



**Chepkemboi v Nangila & another (Suing as the Legal Representatives and Administrators of the Estate of Meshack Wafula Simiyu (DCD)) (Civil Appeal E001 of 2022) [2025] KEHC 4479 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4479 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E001 OF 2022**

**RK LIMO, J  
APRIL 8, 2025**

**BETWEEN**

**KATHLEEN CHEPKEMBOI ..... APPELLANT**

**AND**

**METRINE NANGILA ..... 1<sup>ST</sup> RESPONDENT**

**JOYCE MUDEIZI ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF  
THE ESTATE OF MESHACK WAFULA SIMIYU (DCD)**

**JUDGMENT**

1. This is an appeal against the judgment of Hon. M.I.G Moranga Senior Principal Magistrate delivered on 29/9/2021 vide Kitale CMCC No.95 of 2019.
2. In that case the respondents suing as legal representatives and administratrixes of the estate of Meshack Wafula Simiyu (dcd) had brought an action against the appellant blaming her/her agent or driver for causing an accident on 21/5/2018 while driving motor vehicle Reg No.KBH 781W within Kitale town. The appellant's driver was blamed by the respondents for knocking down the deceased who was riding a motor cycle Reg No. KMEH 054Q as a result of which he sustained fatal injuries from which he later succumbed while undergoing treatment.
3. A brief overview of the case before the subordinate court shows that the respondents' case with respect to liability mainly hinged on the evidence of a traffic police officer named PC Philip Metios (PW2). This is because there was no eye witness availed by the respondents to testify.
4. The traffic officer (PW2) told the trial court that he was not the investigating officer but had the details of how the accident occurred from the police file. He stated that the appellant's driver left his lane and



drove onto the right side and collided with a motor bike ridden by the deceased. He stated that the driver was charged with careless driving and the traffic case was ongoing.

5. On quantum, the evidence tendered was that the deceased was aged 27 years and was a boda boda rider earning a salary of 3000/- per month. There was no documentary evidence to prove the same however the respondent stated the deceased supported his wife, two children and a younger sister from the income he earned.
6. The appellant called the driver of the suit motor vehicle at the time namely Edward Masai (DW1). He conceded that the accident occurred but disputed the date insisting that it occurred on 28/5/2018 and not 21/5/2018. According to him the accident happened between 5am and 6am and that he was driving the suit motor vehicle within Kitale Town when he spotted 2 bodaboda riders who were on the right side and that they spotted a passenger and both rushed for the passenger. He stated that one made a U-turn suddenly and because he was too close he tried swerving but unfortunately he hit him. He denied being drunk or over speeding. He however, admitted that he was charged with a traffic offence because of the accident. He blamed the rider (dcd) for causing the accident by making a sudden U-turn. He stated that he took the deceased to Kitale Referral Hospital and later assisted him to be transferred to Moi Teaching and Referral Hospital Eldoret where he unfortunately died 2 days thereafter.
7. The trial court evaluated the evidence tendered and found that the respondents had proved their case against the appellant and found the appellant 100% liable for the accident. On quantum the trial court found that because there was no documentary evidence to prove the income of the deceased he resorted to the minimum wage guidelines which stipulated that the minimum wage for the category of persons working where the deceased worked was Kshs. 7,241 . It adopted the ratio of 2/3 and multiplier of 30 years given that the deceased was aged 27 years old at the time. The trial court in summary made the following awards under different heads;
  - i. Pain and suffering - 100,000/-
  - ii. Loss of expectation of life - 100,000/-
  - iii. Loss of dependency -1,737,840/-
  - iv. Special damages - 40,870/-
  - v. Funeral expenses - 70,000/-Total 2,071,330/-
8. The appellant felt aggrieved and filed the appeal and raised the following grounds namely;
  - i. That the trial court erred in law and fact by failing to appreciate the reasonable and sufficient evidence (sic) tendered in court and submissions made on behalf of the appellant and treating the same superficially and consequently coming to a wrong conclusion on apportionment of liability.
  - ii. That the trial magistrate erred by holding the appellant 100% vicariously liable.
  - iii. That the trial magistrate erred by awarding the damages that were excessive in the circumstances.
  - iv. That the learned magistrate erred by applying minimum wage provisions when assessing general damages when there was no evidence of employment of deceased and/or provisions of wages for boda boda riders hence arriving at an erroneous award.



