

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. E105 OF 2024**

*(Being an Appeal from the Judgment delivered by Hon. E. Kemei, Resident Magistrate, Makueni Law Courts, on 27<sup>th</sup> August, 2024 in CM Civil Case No. E113 of 2022)*

**JOSEPHINE MUMBUA MUSEMBI (Suing as the legal representative on behalf of the Estate of STANLEY MUSEMBI (Deceased) ..... APPELLANT**

**VERSUS**

**ALEXANDER KITAVI MUTUNGA ..... 1<sup>ST</sup>**

**RESPONDENT**

**HENRY MUMO MUTUA ..... 2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

1. The Deceased, **Stanley Musembi Wambua**, was involved in a road accident on 19<sup>th</sup> June, 2021, as a result of which he sustained fatal injuries and died on the spot. His legal representative, the Appellant, blamed the Respondents for the accident and instituted a suit seeking damages under the **Fatal Accidents Act** and **Law Reform [Miscellaneous Provisions] Act**. The lower Court delivered the Judgment on 29<sup>th</sup> August, 2024, in which it found the Respondents 100% liable, jointly and severally.
2. The lower Court awarded the Appellant Kshs.1,335,168/= comprising of Kshs.100,000/= for Pain and Suffering, Kshs.100,000/= for Loss of Expectation of Life, Special damages at Kshs.267,080/=, and Loss of Dependency at Kshs. 868,088/=. In arriving at the award for Loss of Dependency, the court utilized the Multiplier Approach in which it used the Multiplicand of Kshs.17,981/=, which was the net pay as per the Deceased's pay slip.
3. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated

18<sup>th</sup> September, 2024, in which she listed the following Grounds of Appeal;

**1) The Learned trial magistrate erred in law, and in fact while assessing damages under the head of loss of Dependency, when she adopted the actual net earnings on the Deceased's last pay slip of Kshs.17,891/= instead of Kshs.65,787/= after only removing the applicable taxes.**

**2) As a result of the erroneous, or wrong application above, the Honourable trial Magistrate arrived at a wrong finding under the head of Loss of Dependency by awarding a sum of Kshs.868,088/=.**

**3) The learned trial magistrate erred in law, and in fact by generally failing to be guided by precedents and authorities submitted by the Appellant, on the settled issue off net earnings.**

4. She asked this Court to allow the Appeal and set aside the trial Court's award under the head of Loss of Dependency,

and in place thereof to assess the same from the correct net earnings as per the pay slip supplied in the trial Court.

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

### **Appellant's written Submissions**

6. The Appellant submitted that the lower Court utilized the wrong multiplicand in arriving at the award for Loss of Dependency. She argued that the Deceased's net earnings for purposes of computation of Loss of Dependency were Kshs.65,786.75/= not the net amount (salary) of Kshs.17,981.95/= as it appeared on the pay slip. She submitted that the issue of net earnings has severally been resolved in many binding authorities, and the common finding has always been that only taxes are deducted from a person's earning to determine net earnings for adoption in computation of Loss of Dependency.

### **Issues for Determination**

7. Having considered the Grounds of Appeal and the submission of the parties, I find that the singular issue for

determination is whether the lower Court applied the correct multiplicand in arriving at the award for Loss of Dependency.

8. During the hearing, the Appellant produced the Deceased's pay slip which indicates his Total Earnings as Kshs.85,243.00/=. According to the pay slip, the amount was subjected to several deductions which reduced the Net Pay to Kshs.17,981.95/=. The Appellant argued that only taxes are deducted from the total earnings to arrive at the net earnings for the purposes of computing the award for Loss of Dependency.
9. Courts have given useful guidelines on how to arrive at the multiplicand, especially in cases where the Deceased's earnings were subject to statutory and non-statutory deductions.
10. The Court of Appeal in **Mary Osano (Personal Representative of the estate Charles Otwori Ogechi - Deceased) vs. Simon Kimutai [2020] eKLR** held that, in determining a multiplicand, a trial Court should only consider statutory deductions. It observed as follows;

***“Counsel for the appellant submitted that the deceased’s net pay as evidenced by a copy of his payslip was Kshs 53,550 per month, with a house allowance of Kshs 45,000 per month which totals to Kshs 98,550. The statutory deductions as contained in the payslip are; PA.Y.E at Kshs 23,947; NHIF at Kshs 320 and NSSF at Kshs 3748 which totals to Kshs 28,015. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.”***

11. Courts have also held that, for the purposes of determining a multiplicand, net pay is gross pay less statutory deductions. This position was stated by the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015]**

**eKLR**, where the Court held that the multiplicand should be arrived at by deducting statutory deductions from the gross pay. It observed as follows;

***“On the issue of the salary, the deceased’s last pay-slip was produced and it showed clearly his gross earnings of Sh. 39,683. That is followed by no less than 13 deductions ranging from statutory deductions to loan deductions leaving a balance of Sh. 16,036. The trial court used the gross earnings as the multiplicand while the High Court used the net figure. With respect, both courts were in error.....***

***As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. In this case, Hellen testified, and it is apparent from the pay-slip, that the net salary after statutory deductions was Sh. 19,373,.. There is no reason why the High Court should have interfered with that figure.”***

12. These principles were applied in **Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others [2014] eKLR**, where Majanja J (as he was then) held as follows: -

