Simba v Chepkwony ((Suing as the Legal Representative of the Estate of the Late Kelvin Kipngetich)) (Civil Appeal E088 of 2021) [2025] KEHC 552 (KLR) (22 January 2025) (Judgment)

Neutral citation: [2025] KEHC 552 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL E088 OF 2021

PN GICHOHI, J

JANUARY 22, 2025

BETWEEN

YUSUF ROBERT SIMBA ..... APPELLANT

AND

PETER KIPRONO CHEPKWONY ..... RESPONDENT

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE KELVIN KIPNGETICH)

(An Appeal from the Judgement and Decree of Hon. A.Mukenga (SRM) delivered on 21st July, 2021 in Molo CMCC No. 304 of 2021)

JUDGMENT

1. The background of this Appeal is that vide a plaint dated 30th October 2019, the Respondent herein sued the Appellant and sought judgment against the Appellant for: -

    a. General damages under the *Law Reform Act* and Fatal Accident Act.

    b. Special damages Kshs. 93,750/=.

    c. Costs of the suit.

    d. Interest on (a) , (b) and (c) above.

    e. Any other relief as the Honourable Court may deem fit and just to grant.

2. The claim was that on or about the 17th August 2017, the deceased was lawfully travelling as a pillion passenger on motor cycle registration number KMDD 459 G along Nakuru -Kericho road when the driver of motor vehicle registration number KBX 950Z drove the said motor vehicle in a careless, reckless and or negligent manner, therefore hitting the motor cycle and as a result, the deceased sustained fatal injuries.

3. The Appellant filed a defence dated 19th December, 2019 denying the claim in its entirety. However, on a without prejudice basis, the Appellant stated that if an accident occurred then, then the same was due to the sole and/or contributory negligence of the deceased

4. After hearing both parties, the trial court delivered its judgement on the 21st July 2021 where he found the Appellant wholly liable for the accident. The court went on to enter judgment in favour of the Respondent as against the Appellant as follows: -

    i. Pain and suffering..... Kshs. 20,000/=

    ii. Loss of expectation of life.....Kshs. 200,000/-

    iii. Loss of dependency.....Kshs. 1,200, 0000/-.

    iv. Special damages.....Kshs.43,750/-

    Total .....Kshs. 1,463,750/-

    Costs of the suit plus interest thereon at court rate from date of judgment until payment in full .

5. Dissatisfied with this Judgement, the Appellant lodged this Appeal by a Memorandum of Appeal dated 4th August, 2021, raising 9 grounds which can be condensed as follows: -

    1. The learned trial magistrate grossly misdirected herself in treating the evidence submissions on liability before her superficially or in the alternative failing to consider the Appellant's demand for contributory negligence hence coming to the wrong conclusion.

    2. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before her superficially and consequently coming to the wrong conclusion on the same.

    3. The learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Appellant hence awarding damages which were inordinately high and represented an entirely erroneous estimate.

    4. The learned trial magistrate failed to adequately evaluate the evidence and exhibits thereby arriving at a decision unsustainable in law.

Appellant's Submissions

6. On liability, the appellant submitted that the Respondent did not witness the accident but the evidence produced was contradictory and false for reasons that his witness Dominic Kiprono (PW2), testified that he was riding the motorcycle Reg No. KMDD 459G when the accident occurred yet the police abstract (PEXH7) showed that the rider of the motorcycle was one Jackson Kipkorir and not Dominic Kiprono (PW2). That on the other hand , the Appellant produced an Investigation Report (DEXB1) showing that the rider of the motorcycle was Jackson Kipkorir and did not name the deceased as having been in the accident.

7. In those circumstances , the Appellant submitted that the Respondent failed to prove his case against the Appellant.

8. The Appellant further submitted that without prejudice, should court hold that the Respondent boarded the motorcycle Reg No. KMDD 459G, (which is denied) then the Appellant invites this

Court to find that the Respondent contributed to his own demise by deliberately boarding a motorcycle which already had a passenger and whose rider was in breach of the *Traffic Act* and regulations including riding without a license, riding without a reflector, riding without helmet and speeding on a wrong lane.

9. Reliance was placed on the case of Rentco East Africa Limited V Dominic Mutua Ngonzi [2021] e KLR, where liability was apportioned on the Respondent who was found to have exposed himself to danger by riding the motor cycle yet the law does not allow for two pillion passengers. Lastly , the Appellant urged that liability be apportioned at 70%:30% in favour of the Respondent.

10. On quantum, the Appellant emphasised on the well settled principles as to when an appellate court that can disturb an award of damages .

