

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E067 OF 2022

***(Being an Appeal from the Judgment delivered on 10th
November, 2022 by Hon. E.M. Muiro (PM) in Kilungu Civil
Suit No. 235 of 2021)***

WILSON MUTHIANI WAMBUA
APPELLANT

VERSUS

**JOSEPH MUTUNGI KYENO *(Suing on behalf of the Estate
of***

JACKLINE MUTHEU MUTUNGI - *Deceased)*
RESPONDENT

JUDGMENT

1. The Deceased, Jackline Mutheu Mutungi, was involved in a road traffic accident on 8th March, 2021 as a result of which she sustained fatal injuries. The accident involved M/V No

KCJ 534J, which was being driven by the Appellant. The Deceased later died on 6th May, 2021 while undergoing treatment. The Respondent blamed the Appellant for the accident and obtained Letters of Administration ad litem to institute proceedings against him. He sued him vide a Plaint dated 8th October, 2021, seeking general damages under both the **Law Reform Act** and the **Fatal Accidents Act**, and special damages.

2. The Court delivered a judgment on 10th November, 2022, in which it apportioned liability between the Respondent and the Appellant at ratio of 30:70 in favor of the Respondent. It also awarded the Respondent Kshs.100,000/= for Pain and Suffering, and Kshs.100,000/= for Loss of Expectation of life, and Kshs.70,000/= for special damages. Lastly, it awarded the Respondent Kshs.2,161,916/= for Loss of Dependency. The Court used the multiplier approach to arrive at the award for Loss of Dependency and adopted a multiplicand of Kshs.27,023.95/=, 10 years as multiplier, and dependency ratio of 2/3.

3. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 5th December, 2022. He listed the following Grounds of Appeal;

1) That the Learned Honourable Magistrate erred in law and fact adopting a multiplicand of Kshs.27,023.95 as the Deceased's net earnings per month being guided by the Regulations of Wages (General) (Amendment) Order 2018 which provide for gross pay whereas there was no evidence that the Deceased was gainfully employed as a cashier or saleswoman at the time of the accident.

2) That the Learned Honourable Magistrate erred in law and fact in ignoring the evidence on record that the Deceased was a business lady who also engaged in subsistence farming and converted her to a salaried employee earning a net salary of Kshs.27,023.95/= per month.

3) That the Learned Honourable Magistrate erred in law and fact by awarding Kshs.70,000/= as funeral expenses which was too high and in absence of documentary evidence to award the same.

4) That the Learned Honourable Magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the Appellant.

5) That the Learned Honourable Magistrate erred in law and fact in failing to consider conventional awards in cases of similar nature.

6) That the Learned Honourable Magistrate erred in law and fact by awarding damages both under the Law Reform Act and Fatal Accidents Act without taking into account as required.

4. He asked the Court to allow the appeal and set aside the judgment of the lower Court.

5. The Appeal was canvassed by way of written submissions.

Appellant's written Submissions

6. The Appellant submitted that the lower Court was wrong in adopting a multiplicand of Kshs.27,023.95/=. He submitted that the Court should not have used this multiplicand, arguing that there was no proof that the Deceased was a cashier. He argued that without proof of the business the Deceased was engaged in, at the very least the court should have applied the multiplicand of Kshs.7,240.95/= based on the subsisting minimum wage for general labourers for people residing in other areas at the time of the Deceased's death as per the **Regulation of Wages (General) (Amendment) Order 2018**.

7. The Appellant also submitted that the Court was wrong to use the multiplier of 10 years. He submitted that the court should have used a multiplier of 7 years, arguing that the period in which the Deceased would have earned income was likely to be shorter than the 10 years applied by the trial Court. In addition, the Appellant submitted that the Court

was wrong to use a dependency ration of 2/3. He submitted that a dependency ratio of 1/3 would be appropriate, arguing that dependency is a question of fact and that the Appellant failed to show in what way the Deceased's income was applied for their well-being.

8. Further, the Appellant picked an issue with the awards for Pain and Suffering, Loss of expectation of life, and special damages. He submitted that the Court should have awarded Kshs.70,000/= for Pain and Suffering, arguing that the Deceased was in a coma after the accident till her death. He also submitted that the award of Kshs.70,000/= for special damages was wrongful, arguing that the Respondent did not prove the claim. Lastly, he submitted that, since there was no proof of earnings, the court should have adopted the global sum approach and award a global sum of Kshs.600,000/=.

Respondent's written Submissions

9. The Respondent submitted that the lower Court's finding on damages was reasonable and that this Court should not

interfere with the lower Court's exercise of discretion. He argued that the Appellant has not demonstrated that the trial Court misapprehended the evidence on record or that she acted on wrong principles applicable in award of damages. He submitted that the trial Court properly exercised its discretion in awarding him the sum of Kshs.2,161,916/= under the head of loss of dependency, and thus this Court should not interfere with the same award.

