

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CIVIL APPEAL NO.E021 OF 2024

BATRA COMPANY LTD
.....1ST APPELLANT

CENTRE STAR CONSTRUCTION LTD.....2ND
APPELLANT

VERSUS

CYPRIANO KIBUI

**(Suing as Personal Representative of the Estate of
KELVIN MWIRIGIA KIBUE(Deceased).....**
RESPONDENT

*(Being an appeal from the judgment and decree of Hon.
E Tsimonjero (SRM) delivered on 14/11/2023 in Isiolo
CMCC No. E014 OF 2023)*

JUDGMENT

1. The Respondent sued the Appellants in the lower court seeking general and special damages for loss suffered by the Estate and dependants of Kelvin Mwirigia Kibue (Deceased), who died following a road traffic accident which occurred on 5th December 2022 at Isiolo Town.
2. Judgment on liability was settled in the ratio of 90/10 in favour of the respondent through the consent of the parties. The parties then filed submissions in respect of Assessment of damages. On the 14th November 2023 the trial court delivered judgment on the following terms:
 - a) Liability 90%
 - b) Pain and Suffering- Ksh.100,000/=

c) Loss of Expectation of life -Ksh.200,000/=

d) Loss of Dependency -Ksh. 4,000,000/=

e) Special Damages- Ksh.255,350/=

Total award : Ksh.4,555,350/=

less 10% contribution- (Kshs.455,535/=)

Net award- Kshs.4,099,815/=

f) Interest on the Net Award at court rates from the date of the judgement until payment in full, plus costs of the suit.

3. The Appellant was dissatisfied with the award on damages and moved to this court through the present Appeal.

Memorandum of Appeal

4. In the memorandum of Appeal dated 24th November 2023 the Appellant has set out grounds as follows:

a) That the Learned Trial Magistrate erred in Law and in fact in assessing damages for loss of dependency excessively.

b) That the Learned Trial Magistrate erred in Law and in fact while determining the multiplicand by relying on the professional certificates produced by the Respondent yet the Respondent had pleaded that the deceased was a boda boda rider and therefore was not pursuing his line of training.

c) That the Learned Trial Magistrate erred in Law and in fact by failing to adopt the wage set out in the Regulation of Wages (General) (Amendment) Order 2022 in assessing damages for loss of dependency.

5. The Appellant prays that the judgment on quantum by the lower court be set aside and this Court do assess the damages. They also seek for the costs of the Appeal.
6. The appeal was canvassed through written submissions.

Appellants' Submissions

7. The Appellants have stated that they are not contesting the awards in respect of pain and suffering, loss of expectation of life or special damages. Their only disagreement with the trial court is on the award on loss of dependency.
8. The Appellants argue other than the oral testimony of the respondent, there was no corroboration on the alleged income of ksh. 25,700; that it was pleaded that the deceased was a *boda boda* Rider and that though some professional certificates were produced, there was nothing to show that the deceased was practicing his trade. It is submitted that there was no sufficient proof of his monthly income, and that the income applied was based on conjecture and was arbitrary.
9. The Applicant further submits that since the deceased's income was unascertained, the Court should have adopted the minimum wage based on the then existing minimum wage guideline, and the global approach. He further submits that the applicable minimum wage for a general laborer in **"other areas"** was **Kshs. 8,109.90** as per Column 4 of the Regulation of Wages (General) (Amendment) Order 2022, On the multiplier it is submitted that based on the deceased's age and

exigencies of life, a multiplier of 15 years is reasonable.

10. The Applicant further argues that even if the trial court was correct in applying the lumpsum approach, the award of ksh. 4,000,000 was too excessive; that the award when assessed using the global approach should be as close as possible to the award which would have been arrived at, if the multiplier approach was used. In this regard the Appellant has relied on the decision in the case of ***Njagi vs Ngugi [2023]KEHC 17682(KLR)***

Respondent's Submissions

11. The Respondent submits that the assessment of damages for loss of dependency was arrived at after considering laid down principles, and therefore, should not be disturbed. He has argued that proof of earnings does not strictly require documentation, as insisting on documentary evidence would cause injustice to many Kenyans. The Respondent further argues that the deceased was a professional, who was well trained; that he held a Diploma in **Journalism and Mass Media**. It is further stated that using the Regulation of Wages (General) (Amendment) Order 2022 would be merely speculative and would not reflect the earning capacity of a person with the deceased's qualifications. Reliance was placed on the cases of Moses ***Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the Estate of Mercy Nzula Maina (2016) eKLR and Frankline Kimathi Maariu & Another v Philip Akungu Mitu Mborothi (Suing as***

administrator and personal representative of Anthony Mwiti Gakungu (2020) eKLR interalia

12. The Respondent submitted that the general rule in the absence of proof of earnings is the adoption of the global figure approach. They contended that the sum awarded by the trial court was justified and not excessively high.

