Seroney & another v Barasa & another (Suing as the Legal Personal Representative of the Estate of Collins Wakeya Sitati – Deceased) (Civil Appeal 64 of 2023) [2025] KEHC 3452 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3452 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 64 OF 2023

RPV WENDOH, J

MARCH 20, 2025

BETWEEN

MIKE KIPCHIRCHIR SERONEY ..... 1ST APPELLANT

SAMUEL KIPLANGAT KIRUI ..... 2ND APPELLANT

AND

CLEAH NANJALA BARASA ..... 1ST RESPONDENT

PAUL WAKEYA AKA BARASA ..... 2ND RESPONDENT

SUING AS THE LEGAL PERSONAL REPRESENTATIVE OF THE ESTATE OF COLLINS WAKEYA SITATI – DECEASED

JUDGMENT

1. This is an appeal by Mike Kipchirchir Seroney and Samuel Kiplangat Kirui(former defendants) against the judgement of Senior Resident Magistrate Kitale delivered on 25/9/2023 in favour of the Respondents Cleah Nanjala Barasa and Paul Wekeya Aka Barasa (suing as the legal personal representatives of the estate of Collins Wakeya Sitati(deceased) (formerly plaintiff).

2. By a plaint 8/12/2021, the respondents sued the appellants for general damages and special damages following an accident that occurred on 19/6/2021 along the Kitale - Endebess road at Maili Nane area involving motor vehicle registration number KBM 054T belonging to the appellants and motorcycle registration number KMES 535 R Tv on which the deceased was a pillion passenger. The Respondent claimed that the 1st appellant drove the said motor vehicle No. KBM 054T negligently by over speeding that it knocked the motor cycle thereby occasioning the deceased to suffer fatal injuries.

3. The appellants filed a defence dated 21/10/2022 denying all the allegations of negligence attributed to them.

4. After the hearing, the court entered Judgment in favour of the Respondent as follows;

    1. Liability at 100% against the appellant
    2. Pain and suffering Kshs. 30,000.00
    3. Loss of expectation of life -..... 150,000.00
    4. Loss of dependency ...30,000 X 12 X 31 X 2/3 - 7,440,000.00
    5. Special damages - 69,700.00
    6. Funeral expenses - 50,000.00

    Total – 7,739,700.00

    Costs and interest at court rates.

5. The appellants are aggrieved by the whole judgment both on liability and the quantum. The appellants preferred this appeal based on the following grounds;

    1. That the learned trial magistrate erred in law and fact in holding the appellants 100% liable in negligence in view of the evidence on record;
    2. That without prejudice to the aforegoing, the learned trial magistrate erred in law and fact in failing to apportion liability against the respondents in view of the evidence on record;
    3. That the learned trial magistrate erred in law and fact in adopting the wrong principles in making a determination as to the damages payable to the respondents both under the Fatal Accidents and *Law Reform Act* entitling this honourable court to interfere;
    4. That the learned trial magistrate erred in law and fact in awarding excessive damages for pain and suffering in view of the evidence on record;
    5. That the learned trial magistrate erred in law and fact in awarding excessive damages for loss of expectation of life in view of the evidence on record;
    6. That the learned trial magistrate erred in law and fact by failing to take into account the valgaries and vicissitudes of life in adopting the maximum multiplier of thirty-one (31) years;
    7. That the learned trial magistrate erred in law and fact in adopting a multiplicand of Kshs. 30,000/= when no evidence of the same was adduced;
    8. That the learned trial magistrate erred in law and fact in adopting 2/3rd as the dependency ratio when dependency was not proved;
    9. That the learned trial magistrate erred in law and fact in awarding special damages of Kshs.69,700/= that were not proved.

6. The appellants pray that the appeal be allowed and the respondent's suit be dismissed with costs.

7. This being a first appeal, this court is required to evaluate all the evidence tendered before the trial court afresh and draw its own conclusions bearing in mind that it neither heard or saw the witnesses testify. This court is guided by the case of Selle and another v Associated Motors Boat Co Limited & another [1968] EA 123 where the court said ““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 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".

8. I will first set out the evidence tendered. The respondents called a total of three witnesses. PW 1 Cpl. Beatrice Adenyo of Kitale Traffic Base who produced the abstract issued on 30/6/2021 to Collins Wakeya Sitati a pillion passenger on the motor cycle KMES 535R Tv which was involved in a collision with motor vehicle KBM 054T. PW1 stated that the driver 1st Appellant was charged with the offence of causing death by dangerous driving but the case had not been concluded and that the 2nd appellant was the registered owner of the vehicle. PW1 did not witness or investigate the case or visit the scene.

