



REPUBLIC OF KENYA



**Onsoti (Suing as Legal Administrator of the Estate of the Late Leah Moraa Onsoti) v
Wambui (Civil Appeal E013 of 2022) [2025] KEHC 7621 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E013 OF 2022
CM KARIUKI, J
MAY 28, 2025**

BETWEEN

**CHARLES ONSONGERA ONSOTI (SUING AS LEGAL ADMINISTRATOR OF
THE ESTATE OF THE LATE LEAH MORAA ONSOTI) APPELLANT**

AND

JOHN W WAMBUI RESPONDENT

*(Being an appeal from the judgment of Hon. Sisenda (R. M.)
delivered on 24/10/2022 in Narok CMCC NO. 5 OF 2020)*

JUDGMENT

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No.5 of 2020, delivered on 24/10/2022, in which the trial court made awards as follows: -
 - i. Liability 75% against the defendant's
 - ii. loss of dependency Kshs. 600,000/=
 - iii. loss of expectation of life Kshs. 100,000/=
 - iv. Pain and suffering Kshs 30,000/=
 - v. Special damages Kshs. 150,460/=
 - TOTAL Kshs. 880,460/=
 - vi. Less 25% Kshs. 220,115/=
 - vii. 75% Kshs. 660,345/=
 - Net Total Kshs. 660,345/=



plus costs and interest at court rates.

2. The Appellant, aggrieved with the decision, filed a memorandum of appeal dated 23/11/2022. He cited four grounds of appeal as follows;
 1. The learned trial magistrate erred in law by apportioning liability in the ratio of 75:25, as the trial court had not been properly requested by the parties to adopt such an apportionment. In disregard of the submissions of the parties and notwithstanding that no such apportionment of liability had been adopted as an order of the Court as at the time of the entry of judgment.
 2. The learned trial magistrate failed to reasonably consider case law cited in the Appellant's submissions on damages for guidance.
 3. The learned trial magistrate misdirected themselves and took into account irrelevant factors in assessing damages payable under the head of loss of dependency.
 4. Damages awarded by the trial court are manifestly too low to constitute a miscarriage of justice.
3. The respondent filed a notice of preliminary objection dated April 19, 2024. The respondent raised the following grounds;
 1. This Court lacks jurisdiction to entertain this appeal on liability, as it relates to a consent recorded by the parties before the trial court on the issue of liability.
 2. Section 67 (2) of the *Civil Procedure Act* expressly and in mandatory terms prohibits appeals from an original decree passed by the Court with the consent of the parties. The trial court's judgment on liability forms part of the original decree passed by the Court with the consent of the parties.
 3. This appeal should be limited to grounds 2, 3, and 4 of the Memorandum of Appeal on the quantum of damages only, and submissions should be made by the parties limited to the three grounds of appeal touching on the quantum of damages.

Directions of the Court.

4. The preliminary objection and appeal were addressed through written submissions.

The Appellant's Submissions.

5. The Appellant submitted that the trial court erred in law and, in fact, by referring to the alleged consent, which was never formally adopted as a court Order. The alleged consent by the respondent was neither adopted by the parties nor formally adopted by the trial court as the Court Order of this honorable Court; thus, the alleged consent cannot be deemed a decree of this honorable Court. The Appellant relied on Sanyo *& 3 others v Attorney-General (Petition 7 of 2019)* [2020] KESC 62 (KLR) (January 10, 2020) (Judgment) Geoffrey M. Asanyo & 3 others v Attorney-General [2020] eKLR Neutral citation: [2020] KESC 62 (KLR), and Section 67(2) of the *Civil Procedure Act*.
6. The Appellant submitted that, as a fare-paying passenger, she had no way of contributing to the occurrence of the accident. The Appellant further contends that the respondent is to be held 100% liable for the occurrence of the accident, as per the submissions made before the trial court. The respondent admitted liability at 100% as it was held in Narok MCCC No. 91 of 2019, a suit arising from the same accident and involving the same respondent who caused the accident; the respondent was held 100% liable for the accident.



7. The Appellant submitted that the trial magistrate erred in law in her assessment of damages for loss of dependency by basing her reasoning on the issue that the Appellant did not produce any report cards or school progress reports for the minor. The Appellant urged this Court to reassess and enhance the damages for loss of dependency. The Appellant proposed a global award of Kshs. One million five hundred thousand would reasonably compensate the Appellant for their loss of dependency. The Appellant relied on the case of Catholic Diocese of Kisumu vs. Sophia Achieng Tete, Civil Appeal No. 284 of 2001[2004] 2 KLR 55, Kwamboka Grace vs. Mary Kemuma Mose [2017] eKLR, quoted with approval the case of Attan Mubarak vs. Mulji Coast Co. Ltd MSA HCCC No. 973 of 1984, Kenya breweries ltd Vs. Saro(1991) eKLR, D M M (Suing as the administrator and legal representative of the estate of LKM V Stephen Johana Njue & Another [2016] eKLR, Savannah Hardware Vs. EOO(suing as representative of SO(deceased) [2019] eKLR quoted with approval the Daniel Mwangi Kememi & 2 Others Vs. JGM & Another [2016] eKLR, and D M M (Suing as the administrator and legal representative of the estate of L K M V Stephen Johana Njue & Another [2016] eKLR.

