

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL DIVISION
CIVIL APPEAL NO. 344 OF 2023

FORMERLY KIAMBU CIVIL APPEAL NO 151 OF 2021

MARTIN MWENDA KARIMI **1ST APPELLANT**
RUNGA KAGWIRA FRIDAH **2ND APPELLANT**

VERSUS

VALERIA SYOMBUA MULI

(suing as representative and Administrator

Of the estate of JOHN MUEMA (Deceased) RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Ekhubi, Chief Magistrate delivered on 30 July 2021 in Thika Chief Magistrate's Court Civil Case No. 285 of 2018)

JUDGEMENT

1. This appeal seeks to challenge the assessment by the subordinate court of quantum of damages under the Fatal Accidents Act and the Law Reform Act, following a fatal road traffic accident.
2. The appellate jurisdiction of this Court is invoked pursuant to Section 79G of the Civil Procedure Act, which confers upon the High Court the power to hear appeals from subordinate courts. In exercising this jurisdiction, the Court is guided by the established principles regarding the duty of a first appellate court. As elucidated in the seminal case of ***Selle & Another v. Associated Motor Boat Company Ltd & Others EA 123***, this Court is obligated to revisit the evidence tendered before the trial court, re-evaluate it, analyze it

comprehensively, and arrive at its own independent conclusions. The Court must, however, remain cognizant of the fact that it did not have the distinct advantage of observing the witnesses' demeanour firsthand and must make due allowance for this limitation.

3. Furthermore, this appeal touches upon the discretionary powers of a trial court in assessing general damages. The principle established in ***Mbogo & Another v. Shah EA 93*** dictates that an appellate court should not interfere with the exercise of discretion by a trial court unless it is satisfied that the court below acted on wrong principles, misapprehended the evidence, or awarded a sum so inordinately high or low as to represent an entirely erroneous estimate of the damages.

Brief Background

4. The litigation traces its genesis to a tragic road traffic accident that occurred on 6 December 2017 along the Nairobi-Thika Superhighway, specifically near the Blue Post Hotel area. The Deceased, John Muema Sabina, was a young man aged 27 years at the time of his demise. He was by occupation a driver. On the material day, the Deceased was lawfully driving motor vehicle registration number KBT 286L, which is described in the Police Abstract as a Mitsubishi Bus. The Appellants were the registered owners of motor vehicle registration number KCF 393M, a lorry.
5. The Respondent's case at the trial court was that the Appellants' driver so negligently managed, controlled, and/or drove the said lorry that it reversed into the lane of oncoming traffic and collided violently with the Deceased's vehicle. The impact of this collision caused the Deceased to sustain severe and fatal injuries, to which he succumbed on 7 December 2017. The Post Mortem Report indicated the cause of death as multiple injuries to the chest, limbs, and head due to blunt force vehicular trauma.

6. The Respondent instituted the suit in the lower court on 5 April 2018 in her capacity as the legal representative and administrator of the estate of the Deceased. She pleaded that she was the widow of the Deceased and that they had one dependent child, who was a minor aged approximately 6 years at the time of filing suit, though a letter from the Assistant Chief indicated the child was 3.5 years old in January 2018.
7. The Plaintiff averred that the Deceased was a diligent breadwinner, employed as a driver earning a monthly income of Kshs. 35,000/=. The Respondent sought special damages amounting to Kshs. 121,290/= and general damages under the Law Reform Act and Fatal Accidents Act.
8. The Appellants filed a Statement of Defence denying liability and attributing negligence to the Deceased. They contested the particulars of the accident and put the Respondent to strict proof regarding the Deceased's income and the dependency of the alleged beneficiaries.
9. The matter proceeded to trial. The issue of liability was settled by consent. The parties agreed to adopt the outcome of Thika CMCC No. 248 of 2018, a related suit arising from the same accident. In that test suit, the court found the Appellants 100% liable for the accident. This finding was subsequently upheld by the Court in Kiambu High Court Civil Appeal No. 28 of 2019. Consequently, the proceedings before the trial court were restricted solely to the assessment of quantum of damages.
10. The Respondent called two witnesses. PW1, the Respondent, adopted her witness statement and produced various exhibits, including the Grant of Letters of Administration, the Death Certificate, the Post Mortem Report, and receipts for funeral expenses. She testified that the Deceased was the sole provider for the family and earned Kshs. 35,000/= per month.

