



REPUBLIC OF KENYA



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**Lee Construction Company Limited v Obare (Sued as Personal Administrator  
of the Estate of Stella Nyaboke Nyameino Deceased) (Civil Appeal  
E005 of 2023) [2023] KEHC 25912 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E005 OF 2023  
WA OKWANY, J  
NOVEMBER 30, 2023**

**BETWEEN**

**LEE CONSTRUCTION COMPANY LIMITED ..... APPELLANT**

**AND**

**ELKANA OMWERI OBARE (SUED AS PERSONAL ADMINISTRATOR OF  
THE ESTATE OF STELLA NYABOKE NYAMEINO DECEASED) RESPONDENT**

*(Being an Appeal against the Judgment of Hon. Mr. C. Ombija – SRM Keroka  
dated & delivered on 8th February 2023 in the original Keroka CCMCC No. 216)*

**JUDGMENT**

1. The Appellant herein was the Defendant in the trial court where the Respondents sued it for damages under the *Fatal Accidents Act*, Cap 32 and the *Law Reform Act* Cap 26 Laws of Kenya. The Appellant sought the following reliefs through the Plaint dated 13<sup>th</sup> October 2017: -
  1. Special Damages at Kshs. 77,550/=
  2. General Damages
  3. Costs of and incidental to the suit
  4. Interests on the above
  5. Any other relief that the court would deem just and fit to grant.
2. The Respondent's case was that on or about 10<sup>th</sup> June 2017 the deceased herein, Stella Nyaboke Nyameino, was a lawful pillion passenger on an unknown motor cycle along Kijauri – Manga road when at Kijauri market area or thereabouts, the Defendant's driver, servant, representative and/or employee of Roller grader/Crane/Combine harvester Reg. No. KBJ 688H negligently, carelessly and/



or recklessly controlled and/or managed Roller/Grader/Crane /Combine harvester Reg. No. KBJ 688H, thereby permitting it to lose control, veer off the road and violently collide with the unknown motorcycle thereby causing an accident in which the deceased suffered fatal injuries.

3. The trial court rendered judgment in favour of the Respondent as follows: -

Liability at 90:10% against the Appellant

- a. Damages for pain and suffering – Kshs. 300,000/=
- b. Damages for loss of expectation of life – Kshs. 150,000/=
- c. Damages for loss of dependency - Kshs. 2,000,000/= less 10% apportioned liability – Kshs. 1,800,000/=
- d. Special Damages – Kshs. 77,550/=
- e. TOTAL - 2,177,550/=
- f. Costs and interest at court rates

4. Dissatisfied with the decision of the trial court, the Appellant filed the present Appeal vide Memorandum of Appeal dated 8<sup>th</sup> March 2023 where he listed 11 grounds as follows: -

1. The learned Trial Magistrate erred by failing to find and to hold that in the totality of the evidence which was adduced, the Respondent had not proved his case on a balance of probabilities.
2. The learned Trial Magistrate erred in his apportionment of liability when there was no evidential basis for apportionment of liability.
3. The learned Trial Magistrate erred by failing to hold that there can be no liability without fault on the part of the Appellant.
4. The learned Trial Magistrate misapprehended evidence which was tendered and erred in his analysis of the same and arrived at wrong findings of fact.
5. The learned Trial Magistrate erred by failing to consider and appropriately apply the law enunciated in the legal authorities which were presented by the Appellant for his guidance.
6. The learned Trial Magistrate took extraneous and/or irrelevant matters into consideration.
7. The judgment of the learned trial magistrate is against the weight of evidence adduces and is a miscarriage of justice.
8. The learned Trial Magistrate erred in his assessment of damages by adopting the multiplier approach when it was impractical in the circumstances to do so and notwithstanding that there was no basis for such approach.
9. There was no basis for award of Kshs. 77,750/= as special damages without strict proof when the basis upon which the claim stood were receipts which did not justify the award.
10. Having apportioned liability at 90:10 in favour of the Respondent, which apportionment is in any event contested in this appeal, the learned trial magistrate erred by limiting his Application of the (contested) apportionment of liability on loss of dependency only.



