Ngulo & another v Musyoka & another (Civil Appeal E052 of 2022)
[2025] KEHC 19041 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 19041 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E052 OF 2022

CJ KENDAGOR, J

DECEMBER 17, 2025

BETWEEN

DANIEL NGULO ..... 1ST APPELLANT

WILLIAM MWANZA MAKAU ..... 2ND APPELLANT

AND

MUTUNGI SAMMY MUSYOKA ..... 1ST RESPONDENT

FREDRICK MUSYOKI SAMMY (SUING AS THE ADMINISTRATORS OF THE ESTATE OF VICTOR MUTISYA SAMMY) ..... 2ND RESPONDENT

(An appeal of the entire Judgment and Decree of the Chief Magistrates Court at Makueni by Honorable A Ndungu (SPM.) dated 25th August 2022 in the Chief Magistrate's Court at Makindu Civil Case No. 181 of 2019)

JUDGMENT

1. This appeal arises from a judgment delivered by the Senior Principal Magistrate's Court at Makindu on 25th August, 2022 in CMCC No. 181 of 2019. The suit before the trial Court concerned, a claim for damages arising from a fatal road traffic accident in which the deceased, a minor aged 17 years, lost his life. The Respondent, suing as the legal representative ad litem of the estate of the deceased, sought damages under the *Law Reform Act* and the *Fatal Accidents Act*.

2. Before the trial Court, liability was compromised by consent at the ratio of 80%:20% in favour of the Plaintiffs as against the Defendants. The parties thereafter agreed to dispose of the matter by way of written submissions on quantum. Upon consideration, the trial Court awarded damages under various heads, including loss of dependency and special damages, culminating in a net award of Kshs.1,557,912/= after apportionment of liability.

3. The Appellants do not challenge the findings on liability, nor do they take issue with the awards made under pain and suffering and loss of expectation of life. Their grievance is confined to two heads only: the award for loss of dependency, which they contend was manifestly excessive given the age and circumstances of the deceased, and the award for special damages, which they argue was made in the absence of strict proof.

Submissions:

4. On loss of dependency, the Appellants submitted that the learned trial magistrate fell into error by awarding a global sum of Kshs. 1,500,000/= in respect of a deceased minor aged 17 years. Counsel argued that while Courts have discretion in assessing damages under the *Fatal Accidents Act*, that discretion must be exercised judiciously and in line with comparable awards.

5. It was contended that there was no evidentiary basis upon which the future income, dependency ratio, or working life of the deceased could be ascertained, the deceased having been a student with no proven earnings.

6. The Appellants submitted that the award was manifestly excessive and out of step with comparable jurisprudence. Reliance was placed on Savannah Hardware v EOO, Siaya HCCA No. 13 of 2019, where the High Court upheld an award of Kshs.700,000/= for loss of dependency in respect of a deceased child aged ten years.

7. Further reliance was placed on Kenya Breweries Limited v Saro (1991) eKLR, where the Court of Appeal emphasised that the age of a child is a critical factor in the assessment of damages and awarded a conventional sum in respect of a much younger child. Counsel urged the Court to interfere with the award and substitute it with a substantially lower global sum, proposing an amount not exceeding Kshs.500,000/=.

8. On special damages, the Appellants submitted that although a sum of Kshs.170,160/= had been pleaded, the Respondent failed to strictly prove the claim. Counsel argued that the matter did not proceed to formal proof and that documents merely attached to written submissions could not, in law, be treated as evidence unless formally produced and admitted.

9. It was submitted that the consent recorded on 19th May, 2022, allowing parties to attach documents to submissions, did not amount to an admission of those documents as exhibits. The Appellants relied on the settled principle that special damages must be specifically pleaded and strictly proved, and contended that the trial Court erred in awarding Kshs.147,390/= in the absence of proper proof.

10. In response, the Respondent submitted that the trial court correctly exercised its discretion in awarding damages for loss of dependency. Counsel argued that the deceased, though a minor, was aged 17 years and therefore an older child whose future prospects could reasonably be inferred. It was submitted that the global sum approach adopted by the trial court was appropriate in the circumstances, given the impossibility of applying the multiplier approach to a minor with no established income.

11. The Respondent relied on several authorities in support of the award, including Francis Odhiambo Nyunja & 2 Others v Josephine Malala Owinyi eKLR, where a global sum of Kes 1,500,000 was awarded in respect of a deceased aged 17 years, and Muli & Another v Nzioka & Another (Civil Appeal No. 98 of 2019), where a similar award was upheld on appeal for a deceased of comparable age.

12. Counsel submitted that these authorities demonstrate an emerging consistency in awards relating to older minors, and that the award made by the trial Court was neither inordinately high nor outside acceptable limits.

