



**Rai Cement Limited v Stephen & another (Suing as the legal administrator  
of the estate of Zablun Khaemba Wanyama (Deceased)) (Civil Appeal  
67 of 2021) [2022] KEHC 13815 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13815 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL 67 OF 2021  
DK KEMEL, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**RAI CEMENT LIMITED ..... APPELLANT**

**AND**

**AGNES WAMALWA ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES WAMALWA STEPHEN ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF ZABLON  
KHAEMBA WANYAMA (DECEASED)**

*(Being an appeal from the judgement of the Senior Principal  
Magistrate's Court at Webuye delivered on 13th October, 2021)*

**JUDGMENT**

1. The Appellant Rai Cement Limited appeals to this Court on Liability and quantum awarded from the Judgement of Honourable Munyekenye (SPM) delivered on October 13, 2021 in Webuye SPMCC No 49 of 2020, in which she apportioned liability as between the Appellant and the Respondent on equal basis of 50%:50% and proceeded to award the Appellant Kshs 30,000/= under pain and suffering, Kshs 100,000/= under loss of expectation of life, Kshs 1, 064, 760/= under Loss of Dependency, Kshs 88,000/= under Special damages less 50% contributory negligence.
2. The principal claim in the Plaint dated March 17, 2020 for the award of damages arising out of an accident which occurred on or about February 18, 2020 when the deceased was lawfully riding a motorcycle along Kitale-Webuye road near Malaha Junction when the Appellant's driver or agent so negligently drove, managed and or controlled motor vehicle registration number xxxx which was hauling trailer Reg No xxxx to violently knock the deceased thereby causing him to sustain severe injuries that led to his death.



3. At the end of the trial, the learned magistrate entered judgement for the respondents as follows:
  - i. Liability at a 50% Appellant and 50% Respondent.
  - ii. Pain and Suffering at Kshs 30,000/=
  - iii. Loss of expectation of life at Kshs 100,000/=
  - iv. Loss of Dependency at Kshs 1, 064,760/=
  - v. Special damages at Kshs 88,000/=
  - vi. Less 50% contributory negligence
  - vii. ½ costs of the suit and interest.
4. Aggrieved by the decision of the trial court on liability and quantum, the Appellant appealed to this court putting forth the following grounds:
  - i. That the learned trial magistrate erred in law and fact in holding the appellant 50% liable and/or at all in view of the evidence on record.
  - ii. That the learned trial magistrate erred in law and fact by failing to dismiss the Respondent's suit when the evidence adduced and the facts of the case suggested an outright dismissal of the suit.
  - iii. That the learned trial magistrate erred in law and fact by failing to properly analyze the circumstances of the accident hence arriving at an erroneous decision on liability.
  - iv. That the trial magistrate erred in law and fact in awarding costs and interest of the suit to the Respondents.
5. The Appellant prays for the judgement to be set aside and substituted with an order dismissing the Respondents' suit with costs and costs of this appeal.
6. The appeal was canvassed by way of written submissions. The Appellant filed its submissions dated May 27, 2022 on July 4, 2022. Counsel for the Appellant submits that the Respondents did not prove their case on a balance of probability thus the suit should have been dismissed with costs to the Appellant.
7. Counsel submits that three witnesses testified for and in support of the Respondent's case during trial. According to the evidence of PW2, the police officer, is that he was not the investigating officer and relied on the case of *Kennedy Nyangoya vs Bash Hauliers (2016) eKLR* where Njoki J observed that PW1 in his evidence informed the court that he was not the investigating officer and thus his evidence did not assist in any way to build the Plaintiff's case as he neither visit the scene of the accident, did not draw a sketch plan or map of the area of the accident for production in court.
8. Counsel submits that PW2 did little to assist the Respondent's case as the production of a police abstract only to confirm an accident was reported to have occurred was not sufficient as the evidence of PW2 was simply hearsay which is inadmissible.
9. Counsel submits that with regard to the evidence of PW3 during cross-examination, the witness stated that he heard a loud bang which made him to look up and proceed to go and check. Counsel contends that PW3 did not see how the accident occurred as he never saw the accident taking place but simply heard a loud bang.