11. On pain and suffering, the Appellant submitted that as per the evidence adduced, the deceased died instantly and the conventional figure is always Kshs. 10,000 in those circumstances. Reliance was placed on the case of Mercy Muriuki & another vs Samuel Mwangi Nduati & another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR where the Court observed that:-

> " 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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

12. While still relying on the case of Mercy Muriuki & another (supra), he submitted that an award of Kshs. 80,000/= would be sufficient under loss of expectation of life.

13. On loss of dependency, the Appellant submitted that the deceased died aged 23 years and documents produced showed that he was studying to become a teacher. Arguing that it may not be known whether he would have finished his studies and was yet to be employed hence no income, then multiplier approach was not suitable.

14. The appellant prays that, in considering the effluxion of time, factoring in inflationary trends and economy, an award of Kshs. 800, 000 would be sufficient .

15. The Appellant further submitted that the Respondent had no known dependants, not married and had no child. He therefore urged that since the persons entitled to the estate are the same persons under the *Law Reform Act* and *Fatal Accidents Act*, the award under the *Law Reform Act* be deducted from the award under the Fatal Accident Act. In support , he relied on the case of Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) V Kiarie Ahoe Stores Limited NYR CA Civil Appeal No. 22 Of 2014 (2015) eKLR on explanation in regard to double compensation under the two Acts.

16. In regard to Special Damages, he submitted that though the Respondent pleaded Kshs.93,750 out of which Kshs. 50,000 was for funeral expenses, there was no receipt filed to prove funeral expenses. That further, all the receipts filed had no indications of the ETR used for the purposes of the Kenya Revenue Authority or revenue stamp.

17. He therefore urged that all the receipts be disregarded particularly the Kshs. 50,000/ He however sated that Kshs. 43,750/= may be appropriate.

18. In conclusion he proposed general damages of Kshs. 497,000/=, special damages of Kshs. 43,750/= .

19. Ultimately he urged the Court to :-

    1. Dismiss the trial court's judgment.

    2. In the alternative, liability be shared at 70:30 in favour of the Respondent and special damages be added making it Kshs. 540,750/=.

Repondent's Submissions

20. On liability, the Respondent submitted that the Respondent's (PW1) evidence and that of PW2 (police officer) was well corroborated as to the occurrence of the accident.

21. He submitted that according to PW2's evidence, the motor vehicle being driven by the Appellant and the motor cycle were going towards opposite directions and on reaching Chepseon, the Appellant was trying to overtake and swerved to avoid the rider who was on his right lane and knocked motor cycle which was on its lane. PW2 blamed the Appellant for the accident for overtaking recklessly. It was submitted that the Appellant was charged for causing death by dangerous driving and was fined Kshs. 20,000/= in default six (6) months.

22. He further submitted that according to the statement made by the Appellant, he (Appellant) was charged with two counts of causing death by dangerous driving and that upon pleading guilty, he was convicted and fined Kshs. 30,000/= which he paid then discharged.

23. It was therefore submitted that this being a civil case, the Respondent discharged his burden by proving that the Appellant caused the accident and therefore, the trial magistrate was right in holding the appellants 100% liable.

24. On damages for pain and suffering, it was submitted that the deceased died while undergoing treatment which means that he suffered pain. He urged the Court to uphold the award of Kshs. 20,000/= considering the lapse of time, the inflation rate and the devaluation of the Kenyan shilling.

25. On loss of expectation of life, the Respondent submitted that the award of Kshs. 200,000/= made by the trial court was fair considering that the deceased was condoled by the Principal of Lugari Diploma Teachers Training College as a promising teacher of mathematics which is clear that the community and the world suffered a big loss by losing the deceased.

26. In further support of the said award, the Respondent relied on the same case he relied on before the trial court which is, Daniel Kuria Nganga (Suing as a legal representative of estate of Samson Kuria (Deceased) vs Nairobi City Council [2013] eKLR , where an award of Kshs. 210,000/= was made under this head and that was in 2015.

27. On loss of dependency, it was submitted in support of multiplier approach in arriving at the award under this head. the deceased was 23 years at the time he died and was a 2nd year student at Lugari TTC College undertaking a Diploma in education, was not married, enjoyed good health and assisted at home with farming and taking care of livestock. It was submitted that his father had high hopes in the deceased expected him to graduate and support him and his siblings after securing a job as a teacher as expected of most parents in Africa. The Respondent submitted that a dependency ratio of 1/3 is not opposed by the Appellants.

