



Ng'ang'a & 2 others (Suing as Legal Representatives of the Estate of Elijah Kivuva Mutua - Deceased) v Bunter Flora Limited & 2 others (Civil Appeal E008 & E011 of 2023 (Consolidated)) [2025] KEHC 5358 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E008 & E011 OF 2023 (CONSOLIDATED)**

JM NANG'EA, J

APRIL 29, 2025

BETWEEN

MARY MUTHOKI NG'ANG'A 1ST APPELLANT

MICHAEL KIVUVA MUTUA 2ND APPELLANT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF ELIJAH KIVUVA
MUTUA - DECEASED**

AND

BUNTER FLORA LIMITED RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E011 OF 2023**

BETWEEN

BUNTER FLORA LIMITED APPELLANT

AND

MARY MUTHOKI NG'ANG'A 1ST RESPONDENT

MICHAEL KIVUVA MUTUA 2ND RESPONDENT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF ELIJAH KIVUVA
MUTUA - DECEASED**

(Being an appeal from judgement and decree of the Honourable E. Kimaiyo Suter (PM) delivered on 8th December, 2022 in Mavoko Chief Magistrate's Court's Civil Suit No. E684 of 2021)



JUDGMENT

1. The consolidated Appeals herein arise from Judgment delivered on 8th December, 2022 in Mavoko CMCC No. E684 of 2021 instituted by the Appellants in Appeal No. E008 of 2023 (“the main Appellants”) against the Respondent therein seeking Special damages of Kshs 255,710, general damages, costs and interest following fatal injuries Michael Kivuva Mutua (“the deceased”) suffered in a road traffic accident involving the Respondent’s motor vehicle registration number KCZ 168 T that was allegedly carelessly driven. The Respondent filed defence traversing all the material claims in the suit including the claim of negligence.
2. The issue of liability for the claim was later compromised in the ratio of 80% to 20% in favour of the Appellants. By further consent, the Court admitted the parties’ respective witness statements and filed bundle of documents in evidence without having their makers take to the witness stand, and then invited learned Counsel for the parties to put in their written submissions for assessment of damages. Upon considering the material on record, the lower court rendered final judgement as follows;
 - a. Liability 80:20%
 - b. General damages for pain and suffering Kshs. 100,000
 - c. Loss of expectation of life Kshs 100,000
 - d. General damages for loss of dependency Kshs. 1,000,000
 - e. Total general damages Kshs. 1,200,000
 - f. Lest 20% contribution Kshs. 240,000
 - g. Net general damages Kshs. 960,000
 - h. Add special damages Kshs 213,650Total Kshs 1,173,650
3. By Memorandum of Appeal dated 11th January, 2023 the main Appellants preferred this Appeal on the following grounds:-
 - i. That the Learned Trial Magistrate erred in law and in fact by making an award of general damages under the Law Reform Act and the Fatal Accidents Act that was manifestly low in the circumstances.
 - ii. That the Learned Trial Magistrate erred in law and in fact by ignoring and /or failing to consider relevant material before her without proper reasons leading to inadequate general damages in the circumstances.
 - iii. That the Learned Trial Magistrate erred in law and in fact in coming to the conclusion that she did contrary to the evidence on record.
and
 - iv. That the Learned Trial Magistrate erred in law and in fact in considering extraneous matters while making her decision which was based on speculation and not supported by the evidence on record.



4. The Appellants therefore pray that the appeal be allowed; the award of damages under the *Fatal Accidents Act* and the *Law Reform Act* be set aside and substituted with a new assessment, and that they be granted the costs of the appeal.
5. The Respondent too (“the cross Appellant”) appealed the decision vide Machakos Civil Appeal No. E011 of 2023 on the grounds that:
 - i. The Learned Magistrate erred and misdirected herself in law, principle and fact when she misapprehended and misunderstood the applicable principles and the law in assessing quantum of damages, thereby arriving at an award that is so manifestly and inordinately high as to constitute an entirely erroneous estimate of the damages in the circumstances.
 - ii. The Learned Magistrate erred in fact and in Law in awarding the Respondents Ksh. 1,000,000/= damages under the Fatal Accident’s Act which award was too excessive in the circumstances.
 - iii. That the Learned Magistrate erred in law and in fact in failing to take cognizance of the fact that the deceased was aged 72 years, and in failing to consider vicissitudes of life in awarding damages under the *Fatal Accidents Act*.
 - iv. The Learned magistrate erred in law and in fact in failing to deduct the damages awarded under the *Law Reform Act* from the total award.
 - v. The Learned magistrate erred in law and in fact in failing to take cognizance of the fact that the Claimants did not proof dependency.
 - vi. The learned Magistrate erred in law and in fact in failing to accord due regard to the Appellant’s submissions and authorities in assessment of damages.
 - vii. That the Learned Magistrate erred in law and fact by arriving at a decision that was not based on the evidence on record, descended into the arena of litigation and thus erroneously apportioned liability against Appellant.
6. The cross appellant thus sought that the appeal be allowed with judgement of the Trial Court being set aside and the award of general damages being revised, as well as costs in both the Trial Court and on the appeals.
7. By consent entered on 11th July, 2024, it was ordered that assessment of damages in Appeal No. E008 of 2023 would also apply in Machakos HCCA No E011 of 2023. The two appeals were thus consolidated and were directed to be canvassed by written submissions.

