

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. E064 OF 2024**

**JANE AWINO ONYANGO AND MAURICE OMONDI ODAWA**  
**(Suing as legal representatives of the estate of VINCENT**  
**OKOTH OTIENO(Deceased).....**  
**APPELLANTS**

**VERSUS**

**JUDITH ANEA AKOTH..... RESPONDENT**

(An appeal from the judgment and decree of Hon. L. Sarapai (PM) delivered on 9<sup>th</sup> November 2023 in Ukwala PMCC No. E008 of 2020 pursuant to leave granted on 6<sup>th</sup> December 2024)

**BETWEEN**

**JANE AWINO ONYANGO AND MAURICE OMONDI ODAWA**  
**(Suing as legal representative of the estate of VINCENT**  
**OKOTH OTIENO(Deceased).....**  
**PLAINTIFF**

## **VERSUS**

**JUDITH ANEA AKOTH.....DEFENDANT**

## **JUDGMENT**

1. Vide a plaint dated 13<sup>th</sup> October 2020, the Appellants sued the Respondent for both special and general damages arising from fatal injuries occasioned to the deceased herein who was a pedal cyclist then lawfully cycling on the verge along Busia - Kisumu road on 8<sup>th</sup> February 2020 when he was hit by the Appellant's motor vehicle registration No. KCJ 431P Toyota Hiace Matatu, wherein he succumbed from the said injuries. The learned trial magistrate, Hon. L. Sarapai (PM) later on the 9<sup>th</sup> November 2023 entered judgment in favor of the Respondent to wit: liability - 70:30, general damages (global sum) Ksh 300,000/=, less amount awarded under Law Reform Act of Ksh 120,000/=, sub-total general damages Ksh 180,000/= less 30% contribution of Ksh 54,000/= total general damages Ksh 126,000/= special damages Ksh 35,000/= total award kshs 164,000/=. Further, the Appellants were awarded costs and interest on the total award at court rates from the

date of the judgment until payment in full. This precipitated the present appeal.

2. Aggrieved by the said decision, the Appellants filed their Memorandum of Appeal dated 6<sup>th</sup> December 2024 wherein they raised the following grounds of appeal:

- i. That the trial magistrate erred in law and fact in awarding a global sum of Ksh 300,000/= for loss of dependency which was extremely low and an abuse of discretion in view of the evidence adduced before her.
- ii. That the trial magistrate erred in law and in failing to find and hold that the Appellants had specifically pleaded and strictly proved special damages in the sum of ksh 85, 350/=.
- iii. That the trial magistrate erred in law and fact in subtracting the award made under the Law Reform Act, Cap 26 Laws of Kenya from the award made under the Fatal Accidents Act, Cap 32 Laws of Kenya.
- iv. That the trial magistrate erred in law and fact in failing to have regard to the Appellants submissions and authorities with regard to assessment of damages for loss of dependency.
- v. That the trial magistrate's exercise of discretion in assessment of quantum was injudicious.

The Appellant therefore prayed that the appeal be allowed, the judgment of the trial magistrate in respect of the award of special damages and damages for loss of dependency be set aside and that this honorable court does assess damages payable to the Appellants for loss of dependency and special damages in view of the evidence on record and finally award the costs of the appeal to the Appellants.

3. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of G2000.** (Okubasi, Githinji & Waki JJA).

4. **No. 71710 Pc Eugene Masika (PW1)** testified that he is from Ugunja police station traffic base performing traffic duties. He testified that on 5/2/2020 they got information relating to a fatal injury traffic accident at Got Nanga involving

motor vehicle registration number KCJ 431 P make Toyota Hiace Matatu. That upon reaching the scene of the accident, they found the suit motor vehicle and a bicycle on the left side of the road while facing Kisumu general direction. That he sketched the scene and went to Ambira hospital where the victim had been rushed. That upon reaching the hospital, the victim whose name was Vincent Okoth Otieno had succumbed to the injuries. That the point of impact was on the left side from Busia to Kisumu general direction about three metres from the road. That he investigated the accident and issued an abstract to the family of the victim. He produced the police abstract as P exhibit 1.