28. It was submitted that if the deceased could have finished his college and join employment at the age of 26 years, he could have worked for over 34 years before reaching the retirement age for civil servant which is 60 years. In support of those submissions, the Respondent relied on the decision in Joshua Mungania & Another Vs Gregory Omondi Angoya (Suing as a legal representative of the estate of

Christine Anyango Omondi (Deceased) [2018]eKLR relied on before the trial court and urged this Court to uphold the award by the trial court.

29. On special damages, the Respondent submitted that he pleaded a total Kshs. 93,750/= in the plaint and he produced receipts for Kshs. 40,000/= for legal fees to obtain grant Ad litem page 13 of the record of appeal, post-mortem receipt of Kshs. 3,200/= and Kshs. 550/= for official copy of records. He therefore urged this Court to uphold the award of Kshs. 43,750/=.

30. Lastly, he urged the court to dismiss the Appellants appeal with costs to the Respondent and interest from the date of judgement at the trial court.

Analysis and Determination

31. This being the first appeal, this Court's duty is to re-assess and re-evaluate the evidence and draw its own conclusion bearing in mind that it has neither seen nor heard the witnesses- See Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123. Towards that end, it is clear that the Appellant contests the trial court's finding on both liability and quantum.

32. On liability, Peter Kiprono Chepkwony (PW1) testified that he did not witness the accident but received information that his son (deceased) had been involved in an accident and it involved motor vehicle registration number KBX 950Z and motor cycle registration number KMDD 459C. He rushed to the scene but found that his son had been rushed to hospital. He rushed to the hospital but found that his son had passed away.

33. No. 75626 PC Wilberforce Mungwana (PW2) testified in regard to the said accident. He had the Police file . The Appellant was the driver of the accident motor vehicle. The motor cycle rider was not injured. He had two pillion passengers including the deceased. The Appellant was charged for causing death by dangerous driving.

34. The Appellant's voluntary statement in the record of Appeal shows that he was driving the said motor vehicle when it was involved in an accident with the motor cycle where the rider was carrying two pillion passengers and encroaching his lane. That the Appellant swerved but lost control. The two pillion passengers fell on the road but he did not see where the motor cycle landed.

35. The statement further shows that upon pleading guilty to the two counts of the offence of causing death by dangerously driving, the Appellant was convicted and fined Kshs. 30,000/=. He did not testify before the trial court and therefore, there was no way of being cross examined.

36. The rider was neither a witness nor a party to this case. Though the deceased was one of the two pillion passengers , the circumstances in this case are very different from those in Rentco East Africa Limited (supra) and therefore, there is no justification upon which liability would be apportioned on him. The trial court's finding on liability is upheld.

37. On special damages, there is consensus by the parties herein that the Respondent only proved Kshs. 43,750/= out of the amount pleaded. That is the amount awarded by the trial court and therefore upheld.

38. It is now settled that an award of general damages is discretionary and that the Appellate court should be slow to interfere with such discretion. Indeed, the Court of Appeal in Catholic Diocese of Kisumu v Tete [2004] eKLR , had this to say:-

> " 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 difference 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 or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate."

39. On damages for pain and suffering, the trial court record shows that the Appellant relied on the case of Harjeet Singh Pandal vs Hellen Aketch Akudho[2018]eKLR in support of his proposal for a sum of Kshs. 10,000/=. On the other hand, the Respondent did not cite any case law in support of his proposal for Kshs. 100, 000/=.

40. Contrary to the Appellant's grievance that his submissions were not considered, the trial court held in its judgment:-

> " For pain and suffering, the deceased died on the same day while undergoing treatment. The Plaintiff did not cite any authority in support of his submissions. Guided by the case of Harjeet Singh Pandal vs Hellen Aketch Akudho[2018]eKLR, I award Kshs. 20,000/=."

41. A look at Harjeet Singh Pandal case (supra) shows that in reducing the trial court's award of Kshs. 30,000/= to Kshs. 10,000/=, High Court held:-

> " In this case, there is no clear evidence about the duration of time between the time when the deceased was hit by the trailer and the time when he met his death. However, taking into account the Respondent's evidence, concerning the speed at which the tractor was being driven, I find that the duration between the time when the deceased was first hit by the trailer and the time when he met his death, was nominal. Nonetheless, it cannot possibly be said that the death was painless."

42. In Retco East Africa Limited v Josephine Kwamboka Nyachaki & another (2021] eKLR the deceased died within 30 minutes after the accident and High Court upheld the award of Kshs. 100,000/= while rejecting the Appellant's proposal of nominal award for Kshs. 10,000/= as " what was awarded in the eighties and the nineties."

