Cherangany Hills Ltd & another v Wanyama (Suing as the Administrator to the Estate of Brian Khisa Wanyama) (Civil Appeal 243 of 2019) [2025] KECA 1030 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KECA 1030 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 243 OF 2019

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

JUNE 5, 2025

BETWEEN

CHERANGANY HILLS LTD ..... 1ST APPELLANT

RODGERS NDAGA ..... 2ND APPELLANT

AND

BERNARD MAKANDA WANYAMA (SUING AS THE ADMINISTRATOR TO THE ESTATE OF BRIAN KHISA WANYAMA) ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kitale (H. K. Chemitei, J.) dated 30th May, 2018 in CA No.18 of 2017)

JUDGMENT

1. This is a second appeal by Cherengany Hills Ltd. and Rodgers Ndaga in which they seek to overturn the judgment of the first Appellate Court delivered on 30th May 2018 by Chemitei, J. in Kitale High Court Civil Appeal No. 18 of 2017. In the said judgment, the learned judge dismissed the appellants' appeal against the judgment rendered by the Principal Magistrate's Court at Kitale in PMCC Case No. 339 of 2015 on 29th May, 2017. Before the trial court, the respondent had sued the appellants seeking recovery of general and special damages arising from fatal injuries sustained by the late Brian Khisa Wanyama (deceased) in a road traffic accident which occurred on 12th December 2014 along Eldoret /Kitale road. The respondent's claim was that the 2nd appellant negligently drove the 1st appellant's motor vehicle registration No. KBV 962P as a consequent of which he hit the deceased fatally, injuring him. The respondent instituted the said proceedings in his capacity as the deceased's legal representative claiming recovery of special damages of Kshs.193,000/=, damages under both the *Fatal Accidents Act* and the *Law Reform Act*, costs of the suit and interests.

2. Before the trial court, the parties recorded a consent on liability at 85% as against the appellants and 15% as against the respondent and the suit proceeded for hearing only for determination of the issue

of damages. In a judgement dated 29th May 2017, the learned magistrate awarded damages to the respondent as follows:

a) Pain and suffering

- Kshs. 60,000.

b) Loss of life expectation

- Kshs. 200,000.

c. Loss of dependancy (future) -Kshs.2,160,000.

d. Special damages - Kshs. 183,625. Total - Kshs.2,603,625.

Less 15% contribution - Kshs. 390,000.

Balance - Kshs.2,213,081.

3. Dissatisfied by the said award, the appellants appealed to the High Court vide memorandum of appeal dated 9th June 2017. However, the High Court (Chemitei, J.) in the impugned judgment dated 30th May 2018, upheld the said award and dismissed the appellants' appeal. In arriving at the said decision, the learned judge noted that the deceased's age and his situation in life at the time of his death was not disputed and that the trial court based its findings on the retirement age of 60 years and a minimum salary of 9,000/= which was reasonable and that awards were not excessive.

4. In this appeal, the appellants seek to overturn the said finding. In their memorandum of appeal dated 2nd October, 2019, the appellants fault the learned judge for: (a) adopting the wrong principles in assessment of damages thereby arriving at an erroneous decision; (b) awarding damages under the *Fatal Accidents Act* without taking into consideration that the only damages awardable were under the *Law Reform Act*; (c) failing to hold that damages under the Fatal Accident Act were not awardable in view of the circumstances and the evidence on record; (d) adopting a dependency ratio of 2/3 when no evidence was adduced in support of the same; (e) adopting a multiplicand of Kshs.9,000/= which was not supported by evidence; (f) adopting a multiplier of 30 years contrary to the evidence on record and principles of law; and (g) awarding a sum of Kshs.60,000/= for pain and suffering which was excessive.

5. During the virtual hearing of the appeal on 12th March 2024, Ms. Were appeared for the appellants, while Mr. Onyancha appeared for the respondent. Both parties relied on their respective written submissions dated 10th July 2020 and 27th April 2020.

6. In her submissions in support of the appeal, M/s Were's argument was primarily twofold; one, whether the damages awarded under the *Fatal Accidents Act* were payable, and, two, whether the award of Kshs.60,000 for pain and suffering is reasonable. From the grounds of appeal and counsel's submissions, the appellants do not seem to be questioning the awards for loss of life expectation and the special damages.

