



REPUBLIC OF KENYA



**KENYA LAW**  
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**Attorney General & another v Wayongo (Suing as Personal Representative  
of the Estate of Phelisters Wamalwa Walubengo) (Civil Appeal  
E39 of 2022) [2025] KEHC 1298 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1298 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E39 OF 2022  
RPV WENDOH, J  
FEBRUARY 27, 2025**

**BETWEEN**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> APPELLANT**

**JUSTUS NZUKI MOTINGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DAVID MASINDE WAYONGO (SUING AS PERSONAL REPRESENTATIVE OF  
THE ESTATE OF PHELISTERS WAMALWA WALUBENGO) ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal by the Hon. Attorney General and Justus Nzuki Motingo (formerly Defendants) against the judgment of the Principal Magistrate dated 31/8/2022 in favour of the Respondent David Masinde Wayongo (suing as the personal representative of the Estate of Phelisters Wamalwa Walubengo (formerly plaintiff))
2. By a plaint dated 17/9/2019, the Respondent sued the appellants for general and special damages following a road accident that occurred on 25/2/2019 along Kitale-Cherangany Road involving GKB 716F Toyota Land Cruiser belonging to the Ministry of Internal Security and Interior Coordination and Motor Cycle Registration No. KMDC 879M Boxer.
3. The said accident resulted in the deceased sustaining fatal injuries. The Respondent blamed the occurrence of the accident on the 2<sup>nd</sup> Appellant, the driver/agent of the 1<sup>st</sup> appellant by driving the vehicle negligently and the particulars of the negligence are captured at paragraph 7 of the plaint.



4. The appellants filed a defence dated 5/11/2019 denying liability and in the alternative, the appellants pleaded that the owner of the motor cycle was wholly to blame for the occurrence of the accident. After hearing of the case, the court entered judgment for the Respondents as follows;

“The issue of liability had been settled in CMCC.363 OF 2019 at ratio of 50%: 50% as between the appellant and rider. Under the Law Reform Act for the benefit of the deceased’s estate,

1. Loss of expectation of life Kshs. 140,000.00

2. Pain and suffering Kshs.50,000.00

Under the Fatal Accidents Act for the benefit of the deceased’s family

3. Lost years Kshs. 7,930,160.00

4. Special damages 61,050.00

5. Loss of consortium 150,000.00

6. Funeral expenses 40,000.00

TOTAL – 4,185,605.00

Plus, half the costs of the suit.

5. The appellants are aggrieved by the whole Judgment but at glance at the grounds of appeal, they only challenge the award of damages. The sixteen (16) grounds of appeal were summed up by the appellants in three issues as follows; -

1. Whether or not the/an appellate court has power to interfere with an award of the trial court;

2. Whether or not the learned Magistrate misapplied the law and fact in awarding damages under the Law Reform Act and Fatal Accidents Act;

3. Whether or not the court can award damages that have not been pleaded.

6. The court directed that the appeal be canvassed by way of filing submissions and highlighting but after several mentions, only the appellants filed their submissions. The respondents did not.

7. This being a first appeal, this court has a duty to examine all the evidence tendered before the trial court, analyse it and arrive at its own conclusions. The court has, however, to bear in mind that it neither saw nor heard the witnesses testify. This principle was espoused in the case of *Selle –V- Associated Motor Boat Co., Ltd and others* 1968 EA 123 The court stated “This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 or heard the witnesses and should make due allowance in this respect”

8. The Respondents called only one witness in support of their case. PW1 David Masinde Wayongo adopted his written statement as evidence and testified that the deceased was his wife. Both were teachers and had three children but two died in the accident while one survived; that he was the bread winner but the deceased supported in caring for the family. He produced as exhibit’s P.Exh.1 to 13 some of which I will refer to later in this judgment.

The appellants did not call any witnesses.