9. PW2 Paul Wakeya Sitati adopted his recorded witness statement. He did not witness the accident but produced exhibits Pexh.1-15.

10. PW2 learnt of the accident on 19/6/2021 about 7.00 p.m. rushed to Kitale Referral Hospital where the deceased had been taken after the accident but learnt that he had passed on. He reported to Kitale police station; Post-mortem was done and the deceased buried. He stated that the deceased was a welder and Pastor and earned about 30,000/= per month. He was issued with a police abstract which indicated that 1st appellant as the driver whereas a search revealed the 2nd appellant as the owner of the vehicle.

11. PW3 Meshack Wamema Simiyu adopted the statement he had recorded. He stated that on 19/6/2021 at about 6.30p.m., he was riding his motor cycle from Kitale towards Endebes behind motor cycle KMES 535R Tv which had a pillion passenger; that motor vehicle KBM 054T came from behind in high speed, overtook him, lost control and veered off the road and rammed into motor cycle KMES 553R Tv which was ahead from the rear and it was thrown off the road together with the rider and passenger: that he stopped to see the passengers on KMES 535R Tv and found one to be the deceased who hailed from his village; that the deceased died at the scene while the driver of the motor vehicle rushed the rider to Kitale County Referral hospital. He went to report the incident, and recorded his statement at Kitale police station. PW3 blamed the 1st appellant for driving the suit vehicle at excessive speed on a busy road and also failed to heed presence of other road users; that he was negligent in being unable to swerve or blame or keep a safe distance to avoid the collision.

12. The defendant called one witness, DW1 Mike Kipchirchir Seroney. He recalled that on 19/6/2021, he was driving KBM 054T on the said road about 6.00p.m. behind a Probox vehicle. At Kapkoi junction, he suddenly heard a loud bang and saw something flying in front of his screen. He slowed down, parked and got out of the vehicle to check what had happened when he found his left side and left windscreen had been damaged and a motor cycle was on the ground and a passenger with the rider had been thrown on right side of road. He called out both people but the pillion passenger did not respond. He took the rider to hospital and reported the accident at Kitale police station.

13. The court directed that the appeal be disposed of by way of written submissions and both Counsel obliged. The appellants were represented by Onyinkwa Advocate who submitted on two issues

    1. Whether the trial court erred by attributing 100% liability against the appellants (grounds 1-2)

    2. Whether the damages awarded by the trial court were excessive (grounds 3-9)

14. Counsel submitted that the occurrence of the accident is not the issue but the issue is who is to blame for it. Counsel urged that the court erred in considering the evidence of PW1, a police officer to determine liability and relied on the case of Kennedy Nyangoya v Bash Hauliers [2016] eKLR where it was held that the evidence of a police officer who was not the Investigating Officer and did not draw the sketch plan could not be of any help. Counsel also submitted that the court erred by relying on an abstract to determine liability because it merely confirmed the occurrence of the accident. He relied

on Peter Kanithi Kimunga v Aden Guyo Itaro [2014] eKLR. The appellant also relied on the decision of Sannah Hardware v E O O suing as representative of S O (deceased) [2019] eKLR that the fact of charging the driver with a traffic offence is not proof of negligence.

15. Of Liability – It was submitted that as regards evidence of the eye witness PW3, the same was not corroborated; that the court did not determine the point of impact, whether on the road or off the road; that there was no documentary evidence to support PW3's testimony; that the fact that his name was not included in the abstract as a witness raises doubt in his testimony; that the deceased should have borne some blame because he did not wear protective clothing i.e. helmet, reflection jacket; that it remained unclear who caused the accident. The appellant therefore suggested that liability be apportioned at 50% between the appellant and respondents and relied on the decision of Hussein Omar Farah v Lento Agencies [2006] eKLR.

16. In the lower court judgment, the magistrate did not analyze the evidence adduced by the three prosecution witnesses but generally stated that they go to prove that the appellants were to blame for the accident.

17. PW1, a police officer produced the police abstract form confirming that an accident did occur, that is, a collision between motor vehicle KBM 054T and motor cycle KMES 535R Tv. The police officer was not the Investigating Officer and could not testify as to the occurrence of the accident. In Kennedy Nyangoya v Bash Hauliers [2016] eKLR and Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR, the courts held that production of a police abstract is not proof of the driver's negligence.

18. It is also noteworthy that the fact that the 1st appellant has been charged with a traffic offence of causing death by dangerous driving does not necessarily point to his liability. I am guided by the decision in Sannah Hardware v E O O (Supra) where the court held "it is not a conviction or charging of a driver with a traffic offence that would determine the liability of such a person in civil claims."