7. It was M/s Were's submission that dependency is a matter of fact which must be proved by evidence. In support of this proposition, counsel cited this Court's decision in Gerald Mbale Mwea vs. Kariko & Ano. [1997] eKLR and maintained that dependency was not proved because the deceased was a form two student aged 18 years and in absence of proof of income or how he supported his parents, the award for loss of dependency under the *Fatal Accidents Act* was wrongfully awarded. For authority counsel cited James Mukolo Elisha & Another vs. Thomas Martin Kibisu [2014] eKLR where this Court upheld the High Court decision declining to award damages for loss of dependency under the *Fatal Accidents Act* for lack of evidence in support of the deceased's earning.

8. Counsel contended that the application of the 2/3 as the dependency ratio was not based on any discernible evidence on record and the inevitable conclusion is that, the learned judge did not analyse the evidence afresh to come up with his own conclusions. Counsel also submitted that the learned judge adopted a multiplicand of Kshs.9,000/= as the minimum wage of a casual laborer without making reference to any gazetted regulation(s) on the minimum wage as at the time of the deceased's demise.

9. Lastly M/s. Were submitted that since the deceased died shortly after the accident, the sum of Kshs.60,000/= adopted by the learned judge was excessive in the circumstances and urged this Court to substitute it with an award of Kshs.10,000/=.

10. On behalf of the respondent, Mr. Onyancha submitted that the appellants never challenged the claim in respect of pain and suffering before the High Court, therefore, they are precluded from raising the same before this Court. Nevertheless, counsel maintained that the deceased did not die instantly since he was taken to Cherangany Nursing Home Hospital where he died while undergoing treatment.

11. On loss of dependency, counsel contended that the respondent's evidence before the lower court was that the deceased used to help him farm on his 5 acre piece of land and under Sections 3 and 4 (1) of the *Fatal Accidents Act*, the respondent as a parent was lawfully entitled to the said award.

12. Regarding the Kshs.9,000/= multiplicand and the 30 years multiplier, counsel submitted that there is evidence on record that the deceased aspired to be either a teacher, a farmer or a mechanic, and that on average, he used to score "C" grade, therefore the learned magistrate used the correct multiplier.

13. This Court's jurisdiction in a second appeal is confined to questions of law only, unless it is demonstrated that the courts below in determining matters of fact failed to take into account relevant considerations or took into account irrelevant considerations, or the decision is perverse. Additionally, Section 72 (1) of the *Civil Procedure Act*, restricts this Court to consideration of matters of law only. (See Kenya Breweries Ltd vs. Godfrey Odoyo, [2010] eKLR.

14. The key issues in this appeal as we discern them from the grounds of appeal and the appellants' counsel's submissions are twofold; one, whether the damages under the *Fatal Accidents Act* were properly awarded, and, whether the award of Kshs.60,000/= for pain and suffering was justifiable.

15. As a general principle, assessment of damages lies in the discretion of the trial court. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or failed to take into account relevant factors or, short of this, the amount awarded is inordinately low or inordinately high, that it must be a wholly erroneous estimate of the damages. (See Kemfro Africa Ltd t/a Meru Express & Another vs. A. M. Lubia and Ano. [1982-88] 1 KAR 727, Peter M. Kariuki vs. Attorney General [2014] eKLR and Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5 and Catholic Diocese of Kisumu vs. Sophia Achieng Tete [2004] 2 KLR 55).

16. The appellants' contestation is that the deceased was an 18 year old form two student, he was not working and no evidence was adduced to support that he had income. The appellants also took issue with the manner in which the amount of Kshs.9,000/= was arrived at which was described as the minimum wage yet no official gazette notice was produced to support the said amount. As we deliberate on this issue, we find immense support in the words of Lord Wright in Davies vs. Powell Duffryn

Associated Collieries Limited [1942] 1 All ER, 657, a decision regarded as the pointer to the practical way in which assessment of damages should be ascertained. The learned law Lord stated:

> " ... The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a 'datum' or 'basic' figure which will generally be turned into a lump sum by taking a certain 'number of years purchase'. That sum, however, has to be tasked down by having due regard to the uncertainties," (Emphasis added).

