



REPUBLIC OF KENYA



**Gaitho & Gachanja (Suing as The Legal Administrators of the Estate of the Late Raphael Gachanja Njenga - Deceased) v Ali (Civil Case E013 of 2024) [2025] KEMC 194 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEMC 194 (KLR)

**REPUBLIC OF KENYA  
IN THE LAMU LAW COURTS  
CIVIL CASE E013 OF 2024  
FM MULAMA, RM  
FEBRUARY 21, 2025**

**BETWEEN**

**NANCY WAMAITHA GAITHO & TERESIA WAMBUI GACHANJA (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE RAPHAEL GACHANJA NJENGA - DECEASED) ..... PLAINTIFF**

**AND**

**WALIDI AHMED ALI ..... DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION.**

1. By a plaint dated 13<sup>th</sup> September 2024 the plaintiffs seek the following prayers from the court.
  - a. General damages under the Law Reform and Fatal Accident Act.
  - b. Special damages for Kshs.140,000/=
  - c. Loss of consortium, fellowship and companionship.
  - d. Costs.
  - e. Interests on [a], [b] and [c]
2. The suit is opposed by the defendant however, at the hearing of the plaintiff's case a consent on liability was recorded and the matter is due for assessment of damages.

**Plaintiff's case.**

3. The plaintiffs aver that at material times to the suit, the defendant was the insured, registered and/or beneficial owner of motor vehicle registration number KDE 805V and that on 18<sup>th</sup> October 2023



the deceased was a lawful passenger aboard motor vehicle registration number KDE 805V when the defendant and/or his authorized, driver/agent and/or servant recklessly and carelessly drove the said motor vehicle and upon reaching Gamba-Witu road, he swerved and caused the same to overturn and as a result the deceased sustained fatal injuries.

4. It is their averment that the said accident was wholly caused by the negligence of the defendant and/or his authorized driver, employee and/or servant in the manner in which he drove the said motor vehicle along the said road. The plaintiffs pleaded particulars of negligence on the part of the defendant that according to them led to the accident and death of the deceased.
5. As earlier indicated, the defence secured a consent on liability from the plaintiff in the ratio of 80:20 in favour of the plaintiffs as against the defendant and the same was adopted as order and judgement of the court and they proceeded to close their case.
6. I have considered the facts, evidence, exhibits and submissions of both parties as filed.

## **B. ISSUES FOR DETERMINATION**

7. The following issues commend themselves to me for determination.
  - a. Who is liable for the accident?
  - b. What is the quantum awardable to the claimant if any.
  - c. Who bears the costs of the claim.

## **C. ANALYSIS AND DETERMINATION.**

### **a. Who is liable for the accident?**

8. Liability was agreed upon by the parties in the ratio of 80:20 in favour of the plaintiffs and the same is adopted as the judgement of the court.

### **b. What is the quantum awardable to the claimant if any.**

9. The plaintiff has prayed for general damages under the law reform and fatal accident Act, special damages as well as damages for loss of consortium, fellowship and companionship.

## **Damages under the Law Reform Act**

### **i. Pain and Suffering.**

10. From the record the accident happened on 18/10/2023 and the death certificate indicates that the date of death was 2/11/2023 at CGTRH. It is evidently clear that the deceased died while undergoing treatment at CGTRH which appears to be the acronym for Coast General Teaching and Referral Hospital.
11. These facts suggest that the deceased suffered pain for a period of 15 days before kicking the bucket.
12. The underlying principle under this head is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his/her injuries in the period before his/her death.
13. Courts of law have however held that in as much as damages under this head are awardable nominal damages should be awarded of the death followed immediately after the accident and the vice versa is also true.



14. In the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the Court stated as follows-

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... 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 Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.” [emphasis added].

15. No amount of money can be commensurate with the pain the deceased underwent for the period preceding his death was but under this head and guided by the aforementioned authority I award Kshs.100,000/= under this head.

**ii. Loss of expectation of life.**

16. Most courts when awarding damages under this head have opted to adopt the conventional award and once such case was the case of Hyder Nthenya Musili case[supra].
17. A Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded under this head if the death followed immediately after the accident.
18. The plaintiff in his submissions has made a proposal of Kshs.300,000/= and in so doing relied on the case of Cherengany Hills Limited & Another V B W M [2018] eKLR where an award of Kshs.200,000/= was awarded. I will however, for purposes of this case go by the conventional award as held in Hyder Nthenya Musili case[supra]
19. Similarly, I adopt the conventional award for loss of expectation of life and I award Kshs.100,000/= under this head.

