



Waweru & another (Suing as the legal representative of the Estate of Brian Mburu Waweru – Deceased) v Were & another (Civil Appeal E1052 of 2024) [2025] KEHC 15758 (KLR) (Civ) (3 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1052 OF 2024

WM MUSYOKA, J

NOVEMBER 3, 2025

BETWEEN

FRANCIS WAWERU 1ST APPELLANT

BARNICE NJAMBI WAWERU 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF BRIAN
MBURU WAWERU – DECEASED**

AND

GEORGE OTIENO WERE 1ST RESPONDENT

STANLEY MAKORI ONDERO 2ND RESPONDENT

(Appeal from the judgement and decree, of Hon. E. Riany, Principal Magistrate, of 15th August 2024, in Milimani MCCC No. E878 of 2024)

JUDGMENT

1. The suit, at the primary court, was by the appellants, against the respondents. It sought compensation, by way of general and special damages, loss of expectation of life, costs and interests. The appellants had brought the suit on behalf of the estate of the deceased, Brian Mburu Waweru, who had been hit by a motor vehicle, while walking along Marurui-Thome Road, Nairobi. The said vehicle belonged to or was controlled by the respondents, and it was registration mark and number KDD 796C. They attributed the accident to negligence on the part of the respondents.
2. The respondents did not participate in the proceedings at the trial court.



3. An interlocutory judgement was entered on 19th July 2024, followed by formal proof on 24th July 2024, where the 1st appellant testified. Judgement was delivered, on 15th August 2024. Liability was assessed at 70:30, against the respondents. General damages were awarded at Kshs. 1,500,000.00; specials at Kshs. 70,000.00; loss of expectation of life at Kshs. 100,000.00; plus, costs and interests.
4. The appellants were aggrieved, hence the instant appeal, on grounds around liability; global approach to assessing loss of dependency; award of pain and suffering being premised on the fact of the deceased died on the spot; failure to award funeral expenses; expectation of life award being subtracted from the loss of dependency award; failure to give due regard to the weight of the evidence; and the judgement being against the weight of the evidence.
5. Directions were given, on 16th May 2025, for disposal of the appeal by way of written submissions. The respondents did not participate in the appeal proceedings, and, therefore, only the appellants filed written submissions.
6. On liability, it is submitted that the deceased was lawfully walking on a footpath, when he was hit by the vehicle, and it is argued that liability should have been assessed at 100%. They cite *Ondindo vs. Ouma* [2024] KEHC 11298 (KLR) (Njagi, J), *Khadambi & another vs. Mahithi & another* [1968] EA 18 (de Lestang Ag P, Duffus Ag VP & Spry JA), *Katimi vs. County Government of Kakamega* [2025] KEHC 9240 (KLR) (Mbungi, J), *Ngugi vs. Muriithi & another* [2023] KEHC 3009 (KLR) (L Mugambi, J), *Edward Akong'o Oyugi & 2 others vs. Attorney General* [2019] eKLR [2019] KEHC 10211 (KLR) (Mativo, J).
7. On loss of dependency, it is submitted that the global award approach should have been avoided, in favour of the multiplier/multiplicand approach, based on *Chanibhai J Patel and another vs. PF Hayes and others* [1957] EA 748 (Briggs Ag VP, Forbes JA & Bennett Ag CJ), and *Hellen Waruguru Waweru vs. Kiarie Shoes Stores Limited* [2015] KECA 318 (KLR) (Waki, Nambuye & Kiage, JJA). In the alternative, even upon adopting the global award approach, the court should have applied a more fair and judicial approach in arriving at the award. *Moses Mairua Muchiri vs. Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (Deceased))* [2016] KEHC 5958 (KLR) (Ngaah, J) is cited.
8. On pain and suffering and loss of expectation of life, it is submitted that the *Law Reform Act*, Cap 26, Laws of Kenya, allows both heads, and *Stella Nasimiyu Wangila & another vs. Raphael Oduro Wanyamah* [2016] KEHC 1666(KLR) (Janet Mulwa, J) is cited. It is submitted that the deceased person did not die on the spot, but in hospital, after surviving several hours where he experienced pain. It is proposed that the court should have awarded Kshs. 500,000.00 under both heads.
9. On special damages, it is submitted that Kshs. 641,020.00, for hospital, funeral and administration expenses were specifically pleaded and supported by receipts. *Hahn vs. Singh* [1985] KLR 716 (Kneller, Nyarangi, JJA & Chesoni Ag JA) and *Premier Dairy Limited vs. Amarjit Singh Sagoo & another* [2013] eKLR [2013] KECA 95 (KLR) (Onyango Otieno, Azangalala & Kantai, JJA) are cited. It is argued that the decision on funeral expenses contradicted *Premier Dairy Limited vs. Amarjit Singh Sagoo & another* [2013] eKLR [2013] KECA 95 (KLR) (Onyango Otieno, Azangalala & Kantai, JJA).
10. The issues for determination, from what I distil from the above, revolve around liability, loss of dependency, pain and suffering, loss of expectation of life, and special damages.
11. On liability, the respondents did not appear nor file a defence. There was no defence, with alternative allegations on causation, possibly asserting contributory negligence, hence providing a basis for the court to consider contribution. In the absence of a defence, there was no basis for the trial court to



