



**Khalif v M’Kirea & another (Suing as the legal representative of the estate of JMM (deceased))  
(Civil Appeal E127 of 2021) [2022] KEHC 15932 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15932 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E127 OF 2021  
EM MURIITHI, J  
NOVEMBER 30, 2022**

**BETWEEN**

**H. KHALIF ..... APPELLANT**

**AND**

**ISAAC M’IMARIA M’KIREA ..... 1<sup>ST</sup> RESPONDENT**

**ZIPPORAH MUKOMENE NTUNDU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JMM  
(DECEASED)**

*(An appeal from the Judgment and Decree of Hon. Tito Gesora  
(C.M) in Maua CMCC No. E20 of 2020 delivered on 26/8/2021))*

**JUDGMENT**

1. Before the trial court was a claim commenced by a plaintiff dated February 27, 2020, in which the respondent sued the appellant seeking payment of special damages, damages under the *Fatal Accident Act* and *Law Reform Act*, costs of the suit and interest.
2. The gist of the claim was that on or about December 31, 2019, the deceased was a lawful rider on motorcycle registration No KMEK 012 W along Maua-Meru Road at Nkinyanga area when the appellant’s employee and/or driver so carelessly and negligently drove motor vehicle registration number KCT 169 T Toyota Pickup that he caused it to hit and knockdown the deceased occasioning him fatal bodily injuries. It was pleaded that the deceased, a young man at the prime age of 35 years with a young family, was the bread winner of his family and was in good health at the time of his death. By reason of his death, his family has lost the said support and his estate has suffered loss, expense and damages.



3. The appellant denied the claim by his amended statement of defence dated on January 15, 2021 and prayed for the respondent's suit to be dismissed. After conclusion of the trial, the trial court found that the respondent had proved his case on a balance of probabilities and awarded general damages of Ksh 70,000 for pain and suffering, Ksh 150,000 for loss of expectation of life, Ksh 2,000,000 for loss of dependency (global) and special damages of Ksh 240,000 totaling to Ksh 2,460,500 plus costs and interest.

### **The Appeal**

4. On appeal, the appellant filed his memorandum of appeal on September 16, 2021 listing 8 grounds as follows:
  1. The honourable chief magistrate erred in law and fact in holding that the respondents had proved negligence against the appellant contrary to the evidence tendered.
  2. The honourable chief magistrate erred in law and fact in failing to apportion liability to the deceased, JMM, for the accident which occurred on December 31, 2019.
  3. The honourable chief magistrate erred in law and fact by failing to appreciate that the respondents' claim under the Law Reform Act had not been authorized by both respondents in the suit.
  4. The honourable chief magistrate erred in law and fact in awarding an excessive amount in general damages on pain and suffering without any evidence as to the length of suffering of the deceased.
  5. The honourable chief magistrate erred in law and fact in awarding an excessive amount in general damages for loss of dependency not within limits of already decided cases of similar nature.
  6. The honourable chief magistrate erred in law and fact in awarding an excessive amount in general damages for loss of expectation of life not within limits of already decided cases of similar nature.
  7. The honourable chief magistrate misdirected himself on the law and fact by awarding special damages for funeral expenses which had not been pleaded and by amending the plaint suo moto in the judgment.
  8. The honourable chief magistrate misdirected himself on the law and fact by awarding special damages for obtaining limited grant which had not been specifically proved.

### **Duty Of The Court**

5. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co & others* [1968] EA 123). It is also an established principle of law that an appellate court should be slow to interfere or reverse the findings made by the trial court unless it is satisfied that the court acted on no evidence or on a misapprehension of the evidence or applied the wrong legal principles in reaching its decision. (See *Sumaria & Anor v Allied Industrial Limited* (2007) 2 KLR 1).