- v. That the learned trial magistrate erred by awarding Kshs.1,737,840 which amount was excessive and inordinately high to amount to a miscarriage of justice.
  - vi. That the trial court erred on the award on special damages.
  - vii. That the trial court erred by not considering submissions made by the appellant and authorities.
  - viii. That the trial court failed to exercise her judicial discretion judiciously.
  - ix. That the trial court failed to evaluate the evidence well and arrived at an unsustainable decision.
9. In her written submissions through her learned counsel M/S . Mose, Mose and Mose Advocate dated 24/9/2024, the appellant faults the trial court on the manner she apportioned liability at 100% against her.
  10. The appellant contends that the burden of proof lay on the respondents but the same in her view was not discharged. She submits that there was no evidence tendered to prove the particulars of negligence attributed to her.
  11. She submits that her driver was not over speeding and that he testified that he was driving at 30KM/h. She points out that there was no evidence tendered showing that he was over speeding. She submits that the respondents bore the burden of proof adding that there was no eye witness to the accident.
  12. It is her contention that the traffic case against the driver for careless driving was on-going and as such there was no evidence that he was negligent.
  13. She submits that there was no evidence adduced from an eye witness to show that the driver drove without due care and attention to other road users.
  14. She submits that the respondents failed to prove negligence against her to the required standard and relies on the following authorities;
    - a. Morrison Mbuthia Maina & Anor v-s- Jane Wanjiku Mwangi & Anor (2006)eKLR
    - b. Kiema Muthuka –vs- Kenya Cargo Handling Services Ltd (1991)KAR &
    - c. David Kimani Njoroge –vs- James Kihara & Anor (2011)eKLR

In the above decisions the courts noted inter alia the plaintiff bore the burden to prove negligence on the part of the defendant and that the proof must be on a balance of probability.
  15. The appellant contends that she cannot be held liable just because an accident occurred adding that the respondent ought to have proved that there was negligence on her part or her driver.
  16. She faults the evidence of the police officer (PW2) who testified stating that he was not the investigating officer in the case. She points out that there was no occurrence book or extract thereof tendered to show how the accident happened adding the police abstract tendered only provided the details of the motor vehicles involved in the accident but with little being shown on how the accident happened. She submits that the police abstract was not conclusive proof of liability. On this score she relies on the case of Kennedy Nyangoya –vs- Bash Hauliers (2016)eKLR where the court observed inter alia that production of police abstract was not conclusive proof of liability in the absence of evidence to support it.