The respondent's submissions.

8. The respondent submitted that this Court should not interfere with the consent on liability because (i) under Section 67(2) of the *Civil Procedure Act*, no appeal shall lie from a decree passed by the Court with the consent of parties, (ii) a consent is like a contract and is binding to the parties (iii) the Appellant has exhibited no vitiating factors to justify the setting aside of the consent on liability. The respondent relied on Brooke Bond Liebig Ltd v Mallya [1975] E A 266, Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd [1982] KLR 485, Hirani v Kassam [1952] 19 EACA 131, Wema Foundation Trust Company Limited v County Government of Nairobi City & another [2022] eKLR.
9. The respondent submitted that it has not been shown which factors should not have been considered.
10. The respondent submitted that it has not been elaborated on whether the award under the *Law Reform Act* or the *Fatal Accidents Act* is alleged to be manifestly low. No justification has been shown for this Court to interfere with the trial court's discretion regarding the award of quantum. The respondent relied on Ojwang v Kara & another [2024] KEHC 3131 (KLR); Mbae (suing as the legal representative of the estate of Koome Mbae) v Kinya [2024] KEHC 2285 (KLR) at paragraph 22 and Otieno & Another v Mwanga [2023] KEHC 26648 (KLR)
11. The respondent prayed that this appeal be dismissed with costs and that the said costs be recovered from the award made to the Appellant by the trial court, which award is yet to be settled. The respondent urged this Court to assess the said costs summarily at a modest sum of Kshs 300,000 in order to reflect the status of the litigation before the Superior Court.

Analysis and Determination.

Duty of the Court

12. The appellate Court shall have the same powers. It shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (Section 78(2) of the *Civil Procedure Act*).
13. The first Appellate Court should, therefore, evaluate the evidence afresh and make any of its conclusions, albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of Selle & Anor –vs. Associate Motor Boat Co. Ltd 1968 EA 123.



Issues.

14. I have considered the record of appeal, the notice of preliminary objection, and the written submissions of the respective parties. The main issues that fall for determination are;
 - i. Whether the learned Magistrate erred in apportioning the liability at the ratio of 75:25.
 - ii. Whether the award for loss of dependency was reasonable.
15. It is an appeal on both liability and quantum of damages.

Liability.

16. The preliminary objection raised by the respondent primarily concerns the alleged consent entered into by the parties regarding liability before the trial magistrate.
17. This Court has perused the record and found that consent was recorded on 21/01/2022 in a ratio of 75:25 in favor of the Appellant.
18. The issue of liability was settled by consent of the parties. The law on consent Judgments in civil disputes is provided for in Section 67(2) of the *Civil Procedure Act*, which states that "no appeal shall lie from a decree passed with the consent of the parties."
19. It is well settled in law that a consent Judgment or order has a contractual effect and can only be set aside on grounds that would justify setting aside a contract or if certain conditions remain to be fulfilled, which are not carried out. See the Court of Appeal decision in *J.M Mwakio -vs.- Kenya Commercial Bank Ltd Appeal No. 28/1982 E.R.* In the case of *Hirani -vs.- Kasam (1952) 19 E.A, C.* On page 134, it was stated that:

“The mode of paying the debt, then, is part of the consent Judgment. That being so, the Court cannot interfere with it except in circumstances that would afford good grounds for varying or rescinding a contract between the parties. No such ground is alleged here. The position is set out in *Setton on Judgments and Orders (7th Edn) Vol 1, page 24* as follows: “Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court... or of the consent was given without sufficient material facts, or in general for which would enable court to set aside an agreement.”
20. See also *Brook Bond Liebig Ltd -vs- Mallya (1975) E.A 226 at 269* what it was stated that:

“A court cannot interfere with a consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”
21. Thus, for this Court to set aside consent, the Appellant is bound to prove that circumstances that would justify the setting aside of a contract exist. These include fraud, collusion, misrepresentation, or that the agreement is contrary to the Court’s policy.
22. This forms the record of the Court, and there can be no doubt that the parties recorded that consent. The record does not support the Appellant’s contention that the consent was 75:25. I find that the Appellant has not laid any grounds to warrant this Court’s interference with the consent recorded on liability.



