County Government of Tana River & another v Ngombo (Suing as legal representative of the Estate of Anthony Iha Robert - Deceased) (Civil Appeal E102 of 2023) [2025] KEHC 736 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL E102 OF 2023

M THANDE, J

JANUARY 31, 2025

BETWEEN

COUNTY GOVERNMENT OF TANA RIVER ..... 1ST APPELLANT

OMAR SHEE ..... 2ND APPELLANT

AND

GLADYS HARUSI NGOMBO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ANTHONY IHA ROBERT - DECEASED) ..... RESPONDENT

(An Appeal from the Judgment of Hon. James Ong'ondo, SPM delivered on 21.6.23 in Malindi CM Civil Case No. E347 of 2022)

JUDGMENT

1. The Appeal herein arises from the judgment delivered in Malindi CM Civil Case No. E347 of 2022, instituted by the Respondent herein as legal representatives of the estate of Anthony Iha Robert (the deceased) by way of a plaint dated 14.11.22 against the Appellants, under the *Fatal Accidents Act* and the *Law Reform Act* on their own behalf and on behalf of the deceased's dependents. The Respondent claimed both general and special damages arising from a road traffic accident. The Respondent's case is that on 20.3.22, the deceased was lawfully riding motorcycle registration number KMFX 013X along Lamu-Malindi Road, at Kanagoni area, when the 2nd Appellant so negligently drove, managed and/or controlled motor vehicle registration number 04CG061A that he caused the same to hit knock the said motorcycle. As a result, the deceased sustained fatal injuries.

2. The Appellants opposed the plaint vide a statement of defence dated 28.11.22 in which they denied the allegations by the respondent.

3. The matter proceeded to hearing and the trial court entered judgment in favour of the Respondent as follows:

> Liability against the Appellants 100 per cent
>
> Pain and suffering Kshs. 50,000/=
>
> Loss of expectation of life Kshs. 300,000/=
>
> Loss of dependency Kshs. 2,595,168/=
>
> Funeral expenses Kshs. 97,395/=
>
> Special damages Kshs. 36,550/=
>
> Total Kshs. 3,079,113/=
>
> Costs and interest at court rates.

4. Being aggrieved, the Appellant preferred the Appeal herein, the summarized grounds of which are that the learned Magistrate erred in fact and in law by:

    1. Ignoring the principles for the award of general damages as well as the relevant authorities and applying a multiplicand of 2/3 instead of 1/3, despite the deceased being survived by 5 adults thereby arriving at an inordinately high award.

    2. Applying the wrong principles when assessing and awarding damages for loss of expectation of life under the *Law Reform Act*.

    3. Failing to judicially and adequately evaluate the evidence and exhibits tendered on general damages thereby arriving at a decision unsustainable in law.

5. The Appellants prayed that the appeal be allowed and that the judgment of the trial Magistrate be set aside with costs.

6. The Court has re-examined the entire record and given due consideration to the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusion. However, the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

7. In their submissions, the Appellants asserted that the deceased was mostly to blame for the accident by contravening numerous traffic regulations. They thus urged that if any liability was to be found on them, it be apportioned on the ratio of 50:50. For the Respondent, it was submitted that the issue of liability was raised in submissions and cannot be sustained.

8. In their memorandum of appeal, the Appellants only challenged the decision of the trial court on the damages awarded. They did not indicate that they were aggrieved by the trial Magistrate's finding on liability. This issue was raised in submissions.

9. Our courts have time and again pronounced themselves on the issue of raising new matters in submissions. One such case is Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto [2018] eKLR, where the Court of Appeal stated:

> Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.

10. What the Court of Appeal said is that a court cannot entertain grounds of appeal other than those set out in the memorandum of appeal before it. It is quite clear that the Appellants have surreptitiously changed the nature of their case at the submissions stage by raising a new ground, namely liability, without leave of the Court. Accordingly, the Court declines to entertain the same.