9. Upon considering all the pleadings, the grounds of appeal and the appellants submissions, there is no dispute that a traffic accident occurred between motor vehicle GKB 716F driven by the 2<sup>nd</sup> appellant and motor cycle KMDC 879M Boxer on which the deceased was a pillion passenger. As earlier noted, though the appellant claim to be appealing the whole judgement, their grounds did not challenge liability and the Magistrate noted that the issue of liability had been settled in another case Kitale CMCC 362/2019. The only issue for consideration is therefore on award of damages.
10. Appellate courts over the years have held that they are slow to disturb awards by the trial courts because it is an exercise of discretion and not will interfere unless certain conditions are met. In *Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR, the Court of Appeal stated thus;
 

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”
11. In *Catholic Diocese of Kisumu v Tete* [2004] eKLR the court added to the earlier cited case the circumstances under which the appellate court can interfere in a trial court’s award on damages.
12. The court said “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 appellate 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 present an entirely erroneous estimate”.
13. See also *Kemfro Africa Ltd t/a Meru Express Services v A.M Lubia & another* [1987] eKLR 727 and *Robert Msioki Kutavi v Coastal Bottlers Ltd* [1985] eKLR.
14. Some of the principles that the courts will take into account when assessing quantum are
  1. That assessment of damages is a matter of exercise of discretion and it depends on the facts and circumstances of each case.
  2. Money as an award cannot review a physical frame that has been battered and shattered or a lost life. The award is only meant to give a party reasonable compensation.
  3. It is desirable that so far as possible, comparable injuries should be compensated by comparable awards.

See *H. West and Son Ltd v Sheffied* [1964] AC 326.
15. In *Charles Oriwo Odenyo v Appollo Justus Andambwa & another* (2017) e KLR the court set out the principles to guide the court in assessment of damages to include;
  1. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
  2. The award should be commensurate with the injuries sustained
  3. Previous awards in similar injuries sustained are mere guides but each case be treated on its own facts.



4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.
  5. The awards should not be inordinately low or high.
16. The court in considering the grounds of appeal will be guided by the above principles
  17. Whether the trial court applied wrong principles in awarding damages;

### **Pain and Suffering**

18. In awarding the above damages, the court takes into account the length of time the deceased endured pain before death. The appellant contended that an award of Kshs.50,000/= was on the higher side and relied on the following cases;
  1. Crown Bus Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa where an award of Kshs. 20,000/= was made.
  2. In Mercy Muiruki & Another v Samuel Mwangi Nduati & Another (suing as legal representative of Estate of Robert Mwangi) [2019] eKLR an award of Kshs. 10,000/= was made.
  3. James Gakinya Karienyne & Another (suing as legal representative of Estate of David Kelvin Gakinya (deceased) [2015] eKLR an award of Kshs.10,000/= was made.
19. I have considered the above decisions in comparison with the case of Coast Bus (Msa) Ltd v Fatimabhai Osman Suleiman & Another [2020] eKLR where the judge awarded Kshs. 50,000/= for pain and suffering;
20. In Cromwell Mzama Zablun Mwanyumba Lalu & Another [2022] eKLR, the court made an award of Kshs. 100,000/=
21. In Lyder Nthenya Musili & Another v China Wu Yi Ltd & another [2017] eKLR the court observed that awards for pain and suffering where the deceased died soon after the accident range from 10,000/= to 100,000/=
22. In Accelar Global Logistics v Gladys Nasambu Waswa & Another [2020] eKLR Judge Mativo upheld an award of Kshs. 50,000/= where the deceased died on the spot. Hon Majanja also upheld an award of Kshs. 50,000/=. In Sukari Industries Ltd v Clyde Machimbo Juma [2016] eKLR where the deceased died on the spot. In so doing the judge stated thus;
 

“..... It is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting, but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from 10,000/= to Kshs. 100,00/= over the last twenty (20) years hence I cannot say that the sum of Kshs.50,000/= awarded under this head is unreasonable”
23. In the instant case, the deceased died on the spot and from a consideration of the comparable decisions, Kshs. 50,000/= is not inordinately high or unreasonable. I decline to disturb that award.