13. With regard to special damages, the Respondent submitted that the claim was pleaded and proved to the extent awarded. Counsel argued that receipts were placed before the trial Court and formed part of the record, and that the Court was entitled to consider them in assessing the claim.

14. Further, reliance was placed on the decision of the Court of Appeal in Premier Dairy Limited v Amarjit Singh Sagoo & Another eKLR, where the Court recognized that funeral expenses are invariably incurred and that a pragmatic approach is necessary when compensating bereaved families. It was therefore submitted that the trial court did not err in awarding special damages in the sum of Kshs.147,390/=.

Issues:

15. The issues for determination in this appeal may quickly be summarized as follows:

    a) Whether the trial court erred in law and fact in awarding a sum of Kes 1,500,000 for loss of dependency in respect of a deceased minor aged 17 years

    b) Whether the trial court erred in law in awarding special damages in the sum of Kes 147,390 in the absence of strict proof

Determination:

16. I have considered the appeal and have evaluated and analyzed afresh the record before the lower Court.

17. In Okeno Vs Republic 1972 Ea 32 the role of a first Appellate court is given as follows:

> " An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya vs. Republic (1957) EA 336] and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424."

18. On the question of special damages, it is trite that special damages must not only be specifically pleaded but must also be strictly proved. This principle is well settled and requires no elaboration. The question before me then is whether, in the peculiar manner in which the proceedings before the trial Court were conducted, the learned magistrate can be said to have misapplied it that rule.

19. I have carefully perused the record, and in particular the proceedings of 19th May, 2022 when the issue of liability was compromised. Although no written consent was filed, the Court clearly recorded the terms of the consent. Liability was agreed at 80%:20%, and the matter was left for determination of quantum by way of written submissions.

20. I have also examined the documents relied upon by the Respondent in support of the claim for special damages. These documents were annexed to the Plaint at the time the suit was instituted. They therefore formed part of the Court record from the outset. The consent recorded on 19th May, 2022 further provided that parties would file submissions on quantum and "attach documents as per their lists of documents".

21. The Appellants' grievance is that the documents referred to by the trial Court were never formally produced as exhibits, and that their mere attachment to submissions could not amount to proof. That proposition, when examined against the record as a whole, is difficult to reconcile with how the matter was conducted.

22. The learned magistrate addressed this issue directly in the judgment. In awarding special damages, the court stated as follows:

> "The plaintiff pleaded Kshs.170,160/= for special damages and produced receipts for printing programmes, coffin, radio announcement, transport, flowers, post mortem, embalming and mortuary fees, public address system, food stuffs, suit and shoes and obtaining letters of administration totaling Kshs. 147,390/=. Since the same was specifically pleaded and proven, I will award the same."

23. To begin with, the documents in question were not introduced at the submissions stage. They were annexed to the Plaint when the suit was instituted. They therefore formed part of the Court record from inception. The Appellants had notice of them, had the opportunity to interrogate them, and did not, at any point, object to their authenticity, relevance, or propriety.

24. The procedural posture of the case then changed materially on 19th May, 2022. By consent, the parties compromised liability and agreed that the only issue remaining for determination was quantum. From that point, the trial Court was no longer engaged in resolving contested questions of fact. Its role was evaluative rather than fact-finding, and the evidentiary landscape was necessarily defined by the material already placed on record.

25. It was for those reasons that the direction to file submissions on quantum, with documents attached as per the lists of documents, must be understood. The purpose of that direction could only have been to facilitate the Court's assessment of damages on the basis of the material already disclosed, without the need for a formal hearing. To construe that direction as requiring a fresh round of formal production would be to read into the consent a requirement that the parties themselves did not articulate.

26. Discernibly, the Appellants' argument proceeds on the premise that, notwithstanding the compromise on liability and the agreement to proceed by submissions, the Court was still bound to insist on the formal mechanics of production as though the suit had proceeded to full trial. That premise is difficult to sustain. In my view, parties who elect to resolve a matter by consent necessarily shape the procedure that follows, and the Court is entitled to give effect to that procedural choice so long as no prejudice is occasioned.

27. Indeed, accepting the Appellants' position would yield an incongruous outcome. It would mean that parties may agree to dispose of a case on quantum by submissions, expressly contemplate the use of documents in doing so, and yet contend that the Court must disregard those documents because they were not formally produced in a hearing that the parties themselves chose to dispense with. Such an approach would render the consent largely hollow.

28. It is also material that the learned magistrate did not simply award the pleaded sum. He undertook an assessment and confined the award to the amount supported by documentation, declining to award the balance. That is not the conduct of a Court that ignored the requirement of proof. Rather, it reflects an evaluative exercise consistent with the nature of the proceedings as shaped by the parties themselves herein.