## The Evidence

6. PW1 PC Muita Julius, of Maua Police Station Traffic Duty, testified that, “On December 31, 2019 at about 8 pm an accident occurred along Maua-Meru road at Nkinyanga involving a motor vehicle and motor cycle KMEK 012 N make captain and motor vehicle KCT 169 T Toyota Hilux. The driver of the Toyota is Bek Mohammed Ismail. On getting to Nkinyanga he overtook improperly and knocked the oncoming motor cycle driven by the late Jacob Mwiti. The rider succumbed due to the injury. The driver of the Hilux was charged for causing death by dangerous driving. Matter is pending before court to be heard on June 21, 2021. The driver of the Hilux was to blame. I produce the abstract as P Exhibit 1.”
7. On cross examination, he stated that, “I am the current investigating officer the file was handed over to me. I didn’t investigate the accident on the date it occurred. I am not an eye witness. I have the sketch map here. I have not produced it. I can’t confirm whether it was disclosed. Member of public reported. OB 17/31/12/2019. I don’t have the OB here. The driver of the Hilux did not report that according to the police file. The OB is captured in our police file. We couldn’t ascertain whether the motorcycle rider had a licence. We did not recover the insurance for the motorcycle. At the scene. The body of the deceased was on the left as one faces Maua general direction. The motorcycle was on the same side. Both the body and motorcycle was off the road. The motorcycle was headed to me and the motor vehicle in the opposite direction. The motor vehicle was overtaking another motor vehicle then it hit the oncoming motorcycle. Point of impact was on the rider’s lawful lane. Left side as one faces Meru. He was thrown to the right side. I have been an officer for 14 years. After impact the resting position has no formula. Point of impact was decided by the skid marks of the motorcycle and motor vehicle. They were both there.”
8. On re-examination, he stated that, “the victim landed on the right side. After impact the victim could land anywhere.”
9. PW2 Isaac M’Imaria M’Kirea, the deceased father, adopted his statement recorded on February 27, 2020 as his evidence in chief. He also produced the police abstract, demand notice together with its receipt, limited grant together with the receipt for Misc succession, post mortem report and its receipt, funeral expenses receipt, death certificate and copy of chief’s letter as exhibits in court.
10. On cross examination, he stated that, “I didn’t witness the accident. When I got there the motor vehicle was on the side of the road, just on the tarmac. When police came after me, the body was off the road. The body was on the left as you face Maua. The deceased was my child. I have the identity card. The deceased had a shop. There is stock in the shop. He had bought a motorcycle and took his children to school. We didn’t recover any papers.”
11. On re-examination, he stated that, “I didn’t take measurement. I was in shock. The police came to do it.”
12. PW3 Samuel Mbiti Mutea adopted his statement recorded on February 27, 2020 as his evidence in chief.
13. On cross examination, he testified that, “I had come from Kangeta going to Nkinyanga. I saw the miraa vehicle collide with the motorcycle. Motor vehicle was overtaking a school vehicle. I was walking. I don’t recall the side of the road where the body fell. The motorcycle was on the tarmac.”
14. On re-examination, he stated that, “I saw all of the things I have said. I was in shock. I didn’t measure.”



15. DW1 Bek Mohammed Ismail, adopted his statement dated February 9, 2021 as his evidence in chief. He also produced the list of documents dated February 8, 2021 as DExh 1.
16. On cross examination, he stated that, “I have a driving licence. I went to driving school in Garissa. I don’t recall the school. I took driving licence in year 2008. I have no document to show I went. On the date of accident, I was coming from Meru to Maua. I had taken miraa to Nairobi and was returning. I had taken it in the night at about 1.00 am. I slept at Nairobi abit and left at 10.00 am or 11.00 am. I was driving at 18 kph but why and how the accident occurred is God’s will. I stopped but I got scared and drove away. Motor cycle was overtaking another vehicle and he rammmed into me. It was a big vehicle. I don’t recall the Kangeta Girls area has a slope. Just before the cess collection point. I have no map of the place. I told the police as much. They still charged me.”

## Submissions

17. The appellant faults the trial court for relying on a sketch plan and the OB which were not produced as exhibits, and relies on *Osman Ahmed Kabia v Joseph G Njoroge* (2012) eKLR. He urges that the respondent did not either prove his case on a balance of probabilities or that the appellant was 100% liable, and prays the court to dismiss the suit with costs. He feels that liability ought to have been apportioned equally, in line with the principle that where there is a collision, the court cannot determine which of the 2 motorist is at fault, and relies on *Samuel Kagema Mwangi v Erukana Mutebi & another* (2018) eKLR. He submits that since no authority was filed by Zipporah Mukomene Ntundu, the co-administrator of the deceased estate, consenting to the institution of this suit, the claims under the *Law Reform Act*, special damages, pain and suffering and loss of expectation of life ought to have been declined, and relies on *Peter Kimani Nene v Nation Newspapers Limited* (2012) eKLR. He submits that since the length of suffering was not proved, the award under that head ought to have been nominal, and relies on *Ngugi Aloice T/A Siloam Hide & Skin Ltd v Esther Kanini Njeru & Anor (Suing as legal representative of Daniel Gitonga Njeru- deceased)* (2020) eKLR. He accuses the court of literally plucking the award of Ksh 2,000,000 from the air, as there was no reasoning showing how the same was arrived at. He proposes an assessment of Ksh 700,000 as the deceased dependants were not proved save for the respondent, and relies on *Oyugi Judith & Anor v Fredrick Odhiambo Ogong & 3 others* (2014) eKLR, where the court assessed damages in the sum of Ksh 700,000 for a 30 year old deceased who was married with 2 children. He urges that since very little can be ascertained of the life the deceased would have had, the court ought to have resorted to the conventional figure of Ksh 100,000 for loss of expectation of life, and relies on *Benjo Travellers (K) Limited v Justus Kamenya Mwasya (Suing as legal representative of the estate of Kavilenge Kamenya (deceased). Kavilenge Kamenja (deceased) & Anor* (2021) eKLR. He urges that no receipt was furnished for burial expenses and the sum of Ksh 190,000 was not pleaded, thus no award for special damages ought to have been made. He faults the trial court for descending into the arena of litigants, when it substituted the sum of Ksh 19,000 pleaded by the respondent with Ksh 190,000. In his view, the sum of Ksh 35,000 for obtaining a limited grant ought to have been rejected, as there was no official court filing fees receipt showing that the said sum had been expended. He urges that the suit ought to have been dismissed as negligence was not proved, but if the court was inclined to find otherwise, liability ought to be apportioned equally. He urges the court to award Ksh 15,000 for special damages, Ksh 20,000 for pain and suffering, Ksh 100,000 for loss of expectation of life, Ksh 700,000 for loss of dependency less 50% contribution totalling to Ksh 417,500. He prays for costs of the suit below and of this appeal.
18. The respondent submits that negligence was fully proved and the appellant was properly held to have been 100% liable. He urges that since both administrators are parents of the deceased herein, identified as such in the chief’s letter, and the trial court only decided to hear the evidence of one, the same is



a procedural technicality that ought not be prioritized at the expense of substantive justice, and relies on the provisions of [sections](#) 1A, 1B, article 159 (2) (d) of the [Constitution](#) and the Supreme Court case of [Raila Odinga v IEBC & others](#) (2013) eKLR. He submits that the claims for special damages, pain and suffering, loss of expectation of life and loss of dependency were properly awarded, as the deceased was fairly young, a vibrant business man running his own general shop and also engaged in the boda boda transport sector, where he earned a good income, and relies on [Sukari Industries Limited v Clyde Machimbo](#) (2016) eKLR, [Mary Njeri Murigi v Peter Macharia & another](#) (2016) eKLR, [David Mbuba & another v Victoria Mwongeli Kimwalu & another](#) (2018) eKLR and [Vincent Korir Tanui \(Suing as the administrator of the estate of Samuel Kiprotich Tanui \(deceased\) v Mogogosiek Tea Factory Co Ltd & Another](#) (2018) eKLR. In praying for the dismissal of the appeal with costs, he urges that the special damages pleaded were specifically proved and therefore the sum of Ksh 240,000 was proper.