Analysis and Determination

13. This being a first appeal, it is the duty of this Court to re-evaluate the evidence placed before the lower court and make its own conclusions thereon, while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses (see: ***Selle & Another v Associated Motor Boat Co. Ltd & Others***)

14. The contest in this Appeal is limited to the award of damages for loss of dependency.

15. It is trite law that assessment of damages is at the discretion of the trial court, and an appellate can only interfere under certain circumstances. In ***Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR***, the Court of Appeal stated as follows:

“...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount

awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that: "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

16. On the formula used to assess the loss of dependency, the Appellant has faulted the trial court for using the global approach as opposed to the multiplier approach. It is argued that there was a basis upon which the court could arrive at an appropriate award based on the minimum wage applicable at the time of the deceased's demise .
17. In the case of **Board Of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku Court of Appeal sitting at Nyeri In Civil Appeal No. 35 of 2014 eKLR** pronounced itself as follows on the multiplier approach: *"The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason"* .
18. In **Mwanzia vs Ngalali Mutua Kenya Bus Ltd and quoted in Albert Odawa vs Gichumu Githenji** (2007), eKLR , the Justice Ringera held:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency and the expected length of the dependency are known 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.”

19. **In Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999] eKLR** Nambuye J stated that:-

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

20. Also in **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] KEHC 5958 (KLR):** the court had this to say“ ... where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the

head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case”

21. From the aforesaid decisions it is evident that both the global or lumpsum, and the multiplier approach, are valid methods of Assessing loss of dependency , with general inclination towards the lumpsum approach where the income of the deceased or occupation is not ascertainable. However, courts have also resorted to minimum wage guidelines and use the multiplier approach where there is no proof of earnings.
22. In the present case, save for the respondent’s testimony there was no corroborative evidence of the deceased’s earnings. The court then had the option of using the minimum wage guideline or award a lumpsum figure. Since both approaches are valid , there was no error in principle committed by the trial court to warrant the intervention of this court
23. The next question is whether the award was excessive in any event. To the Appellant the award was excessive. The respondent on the other hand submits that the award was fair in view of the fact that the deceased was 28 years of age , had a wife and two children aged 4 years old, as dependants.
24. The trite law in assessment of damages is that comparable loss should attract comparable awards. In the case of **Geoffrey Obiero & another v Kenya Power & Lighting Corporation Limited & another [2019] eKLR**, The court awarded a

global sum of Kshs 1,200,000/- for loss of dependency. The deceased was 25 years old and the decision was made in 2019.

25. In ***Irungu Susan & another v Jane Kanini Kavingu (Suing as the administrator to the estate of the late Bosire Kanini-(Deceased,)*** - ***Nairobi High Court Civil Appeal No 495 of 2019*** the court set aside a global award of Kshs 2,000,000/- and substituted it with Kshs 1,700,000/ the deceased was 26 years old at the time of his demise and the decision was made in 2022.
26. In ***Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago [2020] eKLR, the court*** set aside the trial court's global award of Kshs 2,000,000 wherein the deceased died at at 28 years of age ,and substituted it with Kshs 1,500,000/- . The year was 2020.
27. Taking into consideration the above comparable decisions, the comparative ages of the deceased persons and factors of inflation I consider an award of ksh. 2,500,000 a reasonable compensation under this head of damages. I agree with the Appellant that the award of ksh. 4,000,000 was excessive.
28. In conclusion the Appeal partially succeeds. The award of ksh. 4,000,000 on loss of dependency is hereby set aside and substituted with an award of ksh. 2,500,000
29. The award will attract interest at court rates from the date of judgment at the trial court.
30. Each party to meet their costs in this Appeal.

Dated , signed and delivered at Isiolo, this 3rd day of December 2025.

S. Chirchir

Judge

In the presence of :

Roba Katelo

ORIGINAL