REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO. E010 OF 2023

STANLEY NDICHU MUGO .... 1ST APPELLANT

KENNEDY ONKOBA AGANI .... 2ND APPELLANT

SIDIAN BANK LIMITED .... 3RD APPELLANT

VERSUS

JOHN NGATIA NDIRITU
Suing as the legal administrator of the estate of
JOSEPH NDURA GICHUHI **...**

RESPONDENT

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JUDGMENT

1. This is an appeal from the Judgment and decree of Hon V.S. Kosgei delivered on 14.12.2021 in Karatina CMCC No. 18 of 2019. Leave was granted on 5.2.2023 vide Misc. Application No. E005 of 2022.

2. The Appellants set out the following grounds of appeal:

    a. The Memorandum of Appeal dated 10.02.2023 is against the award of general damages.

b. The learned trial magistrate erred in law and misdirected herself when she failed to consider the Intended Appellant’s submissions on both points of law and facts.
c. The learned trial magistrate erred in fact and in law in finding that the Respondent was entitled to general damages of Kshs.1,100,000/= for the fatal injuries suffered which ought to have attracted a lesser amount than that awarded.
d. The learned trial magistrate erred and misdirected herself as to the exact nature of the Respondent’s fatal injuries and therefore erred in law in her assessment of damages awardable to the Respondent which was manifestly excessive.
e. The learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the Appellants which are related to the fatal injuries and the evidence adduced in trial.

3. The appeal is on quantum. Therefore, it is futile to deal with the facts related to liability. The claim is by the estate of a deceased pedestrian. The deceased left behind one dependant, Mary Muringe Gichuhi. There were other person’s named in the plaint christened sisters and brothers. *Ipso facto* these are not dependants under the Fatal Accidents Act. Section 4 of the said Act provides as follows:

> (1) 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

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> person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

4. The deceased was said to be 32 years at the time of his death. The Respondent claimed a sum of Ksh. 220,900/= as special damages. Letters of administration were granted to the Respondent's estate on 25.09.2018.

Submissions

5. The Appellants filed submissions dated 24.04.2025. They stated that the respondent only spent a sum of Ksh.1,000/= for medicine. The deceased was neither married nor had children, and it is correct to state that the mother was the only dependant. They averred that loss of dependency was excessive. Reliance was placed on the case of **Ainu Shamsi Hauliers Limited v Moses Sakwa & another** (suing as the Administrators of the Estate of the Ben Siguda Okach

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(Deceased) [2021] KEHC 4971 (KLR), where a global sum of Ksh 2,000,000/= was awarded for a 40 year old who left behind a 29 year old wife and 2 young children.

6. Further they stated that a comparable award should be awarded for comparable injuries. Reliance was placed on the case of **Denshire Muteti Wambua V Kenya Power & Lighting Co. Ltd**, where the court of appeal [G.B.M. Kariuki, Kiage & Murgor, JJ.A.] held as follows:

> Further, we observe that the learned trial Judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that "comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases" (see the decision of the court in Arrow Car Limited vs Bimomo & 2 Others [2004] 2 KLR 101). Although the award of damages was at the discretion of the trial court, that discretion required to be exercised judicially.

7. They averred that a sum of Ksh. 240,000/= will suffice. There was no other grounds of appeal. They stated that the court ought to have deducted double awards. They sought costs.

8. The Respondent filed submissions dated 1.07.2025. They submitted extensively on liability, which is not in dispute. They relied on the case of **John Thanga Rindiri & another v Peter Wahome Kagiri & another** [2019] KEHC 10276 (KLR). They quoted the same extensively

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but said nothing of the same. The only excerpt I find useful is as hereunder:

> 25. The Appellants also contested the trial Court's choice of multiplier of 22 years. In Francis Wainana Kirungu (Suing as personal representatives of the estate of John Karanja Wainaina) Deceased vsElijah Oketh Adeloh (2015) eKLR the Court reasoned that a multiplier of 35 years was reasonable for a promising young man who died at 28 like in the instant case. I find no reason to interfere with the trial Court's choice of a multiplier of 22 years taking into account vicissitudes of life.

