that the trial court considered irrelevant factors and/or did not consider relevant factors as it made the award. This was the holding in the case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini V A. M. Lubia and Olive Lubia (1985) I KAR 727 where the Court of Appeal stated:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage".

23. Regarding the award for pain and suffering the trial court gave an award of kshs. 50,000/=. The court in Mercy Muriuki & another v Samuel Mwangi Nduati & another (suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, observed as follows: -

> " The generally accepted principle, therefore, is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for Loss of expectation of life is Ksh. 100,000/- while for pain and suffering, the awards range from Ksh. 10,000/= to Ksh. 100,000/= with greater damages if the pain and suffering were prolonged before death."

24. From the material before the court the accident occurred on 23rd March, 2022 and the deceased passed on, the same day. The respondents did not adduce any evidence to show any prolonged pain. I therefore find the award of Ksh 50,000/= to be on the higher side and and reduce it to Ksh 30,000/=.

25. Regarding the award of loss of dependency, it is not disputed that the deceased was 26 years old at the time of his untimely death. PW1 in his testimony informed the court that the deceased was a casual worker. However, he confirmed that he had no documents to prove his income. He was also not married but had a son.

26. In assessing loss of dependency, the trial court while relying on several authorities computed the award on loss of dependency as follows;

18,500 x 34 x 12 x 2/3 = 5, 032,000/-

27. The decision by the trial court to use the multiplier approach was purely a discretional one. Jurisprudence by the courts reveal that either the multiplier approach or an award of a global figure is applicable when it comes to assessing loss of dependency. In the case of Mwanzia vs Nagalali Mutua Kenya Bus Ltd cited in Albert Odawa vs. Gichumu Githenji [2007] eKLR the court gave guidance on when to use the multiplier approach as follows:-

> " The multiplier approach is just a method of assessing damages. It is not a principle of law of a dogma. It can, and must be abandoned, where the facts do no 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." [emphasis added]"

28. In the instant case no evidence whatsoever was adduced before the trial court on the deceased's earnings and this was equally noted by the trial Magistrate. Thus, the correct approach would have been to assess the deceased's income by applying the global award approach even though the parties had consented on the multiplicand of kshs. 18,500/=. For the said reasons, I find that the trial court applied the wrong approach in assessing the damages for loss of dependency. I therefore set aside the award of Kshs. 5,032,000/20 as loss of dependency and substitute it with a global award of 3,000,000/=. This is in consideration of the vulgarities of life and the fact that the deceased was still young, of good health and productive.

29. Lastly, on the issue of the appellant's evidence and submissions not having been considered, I opine that the said allegation is not correct. I note that the trial Magistrate in the judgment did a summary to the parties' evidence and submissions and noted that she had considered them in her determination.

30. The upshot is that the appeal herein succeeds partially, and the Judgment of the lower court is set aside in terms of the award for loss of dependency which is substituted with the sum of kshs. 3,000,000/=. The other awards shall remain intact including costs and interest in the lower court.

31. The appellant shall get half costs of the Appeal.

32. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 19TH DAY OF SEPTEMBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE