



Waweru (Suing as the Legal Representative and Administrator of the Estate of Brian Waweru Mwaura (Deceased)) v Bonafide Clearing and Forwarding Company Limited & another (Civil Appeal E506 of 2023) [2025] KECA 620 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 620 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E506 OF 2023
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
APRIL 4, 2025**

BETWEEN

SAMUEL MWAURA WAWERU APPELLANT

**SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE
ESTATE OF BRIAN WAWERU MWAURA (DECEASED)**

AND

**BONAFIDE CLEARING AND FORWARDING COMPANY LIMITED 1ST
RESPONDENT**

DAVID LAWRENCE KIGERA 2ND RESPONDENT

*(Being an appeal from the judgment and decree of the High Court at
Nairobi (C. Meoli, J.) dated 4th May 2023 in Civil Case No. 140 of 2015)*

JUDGMENT

1. On 12th March 2012 the deceased, Brian Waweru Mwaura, was traveling as a passenger in a motor vehicle registration number KAH 500Y Volkswagen Golf along James Gichuru Road in Nairobi. The vehicle belonged to Ms. Otieno Gladwell (3rd Party in the proceedings before the trial court). The vehicle collided head-on with motor vehicle registration number KBA 111E Land Cruiser which belonged to the 1st respondent, Bonafide Clearing and Forwarding Company Limited, and was being driven by the 2nd respondent, David Lawrence Kigera. The deceased suffered fatal injuries.
2. The appellant, Samwel Mwaura Waweru, filed this suit as the legal representative and administrator of the estate of the deceased. He pleaded that he was the father and dependant of the deceased. The other dependant was the deceased's mother, Elizabeth N. Mwaura.



3. In the suit, the appellant claimed that the accident was caused by the negligent driving of the 2nd respondent, and stated that the 1st respondent was vicariously liable. The appellant sought compensation under the Fatal Accidents Act and under the Law Reform Act. Special damages of Kshs.600,032 were sought. Then costs and interest.
4. The 1st and 2nd respondents filed a defence in which the accident, negligence and injuries were denied. The 3rd Party filed a defence to deny blame that was attributed to it by the respondents. She pleaded that the accident had been caused by, and/or, substantially contributed to by, the respondents' negligence.
5. The parties signed a consent dated 28th February 2022 in which the respondents were found to be 100% liable, jointly and severally. The parties agreed to the pleaded special damages of Kshs.600,032. The 3rd Party was discharged from the matter.

It was agreed that, as between the appellant and the respondents, the question of general damages payable by the respondents would be decided on the basis of their written submissions.

6. Written submissions were filed, and on 4th May 2023 the learned C. Meoli, J. delivered a judgment in which general damages of Kshs.200,000 were awarded for pain and suffering; general damages of Kshs.100,000 were awarded for loss of expectation of life; a global figure of 5,500,000 was awarded for loss of dependency; special damages were allowed at Kshs.600,032; then costs and interest.
7. The appellant was aggrieved by the award of Kshs.5,500,000 for loss of dependency and filed this appeal whose grounds were as follows:-

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- “ 1. The learned judge erred in law and fact in awarding the appellant generally damages that were inordinately and manifestly low in the face of the evidence adduced and circumstances of the suit.
2. The learned judge erred in law by awarding an amount of Kshs.5,500,000/- as a reasonable award for loss of dependency without satisfactory legal reasoning for awarding the said amount.
3. The learned judge erred in law and fact by holding that the appellant had not provided any documentary evidence whatsoever in regard to his claim and in the circumstances, reached a wrong conclusion.
4. The learned judge erred in law and fact by holding that the sum of Kshs.5,000,000/- which sum was what the respondent proposed in their submissions was the basis upon which the award for loss of dependency was to be calculated without any basis in fact or law.
5. The learned judge erred in law and fact by failing to find that the appellant had proved his case on a balance of probability as required in all civil cases.
6. The learned judge apportioned 7 months to review the parties' final submissions yet erred in law and fact by not properly reviewing the evidence placed on record by the appellant and or overly favoring the evidence by the respondent.
7. The learned judge erred in fact and law by failing to take into account the judicial authorities cited by the appellant.



8. The learned judge erred in law by applying the wrong considerations devoid of well-established legal principles in determining the suit; more particularly.
9. The learned judge erred in law by misinterpreting the established principle of dependency ratio in arriving at her judgment.
10. The learned judge erred in law by arriving at a decision upon disregarding the established principle on multiplicand in arriving at her judgment.
11. That in all circumstances of the case, the findings of the learned judge are insupportable in law.
12. That in all the circumstances of the case, the learned judge failed to do justice to the appellant.”

The appellant had in the submissions in the trial court proposed an award of Kshs.316,800,000. He sought that the judgment and decree be set aside, after allowing the appeal, and that the proposal be awarded.

8. Our mandate on first appeal where the appellant has challenged the quantum of damages is not open-ended. This Court in Catholic Diocese of Kisumu -vs- Sophia Achieng Tete [2004] 2KLR 55 stated as follows:-

“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 appellant 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 or 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.”

