Njau v Mwanga & another (Suing as administrators of the Estate of Onesmus Ngungu Kula - Deceased) (Civil Appeal 104 of 2023) [2025] KEHC 16443 (KLR) (Civ) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16443 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 104 OF 2023

H NAMISI, J

NOVEMBER 14, 2025

BETWEEN

HEZEKIAH MACHARIA NJAU ..... APPELLANT

AND

RACHAEL NDEREKE MWANGA & NZAMBI KULA (SUING AS ADMINISTRATORS OF THE ESTATE OF ONESMUS NGUNGU KULA - DECEASED) ..... RESPONDENT

(Being an Appeal from Judgement and Decree of Hon. R. N. Nganga, Senior Resident Magistrate, delivered on 14 February 2023 in Gatundu Civil Suit No. E373 of 2021)

JUDGMENT

1. The Respondents' claim in the trial court, filed in their capacity as the Administrators of the estate of Onesmus Ngungu Kula (Deceased), arose from a fatal road accident that occurred on 16 November 2019. The Deceased was a passenger in motor vehicle KCV 542N, owned by the Appellant, when the said vehicle lost control and plunged into Ndarugu river. The Deceased sustained fatal injuries.

2. In its judgement, the trial court found in favour of the Respondents. The court apportioned liability in the ratio of 80:20 in favour of the Respondents and assessed damages under *Law Reform Act* and the *Fatal Accidents Act*. Judgement was entered for a total sum of Kshs 2,880,403/=, plus costs and interest.

3. Aggrieved by the judgement, the Appellant lodged the appeal herein on the following grounds:

    i. That the learned Magistrate erred in law and fact by applying 27 as the Deceased's age at the time of his death instead of 35 years as indicated on the Death Certificate, resulting to the use of a higher multiplier, thereby making a wholly erroneous award;

ii. That the learned Magistrate erred in law and fact in awarding the Respondent damages under the Fatal Accident Act and the *Law Reform Act* thus amounting to double compensation;

iii. That the learned Magistrate showed extreme prejudice by totally ignoring the Appellant's submissions on issues of law and evidence and thereby made an inordinately high award of damages.

4. The appeal, which confines itself exclusively to the quantum of damages, was canvassed by way of written submissions.

5. The Appellant submitted that the trial court made a clear factual error by stating in the judgment that the Deceased died at the age of 27. It was argued that this was a manifest error, as the Respondents' own Plaint, the sworn testimony of PW1 and the Respondent's submissions in the trial court all stated that the Deceased was 35 years old at the time of his death. It was argued that this error led the trial court to apply an erroneous and excessive multiplier of 25 years. The Appellant proposed that, based on the correct age of 35, a multiplier of 20 years would be appropriate, citing the decision in Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese eKLR. Using this multiplier, the Appellant proposed a revised award for loss of dependency of Kshs 2,628,480/=.

6. The Appellant submitted that the trial court erred by awarding damages under both the *Law Reform Act* and the *Fatal Accidents Act*, which amounted to double compensation. The Appellant contended that the trial court ignored his submissions leading to an inordinately high award.

7. In opposing the appeal, the Respondents submitted that there was no double compensation. They relied on the Court of Appeal's decision in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited and the case of Thomas Wambua & Anor. v Martha Wambui Kiriri. Their submission was that the principle of duplication only occurs when awards for the pecuniary loss and loss of dependency go to the same beneficiaries. It was argued that awards for non-pecuniary loss, such as pain and suffering and loss of expectation of life, are awarded only under the *Law Reform Act*, and the issue of duplication does not arise. The Respondent emphasised that the law requires such awards to be taken into account, not mathematically deducted.

8. The Respondents further submitted that the trial court was not biased, and, in fact, heavily relied on the Appellant's submissions when awarding damages, by specifically adopting the Appellant's proposed multiplicand.

Analysis & Determination

9. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. This was set out in the case of Selle & Another vs Associated Motor Boat Company Limited, [1968] EA 123.

10. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence, or made an award so inordinately high or low as to represent an entirely erroneous estimate of damages or was based on a misrepresentation of the evidence or on wrong legal principles.

11. On the first ground of appeal, this Court has meticulously examined the Record of Appeal. In the impugned judgment, the trial court indicates the Deceased's age to be 27 years. This finding is a

manifest error on the face of the record and is directly contracted by the entirety of the evidence, including the Respondents' own pleadings. The Plaint, the sworn testimony and submissions by the Respondents all confirm that the Deceased was 35 years old when he died. It is clear, therefor, that the trial court took into account an irrelevant and erroneous fact and failed to take into account the clear, uncontroverted evidence on record that the age was 35. This factual error directly and improperly influenced the trial court's choice of a 25-year multiplier, which is an erroneous estimate for a 35-year-old. For that reason, this ground of appeal succeeds. Consequently, this Court must set aside the multiplier of 25 years and substitute it with its own finding.

