



**Kamau (Suing as the legal representative and administrator of the Estate
of the Late Philemon Cheruiyot) v Kiptanui & 2 others (Civil Appeal
E060 of 2020) [2022] KEHC 13328 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E060 OF 2020
EKO OGOLA, J
SEPTEMBER 28, 2022**

BETWEEN

**FRANCIS KAMAU APPELLANT
SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE
ESTATE OF THE LATE PHILEMON CHERUIYOT**

AND

**SAMWEL KIPTANUI 1ST RESPONDENT
BERNARD MACHARIA MURIUKI 2ND RESPONDENT
JANE MUTHONI MACHARIA 3RD RESPONDENT**

*(Being an Appeal from the Judgment delivered by Hon. N. Wairimu,
Principal Magistrate, delivered on 28th June 2019 in CMCC No. 429 of 2010))*

JUDGMENT

1. The Respondent instituted a suit in the Chief Magistrates Court vide an amended plaint dated June 7, 2010. The cause of action was that the appellant was the owner of motor vehicle registration number KAS 459K which was driven negligently causing an accident on November 29, 2011 along Nairobi Nakuru road resulting in the death of the deceased. The matter proceeded to full hearing and on June 28, 2019, the trial court delivered judgment where liability was apportioned at 50/50 and the quantum was awarded at a total of Kshs 2,055,690/-.
2. The Appellant being dissatisfied with the judgment of the court instituted the present appeal vide a Memorandum of Appeal dated July 20, 2020 wherein he set out the grounds of appeal as follows;
 - i. The learned trial magistrate erred in fact and in law in finding that the appellant was 50% liable for the accident which was the subject matter of the suit.



- ii. The learned trial magistrate erred in fact and in law in failing to consider the defendant's submissions and authorities supplied on the issue of liability and quantum.
- iii. The learned trial magistrate erred in fact and in law in failing to consider the evidence that was tendered on liability during the hearing of the suit.
- iv. The learned trial magistrate erred in fact and in law in relying on extraneous circumstances not supported by the evidence on record.
- v. The learned trial magistrate erred in fact and in law in failing to distinguish between awards made under the [Law Reform Act](#) from those under the [Fatal Accidents Act](#).
- vi. The learned trial magistrate erred in fact and in law in by duplicating the award under lost years, that is Kshs 485,640/- and at the same time awarding Kshs 600,000/- under the [Fatal Accidents Act](#).
- vii. The learned trial magistrate erred in fact and in law by awarding special damages of Kshs 870,050/- which were not pleaded grossly excessive and not strictly proved.
- viii. The learned trial magistrate erred in fact and in law by adopting a multiplier of 30 years which was excessive.
- ix. The learned trial magistrate erred in fact and in law in awarding the plaintiff a sum of Kshs 2,055,690/-, an award which was excessive, in contravention of the laid down principles and an erroneous estimate of the awards available.

Appellant's Case

3. The Appellant filed submissions dated November 1, 2021. It is the appellant's case that the police abstract showed that the matter was pending investigation and that the lower court did not consider the evidence placed before it in that the accident was caused by another vehicle.
4. The Appellant cited the case of *Statpack Industries v James Mbithi Munyao*; Nairobi HCCA No 152 of 2013 in support of his submission that the plaintiff failed to link the death of the deceased to the negligence of the defendant. According to the witnesses, the appellant's vehicle was not being driven at the point the accident occurred. He further stated that the respondents failed to prove their case. He relied on the case of [Benter Atieno Obonyo v Anne Nganga & Another \(2021\) eKLR](#). It was the appellant's case that the plaintiff barely made his case and the trial court did not weigh the case on a balance of probabilities. Counsel submitted that the third-party lorry was served with a notice and failed to enter appearance. The suit ought to have been dismissed and the owner of the third party lorry held 100% liable.
5. Counsel further submitted that the deceased was married and the estate did not demonstrate how they depended on him to support their claim. He asked the Court to apply a dependency ration of 1/3. He also cited the case of [Mary Njeri Murigi v Peter Macharia & Another \(2016\) eKLR](#) where a multiplier of 2 years was applied for a 58-year-old self-employed deceased person based on the retirement age of 60. According to him the trial court failed to state the basis of the application of 13 years as the multiplier and the ration of 2/3 as the multiplicand; nor the rationale of an income of Kshs 5,844/- while relying in the submissions filed. Counsel submitted that the deceased should have been classified as a casual labourer or unskilled employee and an award given at a minimum wage of Kshs 4,047/- as per the Regulation of Wages (General) (Amendment) Order 2011.