17. The appellant submits that the respondents should have provided more evidence to assist the trial court in making a fair determination on liability. She submits that the deceased should have shouldered 30% liability.
18. On quantum, the appellant faults the trial court for making an award she contends was too high and excessive. She faults the trial court for adopting minimum wage guidelines when the income and dependency were not established.
19. She submits that it was impractical for a boda boda to earn 1000/- per day taking into account realities of life.
20. She submits that there was no evidence that the deceased earned 1000/- per day employed as a boda boda rider. She contends that in view of lack of sufficient evidence on what the deceased did for a living, a global award/lump sum approach would have been appropriate. She relies on the case of *Mwanzia – vs- Ngalali Mutua Kenya Bus Ltd* (citation not provided). She further relies on *Mary Khaesi Awalo & Anor –vs- Mwilu Malungu & Anor* (1999)eKLR where the court held that where a deceased person’s income is not easily established or proved by documentary evidence, a lump sum award was a better option to avoid speculation.
21. The appellant submits that a global award of Kshs.800,000/- would have been fair in the circumstances. He relies on *Bonton Ltd –vs- Beatrice Kanaga Kereda suing as administrators of the estate of Richard Alembi Ochenga (dcd)* (2018)eKLR where the High Court set aside the award made and substituted with an award of Kshs.800,000/-.
22. She faults the trial court for adopting a multiplier approach and adopting the minimum wage guideline when the skill of the deceased was not established. She submits that the multiplier approach led to an excessive award.
23. She further submits that the dependency ratio of 2/3 awarded was too high given that prove of dependency was not established in the first place. She submits that no marriage certificate or any documentary proof was tendered to prove that the deceased was a family man and that his family depended on him.
24. On special damages, the appellant submits that though the respondents pleaded special damages totaling 110,870 inclusive of funeral expenses, only Kshs.25,120/- was proved and that the award of Kshs.40,8709/- as special damages was excessive.
25. The respondents have opposed this appeal vide written submissions by learned counsel *Namatsi & Co Advocates* dated 12/2/2024. The respondents support the decision made by the trial court contending that the same was based on evidence tendered.
26. They submit that they produced the Death Certificate, post mortem report and police abstract to prove their case.
27. They submit that they did not have receipts to prove that they spend Kshs.70,000/- for funeral, contending that they are Christians which indicates that they bought a casket and food stuffs for mourners. They ask this court to take judicial notice of that fact and have relied on the case of *Maureen Alukwe (dcd) –vs- Akamaba Public Road Services Ltd & 3 Others* (2013)eKLR where the court in awarding Kshs.30,000/- for funeral expenses observed that the court may make a reasonable award for funeral expenses where receipts are not available.
28. On loss of dependency, the respondents reiterate that the deceased was 27 years old with a widow and two children who depended on him. They contend that he was a boda boda rider earning a salary of



1000/- per day translating to Kshs.30,000/- per month. It is their contention that a dependency ratio of 2/3 and a multiplier of 33 years was reasonable.

29. They also support the award of Kshs.100,000/- for loss of expectation of life stating that the figure awarded was a conventional one.
30. On pain and suffering, the respondents contend that the deceased died 7 days after the accident and the award of Kshs.100,000/- under that head should be upheld.
31. Finally the respondents submit that the award of Kshs.70,000/- as special damages was proper because the amount was pleaded and proved.
32. This court has considered this appeal and the response made. I have highlighted above the case summary of what the case was about and the respective submissions. The role of this court as a 1<sup>st</sup> appellate court is to re-assess evidence tendered during trial and determine whether the trial court made the correct decision. The issues arising in this appeal are basically two namely;
  - i. Whether or not the trial court reached the correct decision on liability.
  - ii. Whether the awards made under different heads were justified.

33. Liability

On this question the trial court found that the respondents had proved their case to the required standard and found that the appellant was 100% liable to blame. The appellant's main argument in this appeal is that there was no eye witness availed and that the deceased should have shouldered part of the blame because he made an abrupt U-turn thereby causing the accident.

34. This court has re-evaluated the evidence tendered and finds that it is true there was no eye witness to the incident who was availed to testify but an absence of an eye witness in itself is not fatal to establishing negligence. I have looked at the evidence of PC Philip Mitios (PW2). He was not the investigating officer in the case and did not visit the scene of the accident. However his evidence that the appellant's driver was charged with careless driving after the investigations were done was admitted by appellant's driver Edward Masai (DW1) who stated that he was charged with Traffic Case NO.498 of 2018. The police officer (PW2) did not have the details of the traffic case or its outcome but the appellant without realizing unwittingly appears to have lend a hand by, one admitting he was charged for careless driving and two giving the details of the traffic case which was said to be pending for determination. By so doing the appellant corroborated the respondents' position that she was to blame for the accident. Without that oblivious assistance, the trial court may have found that the evidence tendered though proved that an accident occurred, there was no clear cut evidence on who was to blame and therefore both the appellant's driver and the deceased would have shared liability at the ratio of 50:50. This court certainly would have taken that position given the current jurisprudence on that situation.
35. However this court finds that the evidence tendered by the police officer was corroborated by the appellant's driver's own admission that he was charged with careless driving because of that accident. On that basis, the court finds that the respondents' case on liability met the threshold required which was a balance of probability.
36. The appellant's driver stated that he was driving at 30KM/h at the time but at that speed if one is to apply emergency brakes on a serviceable car, the car would come to a complete sudden stop. This court takes judicial notice of that fact slamming on brakes sharply (even when one is driving around 40KM/h) a car will be brought to a complete stop unless the breaks of the car are defective. There was no evidence indicative that the motor vehicle was defective in any way and because the appellant's driver



drove onto the lane of the deceased cyclist, then probably he was either speeding or negligent or both. It is on that basis that this court finds that the trial court was correct in its verdict with respect to liability.