19. The appellant challenged all the awards made under the different heads on quantum and made its own suggestions.

20. The Respondents Counsel Gachathi & Co Advocates in their submissions identified the same issues as did the appellants. Counsel relying on the decision of Malde v Angira *CA 12/1982*, and Isabella Wanjiru Karanja v Washington Malele, submitted that the appellate court can only interfere in the lower court's decision if the decision is based on no evidence, or misapprehension of evidence or on wrong principles. It was submitted that it is clear from the 1st appellant's defence, he did not know what happened and the only credible evidence is that of PW3. Counsel relied on the case of Isabella Wanjiru Karanja v Washington Malele (1985) e KLR where Chesoni ag. Judge of Appeal held that the driver of a vehicle had greater duty to look out for other road users.

21. As for contributory negligence alleged in the defence, Counsel urged that none was proved as against the deceased; that the deceased being a pillion passenger was not in control of the motor cycle and cannot be held liable. Counsel relied on the decision of Boniface Waiti & another v Michael Kariuki Kamau [2007] eKLR where it was held that the passenger has no control over the manner in which the vehicle is driven.

22. As to whether the rider was negligent counsel submitted that the rider was not enjoined to the suit nor has the owner of the motor cycle joined as a third party in terms of Order 1 Rule 15(1) CPR. See also Esther Mutuku Muthoka v Marania Nduta HCC 3039 OF 1991 and John Nyaga & another v Humphrey Kinyua Rukeria [2016] eKLR. Counsel urged this court not to interfere with the finding on liability because it was an exercise of discretion.

23. On quantum, the Respondent's counsel urged the court not to interfere and relied on the following authorities. Jane Chelagat Bor v Andrew Otieno Onduu [1988-1992] 2KAR 288; and Kemfro Africa Ltd t/a Meru Express Services v A.M. Lubia & Another [1987] KLR 27 where the court said "The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge... be that it must be satisfied that either that the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages."

24. Upon a careful consideration of the pleadings, grounds of appeal and the submissions by counsel, there is no doubt that an accident occurred on 19//6/2021 involving motor vehicle KBM 054T and a motor cycle KMES 535R Tv along Kitale-Endebes Road.

25. It is also not in dispute that the deceased was a pillion passenger on the motor cycle at the time of the occurrence of the accident. It is also apparent that though in his defence, the appellant shifted blame on the rider of the motor cycle, he failed to enjoin the rider as a third party by instituting 3rd party proceedings as required under Order 1 Rule 15 Civil Procedure Rules. The said Rule provides that where a defendant claims as against any other person not already a party to the suit (referred to as 3rd party) that he is entitled to contribution or indemnity, then he is required to apply to the court within 14 days after close of the pleadings for leave of the court to issue a third party notice to that effect.

26. In this case, the appellant who wished to absolve himself from liability ought to have instituted 3rd party proceedings against the motor cycle rider. I will later revert to the issue whether the deceased contributed to the accident.

27. The only eye witness to the accident was PW3 who said that the 1st appellant drove the motor vehicle in speed, over took him, lost control veered off the road and went and hit the rear of the motor cycle KMES 535R. The 1st appellant denied seeing what happened before hearing a bang on the left side of the vehicle. He admitted that the motor cycle was on the left side of the road. From the appellant's testimony, that the motor cycle KMES had been ahead of his and both were headed for Endebes including the appellant and the fact that the appellant did not see what happened confirms PW3's testimony that he was in high speed and was not aware of the surroundings hence negligent. In Chesoni Ag. JA in Isabella Wanjiru Karanja (supra) stated that "Isabella had under her control a lethal machine when Washington (respondent) had none. She (the driver) was under an obligation to keep a greater look out for other road users..... there can be no excuse for the driver's complete failure to see the pedestrian"

28. In this case, the 1st appellant had in his control a lethal machine and by telling the court that he did not see the cyclist, demonstrates that he was not on a proper look out or alert or he did not exercise greater care as required of him as a driver. It is also my finding that the impact upon collision is evidence of very high speed. The court was told that the motor cycle and the bodies of the rider and deceased were thrown far off the road. This evidence was not controverted. I find that the 1st appellant was negligent in the manner he drove the said vehicle.

29. The appellant attributed negligence on the part of the deceased because he did not wear protective gear. It is true that every road user has a duty of care owed to himself as well as other road users. It is imperative on the pillion passengers to take care of their own safety too. There is no evidence that the deceased had worn a helmet that would have reduced the injuries he may have suffered on the head upon impact. In my considered view, the failure to have protective gear would account for a very small percentage in terms of liability. I find that the deceased's contribution if any, was minimal and I would

asses it at 5%. It means that the 1st appellant bears 95% of the liability with the 2nd appellant being vicariously liable, being the owner of the vehicle.