Issues for Determination

10. I have considered the Grounds of Appeal and Submissions from both parties. It occurs to this Court that this Appeal is on the quantum of damages awarded by the trial Court. The Appellant does not question the apportionment of liability and the Respondent did not raise a cross-appeal on the same. Thus, I find that there are three issues for determination;

a) Whether the lower Court applied the right principles in making the award for Loss of Dependency

b) Whether the lower Court's awards for Pain and Suffering and Loss of Expectation of life were reasonable

c) Whether the lower court applied the right principles in awarding the Special Damages.

11. It is a well-established principle in our legal system that an appellate Court should exercise caution and restraint where it has been called upon to review the trial court's award of damages. This principle was restated by the Court of Appeal in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, where the court said:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The

scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

12. The principle underscores that the Appellate court can only interfere with the trial Court’s award of damages if the trial Court acted on wrong principle of law, or misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. This rule was succinctly said by the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55**, where it stated:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded

by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

Whether the lower Court applied the right principles in making the award for Loss of Dependency

13. In the Complaint dated 8th October, 2021, the Respondent claimed that the Deceased was a business lady operating a successful business and earning on average a sum of Kshs.60,000/= per month.

14. It is trite law that he who alleges must prove. **Section 107 of the Evidence Act** provide as follows:

107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

15. Therefore, the burden lay on the Respondent to tender proof of the monthly salary earned by the Deceased. I shall relook at the facts and the evidence on record to determine whether the Respondent proved the Deceased's monthly earnings.
16. In his witness statement dated 8th October, 2021, and which he adopted in Court, the Respondent stated that the Deceased was a business lady and on average earned Kshs.50,000/= . During the hearing, he told the court that the Deceased earned about Kshs.50,000/= per month as profits, but he admitted that he had not availed proof of the earnings.
17. Based on the above facts, I find that the Respondent did not prove his claims that the Deceased used to earn Kshs.50,000/= per month as profits.

18. The Court in Frankline Kimathi Maariu & Another - Vs- Philip Akungu Mitu Mborothi (Suing as administrator and personal representative of Anthony Mwituu Gakungu (Deceased) 2020 eKLR gave useful guidance on what a trial Court should do once the Claimant is unable to prove the monthly earnings of the Deceased. It observed as follows;

“27. In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.”

[24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should

not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

19. I now turn to the Minimum Wages Regulations of 2018. The Respondent claimed that the Deceased was a businesswoman and he produced a copy of a single business permit issued in the name of the Deceased. I have seen the said copy. It is in the name of the Deceased and indicates that the business activity is retail trader shop or retail services rural. On the evidence that the Deceased was a holder of the business permit, I find that, it is more likely than not that the Deceased was a businesswoman.
20. Which category, then, under the Minimum wages, did she fall? The Respondent argued that the Deceased falls under the category for Cashier and salesman and thus her monthly income should be assessed at Kshs.27,023.95/=. On the other hand, the Appellant argued that the Deceased should be categorized as a General Labourer and thus her monthly income should be assessed at Kshs.7240.95/=. The Appellant cited a previous authority that categorized a holder of a single business permit as a General worker.

21. I have looked at the said Regulations. They define a General Labourer to include a cleaner, sweeper, gardener, children's ayah, house servant, day watchman, and messenger. However, I found it problematic to place the Deceased under any category under the Minimum Wages Regulations. In particular, I am not persuaded that a holder of a business permit should be categorized as a General labourer or a Cashier or a Salesman. For these reasons, I find that the Minimum Wages are not applicable in this case.

22. Courts have enumerated circumstances where the multiplier approach should be abandoned for/or in favor of the Global sum. In **Mwanzia vs Ngalali Mutua Kenya Bus Ltd cited in Albert Odawa vs. Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR**, where the Court stated 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.”

23. Similarly, the Court in Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the court held 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.”

24. Based on the above authorities and the evidence on record, I hold that the Multiplier Approach is not applicable in this case because the multiplicand cannot be ascertained with any precision. Accordingly, I take the view that the global sum approach is the most applicable approach in this case.

25. Even as I adopt this approach, I appreciate that Courts are required to ensure that the awards issued under the Multiplier Approach are comparable with the awards issued under the Global Award Approach. The awards issued under both approaches should not differ unjustifiably, as was held observed in **Ndeti & another (Suing on their own behalf and as administrators of the estate of Gerald Ndeti Mutua (Deceased)) v Mwangangi & another (Civil**

Appeal E282 of 2021) [2022] KEHC 15732 (KLR),

where the Court held:

“From the above authorities, it is clear that even in making a global award, apart from comparison with previous trends or precedents, courts will also consider other factors such as the general health of the deceased before he met his death, his age as well as the number of dependent children and their ages. In my view, this is important as it ensures that the global award made is comparable to some extent with the awards based on multiplier approach. In the instant case, no questions have been raised as to the health of the deceased prior to his death. Further, the deceased left behind three school going children whose needs must be taken care of”.

26. The undisputed facts of this case are as follows; The Deceased died at the age of 53 years, she was married, and

she had 4 children, one of whom was a minor at the time of the accident. She was survived by her husband, the Respondent. It was also not in dispute that the Respondent is a KDF officer and was serving at Kenya Department of Defence at the time of the hearing. This leads to the conclusion that both parties, the Respondent and the Deceased, were working at the time of the accident.

