Modern Coast Express Limited v Kithome & another (Civil Appeal E115 of 2023) [2025] KEHC 19121 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 19121 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E115 OF 2023

CJ KENDAGOR, J

DECEMBER 17, 2025

BETWEEN

MODERN COAST EXPRESS LIMITED ..... APPELLANT

AND

STEPHEN JUMA KITHOME ..... 1ST RESPONDENT

REGINA SYOKAU JUMA (SUING AS THE ADMINISTRATORS OF THE ESTATE OF BENARD MUSYOKI JUMA) ..... 2ND RESPONDENT

(An appeal against the Judgment and Decree of the Senior Principal Magistrate's Court at Makindu by Honorable E Mbicha (PM) dated 9th November, 2022 in Civil Case No. 284 of 2019)

JUDGMENT

1. This appeal arises from a judgment delivered on 9th November, 2023 by the Hon. E Mbicha at Makindu in CMCC No. 284 of 2019. The claim was premised on an accident that occurred on 23rd March, 2019 along the Nairobi–Mombasa Road at the Manyanga area. It was pleaded that the deceased was a lawful pillion passenger aboard a motorcycle when a motor vehicle owned by the Appellant was so negligently driven that it rammed into the motorcycle from the rear. As a result of the collision, the deceased sustained severe injuries and later succumbed thereto.

2. Liability was compromised by consent of the parties and recorded before the trial Court, with liability being apportioned at 80% against the Defendant and 20% against the Plaintiffs. The matter thereafter proceeded to assessment of damages, parties having agreed to canvass the issue of quantum by way of written submissions.

3. In its judgment, the trial Court awarded damages under the heads of pain and suffering, loss of expectation of life, loss of dependency, and special damages. The total award before contribution amounted to Kshs.3,440,000/=, which, after deduction of 20% contribution, resulted in a net award of Kshs.2,752,000/= in favour of the Plaintiffs, together with costs and interest.

4. Being dissatisfied with the judgment of the subordinate Court, the Appellant filed the present appeal and raised the following grounds of appeal:

    a. The Learned Magistrate erred and misdirected herself in law, principle, and fact when she misapprehended and misunderstood the applicable principles in assessing quantum, thereby arriving at an award that was so manifestly and inordinately high as to amount to an erroneous estimate of damages.

    b. The Learned Magistrate erred in law and fact in making a finding in favour of the Respondents when they had not proved their case on a balance of probabilities.

    c. The Learned Magistrate erred in law and fact in awarding the Respondents Kes 3,440,000 under the *Fatal Accidents Act*, which award was excessive in the circumstances.

    d. The Learned Magistrate erred in law and fact in relying on 27 years as the number of productive working years and in failing to consider the vicissitudes of life when assessing damages under the *Fatal Accidents Act*.

    e. The Learned Magistrate erred in law by failing to deduct the damages awarded under the *Law Reform Act* from the total award.

    f. The Learned Magistrate erred in law and fact in failing to accord due regard to the Appellant's submissions and authorities on the applicable principles for assessment of damages.

    g. The Learned Magistrate erred in law and fact by arriving at a decision that was not based on the evidence on record, descended into the arena of litigation, and erroneously apportioned liability against the Appellant.

5. That is the background to this appeal.

Submissions:

6. Both parties filed submissions. On behalf of the Appellant, it was submitted that liability having been settled by consent, the only issue for determination on appeal was quantum of damages, and in particular the award for loss of dependency under the *Fatal Accidents Act*. Counsel submitted that the trial court correctly adopted a multiplicand of Kshs.15,000/= based on the applicable minimum wage, and the Appellant did not contest that figure. The gravamen of the appeal, it was argued, lay in the multiplier adopted by the trial Court.

7. It was contended that the adoption of a multiplier of 27 years for a deceased aged 26 years failed to sufficiently take into account the vicissitudes of life, and resulted in an excessive award. Counsel urged the court to interfere with the exercise of discretion by the trial Court and to substitute the multiplier with a lower and more reasonable one. In support of that submission, reliance was placed on the following authorities:

    a. Musa Alulwa v Attorney General & Another, Nairobi HCCC No. 1597 of 2000, where a multiplier of 20 years was applied in respect of a deceased aged 26 years;

    b. Wandu Kimeu v Evanson Wamutti, Nairobi High Court Civil Appeal No. 1010 of 2005, in which the court adopted a multiplier of 20 years for a deceased aged 26 years;

    c. Ngania & 2 others v Adulu (Suing as the Legal Representative of the Estate of Clinton Morgan Kiprotich), Civil Appeal No. E005 of 2023, [2024] KEHC 4005 (KLR), where the appellate court adopted a multiplier of 20 years for a deceased aged 29 years.

8. On the basis of the foregoing authorities, the Appellant urged this Court to interfere with the award on loss of dependency, substitute the multiplier adopted by the trial Court, and consequently reduce the award under the *Fatal Accidents Act*. The Appellant further submitted that the damages awarded under the *Law Reform Act* ought to have been deducted from the award under the *Fatal Accidents Act*.