### **Analysis and Determination**

19. Before delving into the merits of this appeal, this court wishes to address the contention by the appellant that since the consent of the co-administrator was not obtained in order to commence these proceedings, damages under the [Law Reform Act](#) were not awardable. Section 82 (a) of the [Law of Succession Act](#) provides that, “personal representatives shall, subject only to any limitation imposed by their grant, have the following powers (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.”
20. There is no doubt that the respondent and Zipporah Mukomene Ntundu, the deceased parents, were the personal representatives of the deceased estate, by virtue of a limited grant of letters of administration *ad litem* issued by the court on February 5, 2019. The suit was commenced by the two of them but only the respondent testified in court as PW1, and this court finds that to have been in order.
21. After considering the grounds of appeal as listed, the issues for determination are whether the respondent proved his case on a balance of probabilities; whether the trial court awarded excessive general damages under the various heads; and whether the special damages awarded had been pleaded and proved.

### **Proof Of The Case On A Balance Of Probabilities**

22. The provisions under section 107,109 and 112 of the [Evidence Act](#) were extensively dealt with in [Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another](#) (2004) eKLR, in which the Court of Appeal observed that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the [Evidence Act](#), cap 80....There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...”
23. The appellant contends that there were two contradicting versions of the events leading to the occurrence of the accident as narrated by PW1 and PW3, and therefore liability ought to have been apportioned in the ratio of 50:50. On the other hand, the respondent is unmoved that the appellant was wholly to blame for the accident, as he failed to apply brakes and/or swerve to avoid the accident.
24. The question this court now poses is whether from the evidence on record, it can be firmly concluded that the respondent proved his case on a balance of probabilities.



25. Kimaru, J (as he then was) in *William Kabogo Gitau v George Thuo & 2 others* [2010] eKLR stated that:
 

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
26. PW3, an eye witness testified that the subject motor vehicle hit the deceased as it was trying to overtake, and carelessly so, a school bus that was ahead of it. On cross examination, PW3 stated that, “motor vehicle was overtaking a school vehicle.” That evidence was corroborated by PW1, who stated that, when DW1 got to Nkinyanga, he improperly overtook and knocked the oncoming motor cycle ridden by the deceased.
27. When DW1, the driver of the subject motor vehicle took to the stand to defend himself, he stated on cross examination that, “I was driving at 18 kph but why and how the accident occurred is God’s will....motor cycle was overtaking another vehicle and he rammed into me. It was a big vehicle.....I told the police as such. They still charged me.”
28. DW1 admitted that he did not stop after the accident and PW1 testified that the occurrence of the accident was reported by a member of the public.
29. This court finds that the appellant was wholly to blame for the accident, and the apportionment of liability at 100% by the trial court was proper. The deceased cannot be said to have been at fault because he was riding on his lane when DW1 knocked him down thus fatally injuring him. It thus follows that the respondent proved his case against the appellant on a balance of probabilities.

### **Excessive General Damages Under The Various Heads**

30. The principles on when an appellate court would interfere with the findings of fact by the trial court on quantum are now trite as settled by the court of appeal in the case of *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate. (see *Kemro v A M Lubia & Olive Lubia* (1982-88) 1 KAR 727 and *Kitavi v Coast Bottlers Limited* [1985]KLR 470)”

### **Pain and Suffering**

31. PW3, the eye witness, recorded in his statement dated February 27, 2020 that, “the deceased leg was cut there and then as a result of the impact of the accident; the other part of the body was thrown to the road reserve.” PW2 also recorded in his statement dated February 27, 2020 that, “a few meters ahead I saw my a piece of my son’s motorcycle on the road with one leg and the other part of the body was on the road reserve.”



32. PW1 admitted during cross examination that both the body of the deceased and the motorcycle were off the road. This court finds the sum of Ksh 70,000 awarded by the trial court for pain and suffering was reasonable, as the deceased, albeit succumbing to the injuries on the spot, endured a lot of pain, as his leg was severed due to the impact of the accident and the rest of his body was thrown to the road reserve.