29. Further, the record shows that the consent of 19th May, 2022 was recorded in open Court in the presence of Ms Onyango and Ms Ongoga, learned counsel for the respective parties. The terms of the

consent were therefore known to, and accepted by, both sides at the time it was adopted. Had it been the intention of either party that the documents already forming part of the record would thereafter require formal production through a witness or some other means, nothing would have been easier than to expressly state so at that point.

30. Therefore, I firmly reject the suggestion that documents annexed to the Plaint, hitherto disclosed without objection, and expressly contemplated by the consent, nonetheless lacked probative value unless formally produced, cannot be reconciled with the manner in which the parties elected to conduct the proceedings.

31. It will only suffice to refer to the holding of the court in Hirani v Kassam (Civil Appeal No. 11 of 1952) [1952] EACA 131 (1 January 1952) where the former East African Court of Appeal stated:

> " Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them . . . and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court . . .; or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement."

32. I must yet again reiterate that if indeed counsel for the Appellants was of the view that the documents already on record required formal production notwithstanding the consent, the proper course would have been to raise that issue timeously. Nothing prevented counsel from seeking clarification of the consent, or from moving the Court to vary or set it aside on recognized grounds before judgment was rendered. That course was not taken.

33. Instead, the Appellants now invite this Court to hold that the trial Court erred by acting within the very framework the parties themselves agreed to. That position is difficult to sustain. A party cannot, having acquiesced in a particular mode of disposal, remain silent throughout the proceedings and only later fault the court for adopting that mode.

34. Appellate intervention is not designed to facilitate such a course. I wish to say no more on this issue.

35. Turning to the matter of loss of dependency, the Appellants' principal gripe is that the award of Kshs.1,500,000/= was manifestly excessive, given that the deceased was a student with no proven income, and that the trial Court ought to have awarded a much lower conventional sum. The Respondent, on the other hand, supported the award and relied on several authorities in which comparable or similar sums were awarded to minors of near age.

36. It is evident from the record that the learned magistrate did not arrive at the award in a vacuum. The Court expressly considered the submissions and authorities placed before it, particularly those relied upon by the Respondent. In its judgment, the trial Court referred to Francis Odhiambo Nyunja & 2 Others v Josephine Malala Owinyi (suing as the legal representatives of the estate of Kevin Osore Rapando (Deceased)) eKLR, where a global sum of Kshs.1,500,000/= was awarded for loss of dependency in respect of a deceased aged 17 years. That authority was directly on point, both in terms of the age of the deceased and the approach adopted.

37. The trial Court also demonstrated awareness of the broader jurisprudence on assessment of damages for minors. It cited Kenya Breweries Limited v Saro (1981) eKLR, where the Court underscored the relevance of age in assessing damages and observed that it is possible to make a more reasoned assessment of the future prospects of an older child than of a much younger one.

38. The learned magistrate expressly applied that reasoning, noting that while the deceased was a minor, he was not of such tender years as to render any assessment of future prospects wholly speculative.

39. In addition, the learned magistrate engaged with the factual material placed before the Court concerning the deceased. The judgment makes reference to the deceased's age, his school status as a Form Two student, and the terminal report from Kathyaka Secondary School. The Court did not treat these facts as proof of income, but rather as contextual indicators relevant to the choice of approach.

40. On that basis, the Court rejected the multiplier method and adopted the global sum approach, which is the accepted method in cases involving minors with no ascertainable earnings.

41. Importantly, the trial Court also considered the authorities relied upon by the Appellants. It referred to Savannah Hardware v EOO, Siaya HCCA No. 13 of 2019, in which an award of Kshs.700,000/= for a deceased aged 10 years was upheld.

42. Rather than ignoring that authority, the learned magistrate distinguished it on age, observing that the deceased in the present case was significantly older, and therefore stood on a different footing in terms of potential and expectation.

43. Viewed in its entirety, the judgment reveals that the learned magistrate undertook a comparative exercise, weighing awards made for younger children against those made for older minors, and situating the present case within that spectrum. The award of Kshs.1,500,000/= was not plucked from the air; it was anchored in authority and the prevailing trend in awards for minors of similar age.

44. An appellate Court will only interfere with an award of damages if it is shown that the trial Court applied wrong principles, misapprehended the evidence, or arrived at an award so inordinately high or low as to represent an erroneous estimate. In light of the authorities relied upon by the Respondent and expressly adopted by the trial Court, I am not persuaded that any such misdirection has been demonstrated in respect of the award for loss of dependency.

Disposition

45. Accordingly, the appeal lacks merit and is hereby dismissed in its entirety.

46. The Respondent shall have the costs of the appeal.

47. 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

Mr. Muumbi, Advocate for the Respondent

No attendance for Appellant