43. In the instant case, the accident occurred at about 10.00 am. The post-mortem report shows that he died at 10.00 pm on 17th August 2017 which the same date of accident. There is no doubt that he underwent a lot of pain for several hours. This Court finds no reason to interfere with the trial court's award of Kshs. 20,000/=.

44. On Loss of expectation of life, the deceased (Plaintiff) in Daniel Kuria Nganga (supra), cited by the Respondent and relied on by the trial court, was aged 14 years. High Court awarded Kshs.210,000/= for reasons that it was "not known what the Plaintiff could have been in life as concerns her career."

45. Before the trial court, the Appellant had relied on the case of Harjeet Singh Pandal (supra) but the court made no mention of the same when it chose to award Kshs. 200,000/= and not Kshs. 100,000/= proposed by the Appellant yet it would have been prudent to do so.

46. Though this Court is persuaded by High Court's observation in the case of Mercy Muriuki & another (supra) in regard to generally accepted principles in regard to assessment on loss of expectation of life, it is clear from the authorities cited by both parties at the trial court that awards under this head range from Kshs. 100,000/= to Kshs. 210,000/=.

47. In the circumstances, the award by the trial court was within this range and the court cannot be faulted for being guided by a decided case. In any event, the award cannot be termed as erroneous or excessively high. There is no reason to disturb it.

48. On loss of dependency, the contention before the trial court was whether the evidence on record justified a multiplier approach in the assessment of damages as proposed by the Respondent while relying on the case of Joshua Mungania & Another (supra) or a global award as submitted by Appellant who cited "NAIVASHA HCCA NO 32 OF 2024." The trial court considered both arguments and found multiplier approach highly speculative.

49. While relying on the case of Chen Wembo & 2 others vs IKK & HMM (Suing as a legal representative and administrators of the estate of Christine Anyango Omondi (Deceased) [2018]eKLR, the trial court held:- "The deceased therein was aged 12 years old at the time of death, with no evidence that he was going to school and thus future prospects were not ascertainable. The High Court awarded a sum of Kshs. 60, 000/- for lost years. In the instant case, , there is evidence that of the career path the deceased had undertaken given the exhibits tendered on his educational journey . Guided appropriately by the above authority, and taking all relevant factors into consideration, I find at award of Kshs. 1,200,000/ = reasonable under this head.

50. From the above, the Respondent's line of submissions justifying multiplier approach was not relevant as there is no cross appeal. It is clear that the trial court properly addressed itself when it found this case not suitable for a multiplier approach.

51. The issue is whether this court should interfere with the global award of Kshs. 1, 200,000/= and instead award Kshs. 800,000/= as proposed by the Appellant in this Appeal even though before the trial court, he had proposed a global award of Kshs. 500,000/= while relying on the case Kenya Wildlife Services v Geoffrey Gichuru Mwaura [2018] eKLR. In the case, R. Nyakundi J, applied global sum principle and awarded a sum of Kshs 700,000/= for the 13-year-old who "was still in school and not yet still at a level of choosing a career capable of steering him to any meaningful employment."

52. In Vehicle and Equipment Limited v Omurunga ((Suing as the administrator of the Estate of Teddy Mashisia Omurunga -Deceased) reported as Civil Appeal E473 of 2022, the deceased was a 22-year-old 3rd year student at the University of Nairobi. H.I.Ong'udi, J awarded a global sum of Kshs. 4,500,000/= under this head while considering "the level of joblessness in Kenya...life preponderables and vicissitudes that can shorten one's life besides the accident."

53. In the circumstances, this Court is satisfied that the trial court applied the laid down principles on the evidence on record while arriving at the global award of Kshs. 1,200,000/= and the same cannot or excessively high. That award is upheld.

54. As to whether the award under *Law Reform Act* should be deducted from the award under *Fatal Accidents Act* as proposed by the Appellant , the Court of Appeal in Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) V Kiarie Shoe Stores Limited [2015] eKLR clarified:-

> " 19. Finally on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.

20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.

.....The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/ a Meru Express Services [1976] & Another -VS- Lubia & Another (No.2) and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

> "6. 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*; it appears the legislation intended that it should be considered.
>
> 7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for 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*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
>
> 8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.'"

55. In the circumstances herein, this court finds that it was not mandatory for the trial court to make any deductions in this award.

56. In conclusion and this Court having upheld the awards made by the trial court, this Appeal is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF JANUARY, 2025.

PATRICIA GICHOHI

JUDGE

Mr. Manenes B for Appellant

Mr. Mamwacha for Respondent

Ruto, Court Assistant