On cross examination, he stated that the rider/victim was 17-years-old and that the driver was charged with an offence of causing death by dangerous driving.

5. **Maurice Omondi Oduor (PW2)** adopted his witness statement dated 13/10/2020 as his evidence in chief. He testified that Vincent Okoth Otieno was his cousin who died on 8/02/2020 following a road traffic accident. That he received a phone call from one Pascal informing him that his cousin Vincent Okoth Otieno had been knocked by a motor vehicle at Got Nanga area along Busia-Kisumu road. He rushed to the scene but that the victim had been rushed to Ambira hospital. Upon arriving at the Ambira Sub county Hospital, he found

that he had already succumbed to the injuries. That the post mortem was conducted on 17/02/2020 which established that the deceased had died as a result of the injuries from the accident.

On cross-examination, he stated inter alia; that they live in Ligala and that Vincent who was his cousin was a pupil at Ligala Primary school.

6. **Festus Olang Oyondo (PW3)** adopted his witness statement dated 13/10/2020. That he is a casual labourer within Siaya County. He stated that on 8/2/2020 at around 6.30pm while he was from his work place at Ark Hotel using the murram road and upon reaching the highway along Kisumu - Busia, he saw a young boy riding a bicycle and who had passed Got Nanga shopping Centre and that on reaching the feeder road and had already joined the feeder road towards Ark Hotel when suddenly, a motor vehicle registration number KCJ 431P labeled "Sina Ubaya" on the rear wind screen, which was coming from Busia direction towards Kisumu direction and being driven at high speed, lost control and hit the boy at the junction causing him fatal injuries. That he was among those who rushed him to Ambira Sub-County hospital. That the name of the victim was Vincent Okoth Otieno. He blamed the driver of the motor vehicle who was driving the vehicle at a high speed and losing control of the same.

On cross-examination, he stated inter alia; that he was on the left side facing Kisumu; that the vehicle was registration number KCJ 431P; that he is not related to the deceased; that he reported the accident and recorded his statement.

On re-examination, he stated that he recorded his statement at Ugunja police station on 13/2/2020.

7. That marked the close of the Appellants' case.
8. The matter was then fixed for defence hearing and the defence called two witnesses which was as follows.
9. **Number 82379 Pc Erick Odhiambo (DW1)** testified that he is from Ugunja Traffic base. He stated that it was an accident involving motor vehicle reg. No. KCJ 431 P Toyota matatu and a pedal cyclist along Kisumu -Busia road which was reported via OB No. 21/8/2020. That the matatu was driven by one George Odhiambo Ongana while the cyclist was Vincent Okoth. He stated that the cyclist left his lane into the lane of the driver and that the accident occurred. He blamed the cyclist for the accident. He produced the OB extract as D exhibit 1.

On cross examination, he stated inter alia; that he was not the investigation officer; that he has worked at the traffic base for only two months; that he was not there at the time of the accident; that Pc Too and Pc Masika visited the scene as per the OB and that they are both still in Ugunja traffic base; that

what he testified about was what was in the initial report which needed more investigations; that according to him, the investigation file which he did not bring to court and has not gone through the same, will better assist the court as it contains everything; that the cyclist died as a result of the injuries and that the initial report did not state who was to blame; that he was aware that the driver was charged with causing death by dangerous driving but that he did not tell that to the court in his evidence in chief.

10. **George Odhiambo Ongaro (DW2)** testified that he has been a driver for ten years and a resident of Kisumu. That he was the driver of motor vehicle KCJ 431 P which was involved in an accident with a cyclist on 8/2/2020 at Got Nanga along Busia-Kisumu road. That the cyclist was headed to Busia from Kisumu general direction while he was driving to Kisumu from Busia general direction. That the cyclist turned to look back and lost control of the bicycle and moved to the driver's lane and hit himself on the motor vehicle. He adopted witness statement dated 17/2/2022 as his evidence in chief.

