



Oluoch v Nyalwal & Akhasinye (Suing Legal Representative to the Estate of John Odongo Munala – Deceased) ((Suing Legal Representative to the Estate of John Odongo Munala – Deceased)) (Civil Appeal E013 of 2023) [2025] KEHC 758 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEHC 758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E013 OF 2023
DK KEMEL, J
JANUARY 31, 2025**

BETWEEN

PAUL ALBERT GOL OLUOCH APPELLANT

AND

**WINNIE AUMA NYALWAL & LOICE AKHASINYE RESPONDENT
(SUING LEGAL REPRESENTATIVE TO THE ESTATE OF JOHN ODONGO
MUNALA – DECEASED)**

*(Being an appeal from the judgment of the Hon. Lester Simiyu
(SPM)) delivered on 17/5/2023 in Siaya Civil suit No. 83 of 2021)*

JUDGMENT

1. The Respondents filed a claim against the Appellant at the trial court under the [Fatal Accidents Act](#) and [Law Reform Act](#) claiming for both general and special damages as well as costs of the suit plus interest.
2. The parties entered into a consent judgment on liability at 75% to 25% in favour of the Respondent as against the Appellant.
3. On the aspect of quantum of damages, the trial court awarded as follows:
 - i. Loss of dependency under the Fatal Accident Act –
Ksh 1, 679, 904.4/=.
 - ii. For pain and suffering under the [Law Reform Act](#)- Kshs 50,000/=.
 - iii. For loss of expectation of life under the [Law Reform Act](#)-Kshs 100 000/=.
 - iv. Special damages- Kshs 550/=



Gross Award Kshs- 1,880,450/=

Less 25% contribution –Kshs 470,112.6

Net Award- Kshs 1, 410, 337.8 (One million Four Hundred and ten Thousand Three hundred and thirty-seven and eight cents).

- v. Costs and interest at courts rates.
4. Dissatisfied with the aforesaid judgement of the trial court on quantum, the Appellant has logged this appeal on the same on the following grounds:
- i. That the award of Kshs 100,000/= in respect of pain and suffering was inordinately high.
 - ii. That the multiplier applied was inordinately high.
 - iii. The trial magistrate erred in law and in fact in applying a multiplier of 29 years without considering the authorities referred to her.
 - iv. The trial magistrate erred in law and fact in failing to appreciate the principles governing the award of damages, namely that like cases attract similar awards and completely ignoring the Appellant’s submissions.

The Appellant thus prayed for orders inter alia; that the appeal be allowed and the judgment /decree set aside or otherwise varied; that the quantum of general damages under the heads of pain and suffering and under the loss of dependency be set aside, varied and or be substituted with suitable awards; that the costs of the appeal be borne by the Respondents.

5. Being a first appeal the court relies on a number of principles as set out in *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...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. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

6. It is therefore incumbent upon this court to relook, re-evaluate, reanalyze the evidence at the trial court and arrive at its independent verdict, bearing in mind that it did not see the witnesses first hand.
7. PW1 Loice Akhasinye testified that she is a resident of Ebasyekwe in W. Bunyore and that she is not employed. She adopted her witness statement as evidence in chief plus documents filed. She testified further that the deceased had one wife and four children and that he died at the age of 36 years. That on 6/9/2021 she was in church when she was informed of a road traffic accident. That she found her son beside the road. The motor vehicle was KBX 722L. That he was taken to Yala hospital and referred to Siaya hospital where he died on Sunday. That her family incurred burial expenses of Ksh 441,890/= . That she blamed the owner of the vehicle for the accident and she prayed for compensation.

On cross examination, she stated that her son was aged 36 years and that he left one wife and four children. That she had no receipts for the funeral expenses claimed. That the deceased died on the night of the accident. At that point, the Respondent’s case closed.

