



**Bett & another (Suing as the Legal Administrators of the Estate of Wilson Kipngeno) v Ombui aka Joseline Ombui (Civil Appeal E012 of 2023) [2024] KEHC 13047 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13047 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E012 OF 2023  
F GIKONYO, J  
OCTOBER 28, 2024**

**BETWEEN**

**AGNES TERER BETT ..... 1<sup>ST</sup> APPELLANT**

**BERNARD KIPKOECH ..... 2<sup>ND</sup> APPELLANT**

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF WILSON  
KIPNGENO**

**AND**

**JOSEPHINE GEICHEMBA OMBUI AKA JOSELINE OMBUI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. P.L. Shinyada  
(S.R.M) delivered on 20.04.2023 in Narok CMCC Suit No. E012 of 2022)*

**JUDGMENT**

**Impugned judgment**

1. This appeal challenges the judgment of the Chief Magistrate’s Court at Narok in Civil Suit No. E012 of 2022 delivered on 20.04.2023 in which the trial court made awards as follows:-
  - a. Liability 80:20
  - b. Pain and suffering Kshs. 70,000/=
  - c. Loss of expectation of life Kshs. 100,000/=
  - d. Loss of dependency Kshs.454,104/=
  - e. Special damages Kshs. 81,550/=Subtotal Kshs. 705,654/=



Less 20% contributory negligence.....Kshs. 564,523/=

Total award Kshs. 564,523/=

2. The appellants vide memorandum of appeal dated 16.05.2023 cited six (6) grounds of appeal which relate to; i) liability and ii) quantum of damages.
3. The respondent vide memorandum of response dated 05.03.2024 denied the grounds raised in the memorandum of appeal and stated that the learned magistrate applied her mind to both facts adduced and the law thereby rightly arriving at her judgment.

### **Background**

4. The suit arose from a traffic accident involving motorcycle registration No. KMCG 034C on Narok-Bomet road on 10.07.2021 and motor vehicle registration No. KCL 184D. The deceased was a pillion passenger on the suit motorcycle. The suit motor vehicle lost control, swerved, and knocked the deceased thereby causing fatal injuries to him. The appellants blamed the respondent driver. The deceased lost his life in the accident. Particulars of negligence were set out against the respondent driver. The deceased was 63 years old.
5. During the trial, the appellants called three witnesses.
6. The respondent closed her case without calling any witnesses.

### **Directions of the court**

7. The appeal was canvassed by way of written submission.

### **The Appellants' Submissions**

8. The appellants submitted that the trial magistrate erred in finding the deceased 20% to blame against the overwhelming evidence that the deceased did all he could to avert the accident. the appellants
9. The appellants submitted that the trial court erred in adopting a multiplicand of Kshs. 8,109/= which was too low as the deceased was a businessman in narok town which is a former municipality and therefore the trial court ought to have adopted the minimum wage of a general labourer which is Kshs. 13,572.90 per month and not Kshs. 8,109/= under the Regulations of Wages (General)(Amendment) Order ,2022.

### **The Respondent's Submissions**

10. The respondent submitted that the trial court directed itself well and therefore this court should not disturb the decision of the trial court. the respondent relied on Section 78 of the *civil Procedure Act*, Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, Butt V Khan [1981] KLR 349, and Mkube V Nyamuro [1983] LLR at 403.
11. The respondent submitted that had a duty of care towards his fellow road users, and had he not ridden towards oncoming traffic, not carried two pillion passengers, swerved as the Honorable Court notes, then, the accident would have been averted and the death of the excess passengers would have also been averted. The respondent relied on Rentco East Africa Limited V Dominic Mutua Ngonzi [2021] eKLR, and Simba V Langat (Civil Appeal 84 of 2021) [2024] KEHC 2110 (KLR) (29 February 2024) (Judgment).



12. The respondent submitted that the appellants did not furnish the court with any proof of the deceased's source of income or the existence of the alleged business therefore the proper wage was of Kshs. 8,109/= as per the Regulations of Wages (General)(Amendment) Order, 2022 as the deceased resided in Olmekenyo as per burial permit which is not considered as one of the former municipalities. The respondent relied on *Patriotic Guards Ltd V James Kipchirchir Sambu* [2018] eKLR And *Beatrice W. Murage Vs Consumer Transport Ltd & Anor* (2014) eKLR.

## **Analysis And Determination**

### **Duty of court**

13. The appellate court shall have the same powers and 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*).
14. The first Appellate Court should, therefore, evaluate the evidence afresh and make 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**

15. This court has been called upon to determine liability and the quantum of damages.

### **Liability**

16. Who is to blame for the accident, and by what proportion if at all? Where does the evidence lead the court?
17. It was not disputed that the accident occurred on 10.07.2021. The motor vehicle and motorcycle involved were also not disputed.
18. PW2-Peter Kipkurui Ruto testified that there were two pillion passengers on the motorcycle plus the rider a total of three people. The motorbike was being ridden towards narok. The motor vehicle was being driven from narok headed to Bomet. The motor vehicle was driven into the motorbike's lane. He stated that the rider ought to also look out. He stated that the motor vehicle encroached into the motorbike lane. One of the persons on the motorbike had a helmet.
19. On re-examination he stated that the motor vehicle swerved into the lane of the motor vehicle. The passengers had helmets and reflector jackets on.
20. PW3- PC Gladys Chepkoech based at Ololulunga police station and attached to Ollululnga traffic base. she testified that the accident occurred on 10/07/2021 at about 13.30 hours along the Narok-Bomet area. The rider of the motorcycle was Wilson Terer.
21. She testified that the motor vehicle crossed the motorcycle's path. she blamed the driver of motor vehicle KCL 184D Toyota Wish, Stephen Obere for the accident. She visited the scene after 10 minutes. They found both motor vehicle and motorcycle were off-road on the left side of the road as one faced narok direction. That from the impact the motor vehicle was at high speed. She produced a police abstract P Exh 5 a, covering report P Exh 5b
22. On cross-examination, she testified that only one rider was wearing a helmet and reflective jacket.
23. On reexamination, she stated that the motorcycle carrying two passengers was not the cause of the accident.