11. PW2, Peter Kaeka Mutie, is a director of Dama Tours & Safaris Co. Ltd, the Deceased's employer. He produced a letter dated 13 December 2017 confirming that the Deceased had been employed as a driver since May 2017 earning Kshs. 35,000/= per month. In cross-examination, PW2 admitted that the salary was paid in cash and that statutory deductions were handled by the SACCO or not remitted directly by the employer.
12. The Appellants did not call any witnesses but relied on legal submissions to challenge the quantum.
13. On 30 July 2021, the learned Magistrate delivered judgment. The court accepted the evidence of income but made a deduction for statutory dues, settling on a net monthly income of Kshs. 25,000/=. Crucially, the body of the judgment contained a discrepancy. In his reasoning regarding the multiplier, the Magistrate stated:

"Considering his age, the uncertainties and imponderables of life... I am of the view that a multiplier of 20 years would be reasonable."
14. However, in the final computation of figures, the Magistrate applied a multiplier of 30 years, calculating the loss of dependency as:

Kshs. 25,000 x 12 months x 30 years x 2/3 dependency ratio.
15. This discrepancy led to post-judgment proceedings. The Respondent applied for rectification of the record. On 9 February 2023, the Magistrate issued a ruling invoking Section 99 of the Civil Procedure Act (the Slip Rule). He stated that the mention of 20 years was an error and confirmed that his intention was to award based on a 30-year multiplier, thereby upholding the higher award.
16. The final Decree awarded:

Liability:	100% against Appellants.
Pain and Suffering:	Kshs. 70,000/=.
Loss of Expectation of Life:	Kshs. 100,000/=.
Loss of Dependency:	Kshs. 5,900,000/=.
Special Damages:	Kshs. 68,403/=.
Total:	Kshs. 6,138,403/= (adjusted in decree to Kshs. 6,038,403/= after arithmetic reconciliation).

17. The Appellants, aggrieved by this outcome, lodged this appeal on the following grounds:

- (i) That the learned Trial Magistrate erred in law and fact in awarding to the Plaintiff Kshs 6,000,000/= for loss of dependency under Fatal Accidents Act when there was not plausible and or credible evidence tendered before him that in deed the deceased was in the alleged salary bracket;
- (ii) That the learned trial Magistrate erred in law and fact by over relying on a letter stating an amount of salary and the statement of Peter Kaeka Mutie which was not corroborated;
- (iii) That the learned trial Magistrate erred in law in failing to take into account that the deceased earnings per month was not proved to the required standard and the evidence tendered was not supported by any bank statement, mpesa statements or evidence of Income Tax Returns which would be automatic for any Kenyan earning the same salary as the deceased;
- (iv) That the learned trial Magistrate misapprehended the evidence and misapplied and or overlooked the correct legal principles and judicial precedent and the submissions by parties that he made an award for loss of dependent that was inordinately high;
- (v) That the learned trial Magistrate erred in law in failing to apply the provision of section 2 of the Insurance (Motor Vehicle) Amendment Act

- 2013 in choosing the income of the deceased and failing to apply the minimum wage;
- (vi) That the learned trial Magistrate erred in law and in fact in applying a multiplier that was too high considering the hazardous nature of the deceased job;
 - (vii) That the learned trial Magistrate's choice of dependency ration, the multiplicand and the multiplier is wrong and unreasonable;
 - (viii) That the learned trial Magistrate misdirected himself on all points of law.
18. The appeal was canvassed by way of written submissions.
19. The Appellants contend that the award of Kshs. 6,000,000/= for loss of dependency was based on an unproven salary of Kshs. 35,000/=. They argue that the trial court erred in relying on a simple letter and the uncorroborated statement of PW2 without bank statements, M-Pesa records, or tax returns. The Appellants assert that in the absence of strict proof of income, the court should have applied the statutory minimum wage under the Regulation of Wages guidelines.
20. The Appellants argue that a multiplier of 30 years is excessive for a driver, given the hazardous nature of the job, and that 20 years was the appropriate figure. Further, they submit that the court misdirected itself on the dependency ratio and failed to properly account for the vicissitudes of life.
21. The Respondent, on the other hand, submitted that the Deceased worked in the *Matatu* industry, where strict documentation is rare. They relied on **Jacob Ayiga Maruja & Another v Simeon Obayo eKLR**, arguing that courts should not fetishize documents to the detriment of justice. They maintained that the employer's letter and testimony were sufficient. Regarding the multiplier, they argued that 30 years was reasonable for a 27-year-old, citing **Joel Kiogora M'iringo v Gabriel Memia eKLR**. Alternatively, they

proposed using the minimum wage for a 'Medium Sized Vehicle' driver, which was Kshs. 21,942.30 in 2017.

