Jimcab Services Limited v Osodo & another (Suing as the Administrators of the Estate of Richard Omondi Odhiambo - Deceased) (Civil Appeal 566 of 2019) [2025] KECA 975 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 975 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 566 OF 2019

SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA

MAY 23, 2025

BETWEEN

JIMCAB SERVICES LIMITED ..... APPELLANT

AND

BARTHOLOMEW BERNARD OSODO & JACOB OTIENO (SUING AS THE ADMINISTRATORS OF THE ESTATE OF RICHARD OMONDI ODHIAMBO - DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 19th February 2016 in HCCC No. 413 of 2007)

JUDGMENT

1. In this appeal, the appellant, Jimcab Services Limited, has challenged the judgment of the High Court at Nairobi (Sergon, J.) delivered on 19th February 2016. In that judgment, the High Court awarded the respondents, Bartholomew Bernard Osodo and Jacob Otieno, as the administrators of the estate of Richard Omondi Odhiambo, deceased, a total of Kshs. 3,214,055.00 comprising of general and special damages following a road traffic accident in which the appellant's vehicle knocked down the deceased who sustained injuries from which he died.

2. The facts are that the deceased was on 10th October 2005 walking along Juja Road, Nairobi, when, as the trial Judge found, the appellant's vehicle veered off the road and knocked him down at the pedestrian walkway. The Judge concluded that the appellant was wholly to blame. That finding on liability has not been challenged in this appeal. What is challenged is the award of general and special damages.

3. In its memorandum of appeal, the appellant complains that the Judge erred in admitting as evidence, inadmissible documents in support of the deceased's earnings contrary to Section 35 of the *Evidence*

Act; that the Judge also erred in admitting as evidence documents indicating that the deceased was an employee at Kariobangi Metal Works despite lack of a registration certificate; that the figure of Kshs. 9,280.00 taken by the trial court as the deceased's monthly income as a basis for computing damages for lost years is erroneous; and that the Judge should have applied the minimum wage for general labourers, i.e. Kshs. 4638.00 in quantifying damages for lost years.

4. Also challenged is the multiplier of 39 years adopted by the Judge considering that the diseased died at the age of 21 years. The award of Kshs 150,000 for pain and suffering is also challenged as being contrary to established precedent.

5. The appeal came up for hearing before us on 12th February 2025. Learned counsel Mr. Wanjohi held brief for Mr. Katiku for the appellant. There was no appearance for the respondent. Mr. Wanjohi drew the Court's attention to a consent letter dated 23rd September 2020 by which the parties agreed to rely entirely on their respective written submissions.

6. We have considered the appeal and the submissions in keeping with our mandate under Rule 31(1)(a) of the Court of Appeal Rules. (See Selle & Another vs. Associated Motor Boat Co Limited & Others (1968) EA 123). There are three issues for determination in this appeal. The first is whether the Judge erred in admitting documents in proof of the deceased's employment and income and whether in doing so, Section 35(1)(b) of the *Evidence Act* was violated. Related to that is the question whether the deceased's monthly income of Kshs. 9,280.00 on which the Judge based computation of damages was proved and whether the minimum wage for labourers should have been the basis of computation. The second issue is whether the judge erred in applying a multiplier of 39 years. The third issue is whether this Court should interfere with the award of Kshs. 150,000 general damages for pain and suffering.

7. We begin with the question whether the judge erred in admitting documents in proof of the deceased's employment and income and whether in doing so, Section 35(1)(b) of the *Evidence Act* was violated. In that regard, it was pleaded in the respondent's amended plaint that at the time of his death the deceased was aged 21 years and employed as a mechanic earning a monthly salary of Kshs. 9,280.00.

8. In their list of documents, the respondents listed "letter from deceased's employer" and "petty cash vouchers" and

> "receipts" among the documents they would rely on in support of their case. The letter from the employer emanated from one Paul Ouko as Managing Director of Kariobangi Metal Works and stipulate that the deceased worked there as a welder from November 2004 until the time of his death and that "the salary of the late was Kshs. 9,280.00" per month. There were 6 petty cash vouchers relating to the deceased's salary the last of which was dated 31st August 2005. The receipts related to funeral expenses.

9. Although the advocates for the respondents served a notice to admit documents dated 21st June 2007, the appellant's advocates in response served a notice of non-admission of documents dated 25th June 2007 intimating that the makers would be required to produce the same at the hearing of the suit. The record shows that during the trial, those documents were contested and marked for identification, subject to a decision as to their admissibility by the trial court in its judgment.

10. The learned trial judge considered that issue in paragraph 4 of the judgment and referred to Section 35(b) of the *Evidence Act* on the circumstances when the court may admit documents without the need to call the maker and then stated:

> " In the case before this court, PW1 has presented documents showing that the proprietor of Kariobangi Metal Works where the deceased worked as a welder has relocated to Homa Bay

where he is being treated for a chronic illness. In fact PW1 had to be stepped down from the witness box to enable him secure the medical treatment notes showing Paul Ouko Dawa is critically ill. I have no reason to doubt the veracity of those documents."

With that, the Judge admitted the documents and the same were marked as the respondents' exhibits. Did the Judge err in doing so?

11. Counsel for the appellant submits in the affirmative urging that the appellant was deprived of the opportunity to cross examine the makers of those documents; that the respondents did not satisfactorily satisfy the court that Paul Ouko Dawo the Managing Director was incapable of attending court; that a letter from the Chief explaining his inability to attend court was not sufficient; that consequently the Judge used inadmissible evidence as proof of the deceased's earnings and therefore the minimum wage standards in force at the time should have been the basis for quantifying damages. In support counsel cited the case of Phillip Musyoka Mutua vs. Veronica Mbula Mutiso, Civil Appeal No. 108 of 2008 Machakos [2013] eKLR. Moreover, it was submitted, the registration certificate in respect of Kariobangi Metal Works was not produced.

12. Counsel for the respondents on the other hand submitted the documents were properly admitted under Section 35 of the *Evidence Act* as the attendance of the Managing Director of the deceased's employer could not be procured without delay; that it was established that the said Paul Ouko Dawo was suffering chronic illness and was in Homa Bay town and the Judge was satisfied with the explanation given.

13. Section 35 of the *Evidence Act* makes provision on admissibility of documentary evidence as to facts in issue. Maraga, J. (as he then was) in his ruling in the case of Joao Francis Quadros vs. Sdv Transami Kenya Limited [2005] KEHC 537 (KLR) summarized that provision as follows:

> "Section 35(1) of the *Evidence Act* Cap 80 of the Laws of Kenya is quite clear. Documents have to be produced by the maker except where the maker is:-
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> "...dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.""

14. More recently in the case of Bajaber v Abdulrahman &NAnother (Civil Appeal No. 87 of 2019)[2024] KECA 1736N KLR) this Court reiterated that:

> " Section 35 provides in detail how documents and statements are to be produced in civil proceedings. They are to be produced by the makers except in exceptions allowed by the said section."

15. The proviso to Section 35 stipulates that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

16. In this case, the learned Judge who had the opportunity and advantage of hearing and observing the witnesses as they testified was satisfied with the explanation given why the Managing Director of the deceased's employer could not attend court before concluding that there was no reason to doubt the veracity of those documents. As stated in Mohamed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja [1986] KECA 71 (KLR) the Court "It will not lightly differ from the findings of fact of a trial judge who has had the benefit of seeing and hearing all the witnesses and will only interfere with

them if they are based on no 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." In this case, we have no basis for interfering with the decision of the learned Judge in that regard.

17. Related to the above is the question whether the deceased's monthly income of Kshs. 9,280.00 on which the Judge-based computation of damages was proved. Among the six petty cash vouchers that were produced and admitted as evidence of the deceased's earning were petty cash vouchers dated 30th June 2005, 30th July 2005 and 31st August 2005. Whereas the total payment reflected in each of those vouchers was Kshs. 9,280.00, the breakdown of that amount is shown in the body of each of those vouchers as follows: "end month salary"- Kshs. 6280.00 and "advance paid"- Kshs.3,000.00.

18. Although the undated letter from the Managing Director stated the monthly salary to be Kshs. 9,280.00, that did not accord with the petty cash vouchers which labelled the amount of Kshs. 3,000.00 of that amount, as an advance. Had the learned judge scrutinized those vouchers, he would no doubt have picked that discrepancy and worked with Kshs. 6,280.00 as the monthly salary. Based on the foregoing and given that the proven monthly income in our view is Kshs. 6,280.00, the question of applying the minimum wage does not arise.

19. We turn to the issue whether the Judge erred in applying a multiplier of 39 years. The appellant submits that the multiplier applied was too high and the Judge should have applied a multiplier of between 20 and 25 years bearing in mind the vicissitudes of life and other imponderables which would have otherwise shortened his life. In support, counsel cited the case of Samwel Kimutai Korir (suing as personal and legal representative of Estate of Chelangat Silevia vs. Nyanchwa Adventist Secondary School and Another, Civil Case No. 229 of 2010 [2016] eKLR where the court adopted a multiplier of 25 years where the deceased was aged 21 years at the time of death.

20. Counsel for the respondents on the other hand submitted that there is no settled principle of law requiring the adoption of a multiplier as proposed by the appellant; that a court is required to have regard to the personal circumstances of the deceased and the dependants including such factors as the age of the deceased, expectation of working years; age of dependants and length of the dependants expectation of dependency and chances of life of the dependants; and that it has not been shown that the Judge misdirected himself in applying the multiplier that he did.

21. In their submissions before the trial Judge, the respondents proposed an award for damages for lost years on the basis that the deceased "would have been employed until the age of retirement of 60 years" and proposed a multiplier of 39 years. Similarly, the appellants in their advocate's submissions submitting on "lost years" urged that the deceased was aged 21 and on application of minimum wage of Kshs. 4,638.00 "and the retirement age of 60 years, his lost years would therefore work out as follows: Kshs. 4,638 x 12 x 2/3 x 39=Kshs. 1,447,056." Clearly therefore, based on those submissions both parties were at one, whether rightly or wrongly, that a multiplier of 39 was applicable.

22. In short, there was consensus on the multiplier of 39 years. It is no wonder therefore that the Judge, without any discussion, and quite rightly, adopted the multiplier of 39 years that both parties presented. The only contention between the parties in that regard was whether the monthly income to be used in computation was Kshs. 9,280.00 or the minimum wage of Kshs. 4,638.00. Whereas the multiplier of 39 years for a 21-year-old appears, on the face of it, to be high, given that it was no contested, the learned Judge had no basis for not adopting it. It is therefore late in the day for the appellant to challenge the multiplier adopted which was not a contested matter before the trial court.

23. The final issue is whether this Court should interfere with the award of Kshs. 150,000 for pain and suffering. Counsel for the appellant submitted that an award of Kshs. 30,000.00 would have been appropriate as the deceased died on the same day the accident occurred. Counsel cited the authority

in the case of Kean Transporters Limited & Another vs. Anastasia Wangeci Njogu [2019] eKLR for the argument that awards should be in tandem with previous awards. In that case the court found an award of Kshs. 60,000.00 for pain and suffering to have been inordinately high "given that the deceased died on the spot" and substituted that award with Kshs. 30,000.00.

24. Counsel for the respondents on the other hand has submitted that award of damages involves exercise of discretion. Citing the decision in Kemfro Africa Limited t/a Meru Express Services (1976)" & Another vs. Lubia & Another (No 2) [1985] KECA 137 (KLR) it was urged that an appellate court should not interfere with an award of damages unless demonstrated that the trial judge in assessing the damages took into account irrelevant factors or failed to consider relevant factors or if the amount is shown to be inordinately high or low as to be an erroneous estimate of damages.

25. In their submissions before the trial court, the respondents' advocates proposed an award of Kshs. 300,000.00 under this head. The appellant's advocates on the other hand proposed in their submissions an award of Kshs. 10,000.00. On his part, the trial Judge, stated as follows:

> " On my part and looking at the pleadings and the evidence, it is clear in my mind that the deceased did not die on the spot but had to be taken first for medical treatment at Kenyatta National Hospital where he passed on. I am satisfied that the deceased
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> suffered great pain immediately after the accident. On this head I will award him Kenya shillings 150,000."

26. As this Court stated in Kemfro Africa Limited t/a Meru Express Services (1976)" & Another vs. Lubia & Another (above):

> "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage."

27. It may well be that another court, or this Court might have awarded a different amount under this head. However short of demonstration that the award by the learned Judge is impeachable on the grounds stated in the Kemfro Africa exercise of his discretion as it is evident the Judge considered the passage of time between the time of the occurrence and the time when the deceased died. We decline the invitation to interfere with the award.

28. In conclusion the appeal fails save and to the extent that the award for lost years in the amount of Kshs.2,895,360.00 based on a multiplicand of Kshs. 9,280.00 is hereby set aside and substituted with an award for Kshs.1,959,360 made up as follows: 6,280.00 x 12 x 2/3 x39=1,959,360.00.

29. Consequently, the total award made by the High Court in the amount of Kshs. 3,214,055.00 is hereby set aside and substituted with an award of Kshs. 2,278,055.00 made up as follows:

    I. Special damages-Kshs. 68,695.00

    II. Pain and suffering-Kshs. 150,000

    III. Lost years-Kshs1,959,360.00

    IV. Loss of expectation of life-Kshs.100,000.00

Grand Total: Kshs. 2,278,055.00

30. Interest on that amount will accrue at court rates from the date of judgment of the High Court (19th February 2016) until payment in full. The respondents will have the costs of the proceedings before the High Court. Each party will bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. OCHIENG

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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.