6. The Appellant proposed a multiplier of 15 years and cited the case of [*Francis K Righa v Mary Njeri \(Suing as Legal Representative of the estate of James Kariuki Nganga\) \(2021\) eKLR*](#) in support of this submission. He further submitted that the loss of expectation of life be assessed at Kshs 100,000/- given the uncertainty of life.
7. The appellant relied on the case of [*Hellen Waruguru Waweru \(Suing as Legal Representative of the estate of Peter Waweru Mwenja – Deceased\) v Kiarie Shoe Stores Limited \(2015\) eKLR*](#) where the Court of Appeal explained on the issue of double compensation under the [*Law Reform Act*](#) and the [*Fatal Accidents Act*](#).
8. The Appellant’s case is that the judgment contains no indication that the trial magistrate considered the award under the [*Fatal Accidents Act*](#) vis-à-vis the [*Law Reform Act*](#). The award should take into account deduction between the two to remedy the double award. The appellant submitted that special damages must be proved and the plaintiff only provided an invoice. A re-evaluation of special damages is pertinent in this matter. He relied on the case of [*Total Kenya v Janevams Limited \(2015\) eKLR*](#) where it was stated that an invoice is not proof of payment and only a receipt meets the test. Counsel for the appellant submitted that the plaintiff pleaded special damages of Kshs 91,000/- which he was unable to prove. Citing section 27 of the [*Civil Procedure Act*](#), the learned counsel for the appellant asked the court to set aside the judgment of the trial court and uphold the appeal.

Respondent’s Case

9. The 1st Respondent filed submissions on December 20, 2021. Learned counsel for the respondents submitted that the burden of proof was discharged. He cited the case of [*Treadsetter Tyres Limited v John Wekesa Wepukhulu \(2010\) eKLR*](#) in support of his submission. He further submitted that DW1 testified that according to the sketch plan, motor vehicle registration number KAS 459K belonging to the appellant was partially on the road with the vehicle the deceased had boarded. DW2 confirmed he was on board the appellant’s car with the deceased and he blamed the accused person, that is, the appellant.
10. The Respondent contended that the third-party involvement was shown by the evidence of DW1 who testified that KAS 459K was hit by KAP 263F from behind. From the evidence on record, the driver of KAS 459K was negligent for having parked the vehicle on the road. Further, it is not disputed that the deceased was on board KAS 459K and therefore the trial court was justified on apportioning liability between the defendants and the third party as it was the duty of both the drivers to park the vehicle on the side of the road after he had been flagged down.
11. The Respondent submitted that PEXH-1 showed that the deceased was 22 years old at the time of death and was in the ICU for 2 months. He used to do casual jobs. He cited the case of [*Rose v Ford \(1937\) AC 826*](#) where the court held that damages for loss of expectation of life can be recovered on behalf of the deceased and that only moderate awards should be granted under this. Counsel also cited the case of [*Banedeta Wanjiku Kimani v Changwon Cheboi & Another \(2013\) eKLR*](#) on the issue of damages and maintained that the award of Kshs 100,000/- s for pain and suffering was not excessive.
12. The 1st Respondent contended that the award granted for loss of dependency was reasonable and should be upheld. On loss of expectation of life, he submitted that the appellant did not submit under this heading or give a contrary submission in the trial court.
13. The 1st Respondent submitted that there is no requirement by the trial court to discount and deduct damages under the [*Fatal Accidents Act*](#) with the award received under the [*Law Reform Act*](#). He cited the case of [*David Kenei Julius Cheretei v Zipporah Chepkonga \(Suing as the Legal representative of the estate*](#)



of Wesley Chepkoga Chebii – Deceased) where the court held there was no requirement for deduction of the one award under the *Law Reform Act* from the other under *Fatal Accidents Act*. He further stated that the Court of Appeal in *Kemfro T/A “Meru Express Services (1976) & Another v Lubia & Another (No2) (1987) eKLR* has guided that what the court is required to do is to take into account the award under the *Law Reform Act* from the one under the *Fatal Accidents Act*. and not necessarily deduct the same from the award under the *Fatal Accidents Act*. The Respondent submitted that the trial court in making its awards had in mind all the circumstances and took into account its award for non-pecuniary damages for loss of life and pain and suffering when considering the damages under the two acts therefore the issue of double compensation does not arise. From the evidence of record, the trial court took into consideration the factors it ought to have considered in arriving at the award of Kshs 2,055,050/- and the same was not excessive.

14. The Respondent submitted that special damages were specifically pleaded and proved. PW3 produced an invoice for Kshs 779,050/- as PEXH6 and testified that Kshs 132,500/- had been paid and a title deposited as security for the balance. PEXH6 qualifies as a receipt as per the holding in *Great Lakes Transport Co(U) Limited v Kenya Revenue Authority (2000) eKLR* where the court stated thus;

What we mean is that in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word paid on the invoice and that would turn the status of the invoice into a receipt.

