



Kamau v John (Suing as the Legal Representative of the Estate of Amos Murangiri Nkonge - Deceased) (Civil Appeal 27 of 2024) [2025] KEHC 1622 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 27 OF 2024
FN MUCHEMI, J
FEBRUARY 13, 2025**

BETWEEN

JEFF MWANGI KAMAU APPELLANT

AND

**FABIANO NKONGE JOHN (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF AMOS MURANGIRI NKONGE - DECEASED) RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. V. Asiyo (PM)
delivered on 18th January 2024 in Thika CMCC No. E310 of 2022)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Principal Magistrate in CMCC No. E310 of 2022 a claim that arose from a road traffic accident whereby the Magistrate court found the appellant 50% liable and awarded the respondent damages. Under the *Law Reform Act*, the respondent was awarded Kshs.110,000/-; under the *Fatal Accidents Act*, Kshs. 2,000,000/-was awarded while special damages the court awarded Kshs. 76,200/- totalling to Kshs.2,186,200 less 50% contribution.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in awarding excessive damages not commensurating with the injuries pleaded and without any legal and/or evidential justification.
 - b. The learned trial magistrate erred in law and in fact in awarding excessive damages and arriving at a wrong computation in assessing dependency.



- c. The learned trial magistrate erred in law and in fact by not considering the written facts, evidence, submissions made and case law filed by the appellant.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the magistrate erred in law and in facts by apportioning liability at 50% as against him while the respondent was to blame 100% for the accident. The appellant submits that the accident occurred along Nairobi Thika superhighway on 6th June 2021 involving motor vehicle registration number KCV 181Y and the deceased. The deceased jumped over the guardrails when crossing the road yet there was a foot bridge a few metres away from the point the deceased had crossed. The appellant argues that the deceased decided not to use the footbridge.
5. The appellant further submits that he testified that he was driving on the right side of the road in the speeding lane at a speed of 70km/hr when the deceased abruptly and suddenly crossed from the right side of the road to the left. Due to the abrupt crossing by the deceased, the appellant submits that he could not avoid the accident.
6. The appellant relies on Regulation 6 and 7 of the Highway Code and submits that a pedestrian owes a duty to other highway users to move with due care. The appellant further submits that the Highway Code provides that pedestrians should always cross the road at designated areas such as zebra crossings, footbridges and pedestrian underpasses or at areas controlled by traffic marshals.
7. The appellant argues that the deceased failed to act with due care by crossing on place not designated by pedestrians, running towards the direction which the motor vehicle was being driven, failing to take care while on the road and causing the accident. Thus, the appellant argues that the trial court fell into error when he found him 50% liable yet there was overwhelming evidence that the deceased crossed the highway at an illegal unauthorized or undesignated location.
8. The appellant relies on the case of Julius Omolo Ochanda vs Nicholas Wanjohi Thuo [2007] eKLR and submits that the Magistrate ought to have found the pedestrian solely to blame as the author of his own misfortune that befell him for negligently crossing a busy highway at night and at an undesignated area while there was a footbridge a few metres away.
9. The appellant further submits that pursuant to Sections 107 and 108 of the *Evidence Act* and the cases of Kiema Mutuku vs Kenya Cargo Handling Services Limited [1991] 2 KAR 258 and Statpack Industries vs James Mbithi Munyao [2005] eKLR, the duty to prove allegations of negligence contained in the plaint lay upon the respondent. That duty was not discharged as the respondent did not show that the appellant was negligent and therefore to blame for the accident. The respondent only produced an abstract indicating that there was an accident reported under OB 84/06/06/21. Furthermore, the respondent was the sole witness in his case yet he was not an eye witness and he confirmed on oath that he did not know the circumstances that led to the accident.
10. The appellant relies on the case of African Line Transport Company & Another vs Sylvester Keitany [2017] eKLR and submits that special damages must be both pleaded and proved before they are awarded. In the instant case, the magistrate awarded the respondent Kshs. 60,000/- for funeral expenses which was not proved by any documentation and therefore it ought to be set aside.
11. The appellant relies on the case of Moses Maina Waweru vs Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti (Deceased) [2022] eKLR and submits that the trial court erred by awarding a sum of Kshs. 2,000,000 under the Fatal Accident



Act and urge the court to substitute the said sum with Kshs. 800,000/-. The appellant further submits that the trial court did not cite any authorities to support the award of Kshs. 2,000,000.

