

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CIVIL APPEAL NO. E044 OF 2024

ROBERT MBOGO NYAGA.....APPELLANT

-VERSUS-

PURITY WANJA NJUE & LUCY WANJIRU MWAURA

(suing as the Administrators of the Estate of

CHARLES MAINA MWAURA (dcd).....1ST & 2ND RESPONDENTS

(Appeal arising from the decision of Hon. Stephen K. Ngii, PM in Siakago MCCC No. E011 of 2020 delivered on 07th July 2023)

JUDGMENT

The Memorandum of Appeal

1. The appellants' memorandum of appeal dated 08th May 2024 seeks orders that:

- 1) That the appeal be allowed with costs;
- 2) That the Honorable Court be pleased to award the Plaintiff a quantum of general damages commensurate to the circumstances at hand; and
- 3) That the judgment and orders of the subordinate court delivered on the 7th of July 2023 on liability be set aside.

2. This appeal is premised on the grounds that:

- 1) That the Honourable Learned Trial Magistrate erred in law and fact by failing to appreciate and accord due regard to the Appellant's submissions and authorities on quantum;
- 2) That Honourable Learned Trial Magistrate erred in law and fact by failing to consider the pleadings filed by the Appellant;
- 3) That the Honourable Learned Trial Magistrate erred in law and fact by failing to consider the interest of justice when conducting the hearing of the matter;
- 4) That the Learned Trial Magistrate erred in law and fact by arriving at a wrong and unfair conclusion in his judgment;
- 5) That the Learned Trial Magistrate exercised his discretion capriciously but not judiciously by awarding an inordinately high sum as general damages;

- 6) That the Honourable Learned Trial Magistrate erred in law and in fact and misdirected himself in awarding manifestly excessive general damages to the Respondent in the sum of Kshs.3,752,300/=; and
- 7) That the Honourable Learned Trial Magistrate erred in law and in fact by awarding and accessing extremely excessive and aggravated sums for loss of dependency in sum of Kshs.3,500,000/=.

Background in the lower court

3. The respondents filed an amended plaint dated 27th November 2021 seeking judgment against the appellant for general damages for pain and suffering under the Fatal Accidents Act and Law Reform Act, special damages of Kshs.83,200/=, reasonable funeral expenses and costs of the suit with interest.
4. The respondent's case was that on 04th September 2020, the deceased was lawfully riding motor cycle registration number KMET 234G along Ishiara-Kanyuambora road when at Gwakaithi area, one Alex Kivuti Njeru drove motor vehicle registration number KBC 061J so negligently that it veered off the road and knocked down the deceased's motor cycle. The deceased suffered fatal injuries as a result of the accident. The respondents wanted the appellant to be held vicariously liable as the owner of the named motor vehicle.
5. The appellant filed a statement of defence denying the allegations made in the plaint. He stated that the deceased failed to take the necessary precaution to ensure his own safety while riding the motor cycle. That he was not wearing reflective clothes and was riding in a precarious manner.
6. In their reply to defense, the respondents re-affirmed their averments as stated in the plaint. They stated that no plausible defense has been raised and that the statement of defense is a mere denial of the issues.

Summary of the Evidence

7. PW1 Purity Wanja Njue is the deceased's wife. She testified that on the day of the accident at about 8:30pm, she was informed that the deceased had sustained injuries from the accident and had died. That his body had been taken to Embu Level 5 Hospital Mortuary where she went the following day to confirm if it was true. She found that indeed her husband had died and she identified his body for postmortem purposes. She arranged for the burial of the deceased but she was not able to keep all the receipts for funeral expenses. She collected a police abstract from

Kanyuambora police station and then sought legal representation in order to obtain a grant in the estate of the deceased.

8. A search was conducted on the appellant's motor vehicle and details obtained. She learned that the appellant's driver had been charged with the traffic offence of causing death by dangerous driving. She stated that at his death, the deceased was 27 years old and was operating a retail shop where he earned Kshs.80,000/= every month which he used to support both his elderly and sickly parents, her daughter and herself. She stated that the deceased was in good health at the time of the accident. That she was pregnant at the time of the death of the deceased and the child was born after his death.
9. PW2 was Mike Martin Macharia who witnessed the accident. He stated that the deceased rode his motor cycle past him and when he reached a few meters ahead, he saw the appellant's motor vehicle trying to overtake the deceased but it lost control. As a result, the deceased and his pillion passenger were thrown off the road onto a culvert but the deceased was caught up underneath the motor vehicle. He raised an alarm and members of the public came and lifted the vehicle off his body but the deceased was not talking at that point. Later, he learned that the deceased had succumbed to the injuries sustained from the accident.
10. PW3 was a police officer from Siakago Police Station who stated that the accident was reported at the police station and that one person had died as a result of it. He stated that the driver of the motor vehicle registration number KBC 061J was to blame for the accident and he was charged with a traffic offence.
11. On his part, the Defendant/Appellant closed his case without calling any witnesses.