On cross-examination, he stated inter alia; that he had ten years' driving experience; that there was a junction ahead; that he was driving at a speed of below 60 kph; that he saw the pedal cyclist at a distance of 100 metres away; that police officers Too and Masika visited the scene and he briefed them on how the accident took place; that Masika is the only traffic

police officer who is charged with the duty of testifying in court over traffic cases; that the inspection report would reveal which part of the vehicle was hit; that there was a vehicle which was five metres behind the cyclist; that the accident happened on his lane facing Kisumu.

10. The Defendants closed their case at that juncture.
11. The appeal was canvassed by way of written submissions. Both parties have complied.
12. The Appellant submitted that the net award made to the Appellants on behalf of a 17-year-old school-going juvenile was Ksh 161,000/= and thus the appeal against the said award which is quite low. The Appellants submitted that the liability ratio was reasonable. Likewise, the awards made for pain and suffering as well as for loss of expectation of life, were within range and may be sustained. Their main contention was the award of Ksh 300,000/=. The Appellants submitted that the global award approach by the trial magistrate was proper in the circumstances as both the Appellant and the Respondent had proposed it. The issue was whether the said amount was fair and just.
13. The Appellants relied on several authorities in support of their case including but not limited to **Machakos HCCA No. 132 Of 2016 Twokay Chemicals Limited Vs Patrick**

**Makau Mutisya and Another** where the court upheld an award of Ksh 1, 500,000/= made in favor of a 16-year-old child; this was in the year 2019. Similarly, in **Kitale HCCA No.18 Of 2017 Cheranganyi Hills Limited & Another Vs BWM**, where the court dismissed an appeal against an award of Ksh 2, 160,000/= for loss of dependency made to an 18-year-old form two student; this was in the year 2018.

15. It was the Appellants' submissions that the trial court applied wrong principles in calculating the award, thus this Honourable court should interfere with the said award. They went further to pray that an award between ksh 1,500, 000/= and ksh 1, 800,000/= would be fair and just.

14. The Appellants also raised issues regarding the award of special damages. The Appellants pointed out the fact that from a claim of ksh 85 350/= under this head, the trial magistrate awarded ksh 35000/= only leaving out pleaded and receipted amounts for coffin (ksh 25,000/=) and for transporting the body (ksh 20,000/=). The Appellants submitted that this was an error on the part of the trial magistrate.

15. Lastly, the Appellants contended the trial court's decision to subtract the award under the Law Reform Act Cap 26 from the award under the Fatal Accidents Act Cap 32, and prayed

that the same be set aside. They placed reliance on the case of **Nyeri Civil Appeal No. 22 of 2014: Hellen Waruguru Waweru Vs Kiarie Show Stores Limited** and **Kisumu HCCA No. E054 of 2023: John Gicheru Wachira & Another Vs Sheldon Mulwale Shikamila and Another**.

16. The Respondent on her part raised two issues for determination namely, firstly, whether the trial magistrate erred in law and fact when she made the award of Kshs 300, 000/ and secondly, whether the trial magistrate erred in finding that the special damages of Kshs 85, 350/ were not wholly proved. Under the award on loss of dependency, the Respondent submitted that the global sum of ksh 300,000/= was reasonable as there was no proof of income for the deceased. It was submitted further that there was no dependency in the matter as the parents had predeceased the minor. Reliance was placed in the case of **Nzuki Vs Maithya & Another (Suing as the Legal representative of the estate of Joseph Wambua-deceased) (Civil Appeal No. E024 of 2022) KEHC 2752 (KLR) (11<sup>th</sup> March 2024-judgement)**.

17. Secondly, the Respondent submitted on the issue of special damages stating that the receipts for special damages of ksh 45, 000/= for funeral expenses and mortuary fees were marked for identification and never produced. That only kshs

35, 000/= legal fees for Ad litem is what was proved and that was what was awarded. Learned counsel added that the Appellant failed to prove the funeral expenses as special damages.