*“The net income reflected in the payslips was the result of statutory and other deductions like salary advance, SACCO Loans, School Fee and School Boarding Programme. The net income used as the multiplicand is the net income which would have been available to the deceased to support his family. It is the gross income excluding statutory deductions (see Chunibhai J. Patel and another v P. F. Hayes and others (supra)). The learned magistrate therefore erred by excluding all deductions in calculating the net salary. Apart from statutory deductions, it is clear that the other deductions were for the benefit of the family and they ought to be taken into account in calculating the multiplicand”.*

13. In this case, as per the pay slip, the total earnings were Kshs.85,243.00/=, comprising Basic Salary, Rental House Allowance, Hardship Allowance, and Commuter Allowance. On the other hand, statutory deductions were Kshs.19,456.25/= (comprising P.A.Y.E at Kshs.17,956.25/= and NHIF at Kshs.1,500/=). Thus, by deducting statutory deductions from the gross pay, the net pay is 65,786.75/=. This is the multiplicand for this case.

14. The Deceased was a teacher employed by the Teachers' Service Commission. He was 54 years at the time of his death and he was expected to retire at 60 years. Thus, a multiplier of 6 years is appropriate. There was also evidence to show that he had a family and was survived by a spouse and 3 children who were indicated to be minors at the time of his death. Thus, a dependency ratio of 2/3 was appropriate in these circumstances. As a result, the **total dependency sum** would be;

$$65,786.75 \times 12 \times 6 \times 2/3 = \text{Kshs.3,157,764/=}$$

### **Outstanding Loans**

15. How should the Court deal with the outstanding loans that the Deceased was servicing at the time of his death? According to the prevailing jurisprudence, a Court ought to take account of any benefits that the Deceased may have received in advance and which if not taken into account is likely to lead to double compensation. This applies to instances where the Deceased had secured loans and the same was being deducted from his salary.
16. The Court of Appeal in **Maigwa (Suing as Legal Representative of the Estate of Ezekiel Katupa) v British Council [2023] eKLR** held that outstanding loans ought to be deducted from the award for loss of dependency that will be made to the estate of the Deceased;

***“Before we pen down on this issue, we have to deal with the proposal by the respondent that we should consider deducting the total amount of loan balances so as to avoid double compensation to the deceased’s estate. It is the respondent’s case that the loans were taken for the benefit of the dependants and they had already benefited***

*from them. In our view, this argument sounds reasonable. Whatever the purpose of the loans, the same either benefitted the deceased or his dependants during his lifetime. The payslip also reflects an overpayment recovery meaning that the deceased had already used the money that was being recovered. Our own calculation, using the deceased's payslip of December, 2011 which was produced as an exhibit at the trial, shows that the outstanding loans and overpaid salary was kshs 418,295.50. This is the amount that will be deducted from the award for loss of dependency that will be made to the estate of the deceased".*

17. The Court in **Joshua Mulinge Itumo (suing for and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) v Bash Hauliers Limited & another [2021] eKLR**, took this view and observed as follows;

**93. In my view, where the deceased had taken some temporary advance or loan, the same ought to be taken into account for the period covered by the facility and not for the entire period which the Court finds as regards the reasonable figure representing so many years purchases, otherwise known as the multiplier. I therefore agree with the Appellant that the learned trial magistrate erred in applying the amount stated in the payslip for the whole period of the multiplier. I agree that the prudent thing to do would have been to apply the net salary (gross salary less only statutory deductions) to get the total dependency sum, then deduct the total sum of the loan balances being the 3 SACCO loans with balances of Kshs. 50,000/=, Kshs. 657,325/= and Kshs. 251,650/=), a total of Kshs. 958,975/=. If that is done the amount due under the head of loss of dependency would Kshs.7,011,840/= less total of the loan**

***balances amounting to Kshs.958,975/= leaving the net balance as Kshs. 6,052,865/=.***

18. The pay slip shows that the Deceased had obtained two loans from Mwalimu National Sacco and the respective loan balances as at June, 2021 were Kshs.1,349,950/= and Kshs.672,812/=. Thus, the total loan balances were Kshs.2,022,762/=.

19. Therefore, the amount due under the head of Loss of Dependency would be arrived at by deducting the loan balances from the total dependency sum. In this case, it will be Kshs.3,157,764/= less total of the loan balances amounting to Kshs.2,022,762/= leaving the net balance as Kshs. 1,135,002/=. This, Kshs.1,135,002/=, is the amount due under head of Loss of Dependency.

20. Accordingly, the Appeal succeeds.

21. Considering that the awards on the other heads were not challenged, the amount payable to the Appellant will therefore be as follows;

a) Pain and suffering..... Kshs.100,000/=

b) Loss of Expectation of Life..... Kshs.100,000/=

c) Loss of Dependency.....	Kshs.1,135,002/=
d) Special Damages.....	Kshs.267,080/=
<b>Grand Total.....</b>	<b>Kshs.1,602,082/=</b>

### **Disposition**

22. These are the final orders;

***a) The Appeal succeeds.***

***b) The lower Court Judgment on the award of damages is hereby set aside and substituted with an award of Kshs.1,602,082/=.***

***c) Costs of this Appeal as well as the suit at the lower Court are awarded to the Appellant. The Costs of this Appeal are assessed at Kshs.35,000/=.***

***d) The award will attract interest at court rates from the date of judgment at the trial court.***

**DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 6<sup>TH</sup> day of MARCH, 2026.**

.....

**HON C. KENDAGOR**  
**JUDGE**

**In the presence of:**

Court Assistant: Beryl

No attendance for the Appellant

Mr. Metet, Advocate for the Respondent