9. The Respondents opposed the appeal and urged the Court to uphold the judgment of the trial Court. On liability, counsel submitted that the issue was settled by consent and, by virtue of Section 67 (2) of the *Civil Procedure Act*, was not open to appeal. Reliance was placed on the principle that a consent judgment has the effect of a contract between the parties and is binding unless set aside on recognized grounds.

10. On quantum, the Respondents submitted that the trial Court properly exercised its discretion, considered the evidence and submissions placed before it, and applied the correct principles in assessing damages. Counsel argued that an appellate Court ought not to interfere with an award of damages unless it is shown that the trial Court acted on a wrong principle of law or that the award was so inordinately high or low as to represent an erroneous estimate. In that regard, reliance was placed on the decision of the Court of Appeal in Mbogua Kiruga v Mugecha Kiruga & Another [1988] eKLR.

11. With respect to pain and suffering and loss of expectation of life, the Respondents submitted that the awards of Kshs.40,000/= and Kshs.100,000/= respectively were reasonable and supported by comparable authorities. On the issue of deduction of damages under the *Law Reform Act*, the Respondents relied on the decision of the Court of Appeal in Hellen Waruguru Waweru v Kiarie Shoe Stores Limited [2015] eKLR, submitting that such damages are not to be deducted from the award under the *Fatal Accidents Act*.

12. On the multiplier, the Respondents supported the trial court's adoption of 27 years, submitting that the deceased was young, engaged in gainful employment, and working in the private sector where retirement age is not fixed. Counsel cited the following authorities in support of the proposition that higher multipliers are permissible in appropriate cases:

    a. Re Estate of John Paul Lubalo Were (Deceased) [2010] eKLR, where a multiplier of 29 years was adopted for a deceased aged 31 years;

    b. Dismas Muhani Wainarua v Sopon Kasirimo Morants (Suing as the Administrator of the Estate of Partinini Supon) [2021] eKLR, where a deceased aged 24 years was assigned a working life of 36 years, and the appeal therefrom was dismissed.

13. The Respondents further submitted that the dependency ratio of two-thirds was justified on the evidence, the deceased having been survived by a wife, children, and a parent, and that the Appellant had not adduced any evidence to controvert that position.

14. The Respondents therefore urged the Court to dismiss the appeal in its entirety and to award them costs of the appeal together with interest.

Determination:

15. Before setting out the issues for determination, it is necessary to make a preliminary observation on this particular litigation. From a cursory perusal of the Memorandum of Appeal, it is immediately apparent that grounds 2 and 7 are plainly untenable.

16. Ground 2 faults the learned magistrate for "making a finding in favour of the Respondents when they had not proved their case on a balance of probabilities." That contention does not accord with the record.

17. Liability was neither contested nor determined after trial; it was compromised by consent of the parties and duly recorded in court on 17th August, 2023 at the ratio of 80:20 in favour of the Plaintiffs. In those circumstances, it cannot seriously be contended that the Respondents failed to discharge their burden of proof on liability.

18. Equally, ground 7 alleges that the learned magistrate "erroneously apportioned liability against the Appellant." That assertion too, is plainly inconsistent with the procedural history of the matter. Liability was apportioned by agreement of the parties themselves, not by judicial determination, and the court merely adopted the consent as recorded.

19. Counsel must be reminded that grounds of appeal are not to be framed speculatively or inserted as an afterthought in the hope that something might stick. The indiscriminate inclusion of grounds that are plainly contradicted by the record serves neither the client nor the administration of justice. It is conduct falling short of the professional diligence expected of counsel appearing before this Court.

20. Accordingly, grounds 2 and 7 raise no triable issue and are for rejection at the outset.

21. Having so observed, and having discounted grounds 2 and 7 which are plainly without merit, the court is of the view that the appeal distils into the following issues for determination:

    a. Whether the learned magistrate erred in law and in principle in the assessment of damages for loss of dependency under the *Fatal Accidents Act*

    b. Whether the learned magistrate erred in law by failing to deduct the damages awarded under the *Law Reform Act* from the award under the *Fatal Accidents Act*

    c. What orders ought to be made as to costs

22. It would be remiss of this Court not to restate its duty as a first appellate Court. In the case of Mbogo and Another v Shah [1968] EA 93 the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

23. Now onto the first issue, the principles upon which an appellate Court may interfere with an award of damages are well settled as I have exhibited in the Mbogo case above. Assessment of damages is an exercise of judicial discretion, and an appellate court will not lightly interfere unless it is shown that the trial court acted on wrong principles of law, misapprehended the evidence, took into account irrelevant considerations, failed to take into account relevant considerations, or that the award was so inordinately high or low as to represent an erroneous estimate.

24. It is common ground that the learned magistrate adopted a multiplicand of Kshs.15,000/= based on the applicable minimum wage. The Appellant expressly conceded, both in its submissions and before this Court, that the multiplicand was proper. Equally uncontested is the dependency ratio of two-thirds, the evidence on record showing that the deceased was survived by a spouse and children, which evidence was not controverted.