## Loss of Expectation to life

24. These damages are awarded under the *Law Reform Act*. The appellant's contention is that the have been deducted from the award. Counsel submitted that the principle was buttressed by the court of appeal in Eliphas Mutegi Njeri & another v Stanley M Mwari M'atiri Civil Appeal no. 237 of 2004;
- “As regards the failure of the Superior Court to take into consideration the award under the *Fatal Accidents Act* when arriving at the award under the *Law Reform Act*, the principle is that the award under the *Fatal Accidents Act* has to be taken into account when considering awards under the *Law Reform Act*, for the simple reason that the dependents under the *Law Reform Act* are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the *Law Reform Act* states that the damages under this Act are in addition to those made under the *Fatal Accidents Act*, the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards..... Accordingly, the award of Kshs.890,000/= reduced by Kshs. 100,000/= to Kshs.790,000/=”.
25. Counsel also relied on the decision of Kioko Peter v Beatrice Keli Mbuvi (Suing as legal representative of Estate of Amos Mutunga (deceased) [2022] eKLR. The court stated “I have read the judgement of the learned trial magistrate and I agree that there was no indication that the court took into account the possibility of the double compensation.”
26. Reliance was also made on the decision of Transpares Kenya Ltd & Another –V- S M M (suing as legal representative of Estate of E M M (Deceased) 2015 e KLR which quoted the Court of Appeal In Kemfro Supra where the Court of Appeal stated “The net benefit will be inherited by the same dependents under the *Law Reform Act* and that must be taken into account in the damages awarded under the *Fatal Accidents Act* because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.
27. In Benedeta Wanjiku v Changwon Cheboi & Another HCC 373/2008, Judge Emukule held, “it is of course correct that both awards for loss of expectation of life and for pain and suffering go to the benefit of the deceased’s estate. The awards are therefore capped to a minimum so that the estate does not benefit twice from the same death vide the *Fatal Accidents Act* and the *Law Reform Act*” There is a host of other decisions which have held that the estate of deceased person should not benefit twice from the same death. See also Simeon Kiplimo Murey & 3 others –v- Kenya Bus Management Services Ltd & 4 others Court of Appeal no. 2 of 2013; David Kajogi M’Mugaa v Francis Muthomi Court of Appeal 118 of 2020; Francis Wainaina Kirungu (Sing as representative of Estate of John Karaja Wainana v Elijah Oketch Adellah [2015] eKLR
28. Guided by all the above authorities, I do agree with the appellants that an award of Kshs.140,000/= under the *Law Reform Act* should be deducted from the award and avoid double compensation to the dependents.

## Loss of Dependency

29. I agree with the appellant's submission that the formula for calculating dependency is the multiplicand which is the annual income, multiplied by a multiplier, that is the expected working life lost by the deceased due to premature death and lastly by the factor of dependency ratio that is the deceased's income which is utilized by his/her dependents. This was well articulated in the case of Peggy Prances Hayes and others v Chunibhai J. Patel and another as cited in Radhakrishen M. Khemaney



v Mrs Lachaba Muridhar [1958] E.A 268,269. The Court said “The court should find the age and expectation of working life of the deceased and consider the wages and expectations of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be lump sum the court should apportion among the various dependants.”

### **Multiplier.**

30. The appellants contend that the trial court’s finding that the deceased who died aged thirty-two (32) may have worked for twenty-eight (28) years to be erroneous considering the vicissitudes and vagaries of life; that the court should have been more realistic and that a multiplier of eighteen (18) years should have been adopted. Counsel relied on the case of Hannah Wangaturi Moche & Another v Nelson Muya MRR HCC 4533/1993 the court had “In determining the right multiplier, the right approach is to consider the age of the deceased; the balance of earning life; the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor of accelerated by payment of lumpsum”
31. In Bendeta’s case Supra; Judge Emukule said, “There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore these imponderables: The duty and province of the court is to apply the generally known period during or about which an employee in the deceased’s occupation of Farm Manager would remain in active work and retire. The period was acknowledged to be 64 years of age” .....
32. In Rev. Fr. Leonard Ekisa & Another v Mayor K. Birgen [2005] eKLR, Judge Dulu also held that a multiplier is determined by years of expectation of earning life of the deceased and dependency of the dependants. He went ahead to use a multiplier of sixteen (16) years where the deceased was forty-four (44) years at the time of death.
33. Counsel relied on the case of Crown Bus Ltd (supra) where the deceased was twenty-one (21) years and the court reduced multiplier from thirty-nine (39) to thirty-five (35) years.
34. Having considered all the above decisions, it is my view that the deceased having been thirty-two (32), a multiplier of twenty-eight years (28) years was not a wrong estimate as to require interference by this court. Being a teacher, she would have retired at sixty (60) years. Her dependants were her husband and a child aged seven (7) years. I find no good reason to disturb the award.

