



REPUBLIC OF KENYA



**KENYA LAW**

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**Personal Representatives of Estate of the Late Gerison Kamau Kirima (Deceased) v Wambua  
(Civil Appeal 208 of 2017) [2023] KEHC 21469 (KLR) (Civ) (16 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 208 OF 2017**

**AN ONGERI, J**

**AUGUST 16, 2023**

**BETWEEN**

**PERSONAL REPRESENTATIVES OF ESTATE OF THE LATE GERISON  
KAMAU KIRIMA (DECEASED) ..... APPELLANT**

**AND**

**NZOMO WAMBUA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. C. Obulutsa (CM)  
in Milimani CMCC no. 3371 of 2007 delivered on 13/12/2012)*

**JUDGMENT**

1. The respondent sued the appellant in CMCC no 3371 of 2007 seeking special damages of kshs 637,127 in respect of damages to motor vehicle registration no KMD 296
2. The parties entered into a consent on liability and apportioned the same at 80% in favour of the respondent and 20% against the appellant.
3. The court assessed damages as follows  
Towing charges 15,000  
Assessment report 6,000  
Copy of receipt 500  
Loss of user 384,000  
Repair costs 476,760  
Les 20% 176,808



Total 705,808

4. The appellant has appealed against the quantum on the grounds that the estate of the deceased was wrongly sued and that the trial court was wrong in awarding both the costs of repair which were beyond the salvage value and also the loss of user which was excessive.
5. The parties filed submissions which I have duly considered. The appellants submitted that the respondent had sued a deceased person for damages and further that the respondent was not entitled to the cost of repair of the motor vehicle since the assessment reports stated that it was uneconomical to repair the motor vehicle and further that the loss of user should not go beyond the period of repair and ordinarily that period should not be more than 30 days.
6. The respondents opposed the appellants submissions and said in their submissions that the personal representative of the deceased was substituted and further that there are Court of Appeal authorities that are in favor of awarding loss of user together with the pre-accident value of the motor vehicle less the salvage value.
7. The appellant relied on the following cases;
  - (i) *Stephen Karanja vs Safaricom Ltd* [2018] eKLR where the court said loss of user should be for a reasonable period which should not be more than one month.
  - (ii) *Africa Highland Produce Ltd Vs John Kisono* CA 264/99 [2001] eKLR where the Court of Appeal said the issue as to what the plaintiff would do to mitigate losses was an issue of fact and that the burden of proof was upon the defendant.
8. The respondent relied on the Court of Appeal case of *Peter Njuguna Joseph vs Anna Moraa* CA No 23 of 1991 where the Court of Appeal said that the owner must take all reasonable steps to ensure that the vehicle is back on the road within a reasonable period and mitigate his losses by having the vehicle repaired and then he would be entitled to a reasonable figure for loss of user.
9. This being a first appeal, the duty of the 1<sup>st</sup> appellate court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
10. The issues for determination in this case are as follows;
  - (i) Whether there is a proper suit against the estate of the deceased.
  - (ii) Whether the assessment of damages was erroneous.
11. On the issue as to whether there is a proper suit against the estate of the deceased, I find that it was there is no dispute that the trial court allowed an application seeking substitution on November 4, 2011 and in the circumstances there is a valid suit against the estate of the deceased.
12. The appellant did not raise the issue as to whether there was a proper suit against the estate of the deceased in the trial court where a consent was entered into on the issue of liability and the appellant is estopped from raising the issue at appeal stage since the record is clear that the deceased is deemed to have been substituted with the personal representative on November 4, 2011.
13. On the issue as to whether the assessment of damages was erroneous, the appellant submitted that the respondent was not entitled to the costs of repair of the motor vehicle since the assessment reports stated that it was uneconomical to repair the motor vehicle and



14. The appellant further submitted that the loss of user should not go beyond the period of repair and ordinarily that period should not be more than 30 days.
15. I find that there is no dispute that the assessment report confirmed that it was uneconomical to repair the motor vehicle. Pw1 said the pre-accident value was Kshs 530,000 and the salvage value was Kshs 150,000.
16. In the circumstances the Trial court ought to have awarded the pre-accident value of the motor vehicle less the salvage value together with a reasonable amount for loss of user for one month. Since the motor vehicle took two months to be repaired, the respondent was entitled to Kshs 192,000 in respect of loss of user instead of Kshs 384,000 which was for two months.
17. I accordingly allow the appeal in the following terms;
  - (a) I award the pre-accident value of Kshs 530,000
  - (b) Less salvage value Kshs 150,000
  - (c) Plus loss of user Kshs 192,000Subject to liability agreed at the ratio of 80:20 %= 457,600
18. I set aside the trial court's award of kshs 705,808 and I substitute it with Kshs 457,600.
19. Judgment be and is hereby entered in favor of the respondent against the appellant in the sum of Kshs 457,000 together with costs from the date of filling the original suit with interest at court rates until payment in full.
20. Since the appeal succeeded partially, each party to bear its own costs of this appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16<sup>TH</sup> DAY OF AUGUST, 2023.**

.....

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

..... for the Appellant

..... for the Respondent