10. Relying on section 107 (1) of the *Evidence Act* which is clear that the burden of proof lies with the party that alleges the existence of facts, it was submitted that the evidence adduced in support of the Respondent's case did not meet the threshold of a balance of probabilities.
11. Counsel further submitted that the trial court failed to take cognizance of the evidence of the Appellant as it stated that the motorcycle emerged from a feeder road and rammed on its motor vehicle and its evidence was not challenged by way of cross examination. It was thus contended that the deceased was responsible for the accident.
12. Counsel urged the court to set aside the 50% liability apportioned upon the appellant.
13. On quantum, counsel submits that the award of Kshs 30,000/= under the head of pain and suffering is on the higher side as the deceased died on the spot and submits that the same be replaced by an award of Kshs 10,000/=. Counsel relies on the case of *Jancinta Ruguru vs Beatrice Muthoni Muthike (suing as the legal representative of the estate of the late Isaac Muthike Nyaga) (2021) eKLR*.
14. On loss of expectation of life, counsel submitted that the award of Kshs 100,000/= is on the higher side and submits that the same be replaced by an award of Kshs 80,000/=. Counsel relies on the case of *Easy Coach Bus Services and Another vs Charles Tsuma & Another (suing as the administrator and personal representative of the estate of Josephine Weyanga Tsuma (DCD) (2019) eKLR*.
15. Under the Fatal Accident Act, Counsel submits that the trial court used a multiplier of 30 years after taking into consideration the vicissitudes of life. The amount of Kshs 1, 064, 760/= is inordinately high and the court should have applied a multiplier of 25 years. Counsel relies on the case of *Samuel Kimutai Korir (suing as the legal representative of the estate of Chelangat Sileria vs Nyadhiwc Adventist Secondary School and Another (2016) eKLR*.
16. Counsel finally submits that the trial court erred in awarding costs and interest to the Respondents who were wholly to blame for the accident. Counsel urged the court to allow the appeal.
17. The Respondents did not file submissions.
18. It is imperative to analyze the evidence tendered before the trial court. It was the evidence of PW1 (Charles Wamalwa Stephen) that the deceased herein is his son. He testified that the deceased died due to a road traffic accident. He told the court that the deceased was a farmer aged 20 years old at the time of his death. On cross examination, he testified that he did not witness the accident that led to the death of the deceased.
19. According to PW2 (No xxxx Corporal James Kiricha), he was not the investigating officer regarding the accident as the investigating officer was transferred to another base. He produced the police abstract on the accident. On cross examination, he told the court that the matter is still pending under investigation and that no liability was attributed to the parties and that he could not tell who was to blame for the accident.
20. PW3 (Richard Wafula Sicharani) testified that he wished to adopt his witness statement dated March 17, 2020 as his evidence in chief. In his statement recorded, he noted that on February 18, 2020 at around 4.00pm he was at a brick making site at Malaha junction when a motorcycle passed by while carrying a passenger heading towards Webuye. Behind the motorcycle, was the motor vehicle Reg No xxxx which was hauling trailer reg No xxxx heading towards the same direction. He stated that the truck was being driven at a high speed while swaying on the road when it suddenly rammed onto the motorcycle from behind. The rider and the pillion passenger as a result, fell off the motor cycle landing on the left-hand side of the road as one faced Webuye. The truck did not stop after causing the accident. He testified that his work site is on the left-hand side of the road facing Webuye and was able to witness



the accident as it occurred. He testified that he blamed the driver of the truck for driving at a high speed and failing to apply brakes, slow down or stop altogether. On cross examination, he testified that the truck belonging to Rai Cement Ltd was being driven at high speed and that he saw and heard the accident occur. On re-examination, he testified that the motorcycle was ahead of the lorry.