30. Quantum – As regards quantum, the award of damages is an exercise of the courts discretion and the appellate courts are always slow to interfere with such awards. The appellate court can only interfere with the award if the lower court took into account irrelevant factors or left out of account a relevant factor, or the award is too high or too low as to amount to an error in the assessment of damages. These are the principles set out in Kemfro Africal Ltd t/a Meru Express services v A.M. Lubia [1987] KLR 27 and Jane Chelangat Bor v Andrew Otieno Onduu [1988-1992] 2 KAR 288(1990-1994) EA 47 where the court said "In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principles of law, or has misapprehended the facts, or has for these or other reason made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked by the appellate court is to interfere, whether on the ground of excess or insufficiency"

Pain and Suffering;-

31. For pain and suffering, the lower court made an award of Kshs.30,000/= the appellant complaints that it is excessive and an award of Kshs.10,000/= should be made. Ordinarily, for this head, courts will make a conventional sum depending on how long the deceased suffered before death. The appellant relied on the case of Jacinta Ruguru –V – Beatrice Muthoni Muthike suing as legal representative for the estate of Isaac Muthike.

32. On the other hand, the Respondent relied on the case of Coast Bus Ltd v Fatimabhai Osman & another [2020] eKLR where a sum of Kshs.50,000/= was awarded. Again, in Cromwell Mzama v Zablon Mwanyumba & Another [2022] eKLR the court made an award of Kshs. 100,000/=. In this case, the deceased died at the scene but he must have suffered some pain before death. Considering previous comparable decisions, I find the award of Kshs.30,000/= was not excessive and the court will not interfere with the award on that head.

33. Loss of expectation of life; This is a common law remedy for the loss suffered by the deceased and courts also make conventional awards based on age and any other special circumstances. The lower court made an award of Kshs.150,000/= but the appellants submitted an award of Kshs.100,000/= and relied on the case of Heyder Nthenya Musili and another v China Wu Yi Ltd & another [2017] e KLR.

34. To the contrary, the Respondents urged that the same was fair and relied on the decision of Alice Mbogo v Samuel Kaburu Njoroge HCA 357/1999 where an award of Kshs.150,000/= was made. In David Kajogi M'mugaa v Francis Muthomi [2012] eKLR an award of Kshs. 140,000/= was made. In Cromwell Mzama (Supra) an award of Kshs.200,000/= was made. Having considered the above comparable decisions, I find that an award of 150,000/= is not excessive and the court will not interfere.

35. It must be noted however that when it comes to computation of the damages, the award of loss of expectation to life must be deducted from the total award of damages. This is to ensure that the deceased's estate does not benefit twice from the same death under the *Fatal Accidents Act* and *Law Reform Act*. This principle has been decided in many cases. In Transpares Kenya Ltd & Another v S.M.M suing as Legal representative of Estate of E.M.M (2015) eKLR, the court quoted, the case of Kemfro (Supra) where the Court of Appeal had said "The net benefit will be inherited by the same dependents under the *Law Reform Act* and that must be taken into account in the damages awarded under the *Fatal Accidents Act* because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act.

36. Again, in Benedeta Wanjiku v Changwon Cheboi & Another HC.373/2008, Judge Emukule held: "it is of course correct that both awards for loss of expectation of life and for pain and suffering go to the benefit of the deceased's estate. The awards are therefore capped to a minimum so that the estate does not benefit twice from the same death vide the *Fatal Accidents Act* and the *Law Reform Act*"

37. Multiplier: The appellant urged that a multiplier of 31 years was on the higher side it was argued that the court did not consider the vagaries of life making life unpredictable. The Counsel relied on the decision in Siyaram Enterprises & Another v Samuel Nyachani (suing on behalf of the estate of Vincent Gwacho) where the court applied sixteen (16) years as a multiplier where the deceased died at the age of twenty-nine (29) years.

38. On the other hand, the Respondent argued that the court needs to consider the period the deceased may have worked as was held by Judge Anyara Emukule in Benedeta Wanjiku v Chengwon Cheboi & another [2013] eKLR when he said "I have considered the Defendant counsel's submissions together with cited authorities in support of the theory of imponderables of life. There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore those imponderables. The duty and province of the court is to apply the generally known period during or about which an employee in the deceased's occupation of farm manager would remain in active work and retire. That period was acknowledged to be 60 years of age."

