Mburu & another (Suing as the Legal Administrators of the Estate of Sarah Wangui Thuku) v Bobe (Civil Appeal E025 of 2025) [2025] KEHC 11902 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 11902 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E025 OF 2025

GL NZIOKA, J

JUNE 26, 2025

BETWEEN

ESTHER WAMBUI MBURU ..... 1ST APPELLANT

MARTHA WANJIKU MBURU ..... 2ND APPELLANT

SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF SARAH WANGUI THUKU

AND

CHEDA BOBE ..... RESPONDENT

(Being an appeal from the decision of Hon. Nathan Shiundu Lutta (CM) delivered on 26th February, 2025 in CMCC E998 of 2022 in the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. By a plaint dated 15th November, 2022, the plaintiffs (herein "the appellants") sued the defendant (herein "the respondent") seeking for judgment against the defendant for: -
    a. General damages under the Fatal Accident Act (Cap 32) Laws of Kenya.
    b. General damages under the *Law Reform Act* (Cap 26) Laws of Kenya
    c. General damages - Ksh 54,350 with interest from the date of filing the suit.
    d. Costs of the suit and interest.
2. The appellants' claim arose from a traffic road accident along Naivasha – Mai Mahiu road that occurred on or about 16th April, 2022 wherein Sarah Wangui Thuku (herein 'the deceased") was fatally injured. It is averred that the deceased was at the material time travelling as a lawful passenger aboard motor vehicle

registration KCF 609N when it collided with motor vehicle registration No. KCD 481W owned and/or insured in the name of the respondent.

3. The appellants averred that the accident was caused by the negligence of the respondent and/or his agent as per the particulars of negligence tabulated at paragraph 5 of the plaint.

4. The appellants further averred that the deceased was thirty-five (35) years old at the time of her demise and was a businessperson who earned about Kshs. 100,000 per month. That she is survived by three minor children and two sisters.

5. However, the appellants' claim was opposed by the respondent vide a statement of defence dated 28th November, 2023, wherein he denied; knowledge of occurrence of the accident, ownership of the subject motor vehicle registration No. KCD 481W, the fatal injuries suffered by deceased, and the particulars of negligence attributed to the him and/or his driver.

6. However, the respondent averred on a without prejudice basis that, if the deceased was fatally injured, then the injuries were wholly or substantially contributed to by the deceased for failing to wear a seatbelt as required by law and failing to take special care and attention for her own safety.

7. Furthermore, on a without prejudice basis that, if the accident occurred, then it was wholly or substantially contributed to by the driver of motor vehicle registration No. KCF 609N as per the particulars of negligence stated at paragraph 9 of the statement of defence.

8. The matter proceeded to hearing where the appellants' case was supported by the evidence of (PW1) No. 91912 PC Letaya Sirere who produced the police abstract (Exhibit 1) confirming the occurrence of the accident and that the deceased was a passenger in motor vehicle registration KCF 609N and died as a result of the accident.

9. (PW2) Esther Wambui Mburu, the deceased sister, adopted her witness statement and averred that on 16th April 2022 at around 11:00 pm, she was called by her sister Martha Wanjiku Mburu and informed that the deceased was involved in a road accident and should report to Maai Mahiu Police Station.

10. That when she went to the police station she was informed that the deceased was a passenger in motor vehicle registration KCF 609N which was involved in an accident and as a result she died. She reiterated that the deceased was a business person and used her earnings for her upkeep and her three (3) minor children.

11. The respondent closed his case without calling any witness.

12. Be that as it may, by a judgment dated 26th February 2025, the trial court held the respondent 100% liable for causing the accident and entered judgment in favour of the appellants in the following terms: -

    a. Pain and suffering----------Kshs 10,000

    b. Dependency----------Kshs 1,252,184

    c. Loss of expectation of life----------Ksh 100,000

    d. Special damages----------Kshs 54,350

    e. Funeral expenses----------Kshs 50,000

    f. Costs of the suit plus interest.

13. However, the appellants are aggrieved by the decision of the trial court on quantum on the following grounds:

a. That the learned Magistrate erred in fact and in law by awarding judgment on quantum that was too low when there was overwhelming evidence to support the appellants' case.

b. That the learned Magistrate erred in fact and in law by failing to consider the plaintiff/ appellants and defendant/respondent's submissions on multiplier and therefore using a wrong multiplier of 1/3 instead of 2/3.

c. The learned Magistrate erred in law and fact by considering extraneous facts and not the principles known in law in awarding damages and thereby ending up with an award on general damages that were too low in the circumstances of the case before him.

14. Pursuant to the aforesaid, the appellants are seeking for the following orders: -

a. That the judgment/decree of the Honourable court dated 26th February 2025 be reviewed and/ or set aside and re-assess damages payable to the appellant.

b. That the respondent do bear the costs of this appeal.

15. The appeal was disposed of vide filing of submissions. The appellants filed submissions dated 28th May, 2025, and submitted that the circumstances under which an appellate court can interfere with the discretion of the trial court on an award of damages, were discussed in the case of; Shabani vs County Council of Nairobi (1985) KLR .

16. The appellants argued that, the trial Magistrate erred in applying a multiplier of 1/3 and failed to consider that the deceased left behind three (3) minor children and two (2) sister who had custody of the children. Further, the court did not consider the submissions by both parties who had proposed a multiplier of 2/3.

17. The appellants submitted that the award for pain and suffering was inordinately too low considering the injuries the deceased had suffered before her death. That they had proposed and award of Kshs. 100,000, for pain and suffering however, the trial court relied on a decision delivered in the year 2020 and award, Kshs. 10,000 without considering inflation.

18. The appellants urged the court to allow the appeal.

19. However, the respondent in submissions dated 10th June 2025, too cited the case of; Kemfro Africa Limited t/a Meru Express Services & another vs Lubia & Another (No.2) Civil Appeal No. 21 of 1984 [1985] eKLR where the Court of Appeal discussed the circumstances under which an appellate court can interfere with the discretion of the trial court on an award of damages, and submitted that the trial court has discretion to determine the total amount of damages and how dependency should be computed and apportioned.

20. The respondent submitted that the appellants have not demonstrated any error or misdirection on the part of the trial court as the law does not impose a mandatory 2/3 rule for the dependency ratio. The case of; John Muchiri Njoroge & another vs Monicah Asami [2021] KEHC 13372 (KLR) was where the High Court upheld the trial court's decision to use a dependency ratio of 1/3 where the deceased had dependents.

21. The respondent argued that, the appellants submission that the trial court relied on a precedent delivered in 2020 and failed to consider inflation does not hold water as recent precedents continue to uphold an award of Kshs. 10,000 for pain and suffering. He relied on the case(s) of; John Muchiri Njoroge & another vs Monicah Asami (supra) and Kiarie vs Wanjiru & another (suing as legal

representatives of the Estate of Daniel Waweru Nduati) [2022] KEHC 15592 (KLR) where the High Court upheld an award of Kshs. 10,000 for pain and suffering.

22. The respondent urged the court to dismiss the appeal.

23. At the conclusion of the arguments by the parties, I recognize that the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as stated by the Court of Appeal in the case of; Selle & Another vs Associated Motor Boat Co. Ltd. & Others (1968) EA 123.

24. The Court of Appeal thus observed: -

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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. 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

25. Furthermore, I note that it is settled law that the appellate court will only interfere with the award of damages if; in exercising its discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968) EA and Mkube -vs - Nyamuro 1983 KLR 403.

26. The Court of Appeal in; Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003 (unreported) stated that: -

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257)."

27. To revert back to the matter herein, the appeal rests on only two issues; the multiplier applied in calculating loss of dependency, and secondly Kshs 10,000 awarded as damages for pain and suffering.

28. On the issue of multiplier applied by the trial court, the evidence supported by the statement of; Esther Wambui Mburu is that the deceased was survived by three (3) minors; JKW 17 years, BMW 15 years and MWW 14 years. The birth certificates and Chief's letters supported the same.

29. It is also noteworthy that the parties in their respective submissions in the trial court conceded to a multiplier of 2/3, therefore, the trial court could not apply a multiplier of 1/3 without justification. Consequently, I set aside the multiplier of 1/3 set aside and substituted it with multipler of 2/3.

30. As regard pain and suffering claim, I note from the post mortem report that, the deceased died on the same day of the accident and evidence reveals on the spot. The injuries she sustained as indicated by

the appellants were indeed severe. But be that as it may, it is remain that she died on the spot therefore an award of Kshs 10,000 is justified.

31. Therefore appeal succeeds only is so far the ratio 1/3 set aside and ratio of 2/3 applied. Each party to bear its own costs of the appeal as the appellant is partially successful.

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF JUNE 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Owour for the Appellant

Mr. Gaya for the Respondent

Ms Hannah: Court Assistant