Main Appellants’ submissions

8. It was submitted that the award made was manifestly low and the Learned Magistrate failed to consider the current inflation rate, reliance being placed on the case of Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased) v Dubai Superhardware [2021] eKLR.
9. As regards damages under the *Fatal Accidents Act*, it was submitted that the Trial Court failed to consider the age of the deceased and the usual vicissitudes of life that could affect one’s lifetime. The court is also faulted for failing to note that a large portion of the deceased’s earnings went to the maintenance of his dependants and consider the factor in enhancing damages for loss of dependency.
10. The Learned Magistrate is further said to have erred in placing the standard of proof of income too high, and further failed to consider evidence of earnings provided. Reliance was placed in Muthike



Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) vs Dubai Superhardware [2021] eKLR and David Kimathi Kaburu vs Gerald Mworobia Murungi (Suing as legal representative of the estate of James Mwenda Mworobia (deceased) [2004] eKLR to submit that proof of income is not always by production of documents.

11. According to the main Appellants, a dependency ratio of 2/3 would be fair. A multiplier of 10 years and a multiplicand of Kshs 100,000 per month are further proposed.
12. Regarding damages under the *Law Reform Act*, the main Appellants propose Kshs 200,000 for loss of expectation of life and placed reliance on the case of Moses Akumba & another vs Hellen Karisa Thoya [2017] eKLR. With respect to the claim for pain and suffering, they also urge and award of Kshs. 200,000 based on the injuries the deceased sustained and place reliance inter alia on Beatrice Mukulu Kang'uta & Another vs Silverstone Quarry Limited & Another [2016] eKLR and Catherine Mwendwa Mwirigi vs Lucy Nkoyai Karwamba (Suing as he legal administrator of the estate of Derrick Mugambi Mwimbi (Deceased) [2019] eKLR
13. Finally, it was submitted that the Trial Court was well guided in failing to deduct the damages under the *law Reform Act* from the total award as they are not to be deducted but only need to be taken in to account as required in law.

Cross Appellant's submissions

14. Counsel reiterate that the award by the Trial Court was manifestly high. It is argued that loss of dependency constitutes the multiplicand, dependency ratio and multiplier as was outlined in Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representatives of the Estate of Stephen Sinange alias Sinange (Deceased) [2022] eKLR.
15. As regards proof of income, the cross Appellant contends that there was no evidence of existence of the supplies business that the deceased is said to have been engaged in during his lifetime or the monthly income claimed. No evidence of earnings as by means of bank statements were also provided. The cross Appellant therefore opines that the lower Court rightly adopted a global/ lump sum award in the absence of credible proof of earnings. Reliance was placed on Frankline Kimathi Maariu & Another vs Phillip Akungu Mitu Mborothi (Suing as Administrator and Personal Representative of Anthony Mwiti Gakungu (Deceased) [2020] eKLR where the Court opined that;-

“ where there is no salary proved or employment the Court should be wary in subscribing to a figure so as to come up with a probable sum to be used as the multiplicand.”
16. The Respondent contended that the deceased at 72 was beyond retirement age and if he had any income, it must have been meager. It is suggested that if the Court is inclined to award the deceased's dependants for loss of dependency, then the Basic Minimum Wage of Kshs. 8,109 for a general worker under the relevant Minimum Wage Regulations may be adopted as the multiplicand.
17. As regards the applicable multiplier, the cross Respondent proposed 5 years guided by the Court of Appeal decision in Susan Bondo & Zedekiah Bondo (Suing as the Administrators and Dependants of Walter Bondo Obeto (Deceased) vs Zacharia Nambane Mwita [2015] eKLR. A dependency ratio of 2/3 is suggested since the deceased was married and had children.
18. The cross Appellant therefore thinks that the trial Court did err in making a global award that was too high and instead proposes a sum of Kshs. 400,000. The Respondent also relied on Awale Trasporters Limited vs Dorcas Wamaitha Maina & Another [2021] eKLR for an award of Kshs. 10,000 for pain and suffering since the deceased died 4 hours after the accident.



19. The cross Appellant also raised the issue of double compensation and opines that the award under the Law Reform Act ought to have been deducted from the final figure since the beneficiaries under both Statutes in question are the same.