Analysis & Determination

22. Having reviewed the Record of Appeal, the Supplementary Record and the parties' submissions, this Court distills the following issues for determination:

- (i) Whether the Trial Court erred in its invocation of the Slip Rule under Section 99 of the Civil Procedure Act to uphold a multiplier of 30 years despite reasoning for 20 years.
- (ii) Whether the Deceased's income was proved to the required standard, and if not, what the appropriate multiplicand should be.
- (iii) Whether the multiplier of 30 years was inordinately high and what constitutes the correct multiplier for a 27-year-old driver.
- (iv) Whether the dependency ratio of 2/3 was properly applied.
- (v) Whether the final award requires adjustment to prevent double compensation between the Law Reform Act and Fatal Accidents Act.

The Slip Rule

23. The first issue touches on a fundamental procedural point. The record shows a stark contradiction in the learned Magistrate's judgment. In the analytical section, the learned Magistrate explicitly reasoned:

"Considering his age, the uncertainties and imponderables of life... I am of the view that a multiplier of 20 years would be reasonable."

24. Yet, in the dispositive calculation, the formula used was:

25. When this was challenged, the learned Magistrate issued a ruling on 9 February 2023 under Section 99 of the Civil Procedure Act, stating that the summation was erroneous and corrected the record to reflect 30 years as the intended multiplier.

26. Section 99 provides:

Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties.

27. The Supreme Court, in the landmark case of **Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others, KESC 25 KLR**, provided authoritative guidance on the scope of the Slip Rule. The Court held that the rule is intended to correct obvious errors that do not generate controversy regarding the court's decision. It allows the court to give effect to its true intention at the time the judgment was delivered. Importantly, the Supreme Court warned:

"The Slip Rule does not confer upon a Court any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it."

28. In the present case, the conflict is between the judicial reasoning (20 years) and the mathematical application (30 years). Judicial reasoning is the soul of a judgment; the calculation is merely the mechanical output. When a judicial officer writes that "20 years is reasonable", that is a substantive finding of fact and law. To subsequently change this to 30 years under the guise of a "slip" suggests that the reasoning was the error, not the math. Changing the

reasoning of a judgment post-delivery usually requires a review under Order 45 or an appeal, not a correction under Section 99.

29. This Court observes that the alteration from 20 to 30 years significantly increased the liability of the Appellants by millions of shillings. Such a substantive change, based on a contradiction between text and calculation, arguably exceeds the remit of a clerical correction. It appears the learned Magistrate may have engaged in an impermissible review of his own reasoning.
30. However, as an appellate court re-evaluating the evidence, I am not bound by the learned Magistrate's choice of either 20 or 30 years. I have the jurisdiction to determine the correct multiplier based on the facts. Therefore, while I note the procedural irregularity in using the Slip Rule to alter a substantive finding, I will proceed to determine the appropriate multiplier *de novo* in Issue 3 below.

Proof of Income and the Multiplicand

31. The Respondent claimed the Deceased earned Kshs. 35,000/= per month. The evidence tendered was a letter from Dama Tours & Safaris Co. Ltd and the oral testimony of its director, PW2. The Appellants argue this is insufficient due to the lack of tax returns or NSSF/NHIF records.
32. The Kenyan economy is heavily reliant on the informal sector, often referred to as "*Jua Kali*". The courts have long grappled with the strict application of evidence rules regarding income in this sector. The leading authority is ***Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR***, where the Court of Appeal held:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the

production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways."