21. At the defence hearing, DW1, Brian Kibiegion Chemtai, told the court that he works as a driver at Rai Cement and that on the date of the accident while driving his motor vehicle on the left side of the road facing Webuye on reaching Malaha junction a motor cycle came from the right feeder road and hit the motor vehicle he was driving. He heard people say burn or kill the person so he went to the police station and that he blames the rider of the motor cycle for the accident. On cross-examination, he testified that he was heading towards Webuye and that the motor cycle came from a junction and that the motor cycle was not heading towards Webuye. On re-examination, he told the court that he was never prosecuted for the accident.
22. I have given due consideration to the appeal herein, the evidence before the trial court, the grounds of appeal and the submissions by the appellant in this appeal as well as the parties' submissions in the lower court. In my humble view, I find the only issues for consideration are whether the trial court's apportionment of liability for the accident was proper and whether this court should interfere with the award of damages by the trial court.
23. It is trite that this is a first appeal to this court and as provided in the well settled principles, I am entitled to rehear the dispute, but must remember that the learned trial magistrate had the advantage of hearing and seeing witnesses testify before her, that advantage is not availed this court (See Peters Vs Sunday Post Limited [1958] EA 424.)
24. The court also in the cases of *Bundi Murube V Joseph Omkuba Nyamuro [1982-88]1KAR 108* had this to say; -

' However, a court on appeal will not normally interfere with a finding of fact by the trial court unless, it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably, to have acted on wrong principles in making the findings he did.'

And also, in *Rahima Tayabb & Another V Ann Mary Kinamu [1982-88] 1KAR 90* Law JA also stated; -

'An appellate court will be slow to interfere with a Judge's findings of fact based on his assessment of the credibility and demeanor of witnesses who has given evidence before him.'

25. On this sole important issue, the law is clear that he who alleges must prove. The term burden of proof draws from the Latin phrase 'Onus Probandi' and when we talk of burden we sometimes talk of onus.
26. Burden of proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term 'burden of proof' has two distinct meanings:
  1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.



2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
27. Section 107 of [Evidence Act](#) defines burden of proof as– of essence the burden of proof is proving the matter in court. Subsection (2) Refers to the legal burden of proof.
28. Section 109 of the [Evidence Act](#) exemplifies the Rule in section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
29. The question therefore is whether the Respondent herein discharged the burden of proof that the Appellant was liable in negligence for the occurrence of the accident wherein the deceased was allegedly killed.
30. It is my humble view that, due to lack of evidence to corroborate that of PW2, contradicting evidence from DW1, lack of a concluded police investigations and conclusion on who is to blame being made, the trial magistrate exhibited aptness and made a conscientious decision to draw upon the case of [Baker vs Market Harborough Co-operative Society Ltd 1953 1 WLR 1472](#) to decide the issues between the parties by blaming both the Respondent and the Appellant for the accident. The circumstances of, and evidence presented in this case warrant a 50:50 contributory negligence between the Respondent and the Appellant. It transpired that the rider of the motorcycle had suddenly entered the road from a feeder road and crossed the road and that a collision took place. It is thus clear that had both motorists exercised due care and diligence, the accident might not have occurred. It is also instructive that the officer who investigated the case was not called to testify over the accident and further that the case was referenced as pending under investigations and that none of the drivers have been preferred with charges. In the circumstances, it is proper to hold both drivers jointly liable for the accident and hence liability ought to be shouldered jointly in the ratio of 50% to 50%. I therefore, do not find anything on which to interfere with the apportionment of liability by the trial court. The appeal on liability fails and is dismissed.
31. On the issue of quantum, according to the Court of Appeal in *Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR: -*

‘An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.’
32. The trial magistrate awarded Kshs 1, 194, 760/= as general damages and Kshs 88,000/= as special damages; the Respondent regards the general damages awarded as inordinately high.
33. The trial court being guided by viable decision of *James Gakinya Karienyé & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] eKLR* misguided herself by awarding Kshs 30,000/= where my learned colleague Justice RE Aburili award Kshs 10,000/= for pain and suffering, referring to it as being a convectional figure for the death that occurred immediately after the accident, under the [Law Reform Act](#). It is noted that the deceased