24. The trial court found the respondent driver partly to blame for the accident, and so held the respondent liable in the ratio of 80:20.
25. In the police abstract, the police blame the driver of motor vehicle KCL 184D for the accident.
26. The respondent did not call any witnesses.

### **Analysis**

27. Liability draws upon the evidence. The evidence shows that the driver of the motor vehicle in question knocked the motorcycle on which the deceased was a pillion passenger. As a consequence, the deceased died.
28. The driver of the motor vehicle encroached into the path or lane of the motorcycle hitting the motorcycle; the impact and severe injuries sustained show the motor vehicle was in high speed. The hit was also huge and fatal to all the three on the motorcycle.
29. Evidence also show that the deceased was not wearing a helmet. Other than being a statutory requirement, wearing a helmet serves a noble purpose; protection of the person and mitigation of injuries on the head, and may save a life. Any person riding or aboard a motorcycle without a helmet opens himself or herself to danger. Thus, it is an important consideration which may affect liability as well as quantum in a properly argued case e is another item which also serves to warn other road users of your presence on the road; it is seen from far, and at night makes you visible on the road. In a properly argued case, failure to wear reflective jacket will affect liability.
30. Reflective jacket is another item which also serves to warn other road users of your presence on the road; it is seen from far, and at night makes you visible on the road. In a properly argued case, failure to wear reflective jacket will affect liability.
31. Nevertheless, there was no evidence in this case establishing such nexus with the cause of the accident. Accordingly, the trial court did err in placing liability at 80:20 against the appellants and the decision thereof is hereby set aside
32. Accordingly, the trial court did err in placing liability at 80:20 against the appellants. The appeal on liability succeeds; the trial court's apportionment of liability is set aside and the respondent is found to be 100% liable.

### **Quantum**

33. An appellate court will only interfere with the trial court's discretion in the assessment of damages where; i) there is an error in principle; and or ii) the award of damages is so inordinately high or low as to represent an entirely erroneous estimate of damages (Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR).
34. This claim was founded on the [Law Reform Act](#) and Fatal Accident Act. These laws provide for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years-loss of dependency.

### **Loss of Dependency**

35. Section 4 [Fatal Accidents Act](#) provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents, and child if 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 cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.”

### **The concepts of multiplicand and multiplier**

36. Simply, the formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased’s income utilized on her dependants.
37. See Ringera J (as he then was) in the case of Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988.
38. The appellant submitted that the awarded general damages were inordinately low as the magistrate erred in using Kshs. 8,109/= as a multiplicand. The trial court adopted Kshs. 8,109/= being the salary of a general labourer. The appellants proposed a multiplicand Kshs. 13,572.90/=
39. On loss of dependency, the respondent submitted that an award of general damages was at the discretion of the trial court the appellate court should not interfere unless the court acted on wrong principles.
40. It was not disputed that the deceased died at the age of 63 years.
41. In light of the possibility that the deceased would probably work until he was 70 years old.
42. Both parties herein agree with the multiplier and dependency ratio. What was challenged is the multiplicand.
43. Even if the court was to follow global sum approach, given the age of the deceased, the award arrived at by the trial court in the sum of Kshs. 454,104/= is reasonable compensation for loss of dependency.  
The award is upheld.

### **Loss of expectation of life**

44. The respondent was awarded Kshs. 100,000/= for loss of expectation of life.
45. The appellants have not challenged this award.
46. This award is reasonable and within acceptable range; and is, therefore, upheld.

### **Pain and suffering**

47. The deceased died on the spot.
48. The appellants have not challenged this award. And, the award is within acceptable range.
49. This court, therefore, upholds the award of Kshs. 70,000/=

### **Special damages**

50. None of the parties have challenged this award.



51. The award was proved as provided in law. This court upholds the award of Kshs. 81,550/= as special damages.
52. In an upshot, this court finds that the appeal herein succeeds, in part. Judgment is entered in favour of the respondents in the following terms-;
- i. The appellants are 100% liable
  - ii. Loss of dependency Kshs. 454,104 /=-
  - iii. Loss of expectation of life Kshs. 100,000/=
  - iv. Pain and suffering Kshs. 70,000/=
  - v. Special damages of Kshs. 81,550/=
- Total Kshs.705,654/=
- vi. The appellants are awarded the costs of this appeal.
  - vii. Interest on the award from the date of this judgment
  - viii. Interest on special damages from the date of institution of this suit.
52. Orders accorstablising a nexus between the cause of accident and failure to wear a helmet.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,  
THIS 28<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**F. GIKONYO M**

**JUDGE**

In the presence of: -

1. Chelagat for the appellants
2. Kimani for respondent
3. Otololo C/A