Analysis and determination

20. The Appeals are only on the quantum of damages as liability was settled by consent. The duty of this Court as a first Appellate Court is to evaluate the evidence adduced before the Trial Court afresh in order to arrive at its own independent conclusion on both matters of fact and law (See *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123). The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:

- “i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

Damages and the Fatal Accidents Act

21. Section 4 of the Fatal Accidents Act covers claims of loss of dependency and it provides thus:-

“Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgement, shall find and direct...”

22. In the case of *Njoroge (Suing as the Legal Administrator of the Estate of Francis Karanja Wainaina - Deceased) vs Ponderosa Logistic Ltd* [2024] KEHC 1606 (KLR) my brother Mohochi J. stated:-

“[31]When claiming under this head the Court considers the nature of employment, circumstances, terms and evidence produced in support of allegation of employment. If the deceased was employed and his salary is not determined, his income may be determined by reference to the government wage guidelines issued from time to time. Where the nature of employment is not clear, the Court exercises its jurisdiction and awards a global lump sum...”

23. There is no dispute that the deceased was survived by two children and the widow. The Chief’s letter tendered in evidence corroborates that information. On the evidence, the deceased was a businessman engaged in the supply business trading as KIMCO Agencies and Marley Merchants (Kenya) purportedly earning an average of Kshs 100,000 per month.



24. Contrary to what is alleged by the cross Appellant, the Appellants provided Certificates of Registration of the two businesses in the name of the deceased. Proof of income therefrom was demonstrated by the following supporting documents;
- a. KIMCO Agencies Invoice dated 12th August, 2019 of Kshs.200,000/=
 - b. Local Purchase Order dated 15th August, 2019 of Kshs.200,000/=
 - c. Local Purchase Order dated 28th February, 2020 of Kshs.225,000/= and,
 - d. KMTC Local Procurement Order dated 27th November, 2013 of Kshs.1,053, 164/=
25. The above documentary exhibits do not show the actual earnings from the businesses but only appear to indicate contracts the deceased purportedly procured through the firms.
26. Koome J. (as she then was) in the case of *Albert Odawa vs Gichimu Gichenji* [2007] KEHC 1358 (KLR) with approval cited the case of *Mwanzia vs Ngalali Mutua Vs Kenya Bus Services (Msa) Ltd & Another where Ringera J (Rtd) (as he then was)* expressed himself thus;
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency - are knowable with undue speculation where that is not possible. To insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice must never do”.
27. Using the Minimum Wage Regulations as proposed by the cross Appellant may be preferable in the circumstances. So is the global sum method since the multiplier approach is not the only formula for assessing such damages.
28. To accept the sum of Ksh. 100,000 proposed by the main Appellants would in the premises amount to invitation to the court to engage in speculation as to what were the approximate earnings of the deceased from the stated business ventures.
29. In *Frankline Kimathi Mbariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased* [2020] KEHC 5897 (KLR) the Court stated:
- “ [20] I am aware of the decisions of the Court of Appeal to the effect that evidence of income is not to be proved only by documentary evidence. However, in the circumstances of this case, the evidence produced is not convincing. This is so considering that; the respondent is said to be a director with Gakunju Company Limited where the deceased was allegedly employed. He had access to all the records of that company including and not limited to, the deceased’s letter of employment, payment records of the deceased amongst others. He decided to withhold them from the Court.
- (23) In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum



approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

(24) The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

30. This court accordingly approves the lower court’s decision to employ the global sum/ lump sum approach in assessing the main Appellants’ loss of dependency under the *Fatal Accidents Act*.
31. In assessing whether the amount of Kshs. 1,000, 000 was in inordinately high or low, I have perused the authorities that guided the Trial Court;
- a. In Moses Maina Waweru vs Esther Wanjiru Githae (Suing as the legal representatives of the estate of the late David Githae Kiririo Taiti [2022] eKLR a business man aged 68 years was awarded a lump sum of Kshs 800,000.
 - b. In John Wamae & 2 Others vs Jane Kituku Nziva & Another [2017] eKLR a 61- year old was awarded Kshs. 400,000.
 - c. In China Civil Engineering & Another vs Mwanyoha Kazungu Mweni & another [2019] eKLR Nyakundi J awarded the dependants of deceased person aged 79 Kshs. 700,000 in December of 2019.
32. I wish to sample more recent decisions as hereunder;
- a. In Kimaiyo vs Nyakweba (Suing as the legal representative of the Estate of the deceased Seline Kerubo Nyakweba) [2022] KEHC 15488 (KLR) Aburili J upheld an award of Kshs 700,000 thousand that had been awarded by the Trial Court in 2018 to the dependants of an 80 years old deceased person.
 - b. In Haroon Yuasa Limited & another v Mbeneka & another (Suing as the legal representatives of the Estate of Benard Nzau Muia - Deceased) [2023] KEHC 21265 Muigai J upheld and award of Ksh 1,200,000 granted by the trial Court in the year 2019.
 - c. In Awale Transporters Ltd Mombasa v Wakhungu & another (Suing as Legal Representatives of the Estate of Alfred Sabwami Namasambu - Deceased) [2024] KEHC 2680 (KLR) 61-year-old retired teacher engaged a global sum of Kshs 800,000/- was granted in favour of the dependants of a 61- year old deceased person.
33. In the premises and considering the trend in the authorities alluded to above, I find no basis on which to disturb the discretion of the Lower Court in awarding Kshs. 1,000,000 for loss of dependency.

