

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CIVIL APPEAL NO 156 OF 2024

(Being an appeal from the judgment of Hon. E. Wasike, P.M., delivered on 29th August 2024 in Butere SPMCC NO. E 042 of 2023)

WATU CREDIT-----1ST
APPELLANT

ERICK OMONDI-----2ND
APPELLANT

VERSUS

CAROLINE ACHIENG WEKHOBBA & FRIDAH ORONGA OMUKUBA, suing as
the legal representatives of the estate of BENARD EKHOBA OKOMBE-
deceased-----
RESPONDENTS

JUDGMENT

Background

1. The Respondent instituted a suit in the lower court seeking general damages, special damages and costs arising from a fatal road traffic accident.
2. The Respondent claimed that at all material times on 25th February 2023, the deceased was riding a motorcycle along the Shiatsala - Sidindi road when at Kambala stage, the 2nd defendant, Eric Omondi, riding a motorcycle reg. No KMGD 745 E TVS negligently knocked the deceased, occasioning him fatal injuries.
3. On the issue of liability, the parties entered into a consent on the ratio of 75:25.
4. The trial court awarded the special damages of the funeral expenses of Kshs. 136,800 as pleaded and proved while under the

Law Reform Act, Pain and suffering, the trial magistrate awarded Kshs. 50,000/= and on loss of expectation of life, he was awarded Kshs. 100,000/=.

5. Under the Fatal Accident Act, Loss of dependency, the trial court awarded a global sum of Kshs. 1,200,000/=. Taking into account the 25% less contribution, the court awarded a total of Kshs. 1,149,300/=

6. The Appellants, being aggrieved and dissatisfied with the judgment of Hon. E. Wasike, P.M., delivered on 29/08/2024 in the above case, appealed against the said judgment and put forth the following grounds;

- a) The learned trial magistrate erred in law and in fact in awarding the Respondent general damages of Kshs. 1,200,000/= for loss of dependency, which award was too high, excessive and unmerited considering that the deceased was aged 62 years
- b) The learned trial magistrate erred in law in awarding damages of Kshs. 50,0000/= for pain and suffering, yet the deceased died on the same day of the accident.
- c) The learned trial magistrate erred in law in awarding special damages which had both been specifically pleaded and strictly proved. He erred further by applying the wrong principles and or by failing to apply the correct principle in determining awards of damages, and her awards were excessive, unlawful,

unmerited and indefensible and have occasioned a miscarriage of justice.

7. They pray that the appeal be allowed with costs and that the judgment and or awards for loss of dependency, pain and suffering.
8. The appeal was canvassed by way of written submissions.

Appellant's submissions

9. The Appellant filed their submissions dated 15th July 2025, where they addressed three grounds. On the first ground of loss of dependency, it was averred that it was pleaded that the deceased was a businessman earning Kshs. 30,000/=, however, in the 2nd Respondent's statement, she claimed that he was a boda boda rider. They state that the Respondent failed to provide any evidence to show that he was either a businessman or a boda boda rider to prove his source of income, and as such, the trial court should have adopted the minimum monthly wage of a labourer, being Kshs. 8,109/= as per the Regulation of Wages (General) Amendment Order, 2022.
10. The aver that on the issue of multiplier, the court should have considered that if he were a farmer, he farmed alongside his family and that the land is still in existence and further that since he had aged, he was not going to carry on the manual work for long, and further the court should have considered the vicissitudes of life.
11. They aver that even though he was a boda boda rider, he was past the retirement age of 60 years and as such the court should

have applied the multiplier of 4 years, as such Kshs. 8,109 x 2/3 x 4 years = Kshs. 259,488/=

12. On the claim of pain and suffering, they aver that the deceased died on the same day and that an award of Kshs. 20,000/= would have sufficed.

13. On the funeral expenses, they state that according to the Luhya culture, friends and families made contributions, and as such, the court should not have awarded Kshs. 136,800/= as funeral expenses, and further that the expenses had not been proved and pleaded and that some of the receipts produced were dubious and had not met the requirements of the statute and stamp duty, and they should be rejected, and they pray that the court set aside the award by the lower court, and the sum should not exceed Kshs. 30,000/=.

Respondent's submissions

14. In their submissions dated 21st July 2025, the Respondents raised three issues for determination. On the first issue of whether the trial court erred in awarding Kshs. 1,200,000/= for loss of dependency as they opted for a global sum as opposed to the 4 years and a multiplier of Kshs. 8,109 and a ratio of 2/3 as proposed by the appellant, they quoted the case of **Mwanzia vs. Ngalali Mutua Kenya Bus Ltd in Albert Odawa vs. Gichimu Gichenji Nakuru HCCA No. 15 of 2003 (2007) eKLR.**

15. According to the Respondent, there was no documentary evidence to prove that the deceased was a farmer and a

businessman and thus, since there was no proper book to prove that the deceased had earned Kshs. 30,000 from his business ventures, the trial court was proper in adopting the global sum instead of the multiplier approach .