8. Mr. Karanja, advocate for the Appellant/Defendant closed the defense case with no defense witness having testified.



9. The appeal was canvassed by way of written submissions. Both parties duly complied.
10. The Appellant's submission are dated 20th May 2024. Learned counsel submitted in summary that the appeal is only against quantum specifically the use of multiplier of 29 years for a 36 year old deceased. He submitted further that the multiplier of 29 years was inordinately high for a deceased of 36 years. Reliance was placed on several cases including Vincent Sululu & Another Vs. Rose Wanjiku (2016) eKLR where the High court used a multiplier of 13 years for a deceased aged 41 years. On appeal, the Court of Appeal upheld the said multiplier. In conclusion, he submitted that the appeal be allowed and that the court replace the multiplier of 29 years with that of 17 years.
11. The Respondent filed their submissions dated 30th May 2024. In the said submissions, the Respondents contended that the appeal is defective since the Record of Appeal does not contain a copy of the Decree from which orders he is appealing. Secondly, it was submitted that assessment of quantum of damages is dependent on the court's discretion thus the same should not be interfered with. Reliance was placed on several cases including Mbondo Vs. County Government of Kilifi (2021) eKLR where it cited an older case of Mbogo & Another Vs. Shah (1968) EA. The Respondents sought for dismissal of the appeal with costs.
12. I have given due consideration to the record of the lower court and submissions and authorities filed by both parties and find the issues for determination as follows:
 - a. Whether the omission by the Appellant to file a certified copy of the decree is fatal?
 - b. Whether the award of damages on pain and suffering was excessive and whether the multiplier used by the trial magistrate was erroneous?
 - c. Who should bear the costs of the appeal?
13. On the first issue, it is my considered view that the issue of the decree is a pretrial issue. The Respondent was duly served with the said record of appeal and upon noticing that the decree was missing, it was upon them to object at that stage before setting down the appeal for hearing. Secondly, the decree is part of the court's record and the orders appealed against are explicitly in the court's record. Hence, I do not see any prejudice to be suffered by the Respondents regarding the missing copy of decree. The same does not affect the content of the appeal and therefore the same is not fatal to the appeal. In any case, the Respondents were at liberty during the pre-trial stage to have as well sought to be allowed to file a supplementary record which contains a copy of the said decree. The objection by the Respondents appear to be made rather late in the day. The dictates of article 159 (2) (d) of the [constitution](#) behooves on this court not to be arm strung by technicalities and to sacrifice justice at the altar of such technicalities. I am thus persuaded to ignore the said issue and proceed to determine the appeal on merit.
14. As regards the second issue, as a general rule most courts shy off from interfering with the award assessed by a trial court as that would be tantamount to interfering with that court's discretion. The Court of Appeal pronounced itself in this matter in the case of Denshire Muteti Wambua Vs. Kenya Power & Lighting Co. Ltd (2013) eKLR Nairobi CACA No. 60 of 2005 as follows:

...This court has in the past propounded on the principles to be applied while considering whether to interfere with damages awarded by the trial Court. In KEMFRO Africa Limited



t/a Meru Express Service Gathogo Kanini v. A.M.M Lubia and Another [1982 – 88] 1 KAR 777 at p.730, Kneller, J. A. held: -

“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 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. See *Ilango v. Manyoka* [1961] EA 705 709, 713; *Lukenya Ranching and Farming Co-operatives Society Lt Vs. Kavoloto* [1970] EA, 414 418, 419.”

15. The same Court of Appeal in its holding in *Arrow Car Limited –vs- Bimomo & 2 Others* (2004) 2 KLR 101 cited and applied the *KEMFRO Africa Ltd* case (supra) with regard to the principles to be considered before interfering with an award of damages by a trial Judge when it held:

“in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge, an appellate court must be satisfied 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 a wholly erroneous estimate of the damage.”

16. On the issue of multiplier, the Appellant cited the following cases among others:
- a. *Asha Mohamed vs. Kennedy Bindi Muriungi and Another* (2012) eKLR where the deceased was 34 years and a multiplier of 15 years was applied.
 - b. *Ruth Jemutai Kosgei v. Spencer Kipruto Kimali and Another* (2009) eKLR where the deceased was 34 years and a multiplier of 15 years applied.

In conclusion the Appellant suggested a multiplier of 17 years. The Respondent did not submit on the issue of Multiplier.

17. In *Constance Kanyorota Ngugi vs. Coast Bus Company Ltd and Another* HCCC No. 3344 of 1994 (Judgment delivered on 4/10/2000) where the deceased was 51 years. The court used a multiplier of 14.
18. *Rebecca Mwangi vs. Eastern Bus Service Ltd & another* HCCC No. 2750 of 1998 (Judgment delivered on 31st July, 2000) the deceased died at the age of 36 years. The court used a multiplier of 19.

It is noted that the deceased was 36 years at the time of his death and that he was a boda boda operator. It is not in dispute that such kind of business has high risks and therefore the issue of vagaries of life must be taken into account. Indeed, life expectancy in sub Saharan Africa is still low and that mortality rates are still high. Hence, the multiplier of 29 years adopted by the trial court was quite high as it meant that the deceased was to work up to the age of 65 years which is way beyond the retirement for civil servants in this country. I am persuaded to accept the proposed multiplier by counsel for the Appellant of 17 years which would place the retirement age of the deceased to be 53 years which is quite reasonable in the circumstances. Consequently, the learned trial magistrate’s order on the multiplier was erroneous and must thus be interfered with.

19. As regards the award on pain and suffering, it is noted that the trial court made an award of Kshs 100, 000/-. The accident is reported to have taken place on 13/3/2021 and that the deceased was taken to hospital where he stayed until 6/9/2021 when he succumbed to the injuries. Indeed, this was a long



period in which the deceased must have persevered a lot of excruciating pain for almost six months. The conventional awards under this head range between Kshs 10, 000/-Kshs 100,000/ or even more. I find the award by the trial magistrate was not inordinately high as to represent an erroneous estimate of the damages. I reject the Appellant's ground of appeal in that regard and proceed to uphold the trial court's award.

20. In view of the foregoing observations, it is my finding that the Appellant's appeal partially succeeds. The judgement of the trial court dated 17/5/2023 is set aside only to the extent that the multiplier of 29 years is substituted with 17 years. All other items shall remain undisturbed. The Appellant is awarded half costs of this appeal while the Respondent shall have full costs in the lower court.

DATED AND DELIVERED AT SIAYA THIS 31ST DAY OF JANUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

Karanya.....for Appellant

Kwach.....for Respondents

Ogendo...Court Assistant

