REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. E015 OF 2024

TOM ODHIAMBO WAWA ..... APPELLANT
[Suing as the legal representative and administrator and on behalf of the Dependants of the estate of BERYL PAMELA OWUOR]

VERSUS

JOB OYUGI OTIENO ..... 1ST RESPONDENT

LINUS ALUOCH ..... 2ND RESPONDENT

CALVINE O. OKOTH ..... 3RD RESPONDENT

CALVINE OWINO NGOE ..... 4TH RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S Mutava (SPM) given on 21.02.2024 in Migori SPMCC No. E102 of 2022. The Appellant was the plaintiff in the lower court.

2. The court entered judgment as follows:
   a) Pain and suffering ..... Ksh. 50,000/=
   b) Loss of expectation of life ..... Ksh. 100,000/=

c) Loss of dependency ..... Ksh.608,040/=

d) Special damages ..... Ksh. 289,900/=

Total ..... Ksh. 1,047,940/=

3. The appellant was aggrieved on the award of damages for loss of dependency and filed a Memorandum of Appeal dated 18.03.2024, setting out the following grounds:

a) That the learned trial magistrate in the court below erred in law and fact by calculating the amount due to be awarded to the Appellant based on the minimum wage and yet the Appellant had produced documents to prove the deceased's earnings as at the time of her death.

b) That the learned trial magistrate in the court below erred in facts and in law in finding that there was no evidence to prove that the deceased had no children surviving her and yet the Appellant adduced evidence which was uncontroverted that she was survived by 3 children.

c) That the learned trial magistrate in the court below erred in fact and law in finding that there was no evidence that the deceased had any dependant.

d) That the learned trial magistrate in court below erred in law and fact in awarding the Appellant minimal damages taking all the circumstances of this case into account.

4. The appellant then sought, inter alia, the following prayers:

a) Set aside the award given to the Appellant in the case by the court below and in its place award the appellant a higher figure in terms of damages.

b) Declare that the court below wrongfully ignored/neglected the evidence properly adduced on record thereby misdirecting itself as to the damages awardable to the Appellant.

Pleadings and Evidence

5. Liability is not in issue, hence it is unnecessary to set out facts on the occurrence of the accident.

Impugned judgment

6. The court found that the deceased died at the age of 37, hence an award of Ksh. 100,000/= sufficed. However, on loss of dependency, the court held as follows:

> **The evidence placed before me was that the deceased was a teacher. No documents were produced before me to show that indeed the 'accused' person was employed as a teacher. The payslip that was produced and referred to by the defendant was not filed before the court, despite the fact that the plaintiff was granted leave to do so. There was no payslip that were produced either."**

7. The court found that no birth certificates were produced or a letter from the chief to show that she had children. The court therefore applied the regulations of the Minimum Wage Order, 2022. The deceased died at the age of 37, and no certificate was produced to show her age. The court therefore arrived at a multiplier of Ksh 15,201/=, and a dependency ratio of 1/3 with a multiplier of 10 years.

8. I found it difficult to decipher what the court was saying. It was approbating and reprobating. Was the deceased a teacher or not a teacher? Was a payslip produced or not? This kind of nomenclature does not edify the court. At paragraph 28 of the judgment, the court was categorical as follows:

> *The plaintiff died at the age of 37 years. The plaintiff is therefore awarded Ksh. 100,000/= under this head.*

9. The appellant filed a supplementary list of documents on 15.06.2023, which had three documents:
   a) The deceased's payslip
   b) Copy of records and NTSA invoice dated 24.05.2023

10. The appellant produced a copy of the records and the NTSA invoice dated 24.05.2023. However, the court stated that the same were not placed before it. This is an archaic way of doing things. Under Order 11, the documents produced are always filed in advance. There are no new documents to be filed. The court was plainly wrong in refusing documents that were produced. If the court had required physical copies, it should have called for them. The court appears to be in a state of paradise. While it was away, Kenyans passed Article 159(2)(d) and (e) of the Constitution that provides as follows:

(d) Justice shall be administered without undue regard to procedural technicalities; and

(e) The purpose and principles of this Constitution shall be protected and promoted.

11. The court cannot pretend not to see documents on record and then proceed on the frolics of its own to deal with matters it had already decided. The age of the deceased was already determined by the same court. There was a chief's letter dated 25.1.2022, showing that the deceased left behind the following:

    a) Tom ODHIMBO Wawa as the husband.

    b) WWO – 13 years

    c) JOO – 12 years

    d) BGO – 1 Year

12. Even where there were no children, the appellant was the husband. The court could not have possibly ignored the husband as a dependant. This was both insensitive and cavalier. A death certificate number 0964643 was produced in court. It had the profession and age of the deceased. The post-mortem report was also produced, it also had the deceased's age. The court gets a feeling that the court ignored evidence on record or had no regard to that evidence. There is a need to be sensitive, especially where vulnerable children are concerned.