12. In determining the appropriate multiplier, the Court takes into consideration the fact that the Deceased was 35 years old and worked as a driver in the informal sector. The trial court correctly adopted the minimum wage under the Regulation of Wages (General) (Amendment) Order, 2018, for a driver, which was Kshs 16,428.30. This finding on the multiplicand was not appealed and is hereby affirmed. The dependency ration of 2/3 is also not in dispute.

13. The Appellant proposed a 20-year multiplier, relying on the case of Melbrimo Investment Company Limited vs Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] KEHC 738 (KLR), where the Court upheld a 20-year multiplier for a 35-year-old businessman. In the trial court, the Respondents cited the case of Pauline Kuloba Mwadime v Duncan Mwandago Mwikamba NBI HCCC No. 2774 of 1992, which also applied a 20-year multiplier for a 35-year-old.

14. In Joseph King'ori Wandurwa & another v Loise Karimi Nyaga & another [2021] KEHC 8362 (KLR), the Court applied a multiplier of 22 years for a 34-year-old man engaged in the informal miraa trade.

15. Balancing these precedents and considering the vagaries of life, yet acknowledging that individuals in the informal section often work beyond the formal retirement age, this Court finds that a multiplier of 22 years is reasonable, just and fair in the circumstances. It is more reflective of modern judicial thought than the 1992 decision in Pauline Kuloba Mwadime case (supra) and strikes a fair balance.

16. The award of loss of dependency is, therefore, set aside and recalculated as follows:

    Kshs 16,428.30 X 12 months X 22 years X 2/3 = Kshs 2,891,380.80

17. On the issue of double compensation, the Appellant argued that trial court erred in awarding damages under both the *Law Reform Act*, for pain, suffering and loss of expectation of life, and the *Fatal Accidents Act*, for loss of dependency. This ground, as submitted, is legally misconceived and must fail. The law in this area is settled. The relationship between the two statutes is governed by section 2(5) of the *Law Reform Act*, which provides:

    > The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act*

18. The locus classicus on the subject is the Court of Appeal decision in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another vs Lubia & another (No 2) [1985] KECA 137 (KLR), where the Court clarified the interplay between the two Act. The Court, in a much-cited passage, stated:

    > " To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the *Fatal Accidents Act* are "taken into account". The section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower Court shows that in reaching the figure awarded under the *Fatal Accidents Act* the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for

the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction as suggested by Mr Barasa."

19. This principle was further clarified by the Court of Appeal in Hellen Waruguru Waweru vs Kiarie Shoe Stores Limited [2014] KECA 625 (KLR). The Court explained that duplication only occurs when the beneficiaries of the estate and the dependents are the same, and the award is for the same loss.

20. In the present case, the awards under the *Law Reform Act* were for: (i) pain and suffering, and (ii) loss of expectation of life. These awards compensate the estate for non-pecuniary losses. The award under the *Fatal Accidents Act*, in contrast, is a pecuniary award to compensate the dependants for their loss of financial support. There is no duplication. The trial court's award of Kshs 30,000/- for pain and suffering (death having occurred on the same day) and the conventional sum of Kshs 100,000/= for loss of expectation of life are reasonable and are hereby upheld. This ground of the appeal, therefore, fails.

21. The final ground of the appeal is an allegation of prejudice and that the Appellant's submissions were ignored. This couldn't be further from the truth. As the Respondents correctly pointed out, the record shows that the trial court explicitly considered and adopted the Appellant's submissions on the crucial issue of the multiplicand. The Respondents had argued for Kshs 25,000/= per month, while the Appellant argued for the minimum wage of Kshs 16,428.30. a reading of the judgement itself reveals that the learned Magistrate received, read and judiciously considered the Appellant's submissions, even adopting them over those of the Respondents on this key point. A trial court is not obligated to agree with all of a party's submissions; it is only obligated to consider them. The Magistrate did so. This ground of the appeal is dismissed.

22. For the foregoing reasons, the appeal succeeds in part. The judgement and decree of the trial court is hereby set aside and substituted as follows:

    i. Judgement is hereby entered in favour of the Plaintiffs against the Defendant as follows:

       Liability 80:20 in favour of the Plaintiffs

       Pain & Suffering: Kshs 30,000/=

       Loss of expectation of life: Kshs 100,000/=

       Loss of dependency Kshs 2,891,380.80

       Less Contribution (20%) Kshs 2,417,104.64

       Special Damages Kshs 121,875/=

       Total award Kshs 2,538,979.64

    ii. Interest at court rates from the date of judgement, 14 February 2023, until payment in full.

    iii. Costs of the suit to the Plaintiffs

23. Bearing in mind the outcome of the appeal, each party shall bear its own costs.

DATED AND DELIVERED AT THIKA THIS 14 DAY OF NOVEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered virtually in the presence of:

For Appellant: N/A

For Respondents: Ms. Keya h/b Ms. Mutunga

Court Assistant: Lucy Mwangi