- apportion liability between the deceased and the respondents. Evidence was adduced by only one side. The testimony was not controverted, to provide basis for apportionment of liability.
12. More importantly, the evidence was tendered as formal proof. There was an interlocutory judgement, on account of non-appearance and non-filing of a defence. The interlocutory judgement was on liability. The formal proof was not on liability. It was not meant to establish liability, but to formally prove material that would assist the trial court in the assessment of damages. Formal proof is not conducted for the purpose of liability. The hands of the court would be tied, on liability, once interlocutory judgement is entered, for its effect is to hold the defendants or respondents 100% liable. The issue of apportionment of liability cannot arise thereafter, and it can only arise in error.
 13. On loss of dependency, let me start by stating what it entails. It is a loss suffered by the persons who were dependent on the deceased. Essentially, it is brought by surviving spouses and children of the dead person, and any other persons who were dependent on the deceased for upkeep. It is founded on the provisions of the *Fatal Accidents Act*, Cap 32, Laws of Kenya, which demands that certain disclosures be made, and, therefore, it must be pleaded. The dependants, on whose behalf the suit is brought, must be disclosed, and their ages and relationship with the deceased. The level of income, earned by the deceased, must be disclosed, and his age, as it is from these that the multiplier and the multiplicand are worked out.
 14. The plaint, filed at the trial court, in this case, did not plead that the claim was brought under the *Fatal Accidents Act*, and the particulars required under that Act were not pleaded. There was no disclosure of the dependants, or their ages, nor the income of the deceased. As the *Fatal Accidents Act* was not pleaded, and the particulars required for loss of dependency were not pleaded, there was no basis for considering loss of dependency, and to assess damages for it, whether through the global award approach or the multiplier/multiplicand approach. There was absolutely no foundation for the award the court made, of Kshs. 1,500,000.00. There was no claim for loss of dependency. There was no basis for granting it. Parties are bound by their pleadings. The courts, too, are bound by those very pleadings.
 15. Pain and suffering, and loss of expectation of life, are claims made on behalf of the estate. These are founded on the *Law Reform Act*. The suit, founded on the *Law Reform Act*, is for the benefit of the estate, that is on behalf of the deceased, rather than the dependants, to recover damages for the pain and suffering that he underwent before he died, for special damages incurred on account of his hospitalisation, funeral and those related to his death. Since the suit under the *Fatal Accidents Act* and the *Law Reform Act* would be on behalf of dependants and the estate, it would be a representative suit, and it should be so pleaded, in the plaint, that the suit was brought in a representative capacity, on behalf of the estate and the dependants.
 16. There was no such pleading in the plaint that was before the trial court. The plaint was drawn in a manner suggesting that the claim was by the appellants for themselves. Although some particulars were pleaded, pursuant to statute, the relevant statute was not pleaded or mentioned. The *Fatal Accidents Act* and the *Law Reform Act* were not pleaded or mentioned at all in the plaint. Indeed, the only statute mentioned was the *Traffic Act*, Cap 403, Laws of Kenya, which is of no relevance, so far as assessment of damages is concerned. As it is, no foundation was laid, in the plaint, for award of damages for pain and suffering and for loss of expectation of life. The witness statements carried no material to support those claims.
 17. The only claim that was properly pleaded was that for special damages, being hospital and funeral expenses, and for obtaining representation ad litem. Were those expenses specifically proved? I see an invoice for the Ruaraka Uhai Neema Hospital and a receipt for Kshs. 620.00 and Kshs. 15,400.00. I see receipts for Kshs. 20,000.00 for post-mortem, Kshs. 8,000.00 for mortuary, Kshs. 28,000.00 for



hearse and body bag, Kshs. 65,500.00 for coffin and accessories, Kshs. 28,000.00 for the eulogies, Kshs. 35,000.00 for burial preparations, Kshs. 94,000.00 for tents and seats, Kshs. 312,500.00 for catering, Kshs. 30,000.00 for legal fees and Kshs. 4,000.00 for filing fees. The receipts total Kshs. 734,000.00. but what was pleaded was Kshs. 614,020.00.

18. However, these special damages should be sought on behalf of the estate, which would be claims under the Law Reform Act. The Law Reform Act was not pleaded. The expenses sought to be recovered were not incurred by the appellants, but by the estate. In the absence of anchoring, on the Law Reform Act, there would be no basis for grant of the special damages.
19. I am satisfied that the appeal herein does have merit on liability, but not on the claims on damages. Most of the awards were based on material that was not pleaded. Consequently, I shall set aside the judgement of 15th August 2024, and substitute it with the following:
 - a. Liability is assessed at 100% against the respondents;
 - b. Nil award for loss of dependency;
 - c. Nil award for pain and suffering;
 - d. Nil award for special damages; and
 - e. Costs of the appeal.
20. The appeal is disposed of in those terms. The trial court file to be returned to the relevant registry, but the appeal file shall be closed. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 3RD DAY OF NOVEMBER 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Ngunjiri, instructed by E. Kinyanjui & Company, Advocates for the appellants.