39. In Wilham (K) Ltd & another v Concepta Nekesa Wamalwa & Another Nakuru *CA 156 of 2021* that same judge said "I think to cut a deceased's working life expectancy should be based up on some grounds, known illness for instance and not merely "exigencies or vagaries of life"

40. The Counsel also referred to the case of David Kajogi (Supra) where Justice Makau, held that the deceased would have lived beyond seventy (70) years as a farmer; that the deceased was aged 23 years at time of death and retirement age was fifty-five (55) years. In Racheal Kongara Mbugua Gichui NR HCC 4351/1989, the Court applied a multiplier of ten (10) years for a sixty (60) year old farmer. In Benedeta Wanjiku supra the court adopted a multiplier of 26 years for a 44 year old.

41. In the instant case, the deceased was aged 29 years old. Retirement age is sixty (60) years. A multiplier of thirty-one (31) years was thus very fair in the circumstances and the court finds no reason to interfere.

42. Multiplicand; the deceased was said to have been working as a Welder earning about Kshs.30,000/= per month. The death certificate indicated so. However, there was no other evidence to prove that he worked as a welder and what the deceased's earnings were. I will agree with the appellant's submission that the respondent did not prove the deceased's earnings. There was not even a certificate produced to prove that he qualified as such or books of accounts or his Mpesa statement to prove what the deceased earned daily. The multiplicand of 30,000/= was not based on any evidence. The applicants suggest that the court adopts the minimum wage and relied on the case of Kenya Power and Lighting Co,. Ltd v James Muli Kyalo & Another suing as personal representative of the estate of Stanslous Kimiti Kyalo (deceased) (2020) eKLR where the court said "where one does not tender evidence of employment to prove monthly earnings, the regulation on Wages General Order (minimum wages) should be taken into account as the court's point of reference." The appellant therefore suggested an award of Kshs.8,109/90, being the minimum wage. As it was not disputed as the minimum wage the court will accept it as well. The court therefore sets aside the finding on the multiplicand of Kshs.30,000/= and substitutes it with an award of Kshs. 8,109/90

43. Dependency ratio; It was assessed at 2/3, meaning that the deceased spent 2/3 of his earnings on his family/dependant's. The appellants submitted that the ratio should be 1/3 because there was no evidence of dependency.

44. The Respondent pleaded that the deceased was a married man with three children, and elderly parents. PW2 testified that the deceased's wife was pregnant at the time of his death and gave birth. A notification of birth for a child Blessing, born to Clare was availed in court. Though the wife of the deceased did not testify, and there was no marriage certificate produced as the court acknowledged that not every married couple in Kenya have a marriage certificate, there was a Chief's letter confirming that the deceased was married. The said wife and PW2 jointly took out letters of administration for deceased's estate. This court is satisfied on a balance of probabilities that there is sufficient evidence that the deceased was a married man with a family. The said family must have wholly depended on him for all their upkeep and this court finds that the dependency ratio was properly arrived at.

45. Loss of dependency should therefore be calculated as thereunder 31 X 12 X 8,109.90 X 2/3 = 2,011,255.-00

46. Special damages- It is trite that special damages must be specifically pleaded and strictly proved. The appellants dispute the award of Kshs.69,700/= awarded as special damages. They admit Kshs.45,000/= supported by a receipt dated 28/6/2021 but the balance was not. The appellant's Counsel has submitted that receipts for filing fees and legal fees for Ad litem No. 76/2021 was Kshs.2,500/= and Kshs.20,000/=, were produced as exhibit's. A perusal of the record of appeal at page 73 confirms that item 12 was produced as exhibits and Counsel for the appellant never objected to them as being copies. For the above reasons, the, special damages of Kshs.67,700/= were proved. In the end, the appeal partially succeeds and the Respondent will have Judgment as follows; -

    1. Pain and suffering 30,000.00

       Law Reform

    2. Loss of expectation of life 150,000.00

    3. Loss of dependency under *Fatal Accidents Act* 2,011,255.00

    4. Special damages 69,700.00

    5. Funeral expenses 50,000.00

       Total Kshs.2,310,955.00

    6. Less damages under *Law Reform Act* 150,000.00

       Kshs.2,160,955.00

       Less 5% contribution 108,047.75

       2,052,907.25

47. In the end, I award the Respondents the sum of Kshs.2,052,907.25/=.

    The appellants will have half the costs of the appeal.

DELIVERED, DATEDAND SIGNEDAT KAPENGURIATHIS 20TH DAY OF MARCH, 2025.

R. WENDOH.

JUDGE.

Judgment delivered in open court in the presence of;-

Appellants – Miss. Were

Respondents -No appearance

Court Assistants -Juma/Hellen