

REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL NO. E052 OF 2025

LUCY WANJIKU KIMARU

(Suing as the legal representative of the estate of
WILSON MURIITHI KIMARU- Deceased).....

APPELLANT

VERSUS

PAUL MUNYI WAIHENYA.....

RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of Anastasia Ndung'u (PM) delivered on 25.08.2025 in Nyeri CMCC No. E044 of 2022. The appellant was the plaintiff. The court heard the matter and dismissed the suit.

Pleadings

2. The Appellant filed suit against the Respondent vide a plaint dated 09.02.2022. The Appellant claimed damages for an accident pleaded to have occurred on 4.3.2021 when the deceased was travelling as a passenger in a motor vehicle registration number KAN 554 S. The said vehicle was hit by the Respondent's motor vehicle registration number KDA 028U. Liability was determined and there is no appeal in respect thereto. The deceased only left a mother, whose age was not pleaded. The deceased was 56 years old and

reportedly earning over Ksh. 100,000/= per month as a farmer. There was pleading of a sum of Ksh 150,000/= as funeral expenses. However at the foot, a sum of Ksh.191,605/= was prayed for as special damages.

3. The Respondent filed his amended defence dated 14.03.2022, where they denied liability and blamed the deceased. Since liability is not in dispute, it is unnecessary to address the pleadings and evidence on liability. Liability was actually settled in a test suit on 19.11.2024.

4. The matter proceeded to the assessment of damages. The Appellant testified and tendered evidence. She averred that the deceased's mother was 97 years old at the time. It was stated that the deceased earned approximately Ksh. 100,000/= from farming. The deceased was also described as a general worker and was involved in livestock brokerage, among others. It was further stated that the deceased had no other dependants.

5. The court rendered its judgment as follows:

- a. 100% liability
- b. Pain and suffering - Ksh. 50,000/=
- c. Loss of expectation of life - Ksh. 100,000/=
- d. Loss of dependency - Kshs. 289,638/=
- e. Special damages - Ksh. 91,605/=

Total - 531,243/=

6. This resulted in this appeal, which is on one issue only, damages for loss of dependency. The appellant maintained

that the award is so erroneous as to be so for a healthy 56-year-old man. The appellant lamented that the court should have used a global sum rather than a minimum wage. This court is therefore invited to set aside the judgment on the loss of dependency and assess afresh.

Submissions

7. The Appellant filed submissions dated 14.11.2025, where they urged the court to allow the appeal. They set out the duty of the court as settled by the case of **Butt v Khan [1978] KECA 24 (KLR)**, where the court of appeal (**Madan, Wambuzi & Law JJA**) held as follows:

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.

8. They submitted that the deceased was 56 years old, supporting the aged mother. They correctly submitted that loss of dependency is for the benefit of the dependants. In inviting the court to use a global approach, they relied on the case of Moses **Mairua Muchiri v Cyrus Maina Macharia** (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) 2016 KEHC 5958(KLR), where this court, Ngaah Jairus J posted as follows:

It has been held elsewhere that 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. In *Gammel versus Wilson* (1981) 1 ALL ER 578 Lord Scarman spoke of the assessment of damages in such circumstances; he said:

The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in *Gammell's* case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant

that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it.

9. In a hanging submission, which apparently relates to the position of proof of the deceased as a farmer, they relied on the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] KECA 202 (KLR)**, where the court of appeal (Omolo, Tunoi & Githinji, JJ.A) held as follows:

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. If documentary evidence is available, that is well and good. But we reject any

contention that only documentary evidence can prove these things.

10. They stated that the best approach then is a global sum. Reliance was placed on the decision of Hon. Ringera, J in **Mwanzia v Ngalali Mutua & Kenya Bus Service (Msa) Ltd & another**, where the court posited as follows:

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.”

11. They crowned the submissions with the decision of the High Court in **Waihenya v Kariuki** (Suing as the Legal Representative of the Estate of the Late Nicholus Wachira Kariuki (Deceased)) [2024] KEHC 14237 (KLR) which stated as follows:

The documents produced do no show support for the dependants, further they are all adults. Applying the multiplier is as such not a proper measure as it goes more into the realm of conjecture and surmise. The multiplier of 15 is equally too long for adult children aged 18-23. The best method is thus to have either nominal dependency, which in this case could be 5 years. However, there will be a hurdle on proof of

income. Having business turnover or contracts is not evidence of income. And even where it were, each of the children should prove dependency. They did not. This is where a global award comes in.

57. Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of *Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another* cited by the Court of Appeal for Eastern Africa in *Radhakrishen M. Khemaney v. Mrs Lachaba Murlidhar* (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows: "I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by *Peggy Prances Hayes and others against Chunibhai J. Patel and another*, the principles applied by the learned chief justice, as he then was, were as follows:

"The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left

her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."Upon an appeal against this judgment this court held ([1957] RA. 748 (C.A.):"That the method of assessment of damages adopted by the learned chief justice was correct."

12. The above passage will be left hanging if the next paragraph in that case is not set out. The court in the above case concluded as follows:

Courts are not compelled to adopt the multiplier method in cases where the exercise is groping in the dark, speculation on the important aspects of lost years, or dependency.

13. They posited that a sum of Ksh 3,000,000/= will have sufficed.
14. On their part, the Respondents filed undated submissions, where they set out the jurisdiction of this court as a re-trial court. Reliance was placed on the case of **Jamii Bora Bank Ltd & another v Ndirangu** (Civil Appeal E030 of 2021) [2023] KEHC 25951 (KLR) (30 November 2023) (Judgment).
15. They submitted that a claim of an income of Ksh.100,000/= was deflated in cross-examination, necessitating the appellant to move to a global award. It was submitted that the deceased was a labourer and as such

use of Ksh 7,240.95/= was proper as per the regulation of wages (general) (amendment Order 2018). This was supported by the case of **Phillip Musyoka Mutua v Veronica Mbula Mutiso [2013] KEHC 1563 (KLR)**, where L.N. MUTENDE J held as follows:

Therefore, in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate set is usually like for a wage of an unskilled employee

16. They relied on the case of **Nyamira Tea Farmers Sacco V Wilfred Nyambati Keraita** (suing as the personal representative of) Mary Nyaboke Keraita- Deceased [2011] KEHC 3253 (KLR) that gave guidance to the lower court, where Asike-Makhandia, J, as he then was, held as follows:

In the absence of proof of income, the trial magistrate ought to have reverted to the Regulation of wages (General Amendment Order 2005) and which came into force on 1st April, 2004. It is to be noted that the judgment herein was crafted and delivered on 30th March, 2005. Using this as a guideline, the magistrate should have settled for a round figure for Kshs. 4,000/= as the multiplicand.

17. The respondent submitted that the matter in question was within the discretion of the lower court and should not be supplanted.

Analysis

18. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. 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. In the case of **Mbogo and Another vs. 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 it 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.

19. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board Company and Others** [1968]EA 123, where the Judges in their usual gusto, held as follows;-

.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour

of a witness is inconsistent with the evidence generally.

20. It is a strong thing for an appellate court to depart from the factual findings of a trial court. This is especially so where those findings are based on the trial judge's assessment of the credibility and demeanor of witnesses, having had the distinct advantage of seeing and hearing them testify. An appellate court must therefore exercise great caution before interfering. It should only do so where the findings are plainly wrong, unsupported by the evidence on record, or are based on a misapprehension of the law or the evidence. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

21. In deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously, considering the circumstances, to ensure that the award is not too high or too low as to be an erroneous estimate of damages. The Court of Appeal, pronounced itself

succinctly on these principles in **Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27** as follows:

The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

22. In the case of Henry Hidayo Ilanga versus Manyama Manyoke [1961] EA 705, 713 at paragraph c, Sir Kenneth O'Connor P, in the lead decision to which Sir Alastair Forbes, VP, and Newbold JA agree with nothing useful to add, the former court of appeal for East Africa held as follows:

In considering this question, I apply the rule laid down by the Privy Council, that is Nance vs British Columbia Electric Co Ltd, [1951]A.C. 601, at 613, when discussing the principles to be observed in disturbing the quantum of damages awarded by a judge.