16. On the claim that the trial court had erred in awarding Kshs. 50,00/= for the award of pain and suffering, the Respondents averred that they had proposed Kshs. 150,000/- while the Appellant had proposed Kshs. 20,000 in the lower court, and thus the trial court did not err in awarding the sum of Kshs. 50,000/= . In support, they quoted the case of **Kabeste Restaurant Limited vs Mutie & another (suing as the administrator of the estate of Johnstone Makili Munyao) (2025 KEHC 9410.**

17. On the award of special damages of Kshs. 136,800/= they relied on the case of *Khan vs. Sign Civil Appeal No. 42 of 1983*, where the special damages ought to be pleaded and proved, and aver that the trial magistrate did not err in awarding special damages.

Analysis and determination

18. This being a first appeal, this Court is enjoined to re-evaluate, re-assess and re-analyse the evidence tendered before the trial court and arrive at its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and therefore must give due allowance for that.

19. In **Selle & Another v Associated Motor Boat Co. Ltd [1968] EA 123**, the Court of Appeal held:

“An appeal to this Court from a trial by the High Court is by way of retrial... the Court must reconsider the evidence, evaluate it itself and draw its own conclusions...”

20. In Njoroge v Gakere & another (Civil Appeal E028 of 2024) [2025] KEHC 4048 (28 March 2025), the Court stated as follows:

“This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court, both on points of law and fact and come up with its own findings and conclusions.”

21. In Kamau vs. Mungai & Another [2006] 1LR 150, the Court of Appeal established the principles to be applied when determining whether or not to interfere with the trial court’s award on damages: -

“A Court of Appeal will not normally interfere with a finding of fact by the trial Court in a civil or criminal case unless it is based on evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

22. This court has analysed the lower court records, the appeal before it, as well as the submissions from both parties and finds the following issues for determination;

a) *Whether the award for loss of dependency is Kshs. 1,200,000/= was excessive*

b) Whether the award for pain and suffering of Kshs. 50,000/= was excessive

c) Whether special damages for the funeral expenses were properly pleaded and proved

23. On whether this court should interfere with the trial court's discretion in awarding damages, it is trite law that assessment of damages is a discretionary exercise. An appellate court will not interfere unless it is shown that the trial court acted on wrong principles or the award is inordinately high or low.

24. In **Butt v Khan [1981] KLR 349**, the Court of Appeal held: ***“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.”***

25. Similarly, in **Kemfro Africa Ltd t/a Meru Express Services v Lubia & Another (No. 2) [1987] KLR 30**, the Court emphasised that interference is only warranted where wrong principles were applied.

26. The first issue for determination is whether the trial court erred in awarding Kshs. 1,200,000/= for loss of dependency. The Appellants submitted that the deceased was pleaded as a businessman earning Kshs. 30,000 per month, yet the 2nd Respondent claimed that he was a boda boda rider. They claimed that no documentary evidence to prove their assertion. They stated that in the absence of such proof, the trial court ought to have adopted the statutory minimum monthly wage of a general

labourer at Kshs. 8,109/= as per the Regulation of Wages (General) Amendment Order, 2022. On the multiplier, they argued that at age 62, the deceased was well past the normal retirement age of 60; any dependency should have been limited to a multiplier of 4 years, discounted for vicissitudes of life and the fact that family land remained available. Their mathematical computation was: Kshs. $8,109 \times 2/3 \times 4 \text{ years} = \text{Kshs. } 259,488$.

27. The Respondent countered that the global sum approach was appropriate because income was not capable of precise proof. They relied on **Albert Odawa v Gichimu Gichenji, Nakuru HCCA No. 15 of 2003 (2007) eKLR**, where Ringera J. (as he then was) held that the multiplier method is not a dogma and must be abandoned where the facts do not facilitate its application. They argued the trial magistrate correctly exercised discretion in awarding a global sum of Kshs. 1,200,000/=

28. Upon re-evaluation of the trial court records and the parties' testimonies, I note that there was no evidence presented in court to prove the deceased's earnings. In fatal accident claims where the deceased's earnings are unproven or uncertain, Kenyan courts have consistently held that the court may either adopt the minimum wage guideline for the relevant category of worker or, where there is no receipts, bank slips or payslip award a reasonable global/lump sum.

29. This is not speculation but a pragmatic application of justice as seen in the case of *Nyamu & another v Aloo & another [2025]*

KEHC 6148 (20 March 2025, where the global sum approach was preferred when income was unascertainable; as well as in the case of **Gachie v Muiruri & 2 others [2025] KEHC**, where global sum was adopted for similar evidentiary gaps.