18. Thirdly, the Respondent submitted on the issue of subtracting the award under Law Reform Act Cap 26 from the award under the Fatal Accidents Act Cap 32 Laws of Kenya. Learned counsel stated that in a case where the beneficiaries under both Acts are the same, the court ought to deduct the award of loss of expectation of life and pain and suffering from the award of loss of dependency. He relied on several cases including **Endege & Another (suing as Legal representatives in the estate of John Madede Endege-deceased) vs Benard & Another (Civil Appeal No. 38 of 2020) [2024] KEHC 622 (KLR)**.
19. In conclusion, the Respondent submitted that the appeal should be dismissed with costs to the Respondent.
20. I have considered the record of appeal, rival submissions and all the relevant authorities relied on by the parties. I find the issue for determination is whether the appeal has merit.
21. By and large, the Appellant's contention is on quantum of damages regarding the loss of dependency, special damages as well as the deduction of the awards under the Law Reform Act and Fatal Accidents Act.

22. Delving into the issue of quantum, it is noted that the Appellant has challenged the awards made by the trial magistrate. This being an appeal challenging the trial magistrate's decision on quantum of damages only, it is important to set out the principles that guide an appellate court in deciding whether or not to interfere with the damages awarded by the trial court. In the celebrated case of **Kemfro Africa Limited t/a Meru Express Service (1976) & Another v Lubia & Another (No.2) [1985] eKLR**, the Court of Appeal expressed itself as follows: -

*“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage..”*

In **Mariga v Musila [1984] KLR 251** the same Court of Appeal also stated as follows:

***“The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly***

***erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles...”.***

It is the law in Kenya that general damages must be compensatory. When one looks at the impugned judgement, it must be fair in the sense of what the claimant suffered. In my view, whether at the trial court or appeal, a claimant should not aspire to a perfect compensation. They should take what has reasonably been found by the court as a fair compensation since the said award cannot by any chance replace a damaged part of a human body but that the same suffices as the tortfeasor’s earnest response (sorry for the accident).

23. Guided by the above principles, i now proceed to determine whether the learned trial magistrate erred in the assessment of damages under the loss of dependency awarded to the Appellant in view of the evidence on record. I will start with the damages awarded under the Law Reform Act. It is important to point out at this juncture that general damages under the Law Reform Act are awarded for the benefit of the deceased’s estate in two categories only namely for pain and suffering and secondly for loss of expectation of life. The trial court awarded Ksh 20,000/= for pain and suffering and ksh 100,000/= for loss of expectation of life. The two were not contended on appeal. They are therefore upheld.

On the issue of loss of dependency, the trial court awarded a global sum of Ksh 300,000/=. In **Machakos HCCA No. 132 Of 2016 Twokay Chemicals Limited Vs Patrick Makau Mutisya and Another** the court awarded Ksh 1, 500,000/= for a 16 year old in the year 2019. Similarly, in **Kitale HCCA No.18 Of 2017 Cheranganyi Hills Limited & Another Vs BWM**, the court upheld an award of Ksh 2, 160,000/= for an 18-year-old form two student in the year 2018.

In the instant case, the minor was aged 17 years at the time of the fatal accident. The legal principle of **Stare decisis** demands that similar claims ought to attract similar awards. Learned counsel for the Respondent has submitted that the deceased's parents had already pre-deceased him and as such there should not be any issue of dependency at all. As at the time of filing the suit, it is clear that there were legal representatives who are believed to have been the deceased's guardians as his parents had already passed on. These are the persons who had been taking care of him and meeting his school fees and needs and therefore as guardians, they assumed the role of parents and hence the issue of dependency ought to be considered. Indeed, all parents and guardians look up to their children to provide for them in old age. Hence, the guardians herein must be seen through that prism. I am therefore not persuaded by the Respondent's counsel's submission that the loss on dependency ought not to be interfered with. I am satisfied that the amount awarded

by the learned trial magistrate was inordinately low as to represent an erroneous estimate of damages. It is highly likely that the deceased could have turned out successful after school and be in a position to help himself and his guardians. Guided by the above authorities and due to the inflationary trends, i find that the said award of ksh 300 000/= by the trial court was inordinately low. It is my considered view that an award of ksh 2, 000. 000/= would be adequate compensation.