17. Some of the uncertainties Lord Wright alluded to are: (a) how long would the deceased have continued to live if he had not met this particular accident, (b) how much working life did he have? This second question brings into focus the deceased's state of health and age. Some of the uncertainties taken into account in rolling down the amount are: the deceased may not have been successful in business or employment. He might have been taken ill and become bedridden and thus incapable of earning an income. Where plaintiffs are young widows, the possibility of re-marriage in the shortest possible time. Lord Wright's rule, which has been applied in many jurisdictions is admirably summarized in Charlesworth on Negligence (3rd Edition), pp 560 & 561, para. 909 as follows:

> " Method of calculating damages: When the income of the deceased is derived from his own earnings, 'it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conducted to the benefit of the individual claiming compensation.' The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependants; (b) (i) to deduct there from such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or (ii) what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependents, and then; (c) to capitalize the difference between the sums (a) and (b) (i) or (b) (ii) (sometimes called the 'lump sum' or the 'basic figure') by multiplying it by a figure representing the proper 'number of years' purchase arrived at having regard to the deceased's expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependents and the probable duration of the continuance of the deceased's assistance to the dependents during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependents in consequence of the death."

18. We must underscore that the *Law Reform Act* and the *Fatal Accidents Act* address damages for wrongful death but with different focuses. The *Law Reform Act* allows the deceased's estate to claim damages for the deceased's pain and suffering between the time of injury and death, while the *Fatal Accidents Act* allows dependants of the deceased to claim for financial losses, including loss of dependency. Therefore, the *Law Reform Act* is for the estate of the deceased, while the *Fatal Accidents Act* is for the deceased's dependants, such as spouses, children, and parents. It is also important to emphasize that loss of dependency is a significant head of damage, quantifying the financial loss the dependants have experienced and will continue to experience in the future due to the deceased's death. The *Law Reform Act* covers the deceased's pain and suffering, loss of amenity, and pre-death financial losses.

19. In the exercise of its broad discretion in assessing damages, the court must bear in mind the principles of law governing the award of damages under both the *Fatal Accidents Act* and the Law Reform Act. The Court must also consider a broad spectrum of facts and circumstances of the case such as the

age of the deceased, his status in life, whether he was working, his or her income and whether he had dependants and the level of dependency, of course, bearing in mind that the legal process should yield an appropriate compensation which must be fair, reasonable and justifiable. However, this does not mean that the court is tied down by inevitable mathematical and statistical calculations. Conversely, the court has a wide discretion to award what it considers right and fair in the circumstances of the case. (See Holmes JA in Legal Assurance Co Ltd vs. Botes [1963] (1) SA 608 (A) at 614F).

20. One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". Determining quantum for general damages is certainly not an exact science. This is so because although 'the law attempts to repair the wrong done to a sufferer who has received personal injuries or death in an accident by compensating him in money, there are no scales by which pain and suffering or death can be measured, and there is no relationship between pain and money which makes it possible to express that one in terms of the other with any approach to certainty.

21. The question that begs for an answer is whether it was necessary for the respondents to prove that the deceased had some sort of income for the court to award damages for loss of dependency? In Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & 4 Others [1986] KLR 457, this Court acknowledged that in Kenya, children, regardless of their age, are expected to provide and indeed do provide for their parents whenever they are in a position to do so to the extent of their abilities. Also, this Court in Kenya Breweries Limited vs. Saro MSA CA Civil Appeal No. 144 of 1990 [1991] eKLR observed that:

> "We would respectfully agree with Mr. Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law."

22. In Roger Dainty vs. Mwinyi Omar Haji & Ano. [2004] eKLR this Court held that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life. However, the Court held that if the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is not a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.

23. The High Court in Moses Mairua Muchiri vs. Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, (Ngaah, J.) had the following to say:

> "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."

24. In Francis Odhiambo Nyunja & 2 Others vs. Josephine Malala Owinyi (Suing as the legal Administrator of the Estate of KOR (Deceased) [2020] eKLR, the deceased was aged 17 years and was in Form 3 in High School. Musyoka, J. found a global sum of Kshs.1,500,000/= as being sufficient

compensation. Similarly, in Muli & Ano. vs. Nzioka & Ano. (Suing as the Administrators of the Estate of the Late Michael Makau Nzioka) [2022] KEHC 224 (KLR) (17 March 2022) (Judgment), the deceased was also a 17 years old Form 4 student. Muigai, J. reduced a global award of Kshs.3,000,000/= under loss of dependency to Kshs.1,500,000/=.