**Damages under the *fatal accidents Act***

**i. Loss of Dependency.**

20. Damages under this head have over time posed a challenge to courts especially in instances where the deceased earnings cannot be ascertained with 2 schools of thought emerging from superior courts.
21. One is the multiplier and multiplicand approach whereas the other is the lump sum award approach. Superior courts seem to suggest that the multiplier approach should be resorted to in instances where the earning of the deceased can be ascertained and when that is not possible then the lump sum approach to be used. Some of the courts had this to say;



22. In *Albert Odawa v Gichimu Gichenji* [2007] eKLR, cited with approval the case of *Mwanzia v Ngalali Mutua & Kenya Bus Service [Msa] Ltd & Another*, where Hon. Ringera, J took the view that:
- “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.”
23. This reasoning was adopted in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* ELD HCCC NO. 19 of 1997 [1999] eKLR where Nambuye J., stated that: -
- “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 courts 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.”
24. Similarly, in *John Wamae & 2 others v Jane Kituku Nziva & another* [2017] eKLR, the court held as follows:
- “It is therefore not clear as to what the deceased did for a living. In my view, allocating the deceased an occupation on which to base the minimum wage would amount to speculation.... I am of the considered view that the award of the trial Court should be set aside. A lump sum of Kshs. 400,000/= as general damages will be sufficient in the circumstances of this case.”
25. The plaintiffs in their submissions have just proposed a global figure of Kshs.1,200,000/= with no indication as to which method they used to get to the said figure but all indications point to a lump sum award. It is not in doubt that the deceased died aged 65 years. The death certificate also shows that the deceased was a farmer. Pw 2 in her evidence indicated that the deceased had retired after attaining the retirement age and was working for a certain company and after retirement he started doing farming.
26. It was the evidence of Pw 2 who is the wife to the deceased that despite the deceased leaving behind children, they are all over the age of 18years with the eldest being 44 years old. This for all intents and purposes they are adults and no evidence has been presented that they depended on the deceased.
27. In ordinary course of events and in our African/Kenyan set up it should be the parents now that is Pw 2 and the deceased depending on the children for some of their needs.
28. The plaintiffs in making their case for Kshs.1,200,000/= award, have relied on 2 cases to wit *Moses Maina Waweru v Esther Wanjiru Githae* [Suing As The Personal Representative Of The Estate Of The Late David Githae Kiririo Taiti] [2022] eKLR where the deceased died at the age of 68 years and left one dependent, the court awarded Kshs. 800,000/= under this head and the



case of *China Civil Engineering & Another v Mwanyoha Kazungu Mweni & Another* [2019] eKLR the court awarded Kshs. 700,000/= for a deceased who died at the age of 79 year old.

29. The case of *Moses Maina Waweru* is distinguishable from this one for the reason that in the said case evidence of earnings from the deceased business was produced in court and the court on appeal awarded Kshs.800,000/= down from the global award of Kshs.2,000,000/= awarded by the trial court. It suffices to note that the deceased therein was aged 68years old.
30. I have however, considered the submissions together with cited authorities over the subject matter and the theory of imponderables of life. There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore those imponderables.
31. The plaintiffs further submit that the deceased left behind 4 children, however no birth certificates were produced to even prove that the deceased had those dependants but most importantly an admission by Pw 2 that all of them are now adults.
32. The extent of dependency is a question of fact to be determined from the circumstances of each particular case. No such facts have been presented to court save for the admission on the part of Pw 2 as alluded to in the immediately preceding paragraph. There is no evidence that deceased's income from the alleged farming business went to the expenses of his family, such as shelter, education, clothing and food for the dependants.
33. There is also no mention of how much the deceased used to earning from the farming business although Pw 2 casually mentioned that she used to spend Kshs.30,000/= per month. Sadly that is not a basis for award of such damages even if the multiplicand approach was to be used.
34. In the case of *Catholic Diocese of Machakos & another v Janet Munaa Mutua & another* [2021] eKLR the court held that global awards are generally suitable in cases involving minor, adolescents whose income cannot be ascertained.
35. Further, the court in *Amazon Energy Limited v Josephine Martha Musyoka & another* [2019] eKLR paragraph 36 stated:

“In making a global award, the trial court should always ask itself whether the award made is close to an award that could have been made using the multiplier approach taking into account the age of the deceased, and using the minimum wage of a general worker, where the earnings of the deceased cannot be ascertained. It will be unjust for the lump sum to be much higher than the award to the estate of a deceased whose earnings have been established and a multiplier approach used.”
36. In the case of *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another* [Nairobi HCCC No. 1438 of 1998 [unreported], and referred to in *Rev. Fr. Leonard O. Ekisa & Another v Major Birgen* [2005] eKLR, Ringera J said inter alia -

“In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum [*Hannah Wangaturi Moche & Another v Nelson Muya* [Nairobi HCCC No. 4533/1993].”[my emphasis]