24. As regards the award of special damages, it is trite that the same should be specifically pleaded and proved. However, when it comes to funeral expenses, they need not be specifically proved so long as they are reasonable. Section 6 of the Fatal Accidents Act allows the court to award funeral expenses where they are reasonable. It is noted that the Appellant has provided receipts for legal fees for Ad Litem being ksh 35,000/=, coffin ksh 25,000/= and transporting body from mortuary as ksh 20,000/=. Mortuary fees of ksh 5000/=, police abstract of ksh 200 and death certificate at ksh 150 were not receipted.

25. On the issue of funeral expenses, iam in agreement with the court's decision in the case **of Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR** where the court stated as follows that:

**“.... The plaintiff did not avail any documentary evidence to show the sum of Kshs. 400,000/= was expended. Nevertheless, I think that this court is entitled to conclude that considerable amounts of money is usually used during the burial of a deceased person. Parties cannot be expected to disregard that issue which has assumed public knowledge and notoriety. I think to expect the relatives to keep the receipts of every expenditure incurred, is to underestimate the pain and loss of a loved one. Where a party cannot show the amount of expenses incurred the court would weigh the scales of justice in order to address the pertinent issues involved in the matter.**

From the evidence available and the culture of the deceased and his guardians, it was necessary to give him a good and decent send off. Such expenses needless to mention includes attending to the needs of mourners and other incidental expenses. Indeed, the Appellants had presented the receipts for the funeral expenses comprising of coffin and transport (Kshs 45,000/). The Appellants obviously must have expended other sums to cater for the food and other sundries for the mourners which they opted not to claim. These amounts ought to have been awarded by the trial court as they were not excessive in the circumstances. I find that the trial

magistrate did not address herself correctly on the same. Items like mortuary fees, coffin charges and cost of transporting the body are undisputed in this context. The same ought to have been awarded as very reasonable production of receipts notwithstanding. In this regard, I find that the award of special damages of ksh 35,000/= must be replaced with an award of Ksh 80, 000/= which amount is inclusive of Ad Litem fees and funeral expenses.

26. The Appellants also faulted the trial court's deduction of the award under the Law Reform Act cap 26 from the award under the Fatal Accidents Act cap 32. I am in agreement with the decision of the court in 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)** quoting the Court of Appeal decision in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] Eklr** where the court stated as follows:

*"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim*

*for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.*

*The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that: -An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.*

*The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has*

*the right to sue under the Law Reform Act in respect of the same death.*

*The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient 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. The deduction of the entire amounts made under the LRA in this case was erroneous and once again.....”*

27. It is clear from the foregoing authority that the deduction of awards need not be mandatory and that a trial court has the discretion while making awards from case to case basis. I find that the trial court did not correctly address its mind on the issues and the law in this matter and thus its discretion was not exercised judiciously and which warrants interference by this court.

28. In view of the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The judgment of the trial court dated 9/11/2023 is hereby set aside and substituted with the following orders namely:

|   |       |                                       |
|---|-------|---------------------------------------|
| Liability.....                              | 70:30 |                                       |
| Pain and suffering.....                     |       | Ksh 20,000/=,                         |
| Loss of expectation of life.....            |       | ..Ksh 100,000/=,                      |
| Loss of dependency.....                     |       | Ksh <u>2 000,000/=</u> ,              |
| Total :                                     |       | Ksh 2,120,000/=                       |
| Less 30% contribution                       |       | <u>Ksh 636,000/=</u>                  |
| Sub total                                   | Ksh   | 1,484,000/=                           |
| Special damages<br><b>funeral expenses)</b> |       | <u>Ksh 80,000/=</u> <b>(including</b> |
| Grand total :                               |       | <b><u>Ksh 1,564, 000/=</u></b>        |

The Appellants are awarded the costs of the appeal and in the lower court. The amounts on special damages to attract interest at court rates from the date of filing plaint while the amounts on general damages shall attract interest at court rates from the date of the judgement herein.

Orders accordingly.

**Dated and delivered at Siaya this 14<sup>th</sup> day of November 2025.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**M/s Turget.....for Appellants**

**Omondi.....for Respondent**

**Maureen.....Court Assistant**