Damages under the *Law Reform Act*. Pain and suffering

34. The Post Mortem report dated 4th March, 2021 indicates the deceased’s time of death as 0000 hours on 3rd March, 2021. The Police Abstract dated 26th March, 2021 shows the time of accident as 9.00 pm on the 2nd of March 2021. The deceased therefore died after approximately 4 hours of occurrence of the accident in question.
35. In Catherine Mwendwa Mwirigi vs Lucy Nkoyai Karwamba (Suing as he legal administrator of the estate of Derrick Mugambi Mwimbi- Deceased) [2019] eKLR Kshs. 100,000 was assessed for pain and suffering , the deceased having passed on a day after injury.



36. Majanja J in *Sukari Industries Limited v Clyde Machimbo Juma Homa Bay* [2016] eKLR observed that:

“SUBPARA (5)

..... 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 Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”

37. The proposal by the cross Appellant of Kshs 10,000 is unreasonable given that the deceased suffered four hours of pain before succumbing to his injuries.

38. Again I find no plausible reason to interfere with the Trial Court’s award under this head.

Loss of expectation of life

39. According to the tendered death certificate dated 18th May, 2021, the deceased died at the age of 72 years. There was no evidence tabled before the Court to suggest that the deceased may have suffered from any ill health .

40. In *West Kenya Sugar Co. Limited v Philip Sumba Julaya* (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR it was observed that-

“The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

41. The judicial authorities relied on by the Trial Court to reach the ward on this head are comparable to the instant matter. The amount awarded of Kshs. 100,000 is thus reasonable and will stand.

Whether or not to deduct the award under the Law Reform Act.

42. The cross Appellant argues that the award under the Law Reform Act ought to be deducted from the final figure, contending that awarding the Main Appellants under both the Law Reform Act and the Fatal Accidents Act amounts to double compensation.

43. Guidance in this regard is drawn from the Court of Appeal’s decision in the case of *Hellen Waruguru Waweru* (suing as the legal representative of Peter Waweru Mwenja (deceased) vs *Kiarie Shoe Stores Limited* [2015] eKLR, where the Court did indeed provide clarity to the confusion on the awards under the two Acts .The Court stated:-

“[20] This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the



deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under Law Reform Act, hence the issue of duplication does not arise.

(21) The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

“6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

44. Given the above explanation by the Court of Appeal which this Court and the Trial Court are bound by, it is clear that the Trial Court was not legally obliged to deduct the award under the Law Reform Act from the award for loss of dependency. The court's judgment in this regard is not to be faulted.

Special damages

45. The Appellant pleaded Funeral expenses of Kshs 243, 420; cost of obtaining the Death certificate of Kshs.140; Cost of obtaining records of ownership of the accident vehicle in the sum of Kshs 550; legal costs of procuring Grant of Letters of Administration of Kshs 1,600 and witness expenses of Kshs. 10,000, totaling Kshs. 255,710. The Trial Court awarded a total of Kshs. 213,650. The main Appellants sought to be awarded Kshs 245,710 less the witness expenses since they did not testify.



46. From the evidence in the list of documents tendered in evidence, the expenses that were satisfactorily proven were those in respect of records of ownership of the accident vehicle (Kshs 550) and Funeral expenses of Kshs. 213,100, totaling Kshs. 213,650. The sum was rightly assessed and awarded. Besides, there seems to be no appeal on special damages in the consolidated appeals.

Final Determination

47. The upshot is that the consolidated appeals, being Machakos HCA NO. E008 OF 2023 and Machakos HCA NO. E011 OF 2023, lack merit and are accordingly dismissed. The parties shall bear their own costs of the Appeals.

JUDGEMENT DELIVERED VIRTUALLY THIS 29TH DAY OF APRIL 2025 IN THE PRESENCE OF;

J. M. NANG'EA,

JUDGE.

Mr Ngure Advocate for the main Appellants.

Ms Mwangangi Advocate for the cross Appellant.

