Koech v Mwangi (Suing as Legal Representative of the Estate of John Muchemi Nderitu) (Civil Appeal E015 of 2024) [2025] KEHC 14837 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14837 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CIVIL APPEAL E015 OF 2024

JRA WANANDA, J

OCTOBER 3, 2025

BETWEEN

BENARD KIPKORIR KOECH ..... APPELLANT

AND

SAMUEL MUCHEMI MWANGI ..... RESPONDENT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN MUCHEMI NDERITU

(Appeal from the Judgment dated 30/09/2024 delivered in Iten Senior Principal Magistrate's Court Civil Case No. E045 of 2023 by Hon. V. Karanja - Principal Magistrate)

JUDGMENT

1. This Appeal is against the quantum of damages awarded in the said lower Court suit as compensation for the death of a 59-year-old adult male that occurred as a result of a fatal road accident. In the trial Court, the Appellant was the Defendant, while the Respondent was the Plaintiff.

2. The Appellant is represented by Messrs Nyairo & Co. Advocates, while the Respondent is represented by Messrs Mathai Maina & Co. Advocates.

3. Regarding the background of the Appeal, the cause of action arose from a road traffic accident that occurred on 13/06/2022 in which the deceased, being a pedestrian along the Kapsowar-Eldoret road at Karuna Trading Centre, was hit by the motor cycle Registration No. KMGA 544W alleged to be owned by Appellant, occasioning the deceased fatal injuries. After the trial, the lower Court apportioned liability between the parties at the proportion of 80:20 in favour of the Respondent, and then assessed and awarded damages to the Respondent as follows, plus costs and interest:

Pain & suffering	Kshs 100,000.00
Loss of expectation of life	Kshs 100,000.00
Loss of dependency (global award)	Kshs 1,500,000.00
Special damages	Kshs 103,600.00
Total	Kshs 1,803,600.00
Less 20 per cent in liability	Kshs 360,720.00
Net award	Kshs 1,442,880.50

4. Aggrieved with the award, the Appellant instituted this appeal by way of the Memorandum of Appeal dated 14/10/2024. The same is premised on the following grounds:

   i. That the Learned trial Magistrate erred in law and fact in failing to appreciate and apply the correct principle in assessment of damages under the *Fatal Accidents Act* Chapter 32 Laws of Kenya thereby arriving at an erroneous decision by.

      a. Finding that the Respondent who is a brother to the deceased qualified to be a dependent without any legal justification.

   ii. That the Learned trial Magistrate erred in law and in fact in failing to appreciate and apply the provisions of Section 4 of the *Fatal Accidents Act* Chapter 32 Laws of Kenya on who is entitled to an award on loss of dependency.

   iii. That the Learned trial Magistrate erred in law and in fact in awarding the sum of Kshs 1,500,000/= for loss of dependency without any legal justification and does not reflect the correct estimate of the loss/damages suffered.

   iv. That Learned trial Magistrate erred in law and in fact in failing to hold that the Respondent had not proved his case on a balance of probability as expected by law.

      b. Pain and suffering

   v. That the Learned trial Magistrate erred in law and fact in awarding Kshs 100,000/= for pain and suffering when the deceased died on the same day of the accident hence an excessive award in the circumstance.

   vi. That the Learned trial Magistrate erred law and fact in misdirecting herself by adopting a wrong principle of law as to the claim for pain and suffering hence an erroneous judgment.

5. The parties canvassed the Appeal by way of written submissions. The Appellant's Submissions is dated 8/05/2024 while the Respondent's is dated 1/04/2025. They basically reiterated the two issues at hand, and supported their arguments with authorities.

Determination

6. As reiterated in a plethora of cases, this being a first appellate Court, it has the duty to evaluate, re-assess and re-analyze the evidence before the trial Court and draw its own conclusion. For instance,

in the case of *Kenya Ports Authorityvs Kuston (Kenya) Ltd.* [2009] 2 EA 212, the said principle was highlighted as follows:

> " On a first Appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

7. As aforesaid, the issue that arise for determination in this Appeal are "whether the trial Court erred in its award of damages under the two heads of pain and suffering, and loss of dependency, respectively".

8. The principles guiding an appellate Court in determining whether to interfere with an award for damages were set out in the celebrated case of Butt v Khan [1981] KLR 470 as follows;

> " 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".