Findings of the Trial Court

12. The trial court found the appellant wholly liable for the accident. The respondents were awarded Kshs.20,000/= as general damages for pain and suffering, Kshs.150,000/= for loss of expectation of life, Kshs.3,500,000/= as a global sum for loss of dependency and special damages of Kshs.82,300/=. These findings are the subject of the appeal.

Parties' Submissions on appeal

13. This appeal was canvassed by way of written submissions.

14. The appellant, in his submissions, conceded that the trial court's findings on liability were correct and he did not wish to challenge the same any longer.
15. As for quantum, he referred to the cases of **Grace Wanjiru Gichuki v Peter Gateru Macharia [2004] KEHC 560 (KLR)**, **Theuri Kihira v Gerhard Matthiessen [2018] KEHC 4301 (KLR)** and **Fredrick Gataka v George Kibinyi and Njoroge HCCC No 1993 of 1990**. He argued that the damages for pain and suffering should be reduced to Kshs.10,000/= while loss of expectation of life should be retained at Kshs.150,000/=. For loss of dependency, he urged the court to apply the multiplier method using the minimum wage as multiplicand, a multiplier of 15 years and a ratio of $\frac{1}{3}$ totaling to Kshs.600,000/=. He relied on the cases of **Julius Mokuwa Ongera v Esther Njoki Gicharu [2006] KEHC 2248 (KLR)** and **Robina Mabeya & others Vs Evanson Ngugi and Another HCCC No.1409 of 1984**.
16. The 1st respondent submitted that the award of general damages for pain and suffering and loss of expectation of life should be left undisturbed. She relied on the case of **Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others [2013] KEHC 1206 (KLR)**. For loss of dependency, she stated that the global award by the trial court is fair and should also not be disturbed.
17. That if the court should use the multiplier method, a multiplicand of Kshs.30,000/= should be used against a multiplier of 35 years and $\frac{2}{3}$ ratio, bringing the sum to Kshs.8,400,000/=. She relied on the case of **Mwangi & another v Muya & another (Suing as legal representatives of the Estate of Samuel Mutunga Mutua (Deceased)) [2023] KEHC 24032 (KLR)**. She urged the court to uphold the findings of the trial court on quantum.
18. The 2nd respondent submitted that the trial court's finding on loss of dependency should be left undisturbed. That if the multiplier method should be applied with a multiplicand of Kshs.15,000/=: multiplier of 30 years and $\frac{2}{3}$ ratio, the total would be Kshs.3,600,000/=. She relied on the cases of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] KECA 202 (KLR)**, **Henry Moruka Mong'are (suing as the personal representative of the Estate of Justin Matundura Mong'are (Deceased) v Registered Trustees Catholic Diocese of Nairobi & another [2018] KEHC 4056 (KLR)**, **Joseph King'ori Wandurwa & another v Loise Karimi Nyaga & another [2021] KEHC 8362 (KLR)** and **County Government of Kitui & another v Mutinda & another (Sued as the Administrators of the Estate of**

Samson Kyalo) [2023] KEHC 19406 (KLR). She urged the court to dismiss the appeal.

Issue for determination

19. Only the question of quantum remains for determination, the appellant having conceded on liability. Thus, the issues for determination is whether the trial court's assessment of special damages, general damages for pain and suffering and loss of dependency were erroneous.

Analysis and Determination

20. As a first appellate court, it is the duty of this court to reexamine the evidence adduced at trial. This was held in the case of **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

21. It is trite that special damages must be specifically pleaded and strictly proved. This was the holding in the case of **Maritim & Another v Anjere (1990-1994) EA 312 at 316** where it was held:

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

22. In the amended plaint, the respondents claimed a total of Kshs.83,200/= under this head. They produced a receipt for Kshs.550/= for the motor vehicle search, Kshs.1,000/= for filing the petition for a limited grant, Kshs.6,400/= as mortuary fees, Kshs.2,500/= for tents and chairs, Kshs.15,750/= for soda, Kshs.22,500/= for bread, Kshs.19,000/= for coffin and accessories, Kshs.4,200/= for t-shirts, Kshs.20,000/= paid to funeral logistics service providers, Kshs.3,300/= paid to a cybercafé for eulogy printing and photo framing and 2 receipts for a total of Kshs.11,000/= for a school bus hire.