25. The dispute, therefore, narrows to the multiplier. The Court in Kuria & another (Suing as the personal representatives of the Late Peter Mwangi Kuria) v Mwangi (Civil Appeal E357 of 2021) [2024] KEHC addressing itself on the question of the multiplier explained thus:

> " The multiplier is about the length of time that the deceased would have continued working had he not died at the accident. What would be considered would be the actual age of the deceased, against the average mortality rate in the country and the age of retirement, for the sort of engagement the deceased was in. The so-called vagaries and vicissitudes of life are then brought to bear on these. The retirement age in Kenya is 60 years. The average mortality rate varies from time to time. The court works out the multiplier from a consideration of these factors. There is no scientific way of working out the multiplier, and the courts rely on past decisions as a guide." [emphasis mine]

26. Ringera J. in the case Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC NO. 1638 OF 1988 (UR) stated as follows:-

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants."

27. The deceased was aged 26 years at the time of his death. The Appellant contends that the multiplier of 27 was excessive and urges this Court to substitute it with a lower figure, citing authorities in which multipliers of between 18 and 20 years were adopted for deceased persons of comparable age. The Respondents, on the other hand, rely on authorities where higher multipliers were adopted, including instances where working lives extending well beyond 30 years were accepted for persons engaged in private enterprise.

28. What emerges from Kuria case above and the authorities cited by both parties is that there is no fixed or mathematical formula for determining the appropriate multiplier. The choice of a multiplier is a matter of judicial estimation, informed by the age of the deceased, the nature of employment, the likelihood of continued employment, and the general uncertainties of life. Comparable awards are a guide, not a straitjacket.

29. From the record before me, it is apparent that the learned magistrate did not proceed on a mechanical basis. The Court did not simply take the difference between the deceased's age and a notional retirement age. Instead, it expressly discounted the potential working life and settled on a figure that, in its view, reasonably reflected both the youth of the deceased and the uncertainties attendant to life and employment.

30. Indeed, the learned magistrate stated at paragraph 3 of his judgment that:

> " Considering the vagaries and vicissitudes of everyday life, I shall use a multiplier of 27 years."

31. Whereas the learned magistrate's reasoning was brief, brevity does not amount to error. What matters is whether the court identified and applied the correct principle. The Court's explicit reference to

"the vagaries and vicissitudes of everyday life" demonstrates that the trial court was alive to the very consideration that the Appellant complains was ignored.

32. The Appellant urged this Court to adopt a lower multiplier, relying on authorities in which multipliers of between 18 and 20 years were applied for deceased persons aged between 26 and 29 years. The Respondents, conversely, cited authorities where higher multipliers were adopted for young deceased persons engaged in private employment.

33. As this Court has already observed, the selection of a multiplier is not a matter of mathematical precision. It is a matter of judicial estimation. Authorities are guides, not binding tariffs. The question is not whether another Court might reasonably have adopted a lower multiplier, but whether the multiplier adopted by the trial Court was so inordinately high as to amount to an erroneous estimate.

34. A multiplier of 27 years for a deceased aged 26 years assumes a working life up to the age of 53 years. It is a matter of judicial notice that in Kenya, persons engaged in private or informal employment where there is no mandatory retirement age can work all the way past retirement age. That assumption cannot be said to be unreasonable or outside the acceptable range given the learned magistrate allowed room for uncertainties of life to the tune of 7 years to retirement.

35. In Re Estate of John Paul Lubalo Were (Deceased)[2010]eKLR, the court adopted a multiplier of 29 years for a deceased person aged 31 years.

36. Going by all the foregoing, I am disinclined to accept the Appellants proposition on that basis.

37. In respect of the second issue, the Appellant contends that the learned magistrate erred in law by failing to deduct the damages awarded under the *Law Reform Act* from the damages awarded under the *Fatal Accidents Act*, thereby occasioning what is described as double compensation. The Respondents oppose that contention and submit that the law does not require such deduction.

38. Section 2(5) of the *Law Reform Act* addresses the relationship between claims made for the benefit of a deceased person's estate and claims made by their dependants under the *Fatal Accidents Act*. It provides that:

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

39. The plain wording of the statute makes it clear that claims under the *Law Reform Act* and those under the *Fatal Accidents Act* are distinct, accrue to different beneficiaries, and are intended to coexist. The estate benefits under the *Law Reform Act*, while dependants benefit under the *Fatal Accidents Act*.

40. In any event, the matter has long been settled by the Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR) where the Court held that:

> "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."

41. There is nothing more to add.

42. As to the matter of costs, it is settled law that costs follow the event, unless there is a good reason to order otherwise.

Disposition:

43. The appeal is without merit and is dismissed in its entirety, with costs to the Respondents.

44. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 17TH DAY OF DECEMBER, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl Anindo

Ms. Sagini, Advocate for the Appellant

No attendance for the Respondent