11. On the award of general damages, the Appellants faulted the trial Magistrate for accepting without proof that the deceased was a boda boda operator and earned Kshs. 1,500/= per day. Further, that there was no evidence of how much he contributed to the family. The Appellant thus contended that the trial Magistrate erred in employing a multiplier approach, as opposed to a global sum approach. The Appellants further faulted the trial Magistrate for applying a 2/3 multiplicand instead of 1/3 under the *Fatal Accidents Act*. They asserted that this resulted in an award that was inordinately high, yet the deceased was survived by 5 adults who were no longer dependent on him.

12. From their submissions, the Appellants appear to be aggrieved only by the fact that the trial Magistrate did not award a global sum and further applied a multiplicand of 2/3 and not 1/3.

13. For the Respondent, it was submitted that the deceased's occupation was indicated as a boda boda rider in his death certificate. Further, that the witness statements produced in the trial court, the contents of which were unchallenged, indicated that the deceased was 20 years old and was a boda boda rider. The Respondent contended that having noted that the income of the deceased was not proved, the trial court applied a multiplicand of Kshs. 8,109/= as provided by the Minimum Wage Regulations (2022). On dependents, the Respondent submitted that the deceased left behind his parents and 5 siblings. Further that his mother testified that she was supported by the deceased while his father and eye witness testified that the deceased though single, used 2/3 of his earnings to support his family. It is thus the Respondent's contention that the trial Magistrate did not err in his decision.

14. In his judgment, the trial Magistrate rejected the Appellants' proposal of a global sum of Kshs. 500,000/=. He however accepted the Appellants' proposal of applying minimum wage, noting that there was no proof of the deceased's earnings. He also used a multiplier of 40 years given that the deceased was only 20 years old at the time of his demise. He further applied a ratio of 2/3 for loss of dependency and not 1/3 as proposed by the Appellants.

15. Section 2 of the Insurance Motor Vehicle Third Party Risks Amendment Act, 2013 defines earnings as follows:

> " earnings" means revenue gained from labour or services and includes the income or money or other form of payment that one receives from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage

under the *Labour Relations Act* (Cap. 233) or the determination of the reasonable income, whichever is higher;

16. It is not disputed that the deceased's earnings were not proved. However, there was sufficient evidence that he worked as a boda boda rider. The trial Magistrate adopted the multiplier approach and applied the minimum age as the multiplicand. I find no reason to interfere with the finding of the trial Magistrate in this regard.

17. The Appellants' contention is that the deceased was survived by 5 adults and therefore a multiplicand of 1/3 ought to have been used. Reliance was placed on the case of Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, where Ngaah, J. stated:

> 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.

18. The Court notes that the trial Magistrate did not indicate his reasons and reasoning for arriving at the ratio of 2/3. He did however observe that the deceased was barely 20 years old and adopted 40 years. Looking at the record, it can be seen that the deceased was survived by father and mother, 2 adult siblings and 3 minor siblings. In her statement, the Respondent stated that the demise of the deceased resulted in loss of means of livelihood for the beneficiaries. Further, in his statement, Mambo Kalu Changawa an eyewitness stated that the deceased catered for his mother's needs.

19. In Leonard O. Ekisa & another v Major K. Birgen [2005] eKLR, Dulu, J. cited Ringera, J. (as he then was) who in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported) stated:

> I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track.

20. In the present case, the deceased was 20 years old and was survived by his parents, 2 adult siblings and 3 minor siblings. Other than simply stating that the deceased supported his beneficiaries and his mother, the Respondent gave no further details in relation to this support. The trial Magistrate ought to have considered the possibility that the deceased would with time marry and have his own family. While it is the expectation of every parent within the African context that they will bring up their children who will grow up and assist them in old age, a claimant must provide sufficient material to assist the court in arriving at a reasonable ratio. In the premises, I agree that the application of a dependency ratio of 2/3 was not justifiable in the circumstances. I find that the reasonable ratio could not have been more than ½. Accordingly, the award for loss of dependency ought to have been as hereunder:

> 8109.90×40×12× ½ =1,946,376

21. The upshot is that the Appeal partially succeeds. The trial Magistrate's award on loss of dependency is set aside and the Court substitutes therefor, an award of Kshs. 1,946,376/=. All other awards remain unchanged. Each party shall bear own costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF JANUARY 2025.

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M. THANDE

JUDGE