25. Comparatively, in the UK, In Gammel vs. Wilson [1981] 1 ALL ER 578, Lord Scarman spoke of the assessment of damages in such circumstances; he said: -

> "The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases, it is a matter of evidence and a reasonable estimate based on it. (see page 593).

26. The deceased was aged 18 years at the time of his death. He was in Form 2 and he was an average student. The learned magistrate adopted a multiplicand of Kshs.9,000/= which is the minimum wage and a multiplier of 30 years. The appellants have questioned the basis for this award considering that no gazette notice was produced to support the said sum. Regarding the dependency ratio, the learned magistrate awarded a ratio of 2/3 and the reason for arriving at the said ratio was that the deceased would have taken 1/3 with him and his estate would have received 2/3. The issue under consideration now turns on whether the said holding was a misdirection on the part of the trial court and the 1st Appellate Court?

27. As we search for an answer to the above question, it is important to mention that court decisions under the *Law Reform Act* and *Fatal Accidents Act* emphasize the need for courts to consider the "vagaries of life" when calculating damages, particularly in cases involving loss of dependency or earning capacity. This means accounting for unforeseen events, changes in circumstances, and the potential for the deceased's or plaintiff's circumstances to improve or worsen over time or even death. Therefore, whether a court uses a "multiplier" to estimate future earnings, or a global award, it must always bear in mind factors such as the deceased's age, skills, and potential for advancement, while also considering the possibility that these factors might change to the worse, or even death.

28. Predicting someone's future earnings with absolute certainty is impossible. There are various factors that can affect earning potential, including health, employment opportunities, and economic

conditions. The "vagaries of life" concept recognizes these uncertainties. For example, a person might be promoted, lose their job, face an illness, or experience other life events that could alter their earnings. When calculating damages, courts must consider these potential changes and make reasonable assumptions about the future. In our view, the two courts below did not take into account the vagaries of life in considering both the multiplier and the multiplicand.

29. We have on our part considered the deceased age, that he was a student in Form Two, the vagaries and vicissitudes of life and the authorities cited above and we are persuaded that the multiplicand of Kshs.9,000/=, which is essentially an issue of fact, which must be proved, was not supported by evidence and it ignored the vicissitudes of life. Further, the multiplier of 30 years ignored the vagaries of life. Guided by the earlier cited decisions in which the trial courts awarded a global sum for comparable ages, we are persuaded that a global sum is the justifiable way to go in the circumstances of this case. Accordingly, for the reasons stated above, we set aside the award of Kshs.2,160,000/= for loss of dependency and substitute it with a global sum of Kshs.1,600,000/=.

30. Regarding the award of Kshs.60,000/= under the head of pain and suffering, the learned trial magistrate held that Kshs.10,000/= as suggested by the appellants was on the lower side and awarded the respondent Kshs.60,000/=. The deceased died in the hospital some few hours after the accident. The first appellate court upheld this award. The *Law Reform Act* focuses on pain, suffering, loss of amenity, and special damages incurred by the deceased before death, that is, claims falling under the period between the injury and the death. We see no reason to interfere with the award of pain and suffering since there is nothing to suggest that the award is either inordinately too high or too low, or, that the learned Judge's exercise of discretion in affirming the said award was erroneous or palpably wrong.

31. As stated earlier, the appellants' counsel's argument was twofold, and no contestation was raised against the award of Kshs. 200,000/= for loss of life expectancy and the award of Kshs.183,000/= for special damages nor do we find any reason to fault the said awards.

32. The upshot of the foregoing findings is that this appeal partially succeeds to the extent stated above. Therefore, the final orders of this Court are:

    a. the award of Kshs.60,000/= for pain and suffering is hereby affirmed;

    b. the award of Kshs.200,000/= for loss of life expectation is also affirmed;

    c. the award of Kshs.2,160,000/= for loss of dependency is hereby set aside and substituted with a global sum of Kshs.1,600,000/=;

    d. the award of Kshs.183,000/= for special damages is hereby affirmed;

    e. the total sum herein awarded shall be subjected to 15% contribution on liability;

    f. the above sums shall attract interests at court rates from the date of the judgment of the trial court;

    g. the appellants shall bear 85% of the taxed or agreed costs of this appeal and the appeal before the High Court.

DATED AND DELIVERED AT NAKURU THIS 5TH DAY OF JUNE, 2025.

J. MATIVO

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JUDGE OF APPEAL

G. MWANIKI CIArb, FCIArb.

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR