



**Kyoga Hauliers Kenya Ltd v Mudeizi & another (Suing as as administrator and personal rep of the Estate Of Anne Kananga - Deceased) (Civil Appeal E008 of 2023) [2024] KEHC 9917 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9917 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E008 OF 2023**

**DK KEMEL, J  
JULY 26, 2024**

**BETWEEN**

**KYOGA HAULIERS KENYA LTD ..... APPELLANT**

**AND**

**JUMA MUDEIZI & VICTOR AMUGONGO (SUING AS AS ADMINISTRATOR AND PERSONAL REP OF THE ESTATE OF ANNE KANANGA - DECEASED) ..... RESPONDENT**

*(Being an Appeal from the judgment of Hon C.A.S Mutai (SPM) in Bungoma CMCC No. 181 of 2021 delivered on 3rd February, 2023)*

**JUDGMENT**

1. The Respondents were the plaintiffs in the trial court claiming damages under the [Law Reform Act](#) and the [Fatal Accidents Act](#) as a result of a road traffic accident which occurred on 26<sup>th</sup> April, 2021 along the Bungoma-Webuye Road.
2. The respondents pleaded that the deceased was lawfully travelling as a pillion passenger when the appellant's driver so negligently and carelessly managed motor vehicle registration number KBW 943E/ZE 4169 that it knocked the said motorcycle causing serious injuries to which the deceased ultimately succumbed. The suit was therefore instituted for the benefit of her estate.
3. In the suit before that court, PW-1, PC Jackline Were from Bungoma Police Traffic Department produced a police abstract showing that the accident occurred on 26<sup>th</sup> April, 2021 at about 11.00 AM involving the truck above stated in which two pillion passengers in which one of them died on the spot. She stated that she was not the investigating officer.



4. PW-2 Juma Mdeizi stated that the deceased was his wife with whom they were blessed with one issue but expecting another one at the time of her death. That the deceased was aged 32 years and employed as a teacher. He stated that he did not witness the accident.
5. PW-3 Christopher Luseka Musila stated that on the 26<sup>th</sup> April, 2021, he was walking on the road when he witnessed the accident herein involving truck registration number KBW 943E/ZE 4169 and a motorcycle which was carrying an expectant lady and a child. That both the truck and the motorcycle were heading in the same direction with heavy traffic on the road at the time.
6. That the accident happened when the truck driver overtook the motorcycle and immediately the cabin had bypassed the motorcycle, the driver swerved to its lane to avoid a collision with an oncoming vehicle. That as a result, the motorcycle was knocked down and the pillion passengers thrown off the road and that the rear wheels of the trailer ran over the deceased and the minor herein. That the truck driver was avoiding a head on collision with an on-coming vehicle. According to him, the truck driver was to blame for the accident.
7. The trial court records show that the appellant did not avail any witness.
8. Upon reviewing the evidence, the trial court awarded the Respondents as follows;
  - a. Liability against the Appellant.....100%
  - b. Pain and suffering..... Kshs 50,000/-
  - c. Loss of dependence.....Kshs 13,093,696/-
  - d. special damages.....Kshs 385,200/-
9. The appellant being aggrieved by the award lodged the instant appeal raising the following grounds;
  - a. The learned trial magistrate erred by holding the appellant 100% liable in negligence without considering the evidence on record.
  - b. The learned trial magistrate erred in adopting the wrong principles in deciding as to the damages payable therefore arriving at an erroneous decision.
  - c. The learned trial magistrate erred in adopting a multiplier of 28 years without taking into consideration life's vicissitudes and vagaries.
  - d. The learned trial magistrate erred in adopting a dependency ratio of 2/3<sup>rd</sup> in view of the evidence adduced and on record.
  - e. The learned trial magistrate erred in erroneously awarding Kshs 385,200/- as special damages while the respondent had only pleaded Kshs 197,100/- contrary to the well laid principles pertaining to special damages.
  - f. The learned trial magistrate erred in failing to consider the submissions by the appellant on the issue of quantum.
10. By directions of the court, the appeal was disposed of by way of written submissions. The parties duly complied.
11. On liability, the appellant argues that the trial magistrate erred in finding it 100% liable yet the testimonies or evidence adduced pointed to the Respondents' as responsible for the accident. That the police officer did not confirm the circumstances leading to the occurrence of the accident. That the testimony of the appellant's driver adopted from Civil Suit No. 180 of 2021 showed that the



- motorcycle suddenly crossed from the right side of the road to the left. The decisions in Kennedy Nyangoya V Bash Hauliers Ltd (2016) eKLR and Mkube V Nyamuro (1983) eKLR have been cited for the proposition that the suit herein ought to have been dismissed by the trial court.
12. On the issue of award of damages, the appellant submits that the award of Kshs 50,000/- for pain and suffering is inordinately high in that the deceased died on the spot. That the trial court relied on the respondents' evidence who are not experts. The authority in *Barnabas V Ombati Civil Appeal No. E043 of 2021* and Hyder Nthenya Musili V China Wu Yi Limited & another (2017) eKLR have been cited in support of the proposition that the respondent should have been awarded Kshs 10,000/-.
  13. On the issue of multiplier, it is submitted that the trial magistrate did not consider the vicissitudes of life and that in the absence of ill health, the deceased would not have worked up to retirement age. The appellant proposes a multiplier of 18-20 years. The appellants have cited the authority in Crown Bus Services Ltd & 2 others V Jamila Nyongesa and Amida Nyongesa (legal representatives of Alvin Nanjala-Deceased) (2020) eKLR and Bash Hauliers V Dama Kalume Karisa & another (2020) eKLR.
  14. On the adoption of the dependency ratio, the Appellant urges this court to substitute the 2/3 adopted by the trial court with a ratio of 1/3 for the reason that there was no evidence to the effect that the dependants stated were dependent on the deceased in any way. That the minor was depending on the 1<sup>st</sup> Respondent and not the deceased or supporting the mother. The decision in Chania Shuttle V Mary Mumbi (suing on behalf of the estate of Francis Mungai Karanja -deceased) (2017) eKLR has been cited.
  15. Finally, on the issue of special damages, the Appellant submits that the Respondents pleaded Kshs 197,100/- yet the trial magistrate awarded Kshs 385,200/-, a sum which was not pleaded or proved. The decisions in China Wu Yi Limited & another V Irene Leah Musau (2022) eKLR and Peter Gathoni Gatharo V David Waweru Nganga (2020) eKLR have been cited.
  16. The Respondent submits on the issue of liability that the Appellant laid blame on the motorcyclist without instituting the necessary third-party proceedings and therefore dangerous for the court to hold a non-party liable for the accident.
  17. On the award of loss of expectation of life, the Respondents submit that the same is proper as it is a matter within the discretion of the court. That the deceased had a family dependent on her and her estate thus suffered. The decision in Daniel Kuria V Nairobi City Council, (2013) eKLR where Kshs 300,000/- was awarded has been cited.
  18. On loss of dependency, it is argued that the trial magistrate correctly adopted the multiplier as the deceased was only 28 years and employed.
  19. On the multiplicand, it is argued that the same was proper as the court did subtract the statutory deductions i.e; PAYE at Kshs 2,400/- and NHIF at Kshs 1, 300/-. The Respondents cited the decision in Ronald Asman Mukangai V Wycliffe Kipkorir Langat (2024)eKLR.
  20. On dependency ratio, the Respondents submitted that the deceased is survived by the spouse, son aged 5 years and the mother as evidenced by the chief's letter.
  21. That in sum total, the trial magistrate did not err in making the award and urged this court to uphold it.



## Analysis and determination.

22. This is a first appeal and as established by case law, this court is bound to revisit the evidence in the trial court to satisfy itself that the finding is sound and based on evidence. See *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;
- “Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
23. Since this is a matter arising out of a road traffic accident, the issues to be determined herein relate to liability for the accident and the quantum to be awarded in the circumstances.
24. On the issue of liability, the evidence adduced by the eye witness (PW-3) is that the truck and the motorcycle carrying the deceased were headed in the same direction where the truck was trailing the motorcycle. That the truck tried to overtake the motorcycle but could not complete the overtaking due to an oncoming vehicle forcing the driver to swerve back to its lane immediately the cabin had passed the motorcycle. That as a result, the motorcycle was hit and that the deceased fell on the road and was thus crushed by the rear wheels of the truck.
25. The appellants did not tender any evidence in rebuttal of how the accident occurred.
26. It is trite law that in a civil matter, the burden of proof lies on he who alleges and that the standard of proof is on a balance of probability as per the provisions of Section 107 of the *Evidence Act* which provides that;
107. (1)Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
27. It is also noteworthy that in this case, the appellant did not call any witnesses other than the defence filed herein. The trial court record indicates as such and that the trial magistrate also found as much. The appellant’s contention in this appeal through submissions that the evidence in CMCC no. 180 of 2021 is not reflected in the record is not convincing at all. That contention is erroneous and unsupported.
28. In the circumstances herein, the decision in *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007* where Ali-Aroni, J (as she then was) citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:
- “In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.
29. From the above analysis, i find that the Respondents proved their case on a balance of probability and that the trial magistrate was therefore correct in holding the appellant 100% liable. In any event, the evidence of the eye witness (Pw3) left no doubt that the truck driver was overtaking the motorcyclist only for another vehicle to emerge from the opposite direction forcing the truck driver to swerve onto



the motorcycle thereby causing the accident. It is thus clear that the truck driver was negligent. Had he not overtaken the motorcyclist, the accident could have been avoided. Under those circumstances, the deceased pillion passenger and her young child could not be blamed. Again, the Appellant did not see it fit to rope in the motorcyclist as a third party for purposes of contribution and indemnity.

30. Turning to the issue of quantum, the trial magistrate awarded Kshs 50,000/- for pain and suffering. The evidence herein does not exactly point out at what point the deceased died since PW-2 stated that he viewed the body at Bungoma County Referral Hospital mortuary. It was also stated that at the time of her death, the deceased was expecting a child.
31. Case law has established that the longer the period of pain, the more the award and vice versa. In arriving at this award, the trial court considered the proposal and authorities cited by the parties herein which were Kshs 10,000/- and 50,000/- respectively.
32. Noting that award of damages is an exercise of discretion by the trial court, i have considered the said authorities and more particularly the decision in Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs.50,000/- for pain and suffering, Majanja J in affirming the award held that:

“On the first issue, I hold that 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 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 the head is unreasonable.”

33. I have also considered the authority in Leonard O. Ekisa & Another vs Major K. Birgen [2005] eKLR, where Judge Dulu had the following to state on the issue of proof of dependency: -

“Dependency is a matter of fact. It need not be provided by documentary evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances”.

34. I have considered the circumstances herein and find that the award by the trial court under this head was not inordinately high.
35. As regards the award on loss of expectation of life, it is noted that the trial court awarded a sum of Kshs 250, 000/ in the body of the judgement but left it out in the final orders. Learned counsel for the Respondents has submitted in this appeal that the said sum be awarded while on the other hand, the Appellant’s submissions is silent regarding the same. I find that it was incumbent upon the Respondents to file a cross appeal if at all they were aggrieved by the lower court’s judgement. They did not do so and hence their submissions are not sufficient to cure the anomaly. Even though it is the duty of this court to analyse the evidence tendered in the trial court and come up with its own independent conclusion, it cannot award that which has not been abandoned by the parties on appeal. Consequently, I will not make an order as regards that particular head of damages.
36. The next head of damage is loss of dependency. The trial court adopted a multiplicand of Kshs 58,454 and a dependency ratio of 2/3 as well as a multiplier of 28 years giving the sum of Kshs 13,093, 696



as proposed by the Respondent. The appellant on its part urged the court to apply the multiplicand of Kshs 18,195/-.

37. In this appeal, the appellant faults the trial magistrate for adopting the dependency ratio arguing that there was no evidence that the deceased was the sole breadwinner or that the people listed therein depended on the deceased.
38. The appellant also faults the adoption of the multiplier arguing that the trial magistrate ignored the vagaries of life.
39. On the issue of whether the trial magistrate correctly adopted the multiplier and the dependency ratio, i have perused authorities for instance in Boru –vs-Onduu [1982-1988] KAR 299, where the Court expressed that,

“The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation.””

40. In the instant appeal, the Respondents pleaded at paragraph 6 of the plaint that the deceased left a son, the first Respondent and mother who all depended on her. The witness testimony pointed as such including the chief’s letter that was produced into evidence.
41. I have considered the provisions of Section 4 (1) of the *Fatal Accidents Act* Cap 32 Laws of Kenya which provides as follows:

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 judgment, shall find and direct...”

42. I find that the suit having been brought for the benefit of the 1<sup>st</sup> Respondent, the son and mother respectively, the amount is thus recoverable from the appellant being the tortfeasor. It is not enough to allege that birth certificate and marriage were not produced as many marriages in Kenya are seldom with marriage certificates.
43. On the issue of the multiplier, there is no dispute that the deceased died at the age of 32 years and was an employee of the Teachers Service Commission. The appellant faults the adoption of this multiplier as it fails to consider the vicissitudes of life.
44. From the evidence tendered, and considering that an award of damages is a discretion bestowed on the trial court, the fact that no evidence was adduced that the deceased was of ill health, i find no fault in the trial magistrate’s finding. In any case, there is no doubt that the deceased was employed and would have naturally worked up to the age of sixty. No evidence has been produced before this Honourable Court to indicate that the deceased was perhaps in bad health. Indeed, the deceased died a very painful death as she was then expectant and that the unborn child died as well. The same reasoning was adopted by Nyakundi J in *West Kenya Sugar Company Ltd v Mayaka & Another (Suing as the Administrators / legal representatives of the Estate of Edward Maserebu (Deceased)) (Civil Appeal 133 of 2022)*



45. In this case, in the absence of evidence that the deceased was of bad health, i find the multiplier of 28 years adopted by the trial magistrate as sound and legal.
46. As regards the issue of the multiplicand, it is noted that the deceased was a high school teacher then earning a salary of Kshs 62, 154/ per month. I find that the only items to be deducted from her pay slip should be those that are statutory in nature namely, PAYE and NHIF which leaves out the sum of Kshs 58,454/ as the multiplicand.
47. The last issue raised in the appeal is in regard to the award of special damages. The respondent pleaded the sum of Kshs 197,100/. The Appellant contends that the sum awarded by the trial court is not in tandem with the pleadings and that the respondent is entitled to the sum of Kshs 197,100/-
48. As a general rule, special damages must be pleaded and specifically proved for them to be awardable. See the Court of Appeal in Tracom Limited & another v Hassan Mohamed Adan [2009] Eklr
49. I have perused the pleadings herein and indeed find that the Respondents pleaded the sum of Kshs 197,100/- and at no time was the plaint amended to reflect the sum awarded. In the circumstances, i find the trial court's award to be erroneous and is hereby set aside and substituted with the sum of Kshs 197,100/-
50. For the above-stated reasons, it is my finding that the appeal against all the awards except special damages lacks merit and is dismissed. However, the appeal against special damages succeeds to the extent that the sum awarded by the trial court for Kshs 385, 200/ is hereby set aside and substituted with the sum of Kshs 197, 100/. The final orders are as follows:

- a) Liability apportioned  
against the Appellant.....100%
- b) Pain and suffering..... Kshs 50, 000/
- c) Loss on dependency.....Kshs 13, 093, 966/
- d) Special damages ..... Kshs 197, 100/  
Grand Total.....Kshs 13, 341, 066/

Each party shall bear their own costs of the appeal while the Respondents shall have full costs in the lower court.

**DATED AND DELIVERED AT BUNGOMA THIS 26<sup>TH</sup> DAY OF JULY 2024.**

**D.KEMEI**

**JUDGE**

**In the presence of :**

Miss Nyabuto for Appellant

Wayongo for Mukisu for Respondents

Kizito Court Assistants