The Respondent's Submissions

12. The respondent submits that the trial court evaluated the evidence of both parties and the investigating officer's evidence and it is not in dispute that an accident occurred on 6th June 2021 along Thika superhighway near Kalimoni School involving motor vehicle registration number KBV 181Y being driven by the appellant. The respondent further submits that the investigating officer led evidence that the appellant knocked down the deceased who died on the spot. From the evidence on record, the accident was caused by the appellant though he insists that the deceased was 100% liable for the accident. Because of the conflicting theories on how the accident occurred, the respondent submits that the learned magistrate found that both the appellant and the respondent contributed to the occurrence of the accident.
13. The respondent further submits that there was no eye witness to the accident but the appellant who caused the accident, admitted having hit the deceased on the highway but his evidence contradicted that of the police officer on where the accident occurred. The police officer testified that the deceased jumped out the road on the left side but the appellant claimed to have hit the deceased on the right lane of the superhighway.
14. The respondent submits that the police officer's testimony lacked credibility for she could not produce any investigation report on the accident or state whether any traffic offence charges were preferred or if any inquest was opened. In the absence of any explanation, sketch, eye witnesses or investigation report, one can only deduce that the appellant caused the accident and was to blame. Although the appellant testified that he was with his family in the suit motor vehicle, but he did not call any of the said family members to give evidence.
15. The respondent submits that the appellant had a duty of care towards the deceased and he was in a better position to avoid the accident had he been driving at a lower speed which would have enabled him to control the motor vehicle. Thus, the respondent submits that the appellant caused the accident out of his negligence and did not explain why he did not brake, stop, swerve to avoid the accident.
16. The respondent relies on the cases of *Loice Kagunda vs Julius Gachau Mwangi* [*CA 142 of 2003*](#) and *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR and submits that assessment of damages is purely at the discretion of the court. The respondent further submits that there is no reason for the court to disturb the lower court's award as it was supported by a comparative awards made in the case of *Eliud Njenga Mugesha vs Ndavi Nziu aka Jeremiah Ndavi Nziu* [2017] eKLR. The respondent submits that the sum of Kshs. 76,200/- as special damages ought to be upheld as the same was proved.
17. The respondent argues that although the court did not err in awarding Kshs. 2,000,000/- for loss of dependency. He argues that the contribution on liability was arrived at erroneously for there was no evidence of negligence on the part of the deceased. The respondent further submits that the appellant in his evidence did not tender any evidence of negligence and negligence must be specifically pleaded. In the absence of such evidence, the deceased cannot be held as having contributed to the accident.

Issues for determination

18. The main issues for determination are:-
 - a. Whether the liability apportioned by the trial court was against the weight of the evidence adduced.



- b. Whether the damages awarded by the trial magistrate are too high as to amount to an erroneous estimate.
- c. Whether the award on special damages was specifically pleaded and proved.

The Law

19. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

20. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.

21. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the liability apportioned by the trial court was against the weight of the evidence adduced.

22. The appellant seeks to have the court set aside the trial court’s findings of 50% liability against him. According to the appellant, the respondent did not give an account of how the accident occurred not did he call any eye witness to support this case.
23. The principles guiding the appellate court’s power to interfere with the trial court’s finding on liability are well settled. In *Khambi & Another vs Mahithi & Another* [1968] EA 70 it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.



24. The respondent said he did not witness the accident and neither did he know the circumstances of the accident. The witness stated on cross examination that his other relatives and siblings are the ones who visited the scene.
25. DW1, Cpl Lynett Makuti testified that she was the investigating officer in the matter and stated that an accident occurred on 5th June 2021 along Thika superhighway near Kalimoni School. The accident involved motor vehicle registration number KBV 181Y being driven by the appellant and the deceased who was a pedestrian. The witness testified that the appellant knocked down the deceased who jumped over the guard rail and tried to cross from the left side to the right side facing Nairobi general direction. DW1 testified that the deceased died on the spot and when she visited the scene, she met him lying on the speeding lane. She further testified that the appellant had stopped his motor vehicle a few metres where the pedestrian was lying. The witness testified that the deceased contributed to his death because there was a foot bridge a few metres to the road where he crossed.
26. DW2 the appellant, adopted his witness statement and testified that on 6th June 2021, he was driving motor vehicle registration number KCV 181Y along Thika superhighway towards Nairobi at a speed of 70km/hr while keeping to the inner lane of the superhighway. Upon nearing Kalimoni Secondary School, the appellant testified that the deceased suddenly dashed into the road dodging the heavy traffic running from the left side of the road trying to cross over to the other side of the superhighway. The witness testified that upon seeing the deceased, he braked, hooted and flashed lights to warn him but he did not heed to the warning and the witness immediately applied brakes to avoid the accident but the deceased's actions were so abrupt that the accident became inevitable.
27. The witness further testified that the superhighway is barricaded by road guard rails to deter pedestrians from crossing the busy highway. Furthermore, the witness testified that there is a footbridge several meters from where the accident occurred. The witness testified that he blamed the deceased as he ignored the foot bridge and opted to cross the road despite speeding motor vehicle and at a place not designated for pedestrian crossing. DW2 testified that the deceased was later blamed by the police for the accident since he failed to use the available foot bridge. On cross examination the witness testified that he was with his wife and children when the accident occurred although they did not record any witness statements.
28. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-
- Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
29. In *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:-
- As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. 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 which is captured in Sections 109 and 112 of the Act.
30. From the evidence, it is evident that an accident occurred on 6th June 2021. January 2013 between motor vehicle registration number KCV 181Y and the deceased. From the evidence on record, it is evident that the deceased contributed to the accident by crossing the road at a place where pedestrians are not allowed to cross. There is evidence that the deceased chose to jump over the guard rails and cross