11. Ultimately, considering the evidence adduced and submission tendered and, in any event, the learned trial magistrate made a monstrously high award of damages which was an erroneous estimate altogether.
5. The Appellant sought orders for the setting aside of the trial court's judgement in its entirety or in the alternative, the re-assessment of the damages awarded to the deceased's estate and that costs be awarded to the Appellant.
6. The Appeal was canvassed by written submissions.

### **The Appellant's Submissions**

7. The Appellant observed that the Police Abstract indicated that the investigation into the accident was still pending and that the rider of the motorcycle who was unknown. According to the Appellant, the rider of the unknown motor cycle was solely responsible for the accident because he did not adhere to the instructions given to road users to use the diversion. The Appellant noted that failure to use the diversion resulted into the motorcycle's collusion with the grader that was reversing.
8. It was submitted that there was no evidence of negligence on the part of the Appellant and that there was no specific plea, in the Plaint, on contributory negligence so as to justify the trial court's finding on liability. The Appellant cited sections 107-109 of the *Evidence Act* and the cases of Intex Construction Co. Ltd vs. Dennis Mutuka Kasuni (2020) eKLR and Alice Wanjiru Ruhiu vs. Messiac Assembly of Yahweh (2021) eKLR where the court held that the legal burden rests on a claimant and is discharged by way of evidence. Reference was also made to the decision in the case of M'Mbula Charles Mwalimu vs. Coast Broadway Co. Ltd (2012) eKLR where the court held that the mere fact that a motor vehicle is involved in an accident with pedestrians does not mean that the driver is automatically to blame.
9. On the award for pain and suffering, the Appellant submitted that since the deceased died instantly, an award of Kshs. 10,000/= would have been appropriate. Reference was made to the decision in Moses Koome Mithika & Another vs. Doreen Gatwiri & Another (suing as the legal representative and Administrator of the Estate of Phineas Murithi – deceased) (2020) eKLR.
10. On loss of expectation of life, the Appellant submitted that an award of Kshs. 10,000/= was fair as was held in James Njiri & 2 Others vs. FPU & Another (2019) eKLR.
11. On loss of dependency, the Appellant contended that the Claimant did not tender any evidence of monthly income and that a global sum of Kshs. 500,000/= was therefore appropriate. Reference was made to the case of Moses Koome Mithika & Another (supra).
12. On special damages, the Appellant argued that since the Respondent pleaded Kshs. 77,550/= but only proved 61,650/=, he was only entitled to what he had proved. Reliance was placed on the decision in Hahn vs. Singh, Civil Appeal No. 42 of 1983 (1985) KLR 716 at pg. 717 and 721.

### **The Respondents' Submissions**

13. The Respondent submitted on principles governing the circumstances under which an appellate court can interfere with the award of a trial court as was established in the case of Paul Kipsang Koech & Another vs. Titus Osule Osore (2013) eKLR.
14. On the awards under the *Law Reform Act*, it was submitted that the awards made by the trial court were just and reasonable. He urged this Court to uphold them.



15. On loss of dependency, it was submitted that the evidence of monthly income of Kshs. 30,000/= was not rebutted in the trial court and ought not to be denied before this Court. He cited the Court of Appeal decision in *Checkers Trading Ltd & Anor vs. Fatuma Kimanthi & Another* C.A. No. 317 of 2003.
16. It was also submitted that documentary evidence was not all that was needed to prove monthly income as held in *Jacob Ayiga Maruja & Another vs. Simeon Obayo* (2005) eKLR and that the award made under this head using the multiplier method was fair and reasonable.
17. On special damages, the Respondent urged this Court to uphold the trial court's award despite the fact that funeral expenses were not proved. He cited the decision in the case of *Jacob Ayiga Maruja & Another* (supra) where the court noted that a reasonable award could be made for funeral expenses.
18. It was the Respondent's case that liability was properly determined by the trial court after considering all evidence tendered before it. He urged the Court to dismiss the appeal for lack of merit.

### **Analysis and Determination**

19. It is trite that the duty of a first appellate court is to subject the entire evidence presented before the trial court to a fresh analysis in order to arrive at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. See *Kiilu & Another vs. Republic* [2005]1 KLR 174).
20. I have considered the trial court and the rival submissions of the parties. The main issue for my determination is whether the trial court made the correct findings on liability and quantum.
21. Sections 107-109 of the *Evidence Act* stipulate as follows on the issue of burden of proof: -
  107. Burden of proof.
    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.
    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
  108. Incidence of burden.
 

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
  109. Proof of particular fact.
 

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
22. The burden of proof always falls on a claimant to satisfy the court on his claim. It was the Respondent's case that he was on the material day travelling aboard a motorcycle with his wife (the deceased) when at around 4.20 p.m. the said motor cycle rammed into a road grader registration No. KBJ 688H, operated by one Joseph Gitau. PW2 No. 90815, Cpl. Josephine Wangida testified that the victim, who was then aged 45 years, was rushed to Borabu sub-County hospital but later succumbed to her injuries.
23. The defence, on the other hand, presented the evidence of Nashir Moraa, the traffic controller at the construction site, who testified that the unknown motorcycle rider did not heed her instructions to



- stop when the grader was reversing and consequently rammed into it. She further testified that the PW1 and the rider jumped off the motorcycle but the deceased fell down and the motorcycle fell on her.
24. From the testimony of the witnesses, it is not in doubt that an accident occurred on the said date as shown by the Police Abstract dated marked P. Exh4 and that it led to fatal injuries suffered by the deceased whose Post Mortem Report (P. Exh2) and Death Certificate (P. Exh3) were presented as evidence.
25. On liability, I note that the trial court did not justify its apportionment of liability at 90:10% against the Appellant. The trial court merely stated that there was 10% contributory negligence in its computation. From my analysis of the uncontested facts of this case, I am persuaded that the motorcycle rider was largely to blame for the accident. However, since the parties to this suit were only the deceased's Estate and the Defendant (Appellant), this Court limits itself to only those two in apportioning liability.
26. It is the view of this court that a party who is a lawful passenger aboard a vessel cannot be held liable for an accident that they have no control over. In arriving at this conclusion, I am guided by the Court of Appeal case of Rosemary Mwasya vs. Steve Tito Mwasya & 2 Others, Civil Appeal No. 100 of 2017, (2018) eKLR where it was held that: -
- “Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident.”
27. It is therefore my finding that the trial court erred in finding that there was contributory negligence in favour of the Respondent at 90:10% yet no basis had been laid for the same. Having already concluded that a pillion passenger cannot be liable for an accident where they have no control over the vessel, I find that liability in this case ought to have been set at 100/% against the Appellant.
28. On quantum, it is trite that an appellate court should not disturb an assessment of damages by the trial court unless it is satisfied that the said court acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the claimant as entitled (See Gicheru vs. Morton and Another (2005) 2 KLR 333).
29. In the present case, the trial court assessed damages for pain and suffering at Kshs. 150,000/=. It was the Appellant's case that since the deceased died on the spot and did not therefore suffer pain for a long time, damages under this heading should have been assessed at Kshs. 10,000/=. PW2 testified that the deceased was rushed to the hospital following the accident but succumbed to her injuries later on that day. It is therefore clear that the deceased did not die on the spot and must have undergone a lot of pain and suffering before she died.
30. It is my finding that, in the circumstances of this case, an award for pain and suffering cannot be nominal as has been suggested by the Appellant. I am guided by the decision in Civil Case No. 56 of 2014 Beatrice Mukulu Kang'uta & Another vs. Silverstone Quarry Limited & Another (2016) eKLR where Nyamweya J. (as she then was) observed that: -
- “As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason.”