“The principles which apply under this head are not in doubt. Whether the assessment of

damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance even if the tribunal of the first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing damages, applied a wrong principle of law (as by taking into account some irrelevant factor and or leaving out a relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages.

23. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. So my duty as the appellate court is threefold regarding quantum of damages: -

- i. To ascertain whether the lower court applied irrelevant factors or left out relevant factors.*
- ii. To ascertain whether the award is too low as to amount to an erroneous assessment of damages.*
- iii. To ascertain whether the award is simply not justified by evidence.*

24. To be able to do this, I need to take into consideration inflation and other comparable awards. No single case is typically identical to the other. The principle of the award of

damages is settled. It is common reasoning that astronomical awards may lead to higher insurance premiums, thereby hurting the insurance industry and the economy. See the case of **H. West and Son Ltd v. Shepherd [1964] AC.326** (supra) where it was stated that:

...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

In the process, there must be an endeavour to secure some uniformity in the general method of approach. By common consent, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that, so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....

25. On loss of dependency, the deceased had his mother and sister as the named dependants. However, PW1 testified that the deceased earned between Ksh. 100,000/= though no evidence was tendered of this. It was not even clear where he farms. The court below then adopted a minimum wage. The appellant is raising issues regarding the use of the minimum wage and praying for a global award. The Respondent will hear none of it. Unfortunately, the parties must understand that awards using the source of income and the global approach method are not principles of law

but methods of assessment. Whichever route is used, there should not be an undue advantage.

26. The parties used 2 land marks for their position. One decided by myself, Waihenya v Kariuki (Suing as the Legal Representative of the Estate of the Late Nicholus Wachira Kariuki (Deceased)) [supra], where I awarded Ksh. 3,000,000/= for a 52-year-old who left children aged between 18-23. They had a future to depend on their father. The difference with the case in court is that there was proof of income between 45,000-60,000/= and a finding that a claimant therein was involved in business. In this case, nothing was said about it. Further in the said case, the deceased, who is related to the deceased herein, had children aged between 18 and 23. The deceased herein had a 97-year-old mother dependent on him.

27. On the other hand the respondent used a case of Nyamira Tea Farmers Sacco V Wilfred Nyambati Keraita (suing as the personal representative of) Mary Nyaboke Keraita - Deceased [2011] KEHC 3253 (KLR, where nominal awards were given.

28. One part that all the parties and the court disagreed on was the age of the dependents. The mother, who was the only dependent, was 97 years old. The time of dependency in such a case must be nominal. If the court were to use a multiplier, a nominal 5-year multiplier would have sufficed. The court awarded 10 years.

29. The court used a minimum wage as a multiplicand. This was an exercise of discretion. The court had both the multiplicand and the multiplier before her. It must be recalled that the mother did not testify to her dependency. Strictly speaking, even that dependency was not proved. However, it is not the subject of this appeal.

30. The only error discernible is a systemic one. Neither the parties nor the trial court appears to have sufficiently taken into account the age of the dependant, who was 97 years old. The court was therefore required to factor in the limited duration of dependency. It cannot reasonably be expected that a 97-year-old would remain dependent on a 56-year-old son for an extended period. Without venturing into speculative considerations in eschatology which are beyond the court's remit, a multiplier of ten years would, in the circumstances, be unduly generous.

31. The sole dependant was a 97-year-old nonagenarian, an age generally regarded as the upper limit of human longevity, notwithstanding the rare occurrence of centenarians. In such circumstances, a global award would necessarily be nominal. An award in the range of Ksh. 200,000/= to Kshs. 300,000/= would have been sufficient. Nonetheless, the sum awarded by the trial court still fell within an acceptable range. The court, therefore, has no basis upon which to interfere with the exercise of discretion by the lower court.

32. This leaves the question of costs. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

33. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

"It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim

and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

34. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The

relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

35. In the circumstances, where the appellants lost a loved one at the hands of the Respondents, I do not find this a proper case for the award of costs. Each party to bear their own costs.

Determination

36. The upshot of the foregoing is that I make the following orders:

- a) The appeal is dismissed.
- b) Each party to bear their own costs.

DELIVERED, DATED and SIGNED at NYERI on this 12th day of February, 2026. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Michael

ORIGINAL