27. In order to determine the correct award of damages for Loss of Dependency in this case, the Court is required to conduct a comparative analysis of the extent of the awards made for similar injuries in previous decisions. This principle is well-settled and was recently restated in the case of Penina Waithira Kaburu v LP [2019] eKLR, where the Court held as follows:

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries

in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”

28. In **Chania Shuttle v Mary Mumbi [2017] KEHC 6800 eKLR**, the Court awarded Loss of Dependency at Kshs.360,000/=. The Deceased was a man aged 56 years, a business man, engaged in some sort of economic activity to support his wife. All his children were adults.
29. In **Midland Media Limited & another v Pauline Naukot Aule (Suing as the Legal Representative of the Estate of the late Esinyon Esokon Ekai) [2020] eKLR**, the court awarded Kshs.467,520/= for Loss of Dependency. The Deceased was a businessman aged 57 years but the claimant could not prove his exact monthly earnings. He supported his family of a wife and three minor children.

30. In **Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR** the court awarded a global sum of Kshs. 800,000 for a 68 years old farmer and businessman. There was evidence of the deceased was a business man and that he was actively involved in business of making supplies to local hotels and other institutions. He had left a widow and adult children. Only the widow was dependent on the deceased.
31. Lastly, in **China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR**, Kshs.700,000/= for Loss of Dependency. The deceased was a man aged 79 years, survived by the claimant. There was evidence that the Deceased was carrying out farming activities earning a monthly salary of Kshs.18,000/= per month.
32. The Court has considered the fact that the Deceased's exact monthly earnings were not proved. It has also appreciated that although there was no evidence that her family depended on her business earnings, she left behind a

minor who was at the time of the accident 13 years. Being guided by all the above cases and the facts of this case, and while considering the ages of those cases hence inflation, I find a global award of Kshs 750,000/= under the head of loss of dependency reasonable and award the same.

Whether the lower Court's awards for Pain and Suffering and Loss of Expectation of life were reasonable

33. The lower Court awarded the Respondent Kshs.100,000/= for Pain and Suffering, and Kshs.100,000/= for Loss of Expectation of life. The Appellant argued that the amounts are too high. Instead, he submitted that the Pain and Suffering should be assessed at Kshs. 70,000/=, while the Loss of Expectation of life should be assessed at Kshs.80,000/=.

34. In determining whether to interfere with the above awards, I find guidance in **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR**, where, the Court in discussing awards for pain and suffering and for loss of life expectation stated as follows;-

“.....The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000/= while for pain and suffering the awards range from Kshs.10,000/= to Kshs.100,000/= with higher damages being awarded if the pain and suffering was prolonged death.”

35. In South Sioux Farms Ltd & 2 others v Selina Robi Mwita (suing as legal representative of the Estate of the Late Julius Bonare Chacha [2021] KEHC 8580 (KLR), the Court awarded Kshs.80,000/= for Pain and Suffering, for a Deceased who died after being in a coma for 8 days.
36. In this case, the Deceased herein was in a coma for almost 2 months, from 8th March, 2021 to 6th May, 2021. I thus find that the award of Kshs.100,000/= under Pain and

Suffering was reasonable. In addition, I shall not disturb the award of Kshs.100,000/= for Loss of Expectation of Life because that is the conventional award for that category.

Whether the lower court applied the right principles in awarding the Special Damages

37. The trial Court awarded the Respondent Kshs.70,000/= as special damages for funeral expenses. The Appellant claimed that this award was too high and was made in absence of documentary evidence. I have relooked at the evidence on record and I have found that the Respondent did not attach any receipts to prove the funeral expenses.

38. However, the absence of documentary evidence in support of a claim for funeral expenses is not fatal to the claim. The Court of Appeal in **Premier Diary Limited vs. Amarjit Singh Sagoo & another [2013] eKLR**, stated as follows with regards to the standard of proving funeral expenses;

“We do not think that it is a breach of the general rule that special damages must be pleaded and

proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs.400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased - testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs.150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the

respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

39. Similarly, in **Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR**, the Court of Appeal held:-

“We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved..... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.”

40. Considering the above binding authorities, I find that, even though the Respondent did not tender documentary

evidence to prove the funeral expenses, the lower Court's award of Kshs. 70,000/= was justified. The amount was a reasonable and prudent amount to compensate the family for funeral expenses.

41. In conclusion, the Appeal succeeds only on one ground; the approach adopted in assessment of damages for Loss of Dependency.

Disposition

42. In the upshot, the appeal succeeds partially and Judgment is entered for the Respondent against the Appellant as follows;

a) Liability is apportioned between Respondent and the Appellant at ratio of 30:70 in favor of Respondent.

b) Damages

1) Pain and suffering

Kshs.100,000/=

2) Loss of expectation of life

Kshs.100,000/=

apportionment of the decretal sum, this court hereby directs that the decretal sum be and is hereby released to the Respondents' counsel forthwith.

43. Orders accordingly.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 17TH day of FEBRUARY, 2026.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Keiro, Advocate for the Appellant

No attendance for Respondent