9. To therefore successfully persuade this Court to interfere with the award for damages made by the trial Court, the Appellant must satisfy this Court that the trial Court acted on wrong principles or that the award was manifestly excessive in the circumstances.

10. In respect to the claim for damages under the head of "pain and suffering" for which the trial Court awarded the sum of Kshs 100,000/-, it is not in dispute that the deceased died on the same day. In fact, according to the Appellant's Submissions, death occurred within an hour of the accident. The copy of the post-mortem report on record is not so clear to enable me ascertain whether it gives any indication on the timing of death but the Respondent has not denied this alleged interval in duration. I therefore take as it being correct.

11. Having stated as above, my review of awards made for "pain and suffering" in instances where the deceased dies on the spot, or at least a short period after an accident, reveals that majority of the recent awards given by the Courts range in the region of about Kshs 20,000/- to 40,000/-. This is in consideration of the fact that there would be no prolonged distress or torture on the part of such deceased before death. The amount of Kshs 100,000/- awarded by the trial Court therefore appears "excessive" or "inordinately high" in the circumstances to merit a review by this Court. Accordingly, I reduce the same to an award of Kshs 40,000/-.

12. Regarding the "loss of dependency" claim, the trial Court correctly applied the "global award" approach, rather than the "multiplier-multiplicand" method as the earnings made by the deceased were not ascertainable. This choice of approach is supported by various Court authorities, and indeed, neither of the parties has raised any issue over that choice.

13. More importantly, on the issue of "loss of dependency", it is not in dispute that the Respondent's claim under this head is founded on Section 4(1) of the *Fatal Accidents Act*. The Plaint does not however expressly list or mention the names of the alleged "dependents" of the deceased for whose benefit the suit was filed. Both before the trial Court and also before this Court, the Appellant took the position that the Respondent, who sued as the Plaintiff, and therefore the presumed alleged "dependent" of the deceased, being a brother to the deceased, did not qualify as a "dependent" recognized under the *Fatal Accidents Act*. According to the Appellant therefore, the claim for "loss of dependency" should not at all have been entertained. Although the trial Magistrate, in her Judgment, appreciated that this point

of law had been raised by the Appellant, she did not however determine it, but nonetheless proceeded to make the award under the head of "loss of dependency". That issue now therefore lies before this Court as a ground of Appeal.

14. In determining the issue, I observe that Section 4(1) of the *Fatal Accidents Act* is premised as follows:

> " Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ..... be brought by and in the name of the execution or administrator of the person deceased] ....." [Emphasis mine]

15. The said provision, interpreted literally therefore means that a brother or sister of a deceased person, generally, cannot claim for "loss of dependency" under the *Fatal Accidents Act* since that statute specifically limits eligible "dependants" to only a deceased person's wife, husband, parents, or children. While it is true that the *Law of Succession Act*, Cap. 160, on its part, recognizes "dependants" in a much more wider sense, to include siblings where the circumstances permit, the *Fatal Accidents Act* being the primary statute governing claims for financial loss due to a wrongful death, does not include "brothers" as statutory dependants.

16. While considering Section 4 above, the Court of Appeal, in the case of Easy Coach Limited v John Thomas Akalongo & another [2014] KECA 177 (KLR), stated as follows:

> " 12. On the first point, counsel for the appellant submitted that the award in this case was for loss of dependency only and that under the *Fatal Accidents Act*, which governs awards under that head, the only dependants of deceased persons, as per the definition of that term in Section 4 thereof, are their spouses, their children and their parents. Counsel therefore faulted the learned Judge in this case for making an award to both the parents and siblings of the deceased.
>
> 13. This argument is not entirely correct. Paragraph 1 of the amended plaint makes it quite clear that the claim in this case was under both the Law Reform and the Fatal Accidents Acts. In basing the multiplier on the deceased's career prospects, we have no doubt that the learned Judge considered and made an award under the *Law Reform Act*. This view is fortified by the fact that in her entire judgment, the learned Judge never made mention of the sum(s), if any, that the deceased used to give to either her parents or her siblings. So, the issue of making an award for loss of dependency to the deceased's siblings does not arise. We therefore do not need to consider the provisions of Section 4 of the *Fatal Accidents Act*, which as we have said, defines the dependants of deceased persons. That leaves us with the issue of the multiplier and the multiplicand that the learned Judge applied." [Emphasis mine]

17. Majanja J, in the case of John Mungai Kariuki & another v Kaibei Kangai Ndethiu & 2 others [2020] KEHC 5379 (KLR), went further and held as follows:

> " 10. ..... in the submissions before the trial court, the appellant made extensive submissions under the heading of loss of dependency leaving no doubt that the appellants' claim was made under the *Fatal Accidents Act*. Since the appellants had clearly elected to make a claim for loss of dependency under the *Fatal Accidents Act*, it was not open to the trial magistrate to award the appellants

damages for lost years under the *Law Reform Act* as parties are bound by their pleadings.

