



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS COUNTY

COURT NAME: MACHAKOS HIGH COURT

CASE NUMBER: HCCA/E058/2024

MAKAU MUTUNGA VS ANN NZILANI MWAMBI AND JOSEPH KATUMO NDOLO

JUDGMENT

(Being an appeal from the judgment and orders of Hon M. Mbatia (Principal Magistrate) delivered on 19th October 2023 in Machakos Chief Magistrate's Court Civil Suit NO E200 of 2022)

1. The Respondent's claim against the Appellant in the court below was for compensation for fatal injuries sustained by Richard Nzuki Katumo, deceased, in a motor accident that occurred in the Kanaani area on 18th September 2019. The deceased was driving a motor vehicle KBN 256R when a collision occurred between it and motor vehicle KBR 906A belonging to the Appellant.
2. At first, the Appellant resisted the claim and put the Respondent to strict proof. However, on 21st June 2023, learned Counsel for the parties recorded a consent on liability in the ratio of 85:15 in favour of the Respondent against the Appellant. Thereafter, the Respondent took to the witness stand and testified that the deceased was her husband; that they were blessed with two children; that the deceased was the sole bread winner; that he was a matatu driver earning kshs938,220 after tax and that she and her family were adversely affected by his death. She produced a bundle of documents, among them a letter of



employment from **Makos Savings & Credit Co-operative Society Ltd** dated 27th August 2020. The Appellant did not adduce any evidence. After considering the evidence, the learned magistrate assessed the Respondent damages as follows:

a. Lost years	Kshs 4,896,000
b. Less 15% liability	(Kshs 734,400)
c. Balance	Kshs 4,161,600
d. General damaged for pain and suffering	Kshs 40,000
e. Loss of expectation of life	Kshs 155,000
f. Special damages	Kshs 113,230
Total	Kshs 4,469,830

3. Being aggrieved, the Appellant preferred this appeal. The appeal is premised on the following grounds:-

- 1. That the trial Magistrate erred in fact and in law in awarding the Respondent Kshs 4,896,600/= as damages for loss of dependency which award was too excessive in the circumstances.***
- 2. That the learned trial magistrate erred in law and in fact and misdirected herself by providing an inappropriate basis for his award of Kshs 4.896.600 for loss of dependency in the circumstances.***
- 3. That the learned trial magistrate erred in law and in fact in failing to apply the Minimum wage and in adopting the sum of Kshs 38,250 as the multiplicand for income applicable to the deceased yet the net earnings were not proven.***
- 4. That the learned Trial Magistrate proceeded on wrong principles when assessing damages for loss of dependency to be awarded to the Respondent is any and failed to apply precedents and tenets of the law applicable.***
- 5. That the learned trial Magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions and authorities***



in the issue of quantum of damages and on applicable principles for assessment of damages.

6. That the learned trial magistrate erred in law and in fact in failing to consider conventional awards in cases



of similar nature and misapplied the decision in the case of Florence Ngina Nyalando Ochacha and another vs Daniel Munya Njathii and another [2016] e KLR thereby arriving at an irregular and unconventional award for damages o the issue of loss of dependency ; and

a. That the learned trial magistrate erred in awarding a sum in respect of damages which are punitive, excessive and/or inordinately high in the circumstances thus occasioning miscarriage of justice.

4. It is evident from the above grounds that the gravamen of this appeal is the award for loss of dependency under the Fatal Accidents Act. The awards under the other heads of damages have not been challenged. The appeal was canvassed by way of written submissions.
5. In submissions, learned Counsel for the Appellant faulted the trial magistrate for what he described as, adopting a multiplicand of Kshs 38,250 without evidence that this was the deceased's net salary. Counsel stated that pay slips would have been the best evidence of the deceased's earnings yet they were not produced. Counsel contended that the court should have adopted the Minimum Wage General Regulations of 2018 instead. Counsel asserted that, at the time the minimum wage for a driver of a car or light van was Kshs 13,975. Counsel argued that the award of Kshs 4,896,600 was inordinately high. Further, Counsel faulted the learned magistrate for failing to consider the defence and the evidence elicited through cross examination. Reliance was placed on, inter alia, the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR).**
6. For the Respondent, it was submitted the Appellants had not demonstrated any ground to warrant this court to disturb the award; that the awards were not inordinately high and hence this appeal should be dismissed.

Analysis and determination.



7. This being the first appellate court it has reconsidered and evaluated



the evidence in the court below so as to arrive at its own independent conclusion while bearing in mind that it neither saw nor heard the witnesses as did the trial court. The court is also guided by the principle that damages are at the discretion of the trial court and it cannot interfere with such discretion merely for reason that it could have arrived at a different award: that it can only disturb an award where is shown that the court acted on a wrong principle or that it took into account an irrelevant factor or left out a relevant factor or that the award is so inordinately high or low as to be a wholly erroneous estimate of the damage-see the case of **Kemfro Africa Limited t/a “Meru Express Services (1976)& another v Lubia & another(No 2) [1985] KECA 137 (KLR).**

8. In this case the Appellant takes issue with the salary of the deceased and contends that it was not proved whether or was a net or gross salary; that the court should have assessed the damages for lost years based on the minimum wage and that its evidence in the statement of defense was ignored. It is however instructive that the Appellant did not call any witnesses and hence the averments in the defence were just that, averments. In the case of **Linus Nganga Kiongo & 3 Others V Town Council Of Kikuyu [2012]e KLR**, the court observed as follows, and I agree-

“What are the consequences of a party failing to adduce evidence?”

In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand



unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated.



In the circumstances, the Counter-claim must fail.”

Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

The case of Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 said:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations

... Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

9. The Appellant having not adduced any evidence cannot be heard to



say that its evidence was ignored. On her part the Respondent testified and produced a letter of employment which, in my considered view, proved on a balance of probabilities, firstly; that the deceased was in fact working and secondly that he was earning a monthly salary of kshs38,229 and upon his death, she and her children lost their dependency. It was her evidence that the salary quoted was net of



taxes. It is my finding that, as this was not controverted, by other evidence the learned magistrate was correct in arriving at the conclusion that he did.

10. This court also finds that the learned magistrate was correct in adopting the deceased's salary as the multiplicand. This is because the minimum wage is applicable only in instances where the deceased was in the informal sector and his/her earnings are not known- see the case of **Franklin Kimathi Maariu & another v Phillip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR** where the court stated;

“23. 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 approach or the minimum wage as the appropriate mode assessing the loss of dependency”

11. The upshot is that this appeal has no merit and it is dismissed. The award of the learned magistrate is upheld. The Appellant shall bear the costs of the appeal.

Orders accordingly.

Judgment signed, dated and delivered virtually on this 19th March 2026.

IN PRESENCE OF:

Ms Koskei for the Appellant.

Mr L M Wambua for the Respondent.



Mary-court assistant.



SIGNED BY/FOR:
HON. LADY JUSTICE E.N. MAINA



THE JUDICIARY OF KENYA.
MACHAKOS HIGH COURT
HIGH COURT DIV
DATE: 2026-03-24 16:31:49