37. Quantum

The respondents' claim was a fatal claim because the deceased died as a result of the accident. The trial court made various awards which I will take a look at separately.

38.

(a) Loss of dependency

The assessment of damages under this head depends on the age of the deceased, level of dependency and the work he was engaged in or the monthly income.

In this instance the age of the deceased was established to be 27 years and the same was uncontested. What is contested here is the income or what the deceased did for a living. The respondents claimed that he was a boda boda rider with a daily salary of Kshs.1000/- per day. There was no document showing that he was employed as a boda boda. There was no rider's licence to indicate that he was a boda boda rider by profession. There was no evidence tendered to show if the motorcycle he was knocked down with was his or he had been employed and by whom. There was therefore no evidence at all to show what the deceased did for a living and the trial court had no basis to take the approach of a multiplier and multiplicand of 30 years or any other because that was speculative at most.

39. In situations where a deceased person dies in an accident and it is difficult to establish his monthly income or what he did for a living the best approach is a lump sum figure to avoid estimating and speculations on his likely income. The cited case of Mary Khayesi Awalo & Another (supra) clearly demonstrates this approach and to that extent the appellant's argument regarding the option taken by the trial court in assessing loss of dependency is well taken.

40. The trial court fell into error by assuming that the deceased was a boda boda rider by profession. It was also erroneous to find that the dependency ratio was 2/3 when there was no evidence giving exactly the number and the age of the dependents and level of their dependency. The wife testified that she was based in Nairobi while the deceased was based in Kitale. It was difficult to assess the level of support the deceased extended to his family in the circumstances and in such situations to avoid speculations, the safe option was to opt for the principle of a lump sum award.

41. Flowing from the above, this court finds that the approach made by the trial court in assessing loss of dependency was erroneous and is set aside. In its place a lump sum approach is applied. The deceased was a young man aged 27 years and in the absence of any document showing what he engaged in for a living, I will go by the decision cited by the appellant in the case of Bonton Ltd (supra). However I find that the proposed sum of Kshs. 800,000/- at this moment is a bit low considering inflation. This court finds that a lump sum figure of Kshs. 1 Million is fair and just.

42.

(b) Special damages

The respondents pleaded special damages totaling Kshs.110,870/- inclusive of funeral expenses of Kshs.70,000/-. This court has perused through the receipts tendered by the respondents and it is true as found by the trial court that most are ineligible. The trial court found as follows;

“The court has difficulty deciphering the faded receipts availed”.



43. It was erroneous for the court in the circumstances to award special damages of Kshs.40,870/- when there was no specific proof. The law requires special damages to be specifically pleaded and proved. The respondents were only able to produce documents totaling Kshs.25,120/- and that is the amount admitted by the appellant.
44. The funeral expenses were not proved and I find that making an award of 70,000/- without particulars was not safe or fair. The respondents should have given a breakdown or particulars of what was incurred.
45. This court finds that the other awards on pain and suffering and loss of expectation of life were reasonable. I will not disturb them.

In a short summary this appeal fails on liability but succeeds partially on quantum and the award made by the trial court is set aside and substituted with the following awards;

- i. Loss of dependency -Kshs.1000,000
  - ii. Pain and suffering - 100,000
  - iii. Loss of expectation of life - 100,000
  - iv. Special damages - 25,120
- Total 1,225,120/-

The appellant will get half costs of this appeal.

**DELIVERED, DATED and SIGNED at KITALE this 8<sup>th</sup> day of APRIL, 2025.**

**HON JUSTICE R.K. LIMO**

**KITALE HIGH COURT**

Judgment delivered in open court

In the presence of;

Ingosi holding brief for Namatsi for Respondents

No appearance for Mose & Mose for Appellant

Court assistants – Duke/Chemosop