### **Multiplicand**

35. The deceased was a teacher. The multiplicand should be her earnings at the time of death.
36. A payslip for the month of February, 2019 was exhibited. The appellants are aggrieved by the trial magistrate applying a multiplicand of Kshs. 35,402.50. As per the payslip for February 2019, the Gross pay was 36,549.00. The net pay is, therefore, the above sum less statutory deductions being PAYE (4,146.50) and NHIF (950/=) Total 5,096.50/=. The net pay is therefore (36,549.00- 5,096.50) Kshs. 31,452.50



## Dependency ratio

37. As was held in Rev.Fr. Ekisa's cases (Supra) "dependency is matter of fact, it need not be proved by documentary evidence..... expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures."
38. The deceased left a young child aged seven years apart from the husband (PW1) aged thirty-six (36) years. Being a mother of the house, I believe she spent most of her earnings on her children and household. The fact that the deceased's husband was also a breadwinner does not lessen the deceased's responsibility to the family. I will uphold a dependency ratio of 2/3. Loss of dependency will be as follows;  $31,453 \times 28 \times \frac{2}{3} \times 12$ .

## Whether the court erred in awarding damages that were not pleaded.

39. It is the appellant's submission that the trial court erred by awarding damages for loss of consortium and funeral expenses when the same were not pleaded or proved. The appellants relied on the case of *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* (1992) KLR 177 where the court explained the kinds of damages and how they should be pleaded and proved.
40. The court stated as follows "The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be quantify exactly any particular item in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded"
41. As regards an award for loss of consortium the appellants contend that the trial court lacked jurisdiction to award the same. The appellants relied on the case of *Innocent Keti Makaya Denge –v- Peter Kipkore Chesere & another* (2015) eKLR where Judge Githua held as follows;- "with respect to the award of Kshs.150,000/= for loss of consortium. I entirely agree with the appellant that this award should be set aside in its entirety as it was not anchored on any law. There is no law that provides for an award of damages to the widower of a deceased person for loss of consortium. The *Law Reform Act* and the *Fatal Accidents Act* which are the two statutes which govern the award of damages in fatal accident claims recognize only three heads of general damages and loss of consortium is not one of them. These are damages for pain and suffering, damages for loss of expectation of life and damages for loss of dependency.
42. The court further observed that the claim for loss of consortium is subsumed in a claim for loss of amenities in an action filed by a survivor. Other courts have however been of a different view. In *Micah Nyolei & Stanley Kiplagat Milgo v Bonventure Antony Okumu & Another*, an award of Kshs.200,000/= was made on 22/7/2016 for loss of consortium by Judge Ngenye; in *P B S & Another –BV – Archdiocese of Nairobi Kenya Registered Trustees & 2 others* [2016] eKLR. Judge Aburili awarded Kshs.800,000/= for loss of consortium. The Court of Appeal in *Salvadore De Lucas v Abdullahi Hergedi Khalil & Another* [1994] e KLR said as follows; - "So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married to date, he had lost his wife's companionship. There is moreover, an impairment in the social life of the appellant and his young children who too, have lost, love, care, devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Kshs.40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full"



43. In *Ruth Chepngeno Mutai v Patrick Oloo & Another* Kericho H.C 85 of 2000 Judge Visram held “As a result of the death of the deceased the plaintiff lost a husband. She told this court that she had no intention to remarry. Taking into account the cited authorities and the circumstances of the plaintiff in particular, I award her Kshs. 100,000/= for loss of consortium”
44. Having considered the above decisions, I am persuaded that damages for loss of consortium can be awarded where the claimant lost a spouse. In this case, the respondent and child lost the love of the deceased, her care, companionship and support. He was only thirty six (36) years at the time. The Respondent is therefore entitled to damages for loss of consortium. The same had been pleaded in the plaint.
45. As for damages for funeral expenses, the same were not pleaded and cannot be awarded. The special damages of Kshs. 61,050/= that were awarded were not disputed.
46. In the end, the appeal partially succeeds and I give judgment in favour of the Respondent as follows
1. Loss of expectation of life Kshs. 140,000.00
  2. Pain and suffering 50,000.00
  3. Loss of dependency on lost years 7,045,472.00
  4. Loss of consortium 150,000.00
  5. Special damages 61,050.00  
7,446,522.00  
Less damages under *Law Reform Act* 140,000.00  
7,306,522.00  
Less 50% contribution 3,688,261.00  
Total = 3,688,261.00
  6. Costs and interest of the suit from the date of judgment till payment in full.
  7. Costs of the appeal be shared equally.

**DATED, SIGNED AND DELIVERED ON 27<sup>TH</sup> DAY OF FEBRUARY, 2025**

**HON. R. WENDOH – JUDGE.**

Judgement read virtually in the presence of

Appellant- No appearance

Respondent-Ms. Masinde

Juma/Hellen-Court Assistants