9. They submitted that the Appellant erroneously submitted that law reform damages ought to be deducted from the award. They averred that the court was to take into account and not to deduct. Reliance was placed on the case of *John Wamae and 2 others v Jane Kituku Nziva and another* [2017] e KLR.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
11. In the case of *Mbogo and Another vs. Shah [1968] EA 93* the court stated:

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

12. The duty of the first appellate court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus classicus case of **<u>Selle and another Vs Associated Motor Board Company and Others [1968]EA 123</u>,** where the Judges in their usual gusto, held as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

13. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of

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documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

14. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

> **"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"**

15. In **Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR**, Justice D.S. Majanja held as doth:

> "General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

16. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured public must be at the back of the mind of the trial court.

17. The foregoing was settled in the cases of **<u>Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR</u>** where the Court of Appeal held as follows at paragraph 8.

> "In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration."

18. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion the exercise should be done judiciously in circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

19. The Court of Appeal, pronounced itself succinctly on these principles in **<u>Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27</u>** as follows: -

> "The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so

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> inordinately high that it must be a wholly erroneous estimate of damages.

20. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is **Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713** at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> “The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance…”

21. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

22. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. *To ascertain whether the Court applied irrelevant factors or left out relevant factors.*

    b. *To ascertain whether the award is too high as to amount to an erroneous assessment of damages.*

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c. The award is simply not justified from evidence.

23. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

24. There are two issues at hand, that is:

    a. loss of dependency

    b. deduction of awards under law reform.

25. The second issue arose from submissions. It is not therefore available for decision by dint of Order 42 Rule 4 of the Civil Procedure Rules that provides as follows:

> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

26. This leaves the court with one issue at hand, the award of damages for loss of dependency. The court below adopted minimum wage of Ksh. 12,000/=. It also adopted a dependency ration of 1/3 with a multiplier of 20 years. The deceased was 32 years old. The mother's age was not given. The multiplier of 20 years was proper and was not questioned. I find that the same was proper. The dependency ration of 1/3 was not challenged.

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27. The next question is the multiplicand. The court can apply the minimum wage or a global sum. In the case of **China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] KEHC 359 (KLR),** the court, R. Nyakundi stated as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the Fatal Accidents Act.

28. Looking at the circumstances of this case, where the deceased's source of income was ascertainable though the exact amounts were not proved, the court is entitled to adopt the minimum wage and applying the multiplicand approach, as opposed to resorting to a global sum assessment. Ringera J, (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi** HCCC No. 2343 of 1993 stated as follows on the debate of the multiplicand approach, and global sum assessment:

> …The multiplier approach is just a method of assessing damages and not a principle of law or 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 ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

29. The death certificate indicates the occupation as a businessman. The deceased died in Karatina and was a resident of *Ngaini* location outside the former municipalities. The best the court can use is the Regulation of Wages (General) (Amendment) Order, 2018, within Karatina municipality. The deceased was a businessman. General labourers within municipalities are entitled to Ksh12.522.70. The court thus awarded an amount lower than the minimum wage. The claim is thus dismissed.

30. The net effect is that I find no merit in the appeal. It is accordingly dismissed. The next question is costs.

31. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

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> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

32. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR**) had this to say:

> "It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

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33. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

> **18.It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.**
>
> **22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not**

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the circumstances merit an award of costs to the Applicant.

34. The appeal is thus dismissed with costs of Ksh. 85,000/= to the Respondent.

<u>Determination</u>

35. In the upshot, I make the following orders:

a) The appeal is dismissed for lack of merit with costs of Ksh. 85,000/=.

b) 30 days stay of execution.

c) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **12th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

<u>JUDGE</u>

<u>In the presence of: -</u>

Mr. Maingi Wa Mugo for the Appellants

No appearance for the Respondent

Court Assistant – Michael

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