- died on the spot and thus did not undergo excruciating pain before breathing his last. A sum of Kshs 10,000/ would have been appropriate. Under this head, this appeal succeeds.
34. On loss of expectation of life, the trial court misguided herself when making an award of Kshs 100,000/= while placing reliance on the decision of James Gakinya Karieny (supra) where my learned colleague Justice RE Aburili awarded Kshs 80,000/=. I place further reliance on the case of *Charles Masoso Barasa & Another vs Chepkoech Rotich & Another (2014) e KLR* which made an award of Kshs 80,000/= under the head of loss of expectation of life. Under this head this appeal succeeds.
35. The above awards are capped to a minimum so that the estate of the deceased does not benefit twice from the same death –under the *Fatal Accidents Act* and the *Law Reform Act*.
36. On the claim under the *Fatal Accidents Act*, I note that the respondents had a letter of administration ad litem to represent the estate of the deceased person. They sued in their capacities as father and mother of the deceased. They are therefore de jure dependants under section 4(1) of the *Fatal Accidents Act* which provide that:
- ' Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused.'
37. The deceased was unmarried and had no known issue. On the claim for lost years (loss of dependency), the manner of assessment of damages under the Fatal Accident's Act was set out in *Chunibhai J Patel and Another vs PF Hayes and Others (1957) EA 748, 749* where the Court of Appeal stated that:-
- ' The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependants.'
38. In this case, the Respondent pleaded that the deceased was aged 20 years, enjoyed a good health and lived a happy and vigorous life. He was a farmer and no evidence was tendered to support his monthly wages. The trial court relied on Legal Notice No 71 of 2012 where she capped the minimum wage of the deceased at Kshs 8, 873/= per month, which was not contested by the Appellants.
39. The Appellant submitted that the trial court erred in adopting a multiplier of 30 years after taking into consideration the account the vicissitudes of life. Counsel submitted that the appropriate multiplier would be 25 years old.
40. In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and since there was no other evidence to challenge this legal retirement age and due to the fact that the appellant did not state otherwise, I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which



would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life.

41. From the evidence of PW1, the deceased played a role in the financial support of his parents. I would therefore give 1/3 of his earnings to the support of the deceased's direct dependents who are his parents.
42. In *Simon Kiplimo Murey & 3 Others v Kenya Bus Service Management Services Ltd & 4 Others (2014) eKLR* where the deceased died aged 28 years working for Kenya Power and Lighting Co Ltd and earning Kshs 40,000/- per month, the court awarded a multiplier of 25 years.
43. Based on the above authority and the uniqueness of facts in this case, where the deceased was aged 20 years old and considered the future and hope of his family, I will uphold the multiplier of 30 years as awarded by the trial court and proceed to uphold the award of Kshs 1, 064, 760/= under the *Fatal Accidents Act*. Under this head this appeal fails.
44. As the special damages are not contested in this appeal, this court will not venture into its analysis.
45. In the end, the appeal succeeds only to the extent of the awards for pain and suffering and loss of expectation of life. Consequently, the trial court's decision to apportion liability against the Appellant at 50% is hereby upheld and that the appeal on liability lacks merit. Similarly, the awards of Kshs 30,000/= for pain and suffering, and Kshs 100,000/= for loss of expectation of life respectively are hereby set aside and are substituted with awards of Kshs 10,000/= and Kshs 80,000/= respectively.
46. For the avoidance of doubt, the judgment on appeal is as follows:
  - a) Liability 50% to 50% respectively
  - b) General damages
    - (i) Pain and suffering Kshs 10,000/=
    - (ii) Loss of expectation of life Kshs 80,000/=
    - (iii) Loss of dependency Kshs 1,064, 760/=
  - b) Special damages Kshs 88,000/=Total Kshs 1,242,760/=  
Less 50% contribution Kshs 621, 380/=  
Net Damages Kshs 621, 380/=
47. It is noted that the appeal has partially succeeded to the extent that it has had the effect of reducing the award of damages in the sum of only Kshs 20,000/ which is a small amount by any standards, I find that it is just to order that each party bears their own costs of the appeal while the respondents shall have full costs and interest in the lower court.

**DATED AND DELIVERED AT BUNGOMA THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**D.Kemei**

**Judge**

**In the presence of:**

No appearance for Onyinkwa for Appellant

No appearance for Mukisu for Respondents