15. On funeral expenses, he cited the case of Lucy Wambui Kihiro (Suing as the Legal Representative of deceased *Douglas Kinyua Wambui*) v *Elizabeth Njeri Obuong HCCC 237 of 2013(2015) eKLR* and *Premier Dairy Limited v Amarjit Singh Sagoo & Another (2013) eKLR*. The Respondent submitted that the trial court made a reasonable award and the appellant did not show that the trial court took into consideration irrelevant factors when awarding damages. The respondent urged the court to dismiss the appeal with costs.
16. Upon perusing the record of appeal, memorandum of appeal and the submissions I have identified the following issues for determination;
- i. Whether the trial court erred in its finding on liability
 - ii. Whether the trial court erred in awarding damages under both the *Law Reform Act* and the *Fatal Accidents Act*
 - iii. Whether the award for damages was excessive

Whether the trial Court erred in its finding on Liability

17. This being a first appeal, it is the duty of the Court to review the evidence adduced before the trial court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123*, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”



18. I note that the evidence of the Police Officer who testified as DW1 was not direct eyewitness evidence. It was evidence concerning events after the fact had occurred. It is indeed opinion based entirely on the police officer's interpretation of the sketch plans made by the Investigating Officer. He said what the sketch plans show, as understood by him.

19. The probative value of police sketch plans was discussed in [*Equator Distributors v Joel Muriu \[2018\] eKLR*](#) where the Court of Appeal held as follows:

“On probative value to be given to a police sketch map, we are aware that a police sketch map for a road traffic accident is prepared after the event, it is not an eyewitness account. However, it carries some probative value. The sketch map is not binding on the trial court and it is for the trial court to establish facts from all the evidence on record. A police sketch map is just but an item of evidence to be considered. In this appeal the appellant has not demonstrated to us that the trial court acted on wrong material in giving credence to and weight to the police sketch map. In our view the map has a probative value as it shows the relative positions of the two motor vehicles immediately after the accident. We find no reason to fault the judge for giving weight to the police sketch map.”

20. The Appellant's vehicle was partially parked on the road and the deceased was not a driver nor in control of any of the vehicles. It is my view that had the driver parked the vehicle off the road then the deceased would not have lost his life. In [*Pamela Akinyi Lidambiza v TSS Transporters Ltd & 3 Others \[2019\] eKLR*](#) the court held;

Accordingly, therefore that Appellant could not wholly escape liability for the causation of the Accident. I say so because to leave a motor vehicle on the road in a manner that causes danger or presents risk to other road users, is to commit an offence under the [*Traffic Act*](#). There having been evidence, prima facie, that the 3rd Appellants motor vehicle was left on the road in an obstructive manner, it would be an act of turning a blind eye to the law to wholly absolve such a driver. I do find that the 3rd Appellants driver had a portion of blame to shoulder for the accident and the consequent Respondent's injuries.

21. The trial court having considered the sketch plan and the testimony of the witnesses was correct in its apportionment of liability. I find that the trial court did not err in its finding on liability.

Whether the Trial Court erred in Awarding Damages Under Both The [*Law Reform Act*](#) And The [*Fatal Accidents Act*](#)

22. In [*Kemfro Africa Limited t/a "Meru Express Services \(1976\)" & Another v Lubia & Another \(No 2\) \[1985\] eKLR*](#) the court held;

An award under the [*Law Reform Act*](#) is not one of the benefits excluded from being taken into account when assessing damages under the [*Fatal Accidents Act*](#) and so it appears the Legislature intended that it should be considered.

Section 2(5) of the [*Law Reform Act*](#) says this:

“(5) The rights conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the [*Fatal Accidents Act*](#)



23. The court is only required to take into account the award under the *Law Reform Act* and not to deduct the same from the award under the *Fatal Accidents Act*. In the premises this limb of the appeal fails. The trial court did not err in awarding damages under both the *Law Reform Act* and the *Fatal Accidents Act*.

Whether the Award for damages was excessive

Pain & Suffering

24. It is trite law that when awarding damages, the courts should consider comparable awards for similar injuries. The same applies to pain and suffering. The deceased was in hospital for two months. The trial court awarded Kshs 100,000/- as damages for pain and suffering. In *Kimani v Cheboi & Anor (2013) eKLR* the Court awarded Kshs 200,000 for pain and suffering where the deceased died four months following the accident. In *Ricarda Njoki Wabome (Suing as Administrator of the estate of the late Wabome Mutahi (Deceased) v Attorney General & 2 Others [2015] eKLR* the Court held;

The Plaintiff claimed that the deceased underwent much pain from the moment he was admitted until he died. The Defendants denied that claim. The generally accepted principle is that very nominal damages will be awarded on this if death followed immediately after the surgery. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case the deceased died after three months following the surgery. His pain and suffering was prolonged. I would award her Kshs 200,000/-.

I find no reason to disturb the award under this head.