33. This principle recognizes that requiring a *Matatu* driver or a casual labourer to produce Kenya Revenue Authority returns or formal pay slips may amount to denying them justice. However, this does not mean that mere assertion suffices. The court must look for credible evidence.
34. In this case, the Respondent went a step further than many plaintiffs by calling the employer, PW2. PW2 testified on oath that he paid the Deceased Kshs. 35,000/= in cash. The Appellants did not present any evidence to contradict this, nor did they impeach PW2's credibility beyond pointing out the lack of tax compliance.
35. While the court can accept oral evidence of income, it cannot ignore the law regarding taxation. Damages for loss of dependency are meant to compensate for the lost support. The Deceased could only support his family with his net income—that is, income after mandatory statutory deductions. As noted in ***Simon Kiplimo Murey & 3 Others v Kenya Bus Management Services Limited*** [2014] eKLR, statutory deductions must be factored in.
36. The learned Magistrate deducted a lump sum of Kshs. 10,000/= from the gross of Kshs. 35,000/= to arrive at Kshs. 25,000/=. Was this reasonable? This calls for an examination of the Regulation of Wages (General) (Amendment) Order, 2017. This statutory instrument sets the baseline for wages in Kenya.
37. The Deceased drove a Mitsubishi bus. Under the 2017 Order, the minimum wage for a 'Driver (Medium Sized Vehicle)' in Nairobi/Mombasa/Kisumu was Kshs. 21,942.30. The minimum wage for a 'Driver (Heavy Commercial

Vehicle)' was typically higher, ranging towards Kshs. 30,000/= depending on the specific grade.

38. The claimed gross income of Kshs. 35,000/= is consistent with market rates for a PSV driver in the busy Nairobi-Thika route, which often exceeds the statutory minimum. It is not an exaggerated figure.

39. If one applies a hypothetical tax calculation to Kshs. 35,000/= (using 2017 rates):

NSSF - approx. Kshs. 200/= to 1,080/= depending on tier.

NHIF - approx. Kshs. 950/=

PAYE - approx. Kshs. 4,000/= to 5,000/-).

The total deductions would likely range between Kshs. 5,000/= and Kshs. 7,000/=.

40. The learned Magistrate's deduction of Kshs. 10,000/= was, therefore, generous to the Appellants and conservative. It resulted in a multiplicand of Kshs. 25,000/=: which is very close to the statutory minimum wage for a medium/heavy commercial driver (approx. Kshs. 21,942/= to 24,000/=).

41. Therefore, I find that the learned Magistrate did not err in adopting Kshs. 25,000/= as the multiplicand. It strikes a fair balance between the evidence of the employer and the need to account for statutory liabilities. The Appellants' insistence on Kshs. 18,319/=: being the minimum wage for light vehicles, is misplaced given the vehicle involved was a bus.

The Multiplier

42. The determination of the multiplier is a discretionary exercise, but it must be based on settled principles. The multiplier represents the number of years the dependency would likely have continued. It is derived from the Deceased's age, nature of work, and the vicissitudes of life. Some key facts herein are

that the Deceased was 27 years old. He was a driver in the informal section. While public service is 60, the informal sector has no fixed retirement age. However, driving is physically demanding.

43. The courts have moved away from a strict mathematical calculation and instead apply a reasonable figure that accounts for the risks of life such as death, illness, unemployment.
44. In ***Kenya Power & Lighting Co. Ltd v Benard Kilonzo (suing as the administrator of the Estate of the late Maurice Mutinda Kilonzo [2012] KEHC 3642 (KLR)***, the deceased was aged 21 years. The multiplier used was 25 years. The reasoning was that the deceased was young with a long working life ahead.
45. In ***Mwita Nyamohanga & another v Mary Robi Moherai suing on behalf of the estate of Joseph Tagare Mwita (Deceased) & another [2015] KEHC 6754 (KLR)***, the deceased was 27 years old. The multiplier used was 25 years.
46. In ***Innocent Keti Makaya Denge v Peter Kipkore Cheserek & another [2015] KEHC 391 (KLR)***, the deceased was 34 years old. The court used 26 years as the multiplier on the basis that he was a business man in the informal sector and could work past the age of 60 years.
47. In ***Yh Wholesalers Ltd & another v Joseph Kimani Kamau & another [2017] KEHC 2384 (KLR)***, the deceased was 21 years old. The court used a multiplier of 30 years.
48. In ***Joel Kiogora M'iringo v Gabriel Memia [2020] KEHC 6417 (KLR)***, the deceased was 28 years old. The multiplier used was 30 years on the basis that the deceased was in the informal sector, which allows working beyond the age of 60 years.

49. A multiplier of 30 years for a 27-year-old assumes they would work uninterrupted until age 57. While supported by cases like **Joel Kiogora**, it is on the higher end of the spectrum. The Appellants' suggestion of 20 years is unduly low for a 27-year-old in the prime of life.
50. The case of **Mwita Nyamohanga** is particularly persuasive as it involved a deceased of the exact same age (27 years), where the Court of Appeal upheld a multiplier of 25 years. Similarly, in **Kenya Power v Kilonzo**, 25 years was used for a 21-year-old.
51. Considering the hazardous nature of the driving profession and the inherent uncertainties of life in the informal sector, I am of the considered view that a multiplier of 25 years is the most just and reasonable figure. It avoids the potentially excessive nature of 30 years while recognizing the long productive life the Deceased had ahead of him.
52. The learned Magistrate's award based on 30 years is set aside and substituted with a multiplier of 25 years.