30. The deceased was 62 years old at the time of death, an advanced age by any standard. Even if he had continued working, the remaining productive years would have been few, subject to the vicissitudes of life, ill health and retirement. A multiplier of 4 years, as proposed by the Appellants or a modest global sum is more consonant with the evidence. An award of Kshs. 1,200,000/= under this head is, in my considered view, inordinately high and represents an erroneous estimate. Courts have consistently moderated awards in similar circumstances.

31. **In Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another [2014] eKLR**, the Court emphasised that age and uncertainties of life must be factored in.

32. I find that a global award of Kshs. 600,000/= would be reasonable and commensurate for loss of dependency. This figure takes into account the deceased's advanced age, lack of proof of income and the probable short remaining dependency period, and the 2/3 dependency ratio conventionally applied where dependents exist.

33. Whether the award of Kshs. 50,000/= for pain and suffering was excessive given the fact that the deceased died on the same day.

34. The Appellants contended that since the deceased died on the same day of the accident, any pain and suffering was minimal and an award of Kshs. 20,000/= would have sufficed. The Respondent maintained that the trial magistrate's discretion was properly exercised, noting that they had proposed Kshs. 150,000/= while the Appellants had proposed Kshs. 20,000 in the lower court.
35. The principle is that where death is instantaneous or occurs shortly after the accident, courts award nominal damages.
36. In **West Kenya Sugar Co. Ltd v Philip Sumba Waswa [2006] eKLR**, the Court held that minimal awards are appropriate where death is immediate. Nonetheless, courts have awarded between Kshs. 10,000/= and Kshs. 100,000/= depending on circumstances.
37. **In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR**, the court observed that:-
...The conventional award for loss of expectation of life is Ksh 100,000/-, while for pain and suffering, the awards range from Ksh 10,000/= to Ksh 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."
38. In **Mosonik & another vs. Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823**

(KLR) Sewe J. reduced an award of Kshs. 150,000 to Kshs. 50,000 for pain and suffering where the deceased died on the spot.

39. The trial court awarded Kshs. 50,000/=.

40. There is no evidence that death was instantaneous. Death occurred on the same day, which may imply some period of pain.

41. I am not persuaded that the award was inordinately high. In light of the above cited cases, I find no reason to interfere with the trial court's assessment of damages for pain and suffering.

42. On whether the award of special damages of Kshs. 136,800/= was properly made.

43. The Appellants challenge the award of Kshs. 136,800/= because it was not strictly proved.

44. The law is settled that special damages must be specifically pleaded and strictly proved.

45. In **Hahn v Singh [1985] KLR 716**, the Court held: ***“Special damages must not only be specifically claimed but must also be strictly proved.”***

46. The Respondent produced receipts to support funeral expenses. While some receipts may have had technical deficiencies, the learned magistrate was entitled to take a pragmatic view.

47. The argument that contributions were made by family and friends does not negate actual expenditure incurred. Kenyan courts have taken judicial notice of the practical realities of funeral expenses in African families. In **Premier Diary Limited v Amarjit**

Singh Ssagoo & Another [2013] eKLR, the Court of Appeal held that it is not a breach of the strict proof rule to compensate bereaved families for burial expenses even in the absence of complete receipts, as it would be unreasonable to expect meticulous record-keeping during mourning. This was reiterated in **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR and Achenda & another v [relevant party] [2023] eKLR**, where reasonable sums were awarded notwithstanding incomplete documentation.

48. The trial court examined the receipts and was satisfied as to the proof.

49. This Court finds no misdirection. The award is upheld.

50. In the result, the appeal partially succeeds only to the extent of the award on loss of dependency.

51. The judgment of the lower court is varied as follows:

- a) Pain and suffering - Kshs. 50,000/= (upheld)
- b) Loss of expectation of life - Kshs. 100,000/= (upheld)
- c) Loss of dependency - reduced to Kshs. 600,000/=
- d) Special damages - Kshs. 136,800/= (upheld)

Subtotal: Kshs. 886,800/=

a) Less 25% contribution: Kshs. 221,700/=

b) Total Award: Kshs. 665,100/=

Orders

52. The appeal partially succeeds.

53. The award on loss of dependency is set aside and substituted with Kshs. 600,000/=.
54. All other awards are upheld.
55. The Respondent shall have the costs of the suit in the lower court.
56. Each party shall bear its own costs of this appeal, given the partial success.
57. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the Presence of:-

CA: Velma

Alwana for the Respondent present.

Ms. Nanjala for the Appellant present online.

MS NAJALA: I pray for 30 days stay of execution.

COURT: 30 days stay of execution granted.