31. Similarly, in *Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015* [2016] eKLR, the deceased died immediately after the accident and the trial court awarded Kshs. 50,000/= for pain and suffering. On appeal, the court stated: -

“(5) 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 nevertheless pain for which the deceased’s estate 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 this head is unreasonable.”

32. In *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed: -

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

33. It is my finding that the trial court’s award of Kshs. 150,000/= for pain and suffering was, in the circumstances of this case, on the higher side. I find that an award of Kshs. 80,000 is appropriate under this heading.

On loss of expectation of life, I find guidance in *Benham vs. Gambling* [1941] AC 157 where the court held thus: -

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

34. The Appellant contended that an award of Kshs. 10,000/= would be adequate compensation in the circumstances of this case. The Respondent, on the other hand, argued that the award of Kshs. 150,000 should be upheld.

35. I have considered the fact that the deceased was 45 years old at the time of her death. Her husband testified that she was unwell. What is not clear to this Court is whether the wife was sick on the material day or was ordinarily a sickly person as this would guide the Court in considering the appropriate award under this head. Be that as it may, I note that the court rendered itself as follows in *Hyder Nthenya Musili & Another vs. China Wu Yi Limited & Another* [2017] eKLR: -

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of



his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

36. Guided by the above authority, I find that the award of Kshs. 150,000/= was on the higher side and I hereby reduce it to Kshs. 100,000/=.

37. On loss of dependency, the Appellant contended that the award of Kshs. 500,000/= would be appropriate as a global sum. I agree with the Appellant that the trial court ought to have used the global sum approach as opposed to the multiplier approach because no evidence was presented to ascertain her exact earnings. In *Mwanzia vs. Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another, Ringera J.* held thus:-

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do.”

38. Similarly, in *Moses Mairua Muchiri vs. Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the Court held as follows: -

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

39. In *MNM & another vs. Solomon Karanja Githinji* [2015] eKLR, the court employed the global sum approach and assessed damages at Kshs 3,000,000/= for loss of dependency where a 46-year-old deceased died while in good health and left behind a spouse and four children. In *Amazon Energy Limited vs. Josephine Martha Musyoka & another* [2019] eKLR, the court reduced the trial court’s global award of Kshs 2,500,000/= for loss of dependency to Kshs 1,200,000/- because the deceased was 56 years old and his only child was in college.

40. In the present case, even though the deceased is reported to have died at the age of 45 years, her total lifespan cannot be ascertained owing to the imponderables of life. I note that her widower, PW1, remained as the sole parent for their children even though whether or not the said children go to school was not stated. This court can however conclude that both parents were jointly taking care of their children.

41. Guided by the above cited precedents, it is my view that a global sum of Kshs. 1,500,000/= would be suitable compensation under this heading.



42. On special damages, it is trite that the same must not only be specifically pleaded but must also be strictly proved. (See Hahn vs. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717 and 721). The Appellant argued that since the Respondent did not present receipts for the funeral expenses, the same should not have been awarded. This Court however finds that courts have held a different view concerning proof of funeral expenses. In Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR, the court held thus: -

“We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class.”

43. My finding is that it would be against the principles of justice for this Court to turn a blind eye to the fact that the Respondent incurred funeral expenses even though he did not present receipts to prove this expense. I find that the award of Special Damages for funeral expenses was appropriate.

44. In the end, I find that this Appeal is merited, albeit in part. I therefore set aside the judgement by the trial court and substitute it with a judgment as follows: -

Liability against the Appellant at 100%

Damages under the Law Reform Act

- i. Pain and Suffering – Kshs. 80,000/=
- ii. Loss of Expectation of Life – Kshs. 100,000/=

Damages under the Fatal Accidents Act

- iii. Loss of Dependency – Kshs. 1, 500,000/=
- iv. Special Damages – Kshs. 77,550/=

TOTAL = Kshs. 1,757,550/=

45. Each party shall bear its own costs in the Appeal.

46. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS  
THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**W.A. OKWANY**

**JUDGE**

