

REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL NO E040 OF 2024

MALANG KOTIK BUSINESS MERCHANTS 1ST
APPELLANT

KELVIN RUTO 2ND
APPELLANT

WILLIAM KOMEN SOMOKWO 3RD
APPELLANT

VERSUS

DERRICK OBOTE MANAGU & ALLAN KINAGU MUNAVO (Suing as
the Legal Representatives of the Estate of HENRY OBOTE GALO
(Deceased)..... 1st
RESPONDENT

EZEKIEL MWANIKI 2ND
RESPONDENT

(Being an appeal from the Judgment and Decree of Hon J. A. Agonda (SPM)
delivered at Vihiga in the Senior Principal Magistrate's Court Civil Case No
189 of 2016 on 16th July 2024)

JUDGMENT

1. The background of this Appeal is that the 1st Respondent vide an amended
Plaint dated 28th March, 2017 sued the Appellants claiming general
damages (both under the Fatal Accident Act and The Law Reform Act) and
special damages in respect of the estate Henry Obote Galo) hereinafter
referred to as the deceased in respect of the Fatal injuries to the deceased
sustained in a road traffic accident which occurred on 21st April, 2016
along Kapsabet-Chavakali road involving a motor vehicle registration
number KBJ 603D and motor vehicle registration number KAS 427M in
which the Plaintiff was travelling as a lawful passenger when the vehicle
was carelessly, negligently and or recklessly driven at a high speed that it

caused the vehicle to run into a ditch thereby caused an accident as a result the Plaintiff/1st Respondent suffered serious injuries.

2. The defendants entered appearance and filed a statement of defense in which they denied virtually all the averments advanced by the Plaintiff.
3. In her decision of 16th July 2024, the Learned Trial Magistrate, Hon J. A. Agonda, Senior Principal Magistrate, entered Judgment in favor of the Respondents as against the Appellants herein in the following terms: -

<i>Pain and Suffering</i>	<i>Kshs 50,000/=</i>
<i>Loss of expectation of life</i>	<i>Kshs 100,000/=</i>
<i>Loss of dependency</i>	<i>Kshs 640,000/=</i>
<i>Special Damages</i>	<i><u>Kshs 15, 830/=</u></i>
<i>Total</i>	<i>Kshs 805,830/=</i>

4. Being aggrieved by the said decision, on 15th August 2024, the Appellants herein filed a Memorandum of Appeal of even date. They relied on five (5) grounds of appeal. The grounds are captured as hereunder:

- a. The quantum of general damages in respect of lost dependency is inordinately high erroneous, oppressive and punitive and amounts to a miscarriage of justice.
- b. The Learned Trial Magistrate ignored and/or paid lip service to the parties submissions on the multiplicand which she did not analyze or consider at all.
- c. The Learned Trial Magistrate erred in law when she applied the multiplicand of Kshs. 10,000/= without any basis for such a sum, nor any finding as to what the deceased did and earned, and without any analysis of the issue of the

multiplicand, and thus applied a multiplicand unsupported on the evidence and submissions and simply plucked from the air, thereby reaching an unreasonable high, capricious and arbitrary, unjust award.

d. The Learned Magistrate erred in law and fact in completely ignoring the submission made by the appellants and the 1st Respondent that the applicable multiplicand was Kshs. 5,844 and proceeding to hold, without any evidence or precedent, that the multiplicand was Kshs. 10,000/=.

e. The Learned Trial Magistrate failed to take into account all relevant considerations and principles in assessing the quantum of damages.

f. Other grounds as may be argued with the leave of the Court.

5. As at the time of writing this Judgment, the Appellants had not filed their Written Submissions. The 1st Respondent's Written Submissions were dated and filed on 11th November 2025, which I have carefully read and considered.

ANALYSIS AND DETERMINATION

6. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

7. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the

trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

8. Having looked at the Grounds of Appeal and the 1st Respondent's Written Submissions, it appeared to this court that the only issue that had been placed before it for determination was whether or not the quantum in respect of damages under the loss of dependency that was awarded by the Trial Court was excessive in the circumstances warranting interference by this court.
9. This court dealt with the said issue under the following separate and distinct heads.

DAMAGES UNDER THE FATAL ACCIDENTS ACT

LOSS OF DEPENDENCY

A. DEPENDENCY RATIO

10. The dependency ratio was not contested. This court did not disturb the Trial Court's dependency ratio of 2/3 as the deceased was married and had two (2) children.

B. MULTIPLIER

11. The multiplier was also not contested. This court, therefore, did not disturb the Trial Court's multiplier of eight (8) years considering the age of the deceased, that was reasonable in the circumstances.