11. At this stage, it is important to point out that a claim for loss of dependency under the *Fatal Accidents Act* is separate and distinct from a claim of lost years under the *Law Reform Act* although the principles for assessment may be similar and the beneficiaries may, at the end of the day, be the same. The *Fatal Accidents Act* was enacted to provide a statutory cause of action for the benefit of a specific and named class of persons who were dependent of the deceased prior to his death at the hands of the tortfeasor. The *Law Reform Act* was enacted to provide for survival of a certain causes of action upon death of the deceased and thus enable the estate of a deceased person to sue for damages. .....

.....

The brothers and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation, to expand the list of dependants to include siblings of the deceased. Even in the cases relied on by the appellant, the principle that in African culture children are expected to support their parents is supported by the words of the statute as the deceased parents are named as dependants .....”

18. Similarly, E. Muriithi J in the case of Mohamed Hirbo Shande & another v George Mwenda Mwiti (Legal Representative of the Estate of Miriam Makena) [2021] KEHC 7087 (KLR) held that:

> “ 28. There is no mention of brothers and sisters of a Deceased, and the Court, therefore, finds that no damages were awardable for loss of dependency.....
>
> .....
>
> 40. The upshot of the foregoing is that the Judgment of the trial Court with respect to damages for loss of dependency is hereby set aside for the reasons that under the *Fatal Accidents Act*, a brother and sister to a deceased person are not recognized as persons eligible to claim compensation following the death of a deceased. .....”

19. I associate myself fully with the above decisions, which have been buttressed, replicated and/or followed in made other earlier and subsequent Court decisions.

20. I am aware of the decision of L.W. Njuguna J made in the case of Karuku v Mwai & 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), in which, in upholding the trial Court’s award of “loss of dependency” to a sister and a niece of the deceased, stated the following:

> “ 12. On the first issue, dependency is a matter of fact and should be proved through evidence. pw 1 and pw 2 both stated that the deceased was living with and taking care of pw 1 prior to her death. They stated that the deceased took pw 1 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.

13. The argument on dependency in the strict meaning of section 4(1) of the *Fatal Accidents Act* was demystified by the courts as to also mean persons beyond the nuclear family, so long as they can prove that they depended on the deceased immediately prior to their death.

.....

15. It is my view that the appellants have proved dependency on the deceased prior to her death. Therefore, the trial court rightly held them as dependents, hence awarded damages as appropriate.

21. I must say, with all respect, that I am not wholly persuaded by the reasoning in the said decision noting the clear language of Section 4 of the *Fatal Accidents Act*. However, even if this Court were to adopt the reasoning advanced therein, still, I have carefully perused the trial Court proceedings in this matter, and I cannot find any evidence produced by the Respondent demonstrating his dependency on the deceased. Apart from making bare allegations, he did not make any attempt to establish his own alleged dependency. In any case, at the trial, he conceded that he is himself a father of 2 children of his own, aged 14 and 16, respectively, whom he personally caters for. Under these circumstances, I doubt whether he could successfully convince anyone that he was genuinely himself a "dependent" of the deceased. On this ground alone, I would still distinguish the case of Karuku v Mwai & another (supra).

Final Orders

22. The upshot of my findings above is that this Appeal substantially succeeds, to the extent that the trial Court's award of damages is reviewed in the following terms:

    i. The award for "pain and suffering" at the sum of Kshs 100,000/- is reduced to Kshs 40,000/-.

    ii. The award of Kshs 1,500,000/- for "loss of dependency" is set aside in its entirety.

23. Each party shall bear his own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 3RD DAY OF OCTOBER 2025

.....

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Ms. Chebet for the Appellant

Mr. Rotich for Mr. Mathai for the Respondent

Court Assistant: Brian Kimathi