23. The Appellant was traveling as a fare-paying passenger aboard motor vehicle registration number KCJ 278F when the said motor vehicle was involved in a road traffic accident. The Appellant pleaded negligence on the part of the driver of motor vehicle KAW 499D.
24. The Appellant testified that the motor vehicle he was traveling in, KCJ 278F, was struck from behind by the respondent's motor vehicle, registration number KAW 499D, causing the accident; the respondent never controverted the Appellant's testimony or the events leading up to the accident.
25. The Appellant contends that, as a fare-paying passenger, he had no way of contributing to the occurrence of the accident. The Appellant further contends that the respondent is to be held 100% liable for the occurrence of the accident, as per the submissions made before the trial court. The respondent admitted liability at 100% as it was held in Narok MCCC No. 91 of 2019, a suit arising from the same accident and involving the same respondent who caused the accident; the respondent was held 100% liable for the accident.
26. The Appellant has challenged the apportionment of liability at 75:25 in favor of the Appellant. The apportionment of liability arose as a result of a consent agreement signed by the parties. The question, then, is whether this Court should interfere with that consent.
27. I find that the Appellant has not disclosed any grounds to warrant this Court in ruling that the consent is not what was agreed upon by the parties. Grounds for setting aside consent were stated by the Court of Appeal in *Flora N. Wasike -vs.- Destimo Wamboko* (1988) eKLR, where it was stated:

“It is well-settled law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which justify setting aside a contract.”
28. This ground has no merit.

Quantum

29. Whether the award for loss of dependency was reasonable.
30. The Appellant testified that the deceased died at the age of 13 years, and at the time of her death, the deceased was a brilliant schoolgirl in class eight who showed a great future ahead of her, and she was a great source of hope to her family. If she lived to full age, her parents had hopes that she would hold down a good job and earn enough to support herself.
31. It has not been shown that the irrelevant factor the trial court considered while assessing compensation for loss of dependency. It has not been shown which factors should not have been considered. Reading the judgment of the trial court under the award made under the *Fatal Accidents Act*, it is apparent that the trial court was consciously aware of the factors to be considered and did consider them when making the award for loss of dependency. There is nothing to support the claim that the trial court considered irrelevant factors.
32. Regarding the quantum of damages, it is a general rule that an appellate court should not interfere with the award unless it is so high or inordinately low or founded on incorrect principles. This is the principle enunciated in *Rook v Rairrie* [1941] 1 ALL E.R. 297. This was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349, when it held, as per Law, J.A that:

“An appellate court will not disturb an award of 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.”

33. On general damages for loss of dependency, it is not disputed that the deceased was 13 years old. Because the deceased was a child, I find that the learned Magistrate did not err in finding that the formula of loss of dependency did not apply and adopted a global sum. The Appellant proposed a global award of Kshs. 1,500,000.
34. In the case of Antony Angwenyi Okoba v Thomas Kipkurui Langat & Another [2021] eKLR, where the deceased was 10 years old, the Court awarded a loss of dependency of Kshs 1,400,000.
35. In the case of Mpaka Muriuki Japheth v HMM & Another [2021] eKLR, where the deceased was 13 years old, the Court awarded loss of dependency in the amount of Kshs 1,500,000/=.
36. In the case of Makueni Courts Ltd & another v Felistus Kanini Ndunda (Suing as the legal representatives of the estate of Eric Mutuku) [2020] eKLR, where the Court held that an award of Kshs. 1,800,000/= was sufficient compensation for a deceased aged 12 years old.
37. In the case Nderitu v Kiswii (Suing as mother and personal representative of the Estate of Janet Kavindu Kingesi (Deceased) (Civil Appeal E186 of 2022) [2023] KEHC 24678(KLR) (October 31, 2023) (Judgment) where the Court upheld that an award of Kshs. 1,800,000/= for a deceased minor aged 10 years old.
38. Based on the above authorities, it is clear that the compensation for minors aged between 10 and 13 years ranges between Kshs. 1,400,000/= and Kshs. 1,800,000/=. The above-cited authorities were for the years between 2020 and 2023.
39. The Trial Court's assessment of Loss of Dependency was, therefore, below the accepted range. It can be said that the Trial Court erred in awarding a sum of Kshs. 600,000/=: which, according to the Appellant, was not adequate for the loss suffered by the Appellant. Additionally, due to inflation, the sum is Kshs. 600,000/= takes into account the decreasing value of the Kenyan shilling and the prevailing state of the economy.
40. The award in this category was too low under the circumstances.
41. The Appellant has not elaborated as to whether it is the award under the Law Reform Act or the Fatal Accidents Act that is alleged to be manifestly low. No justification has been shown for this Court to interfere with the trial court's discretion regarding the award of quantum. On this, I agree with the respondent. The awards under the heads of loss of expectation of life, pain, and suffering, as well as special damages, fall within the scope.
 - i. In the circumstances, the award on loss of dependency is enhanced to Kshs. 1,200,000/= which is found to be reasonable compensation to the Appellant. Awards under all other heads shall remain as awarded by the trial court. Each party shall bear the costs of the appeal.
 - ii. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,
THIS 28TH DAY OF MAY, 2025**

CHARLES KARIUKI

JUDGE