37. Based on the foregoing and based on the submissions by the plaintiffs it is my considered view that counsel adopted a global award approach in making his proposal
38. Guided by the authorities cited above, the case of Njagi v Ngugi & another [Suing as the personal representatives of the estate of Gedion Kamwe] [2023] KEHC 17682 [KLR] and the fact that the plaintiff admitted to have not produced evidence of deceased earning and birth certificates of the dependants taking the multiplicand/multiplier approach in the circumstances would amount to mere conjecture as observed by the court in Mary Khayesi Awalo case, therefore in the circumstances I award a lumpsum figure of Kshs.500,000/= which I consider reasonable and moderate in the circumstances for loss of dependency after taking into account deceased's age at the time of his death, the inflation rate, age of authorities referred to and further taking into account that the plaintiff will also benefit under the Law Reform Act. Special damages of Kshs.140,000/=
39. It is trite law that special damages have to be specifically pleaded and proved.
40. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 where it was stated that:
- “The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
41. Similarly, in Hahn v Singh, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;
- “Special damages must not only be specifically claimed [pleaded] but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
42. Lastly Lord Goddard C.J. in Bonham Carter vs Hyde Park Ltd [1948]64 TLR 177 said -
- “... Plaintiffs must understand that, if they bring actions for damages it is not enough to write particulars and so to speak, throw them at the court, saying “this is what I have lost, I ask you to give these damages, they have to be proved.”
43. The plaintiff has pleaded Kshs. 140,000/=. A perusal of the documents in support of the said amount, only a receipt of Kshs.40,000/= dated 19<sup>th</sup> August 2024 was produced in evidence. The claim for funeral expenses is thus not proved and it is disallowed.



44. As already observed, special damages have to be specifically pleaded and strictly proved. The plaintiffs have only managed to prove Kshs.40,000/=by way of the receipt and the same is awarded.

Loss of consortium, fellowship and companionship.

45. The plaintiff in making this prayer has placed reliance on the case of *Salvadore De Luca v Abdullahi Hemedi Khalil & Another* [1994] eKLR where the court made an award of Kshs.40,000/=.
46. The plaintiffs further made a proposal of Kshs.150,000/= and relied on the case of *Abdalla Issa & Emkay Construction Company Limited V Leonida M. Alusa & Mohammed L. Ilondanga* [Suing as The Administrators of The Estate Of The Late Andriano Muhanji Likuyani [2019] KEHC 10592 [KLR.] where Kshs. 80,000/= was awarded under this head in 2019.
47. In the case of *Innocent Keti Makaya Denge vs Peter Kipkore Cheserek & another* [2015] eKLR Githua J was of this view;

“with respect to the award of Kshs.150,000/= for loss of consortium, I entirely agree with the appellant that this award should be set aside in its entirety as it was not anchored on any law. There is no law that provides for an award of damages to the widow of the deceased person for loss of consortium. The *law reform Act* and the *Fatal Accidents Act* which are the 2 statutes that govern the award of damages in fatal accident claims recognize only 3 heads of general damages and loss of consortium is not one of them...in my view loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result diminished. Loss of consortium cannot thus be maintained as a claim on its own. In light of the foregoing the award of damages for loss of consortium to the respondents portrays a serious misapprehension of the law by the trial magistrate. The award was obviously made contrary to the law and cannot be allowed to stand. It is consequently set aside”

48. I am also aware of several authorities that have actually awarded the said prayer to wit the one cited by the plaintiffs, *Micah Nyolei and Stanley Kiplagat Milgo vs Bonventure Anthony Okumu & another and P.B.S & Another vs Archdiocese of Nairobi Kenya registered trustees & 2 others* [2016]eKLR it is not in doubt that Pw 2 and her children have lost love and affection from the deceased however, I am persuaded as Judge Githua was that a claim for loss of consortium in a case where a husband or wife dies as a result of a road accident is not provided for in the 2 regimes of law guiding fatal accidents.
49. The award under this head is dismissed as it is contrary to the laws guiding fatal accident claims.

**c. Who bears the costs of the claim.**

50. Having found that the Plaintiffs are the successful party in this matter and the fact that costs follow events, they are awarded costs of the suit.



#### **D. CONCLUSION AND DISPOSITION.**

51. The upshot is that the suit is allowed in favour of the plaintiffs as against the defendant in the following terms;
- A. Liability: 80:20.
  - B. *Fatal Accidents Act.*  
Loss of Dependency Ksh 500,000/=
  - C. *Law Reform Act.*  
Pain and Suffering Ksh.100,000/=  
Loss of Expectation of Life Ksh.100,000/=
  - D. Special Damages  
Ksh 40,000/=
- Total Ksh 740,000/=
- Less 20% contributory negligence Ksh.148,000/=
- Net award Ksh 592,000/=
52. The plaintiff is also awarded costs of the suit and interest on general damages [B & C] from the date of this judgment and that of special damages[D] from the date of filing of the suit until payment in full.
53. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT LAMU LAW COURTS THIS 21ST DAY OF FEBRUARY 2025.**

**FLAVIAN M.MULAMA**

**RESIDENT MAGISTRATE**

In the presence of:-

Court Assistant:- Fathiya Loo

Mr. Adede for the Plaintiff[virtually]

Mr. Onyango for the Defendant[virtually]