C. MULTIPLICAND

12. This was the only issue that was contested under loss of dependency. The 1st Respondents placed reliance on the cases of

Mercy Kirito Mugeti vs Beatrice Nkatha Nyaga & 2 Others [2013]eKLR and **Selle & Another vs Associated Motor Boat Co Ltd & Others** (Supra) on the duty of the first appellate court and the cases of **Butt vs Khan (1977) KAR 1** , **Bashir Ahmed Butt vs Uwais Ahmed Khan (1982)-88** and **Gitobu Imanyara & 2 Others vs Attorney General [2016]eKLR** where the common thread was that an appellate court could only interfere with an award of damages if the aggrieved party satisfies that the trial court took into account irrelevant factors or left out relevant factors and that the amount of damages was so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

- 13.** They argued that the Trial Court took into account the relevant factors being the pleadings, evidence on record and the submissions by parties and correctly awarded them damages under loss of dependency which was commensurate with the age and earnings of the deceased at the time of the accident.
- 14.** They also cited the case of **Kigaragari vs Aya[1985] KLR 273** where it was held that in awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.
- 15.** They pointed out that the Trial Court considered the age of the deceased, the nature of the work he engaged in, age of the

referenced authorities and the rate of inflation in adopting the multiplicand of Kshs 10,000/=. They asserted that in reaching the said conclusion the Trial Court relied on the case of **Martha Ndiro Odero (Suing as the administrator and personal representative of the estate of Willy Patrick Ochieng Ndiro (Deceased) vs Come Cons Africa Limited 2015** where the court therein adopted a multiplicand of Kshs 10,000/= for a deceased who died aged 32 years old and was working with Kenya Army.

16. They were emphatic that the Trial Court took into account relevant principles in arriving at the figure of Kshs 640,000/= under this head and that the same was not excessive in the circumstances. They urged this court to uphold the same and dismiss the Appellant's appeal herein with costs.

17. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in **Kemfro Africa Ltd Vs Meru Express Service 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."

18. The principles which guide the court in the assessment of damages were laid in **In Charles Oriwo Odeyo vs. Appollo Justus**

Andabwa & Another [2017] eKLR of damages in a personal injury case. The considerations include but not limited to; -

“1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2. The award should be commensurable with the injuries sustained.

3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5. The awards should not be inordinately low or high.”

19. According to the Court of Appeal in **Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR** as cited by the 1st Respondent, the court stated that: -

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

20. So as to determine what was the appropriate multiplicand in this matter, this court had due regard to the case of **Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR** where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated that it did not subscribe to the view that the only way to prove the profession of a person had to be by the production of certificates and that the only way of proving earnings was by production of documents as this would occasion a lot of injustice to very many Kenyans who were illiterate and kept no records yet they earned their livelihood in various ways.

21. In that case, the Court of Appeal found that the evidence of the respondent therein and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. This is what the court stated:

“In our view, there was more than sufficient material on record from which the learned Judge was entitled to, and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Shs. 4,000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

32. We reiterate that it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case.

33.

34. We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased’s net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs. 11,995/- was an appropriate place to begin because the deceased being a business lady carrying out a timber and furniture business, she must at least have employed a carpenter for the business and was unlikely to earn less than the carpenter. In our view given the evidence before the trial Judge including the bank statement showing monies going into and out of the

deceased's account, a sum of Kshs 30,000/= would have been appropriate as the net monthly income of the deceased."

22. In **Moses Mairua Muchiri vs. Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR**, it was 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."

23. In the instant case, the Respondents pleaded in their Amended Plaintiff filed on 30th March 2017 that the deceased used to operate a retail shop earning Kshs 30,000/= per month. They claimed that he used the said earnings to educate and maintain his family and dependents and that his estate had, therefore, suffered loss and damages.

24. In the absence of any contrary evidence from the Appellants, this court is persuaded to believe the Respondents' testimony that the deceased was manned a retail shop. However, as there was no documentation to prove that he actually earned Kshs 30,000/=, the Kshs 10,000/= that was awarded by the Trial Court was not unreasonable estimation in the circumstances. The Appellant's Kshs 5,844.00 was on the lower side and they failed to explain how they had arrived at the said figure.

25. On the other hand, the Trial Court had relied on the case of **Martha Ndiro Odera (Suing as the administrator and personal representative of**

the estate of Willy Patrick Ochieng Ndiro (Deceased) vs Come Cons Africa Limited [2015]eKLR where the court therein adopted a multiplicand of Kshs 10,000/= for a deceased who died aged 32 years old and was working with Kenya Army.

- 26.** Courts are guided by comparable cases to arrive at conclusions that are not so wide apart as to cause inconsistency and confusion to those relying on the decisions. In the circumstances foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Memorandum of Appeal were not merited and the same be and are hereby dismissed.
- 27.** In the result, and for the reasons set out hereinabove, the Appeal lodged on 15th August 2024 is found to be without merit and is hereby dismissed. Consequently, the Judgment of the Trial Court in **Vihiga PMCC No. 189 of 2016**, delivered on 16th July 2024, is affirmed.
- 28.** Each party will bear its own costs of the Appeal herein.
- 29.** Orders accordingly.

**DATED, SIGNED AND DELIVERED AT VIHIGA THIS 11TH DAY OF MAY
2026**

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**R. NYAKUNDI
JUDGE**