Loss of Dependency

25. The deceased was 22 years of age at the time of his death. In *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) [2020] eKLR* the court held;

The court's adoption of a multiplicand of 39 years for the deceased who was aged 21 years, although not shown to have been of ill health, was wrong for failing to take into account life's other vicissitudes not restricted to ill health that could cut short the working life of the deceased. For such vicissitudes despite the deceased being of good health, the court awards a multiplier of 35 years.

26. As for the dependency ration, I concur with the finding of the trial court that a dependency ration of $\frac{1}{2}$ shall suffice with the minimum wage of Kshs 4047/- being taken into consideration. I also agree with the multiplicand the trial court applied and find no reason to disturb this award.

Loss of Expectation of Life

27. I reiterate that in awarding damages courts are guided by comparable awards. Notably, for loss of expectation of life there is a conventional award that has been awarded over time under the *fatal accidents act*. In *Benedeta Wanjiku Kimani v Changwon Cheboi & Another [2013] eKLR* the court held;

In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon



the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case, the conventional figure for loss of expectation of life is Shs 100,000/= and I award the said.

28. I am further persuaded by the case of *Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased) v Reuben Muriuki Kabuba, City Hopper Ltd, Michael A. Craig & Rueben Kamande Mburu [2015] eKLR* where Ougo J awarded a sum of Kshs 100,000/= for loss of expectation of life.
29. In *EMK & another v E O O [2018] eKLR* the Court held as follows;
- “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. In the present appeal PW2 testified that the deceased died after a period of hospitalization of about two months. I therefore award Kshs 150,000/= as damages for pain and suffering and Kshs 100,000/= as damages for loss of expectation of life.”
30. The trial court awarded Kshs 600,000/= for loss of expectation of life which was not guided by comparable awards. In the premises, the award for loss of expectation of life is set aside for an award of Kshs 200,000/-.

Special Damages

31. It is trite law that parties are bound by their pleadings. The respondent had pleaded special damages of Kshs 91,000/-. The trial court did not give its justification for awarding Kshs 870,050/- yet the respondent had pleaded Kshs 91,000/-.

In *Sande v Kenya Co-operative Creameries Ltd (1992) LLR 314 (CAK)* the Court of Appeal held that: -

“As we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amount were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved.”

However as was appreciated in *MNM v DNMK & 13 Others [2017] eKLR*:

“A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v Mubea [1970] EA 476*).”

32. I have perused the record and there is an invoice for the hospital bill for Kshs 779,050/- that the appellant contends is not proof of payment. I observed a stamp on the same showing that it had been cleared as at October 13, 2008. I am guided by the case cited by the appellant; *Total Kenya Ltd formerly Caltex Oil (K) Ltd v Janevams Ltd (2015) eKLR* where the Court stated in the case of *Great Lakes Transport Co (U) Ltd v Kenya Revenue Authority (2000) eKLR* 720 on the production of proforma invoices, where the Court stated thus,

“What we mean is that, in case the goods for which an invoice is issued have been paid for, one would normally expect endorsements such as the word “paid” on the invoice and that would turn the status of the invoice into a receipt. Otherwise, in our minds, a proforma invoice is



given in respect of an advice sought from a supplier as to what the cost of goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.”

It therefore follows that the invoice is proof that payment was made for the hospital bill and the same was proved.

33. With regard to funeral expenses, I am guided by *Alice O Alukwe v Akamba Public Road Services Ltd and 3 Others* High Court of Kenya at Nakuru Civil Suit No 26 of 2005 where it was held: -

However she only produced the receipt for the police abstract and the advertisement charges. There were no receipts produced to prove the claim for funeral expenses. However, the court of appeal in the case of *Jacob Ayiga Maruja & Another v Simeon Obayo(2005)eKLR* awarded the plaintiff Kshs 60,000/= for funeral expenses and held thus.”

“We agreed and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. We however must not be understood to be laying down any law that in subsequent cases Kshs 60,000/= must be given as reasonable funeral expenses. Those items are and must remain subject to proof in each and every case and the Kshs 60,000/= we have awarded herein apply strictly to the circumstances of this case.”

34. As the respondent only pleaded Kshs 50,000/- for funeral expenses, the decision of the trial court is therefore substituted with an award for Kshs 50,000/- for funeral expenses. As for the damages sought for legal fees, the respondent did not prove the same and I find that the trial court proceeded on wrong principles in considering the same.
35. The appeal succeeds to the extent that the awards for special damages and loss of expectation are set aside and substituted as follows;Loss of expectation of life: Kshs 100,000/-Special Damages less Kshs40,000/- legal costs.Costs to the applicant

DATED, DELIVERED AND SIGNED AT ELDORET THIS 28TH OF SEPTEMBER 2022.

E K OGOLA

JUDGE