9. During the hearing of this appeal, learned counsel, Mr. Kimathi and Mr. Waweru appeared for the appellant while learned counsel, Ms. Muguku held brief for learned counsel, Mr. Ochieng for the respondents. Each side filed written submissions on which it wholly relied.
10. Learned counsel for the appellant submitted that the learned Judge had erred in awarding Kshs.5,500,000 as general damages for loss of dependency, which amount was inordinately and manifestly low in the circumstances. It was submitted that, in reaching the figure, the learned Judge had failed to take into consideration the special facts and evidence in the suit; that the learned Judge had been persuaded by the respondents’ proposal of a global figure of Kshs.5,000,000 without any legal reasoning. Learned counsel made reference to the decision in Kenya Airways Limited -vs- Kenya Airlines Pilots Association [2013] eKLR wherein evidence was adduced to prove that the salary of a pilot begins at Kshs.500,000 and that the higher figure is Kshs.1,900,000 while in Kenya Airline Pilots Association -vs- Kenya Airways Limited [2020] eKLR it was shown that the average retirement age to be 63 years while Clause 34(a) and (b) of the CBA recommended 65 years as the retirement age for pilots. These two decisions were by the Employment and Labour Relations Court. The learned counsel blamed the trial court and submitted that it had abdicated its responsibility by not relying on them.
11. Learned counsel further submitted that it had been shown that the expected salary of the deceased at the retirement would have been Kshs.1,200,000; but that the trial court had erred by failing to assess the deceased’s net income on the available evidence, however scanty it may have been. Reference was



- made to the decision in *Isaack Kimani Kanyingi & another (suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) -vs- Hellena Wanjiru Rukanga* [2020] eKLR).
12. The appellant's counsel further submitted that the learned Judge erred by failing to acknowledge that the deceased was unmarried and thus the appellant depended on him in an apportioned ratio of $\frac{1}{2}$, that because the deceased was not married, there was a likelihood of him spending more on his parents, hence the enhanced ratio of $\frac{1}{2}$. (See *Crown Bus Services LTD & 2others -v- Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin (Deceased)* [2020]eKLR.)
 13. According to learned counsel for the respondents, the learned Judge was well guided in awarding Kshs.5,500,000 for loss of dependency as there was no proof of the deceased's future income projected at Kshs.1,200,000, save for a letter from Nairobi Flight Training Limited which indicated that the deceased had been a pilot student. We were referred to the decision in *Kenya Wildlife Services -vs- Geoffrey Gichuru Mwaura* [2018]eKLR and asked to find that the award of a global figure of Kshs.5,500,000 for loss of dependency was reasonable and the learned Judge had considered all the available evidence in reaching the decision.
 14. It was submitted for the respondents that the learned Judge rightly held that the estimated period of dependency of 44 years from the deceased's parents aged between 45 and 50 years was unrealistic for a person who was 21 years and had not started earning a salary and whose future earnings were unknown. Reference was made to the case of *Ainu Shamsi Hauliers Limited -vs- Moses Sakwa & another (suing as the Administrators of the Estate of Ben Siguda Okach (Deceased)* [2021] KLR in which it was observed that the multiplier approach was just a method of accessing damages; that it was not a principle of law or a dogma, and may be abandoned where the facts of the case do not favour its application. (See *Marko Mwenda -vs- Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993.*)
 15. We have considered the record of appeal, the grounds of appeal, the impugned judgment and the rival submissions.
 16. It is common ground that the appellant had asked for Kshs.316,800,000 for loss of dependency, having submitted that the deceased was aged 21, a pilot student with expected future salary of Kshs.1,200,000 per month; was healthy and academically bright; that as a pilot he was expected to retire at 65 years; he was not married and therefore his two parents were going to depend on him at the ratio of $\frac{1}{2}$. The learned Judge observed as follows:-
 - “21. With respect, legal authorities cited by the Plaintiff while useful as guides in the correct assessment quantum cannot substitute material proof of income in respect of the deceased herein or even expected dependency. The multiplier approach urged by the Plaintiff's counsel appears unsuited for the case before the court where there is hardly any material tendered to establish the key elements commonly used in the multiplier approach, and especially the earnings of the deceased. Thus, the proposed sum of Kshs. 1,200,000. as the likely income of the deceased herein appears excessive and to have been literally plucked from the air ”
 17. The learned Judge considered that the respondents had offered Kshs.5,000,000 for loss of dependency, and, in considering the proposal of Kshs.316,800,000 found the same to be unsupported by evidence, manifestly excessive, perverse and an erroneous estimate. She then concluded as follows:-
 - “Doing its best in the circumstances, the Court is persuaded to improve slightly on the Defendants' offer of Ksh.5,000,000/-and to grant what it considers a reasonable global award in the sum of Kes. 5,500,000 ”



18. The parties had recorded a consent on liability at 100% against the respondents, and special damages were agreed at Kshs.600,032. The respondents had in the defence denied the rest of the appellant’s case. Under sections 107, 108 and 109 of the *Evidence Act*, the appellant was required to prove, on a balance of probabilities, matters like the deceased’s expected future earnings as a pilot and the current earnings of pilots in Kenya. The respondents pointed out in their submissions that the appellant had not led evidence on these aspects of his case. The trial court cited this Court’s decision *Mumbi M’Nabea -vs- David M. Wachira* [2016] in which it was stated that:-

“In our jurisdiction, the standard of proof in civil liability claims is on the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable ”

19. The appellant opted not to testify, or call witnesses. He did not get the respondents to agree on the production of the documentary evidence in his possession without calling the makers. It is trite that whatever was contained in his written submission was not evidence. (See *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Murithi & Another* [2014] eKLR). The amount of general damages in regard to loss of dependency was going to be decided on the basis of evidence, properly received, and not on the basis of written submissions whose value was only to concretise and form the case of each side.

20. Under those circumstances where the multiplier approach was not supported by evidence, the trial court was correct in adopting a global figure in arriving at the loss of dependency. The actual or expected income of the deceased, for instance, was a question of fact to be proved by the appellant. The same for ages of the deceased’s parents, whether the deceased was their only child, whether they had any income, and so on.

21. In conclusion, we find the appeal not merited and dismiss it with costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF APRIL 2025

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