23. These receipts total to an amount of Kshs.106,200/=. Given that the respondents only pleaded Kshs.83,200/=: they are bound by their pleadings, and the amount pleaded is the amount that can be awarded. On page 135 lines 8-11, the trial court

noted that the parties had proved more than they had pleaded, and it resorted to awarding the pleaded amount. However, in its final orders, the trial court erred in stating that the award of special damages was Kshs.82,300/= in stead of Kshs.83,200/=. This appears to be a typographical error and can be corrected.

24. The trial court awarded a global sum of Kshs.3,500,000/= as general damages for loss of dependency. According to paragraph 7 of the amended plaint, the deceased was 27 years old at the time of the accident and was operating a retail shop from which he made Kshs.80,000/= per month to support his parents, his wife and his children. The respondents urged the court to apply the multiplier method using the minimum wage applicable in 2022, since the earnings were not proved. The appellant proposed that the court applies a multiplicand of Kshs.10,000/= from his own estimations. The trial court, however, abandoned the multiplier method and awarded a global sum.
25. In my view, even though the earnings were not proved, the deceased was working and running a retail shop. Thus, the and the applicable minimum wage could have been applied because the multiplier and dependency ratio are determinable as well. The deceased died in September 2020. At the time the Regulation of Wages (General) (Amendment) Order, 2018 was applicable. It provides for a minimum wage of Kshs.13975.30/= for a shop assistant.
26. The deceased was 27 years old at the time of his death and it is possible that he could have worked in his shop until well over the formal retirement age. Therefore, it makes sense to apply 33 years assuming that he would tend to his shop until that age or beyond. In the case of **West Kenya Sugar Co. Ltd v Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) [2020] KEHC 7454 (KLR)**, a multiplier of 33 was used for a deceased aged 21 years old. In the case of **P.N.M. & Another v Telkom Kenya Ltd & Others (2015) eKLR** applied a multiplier of 30 years for 26 years old deceased.
27. The respondents stated that the deceased used to take care of his aging and sickly parents who were his dependants alongside his wife and child. At the time of his death, his wife was expecting another child who will never meet the deceased. In the case of **Leonard O. Ekisa & another v Major K. Birgen [2005] KEHC 2214 (KLR)** it was held:

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.”

28. The respondent's facts deposed in that manner were not controverted, thus they lead to the persuasion that a dependency ratio of $\frac{2}{3}$ should be applied in the circumstances. Therefore, the computation is as follows:

$Kshs.13,975.30/= \times \frac{2}{3} \times 33 \times 12 = Kshs.3,689,479.20/=$

29. On the award of general damages for pain and suffering, the trial court was guided by the case of **Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR)** where the court observed:

“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 higher damages being awarded if the pain and suffering was prolonged before death.”

30. Given that the deceased died at the accident scene, the award should be kept at the minimum. However, given the exigencies of economic inflation, the award assessed by the trial court is not erroneous and it need not be reviewed.

Disposition

31. In light of the foregoing, the appeal is dismissed.

32. The court orders as follows:

- 1) Liability is maintained at 100% against the appellant;
- 2) Quantum is awarded as follows:
 - i. Pain and suffering- Kshs.20,000/=
 - ii. Loss of expectation of life- Kshs.150,000/=

iii. Loss of dependency - the global sum of Kshs.3,500,000/= is set aside **and substituted with an award of Kshs.3,689,479.20/= based on the multiplier method (Kshs.13,975.30/=× $\frac{2}{3}$ ×33×12).**

iv. Special damages- the trial court's award of Kshs.82,300/= be set aside **and substituted with an award of Kshs.83,200/=.**

- 3) The respondents are awarded costs of the appeal with interest at court rates;
- 4) Special damages shall be paid with interest from the date of filing the suit until payment in full;
- 5) Interest on general damages for loss of dependency shall be paid from the date of this judgment until payment in full. General damages for pain and suffering and Loss of dependency to be paid with interest from the date judgment of the trial court.
- 6) All interest shall be at court rates.

33. Orders accordingly.

Delivered, dated and signed at Embu High Court this 12th day of November, 2025.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Abok for Appellant
2. No Representation for Kalamu Ndolo
3. No Representation for Khan Associates & Advocates
4. Francis Munyao - Court Assistant