the road at a non-designated crossing area. However, the appellant also owes a duty of care to other road users notwithstanding the act of the other road users. The appellant said he was driving his motor vehicle at 70 kph. This can be discerned by the fact that he testified that he saw the deceased at a very close range and although he tried to avoid the accident, it was inevitable. The legal burden of proof was upon the respondent to prove that the appellant was negligent. The evidential burden of proof then shifted to the appellant to show in defence that he was not negligent. Thus it is my considered view that the magistrate considered the totality of the evidence and rightly found that the respondent proved on a balance of probabilities that the appellant contributed to the accident.

Whether the damages awarded by the trial magistrate were excessive

31. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages 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.”

32. Similarly in *Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

Damages under the Law Reform Act.

33. In the case of *Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another* [2017] eKLR the court stated:-

As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/- to Kshs. 100,000/- with the higher damages being awarded if the pain and suffering was prolonged before death.



34. In the instant case, the accident occurred on 6th June 2021 whereby the deceased died instantly at the scene. The trial magistrate awarded a sum of Kshs. 10,000/- having considered that the deceased died immediately. The sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from comparable authorities. As such, sum of Kshs. 10,000/- awarded by the trial court is reasonable and hence this court has no reason to interfere with it.
35. On the issue of loss of expectation of life, the trial magistrate awarded Kshs. 100,000/- which is not unreasonable as to present an erroneous estimate. For that reason, I hereby uphold the said award.

Damages under the Fatal Accidents Act

Loss of Dependency

36. The Court of Appeal in *Chunibhai J. Patel & Another vs P. F. Hayes & Others* [1957] EA 748, 749 stated the law on assessment of damages under the Fatal Accidents Act and held:-

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 dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

37. It is important to note that the appellant submitted that the said award was high without pointing out the specifics. The appellant argues that the trial court awarded Kshs. 2,000,000/- without citing any authorities in support. On perusal of the court record, it is noted that the trial magistrate adopted a global sum approach in the absence of proof of earnings.
38. In *Frankline Kimathi Maariu & Another vs Philip Akungu Mitu Mborothi* (Suing as administrator and personal representative of Antony Mwiti Gakungu (Deceased) [2020] eKLR where the court dealt with a similar issue stated:-

In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.

39. In the same breadth, the court in *Moses Mairua Muchiri vs Cyrus Maina Macharia* (Suing as the personal representative of the Estate of Mercy Nzula Maina (Deceased) [2016] eKLR held as follows:-

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



40. From the foregoing, it is evident that there are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income of the deceased, whereas the other school advocates for a global award.
41. I have perused the trial court's judgment and noted that the learned magistrate in arriving at the decision to award a global sum of Kshs. 1,500,000/- considered that the respondents' witness did not avail evidence that the deceased was earning a monthly income of Kshs. 45,000/-. The trial court considered the cases cited by the parties with the respondent citing an award of Kshs. 5,400,000/- whereas the appellant citing a global sum of Kshs. 500,000/- 700,000/-. The trial magistrate then came to a conclusion that awarding a global sum was suitable in the circumstances and took into consideration that the respondent proved that the deceased was a licensed clinical officer. I therefore concur with the learned magistrate that the global sum was best in the circumstances of this case. Thus, the said sum in my view is reasonable in the circumstances of the case to warrant interference by this court. The said award is hereby upheld.

Whether the award on special damages was specifically pleaded and proved

It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

42. The respondent in his plaint dated 22nd June 2022 pleaded for special damages for the sum of Kshs. 457,000/- which included cost of obtaining letters ad litem of Kshs. 30,000/-, mortuary fees at Kshs. 12,200/-, postmortem fees at Kshs. 14,500/-, funeral expenses at Kshs. 400,000/- and copy of records at Kshs. 550/-. On further perusal of the record, the respondent produced receipts totaling to Kshs. 16,200/-. On the issue of Kshs. 60,000/- awarded as funeral expenses without receipts, this court relies on the Court of Appeal case of Premier Diary Limited vs Amarjit Singh Sagoo & Another [2013] eKLR which held as follows:-

We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise intern their dead relatives should be compensated. In fact, we take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/- was pleaded in the plaint and witnesses who were relatives of the deceased testified that they spent much more than this in preparing for and conducting a cremation the learned judge awarded a sum of Kshs. 150,000/- which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.

43. The reasoning in the above decision binds this court. The facts of this case are similar and the above authority is therefore applicable.



44. It is my considered view that a sum of Kshs. 60,000/- as awarded by the trial court is reasonable for funeral expenses and is hereby upheld.

Conclusion

45. In view of the foregoing, I find that this appeal lacks merit and is hereby dismissed with costs to the respondent.

46. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY 2025.

F. MUCHEMI

JUDGE