Dependency Ratio and Double Compensation

53. The Deceased left behind a young widow, aged 24 years, and a young child. The standard practice in Kenyan courts for a spouse and child is a dependency ratio of 2/3. The reasoning is that the deceased would consume 1/3 of his income for personal use and dedicate 2/3 to the family. The Appellants argued for a lower ratio based on the possibility of the widow's remarriage. This line of argument is increasingly disfavoured in modern jurisprudence as it is speculative and discriminatory against women. The dependency of the minor child is absolute. Therefore, I uphold the 2/3 dependency ratio applied by the trial court.

54. There is a jurisprudential debate on whether awards under the Law Reform Act should be deducted from awards under the Fatal Accidents Act. The traditional view, anchored in ***Kemfro Africa Ltd v. A.M. Lubia***, is that since the beneficiaries of the estate (Law Reform Act) and the dependants (Fatal Accidents Act) are often the same people, paying both fully amounts to double compensation.
55. Recent decisions, such as ***West Kenya Sugar Company Limited v Okendo (2024)*** eKLR and ***Chen Wembo v I.K.K [2017]*** eKLR, have reiterated that while the causes of action are distinct, the value of the Law Reform Act award (specifically for pain and suffering and loss of expectation of life) should be taken into account.
56. The trial court awarded:
- | | |
|--|--------------------|
| Law Reform Act (Pain/Suffering + Expectation): | Kshs. 170,000/=. |
| Fatal Accidents Act (Dependency): | Kshs. 5,900,000/=. |
57. The court then deducted Kshs. 100,000/= from the Fatal Accidents Act award.
58. To ensure clarity and adhere to the principle of preventing double enrichment, the correct approach is to calculate the full Loss of Dependency and then deduct the total non-pecuniary award made under the Law Reform Act. This ensures the family receives the higher of the two assessments without duplication.
59. Therefore, the Kshs. 170,000/= awarded under the Law Reform Act will be deducted from the final Loss of Dependency award.
60. Based on the findings above, this Court reassesses the damages as follows:
- (a) Under Law Reform Act

Pain and Suffering:	Kshs. 70,000/=
Loss of Expectation of Life:	<u>Kshs. 100,000/=</u>
Sub-Total:	Kshs. 170,000/=

(b) Under Fatal Accidents Act

Loss of Dependency:

Calculation: Kshs. 25,000 x 12 x 25 x 2/3 = Kshs. 5,000,000/=

61. The Respondent pleaded and proved special damages (funeral expenses, etc.) to the tune of Kshs. 68,403/=. This is upheld.

62. Final Sum is as follows:

Total Dependency:	Kshs. 5,000,000/=
Plus Special Damages:	Kshs. 68,403/=
Plus LRA Award:	Kshs. 170,000/=
Total Gross:	Kshs. 5,238,403/=
Less LRA Award:	<u>(Kshs. 170,000/=)</u>
NET PAYABLE:	<u>Kshs. 5,068,403/=</u>

63. In the premise, the appeal succeeds partially, specifically regarding the multiplier which is reduced from 30 years to 25 years. The grounds regarding proof of income and the use of the minimum wage are dismissed, as the trial court's assessment of income was reasonable and supported by evidence.

64. Consequently, the Judgment and Decree of the Chief Magistrate's Court in Thika CMCC No. 285 of 2018 delivered on 30 July 2021 are hereby set aside and substituted as follows:

- (i) Liability remains at 100% against the Appellants.
- (ii) Judgment is entered for the Respondent against the Appellants jointly and severally for the sum of Kshs. 5,068,403/= ;

- (iii) Interest on the decretal sum shall apply at court rates from the date of the trial Court judgment (30 July 2021) until payment in full.
- (iv) The Respondent is awarded costs of the suit in the lower court.
- (v) Each party shall bear their own costs of this Appeal, given the partial success.

Dated and Delivered at THIKA this 16 day of JANUARY

2026

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered virtually in the presence of:

For Appellants: N/A

For Respondent: Mr. Uvyu

Court Assistant: Lucy Mwangi