Proceedings

13. In page 10 it is shown that the payslip was produced among other documents up to exhibit 11.

Submissions

14. The Appellant filed submissions dated 13.11.2025, where the court found respondents 100% liable. She lamented that no documents were placed before her. She even referred to the deceased as an accused person. It was their further postulation that the lower court cited the case of **Bonham Carter v Hyde v Park Hotel Ltd (1948) 64 TLR 177**, where Lord Goddard CJ, posited as follows:

> **"Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying "This is what I have lost, I ask you to give me these damages'. They have to prove it."**

15. The appellant agreed with the decision of the good law but maintained that there was a letter dated 25.1.2022 from the chief of East Kabuoch location setting out the children. They maintained that the judgment was written in a hurry and haphazardly. The judgment found that the motor vehicle registration number KBG 960E N was not to blame. The said vehicle was not part of the vehicles in dispute. It was their submissions, which I entirely agree with, that the court should have taken time to analyse the evidence on record.

16. They stated that the main challenge is the loss of dependency. They submitted that the court should have used Ksh 36,995/= as the multiplicand, and the age of 37 years.

17. The Respondent did not file submissions.

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 trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Mbogo and Another vs. Shah [1968] EA 93* where 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."

19. The duty of the first appellate Court was held by Clement De Lestang, VP, Duffus and Law JJA, in the *locus Classicus* 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-trial and the Court of Appeal is not bound to follow the trial 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. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

21. In **Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR**, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> "Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such

as the circumstances surrounding its writing or the history of the party or parties signing it.

22. In Gerald Dworkin, *Odgers' Construction of Deeds and Statutes* (5th edn, Sweet & Maxwell 1967), the learned author at p. 106 states as follows:

> "Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.
> As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein"

23. 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…"**

24. When it comes to general damages, the court in **Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR**, held as follows:

> *"General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."*

25. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally, and the welfare of the insured and injury public must be at the back of the mind of the trial court. The foregoing was settled in the cases of **Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR** where the Court of Appealed held as follows as paragraph 8.

> **"In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies… should be taken into consideration."**

26. Finally, 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.

27. 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.*

28. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is **Nance vs British Columbia Electric Co Ltd, in the**

decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> "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…"

29. 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: -

a. *To ascertain whether the court applied irrelevant factors or left out relevant factors.*
b. *To ascertain whether the award is too low as to amount to an erroneous assessment of damages.*
c. *To ascertain whether the award is simply not justified from evidence.*

30. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had

I handled the case in the subordinate court, I would have awarded a different figure.

31. In this connection, there is no doubt that the court took into consideration irrelevant considerations and was on a mission not borne out of evidence. The evidence on record shows that the deceased was 37 years old, married, and had three children aged 1 to 13. The children will have depended on her for between 17 and 7 years, and on the husband for up to 20 years. She will have worked for 23 more years. However, due to various aspects of life, she may still have died earlier. Therefore, a 15-year multiplier will suffice.

32. From the payslip, the gross salary was a sum of Ksh. 36,955/=. Out of this, a sum of Ksh. 575/= was for the providend fund, Ksh. 3,297/= was PAYE and Ksh. 950/= NHIF, totaling to Ksh. 4,822/=. The net earnings were therefore Ksh. 32,133/=.

33. Being married and with children, a dependency ratio of 2/3 will suffice. This works out to:

Ksh. 32,133 x 2/3 x 15 x 12 = Ksh. 3,855,960/=.

34. There was no appeal on the other limbs. The appeal is accordingly allowed. This leaves the issue of costs, which 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.**

35. 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.

36. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR**), 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.

37. Costs follow the event. The event in this case is the success of the appeal. Therefore, the appellant shall have costs of Ksh. 105,000/= for the appeal.

Determination

38. Consequently, I make the following orders: -

a) The appeal is allowed.

b) Appeal on the award of general damages for loss of dependency is set aside, and in lieu thereof, I substitute with a sum of Ksh. 3,855,960/=.

c) The rest of the awards remain the same.

d) Interest on general damages to run from 21.02.2024, the date of judgment in the lower court.

e) The Appellant shall have costs in the lower court.

f) The appellant shall have the costs of Ksh. 105,000/= for the appeal.

g) 30 days stay of execution.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **26th** day of **February, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kanyangi for the Appellant

No appearance for the Respondent

Court Assistant – Michael