### **Loss Of Expectation Of Life**

33. Although the conventional figure awardable under this head is Ksh 100,000, the trial court, in exercise of its discretion awarded the sum of Ksh 150,000 under this head. This court rejects the invitation by the appellant to disturb the award of Ksh 150,000 made under this head, as it was based on precedent and inflation rates.

### **Loss Of Dependency**

34. I respectfully note the view taken by the court (P.J.O Otieno J) in *Abdalla Rubeya Hemed v Kayuma Mvurya & another* [2017] eKLR that the dependency is a matter of fact and must be proved by evidence as follows:-

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

35. I should agree that if there is no evidence from which dependency may be proved or inferred a claim in dependency should fail.

36. PW2 recorded in his statement dated February 27, 2020 that -

“The deceased was my fourth born son and was my only hope as he was hardworking and I used to depend on him very much as his other siblings also looked to him to get a livelihood as he was a renowned shopkeeper in the area as well as committed in his motorcycle business. His other siblings are non-employed and only depend on menial jobs which are not consistent and may even go missing for a long time hence my whole family was dependent on the deceased herein for a living. The deceased has left behind two children aged 11 years and 8 years respectively who I now stay with and am further tasked with the responsibility of taking care of the livelihood as well as their education as they are all in lower primary despite me not being in any gainful employment.”

That evidence was not subjected to any cross examination, and it thus stands as uncontroverted. The evidence by PW2 is corroborated by the chief of Kangeta Location, *vide* his letter dated January 29, 2020, where he acknowledges that the deceased separated with his wife, leaving the two minors under the care and protection of their grandparents, the respondent and his wife Zipporah Mukomene Ntundu.

37. This court respectfully agrees with the Court of Appeal in *Kenya Breweries Limited v Saro* (1991) (eKLR) that:

“We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well



in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have “homes” for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a “home” while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase “being mindful of other people’s welfare.....In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution.”

38. It is this court’s finding that the respondent proved, on a balance of probabilities, that the deceased was, besides being a boda boda rider, engaged in other income earning ventures. It is not lost to this court that the deceased was aged only 35 years, at the prime of his life, full of good health and his glorious life was cruelly cut short by the negligence of the appellant. This court further notes that the respondent and his wife are the sole care givers to the two children of the deceased.
39. This action, having been brought by the respondent for his own behalf, that of Zipporah Mukomene Ntundu, and the children of the deceased, in view of the provisions of section (4) (1) of the Fatal Accidents Act, this court finds that the global award of Ksh 2,000,000 for loss of dependency was justified in the circumstances.
40. This court is satisfied that the trial court applied the correct legal principles in arriving at the awards of Ksh 70,000 for pain and suffering, Ksh 150,000 for loss of expectation of life and Ksh 2,000,000 for loss of dependency.

### **Special Damages**

41. It is trite law that special damages should not only be specifically pleaded, but also strictly proved. The respondent pleaded Ksh 190,00 as burial expenses and Ksh 35,000 for obtaining the limited grant of letters of administration. The respondent produced a receipt from Newgen Funeral Services of Ksh 190,000 for funeral expenses. He further produced 2 receipts from Mutembei & Kimathi Advocates for filing miscellaneous succession and demand notice of Ksh 35,000 and Ksh 5,000 respectively. There is also a receipt from Dr Njeru C.M of Ksh 10,000 for post mortem. This court is thus satisfied that the special damages of Ksh 240,000 were specifically pleaded and strictly proved. The trial court did not err when it found that the pleaded sum of Ksh 19,000 was a typographical error as it ought to have read Ksh 190,000 as indicated in the receipt from Newgen Funeral Services.

### **Orders**

42. Accordingly, for the reasons set out above, the court does not find merit in the appeal and it is, therefore, dismissed with costs.

*Order accordingly.*

**DATED AND DELIVERED ON THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2022.**



**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

M/S J. M. Mwangi & CO. Advocates for the Appellant.

M/S Mutembei & Kimathi Advocates for the Respondent.

