



Getembe v Korir & another (Suing as Legal Representatives of the Estate of Shandaphine Cherotich (Deceased) & 2 others (Civil Appeal E054 of 2023) [2025] KEHC 4207 (KLR) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4207 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E054 OF 2023
JK NG'ARNG'AR, J
APRIL 3, 2025**

BETWEEN

KEPHA NYAKORA GETEMBE APPELLANT

AND

SIMON KIPYEGON KORIR & GEOFFREY KIPROTICH YEGON (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF SHANDAPHINE CHEROTICH (DECEASED)) 1ST RESPONDENT

NICHODEMUS NYAATA OGETO 2ND RESPONDENT

AUTO INDUSTRIES LIMITED 3RD RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate, Muleka E. in at the Magistrate's Court at Sotik, Civil Suit Number 93 of 2018)

JUDGMENT

1. In the trial court, the Respondents (then Plaintiffs) sued the Appellant (then Defendant) for general and special damages arising out of a road which occurred on 5th March 2018 along Bomet-Kaplom road. The Respondents stated that the deceased was a pillion passenger in motorcycle registration number KMEJ 087Z when they were hit by motor vehicle registration number KCB 321S (allegedly belonging to the Appellant) thereby occasioning fatal injuries to the deceased. The Respondents blamed the Appellant for causing the accident.
2. On the other hand, the Appellant denied causing the accident. He stated that the driver of motor vehicle registration number KBM 153Y was to blame for causing the accident. He then instituted third party proceedings against Nichodemus Nyaata Ogeto (then 1st third party) stating that he was the registered owner of motor vehicle registration number KBM 153Y.



3. In its Judgment dated 5th September 2023, the trial court apportioned 35% liability against the Appellant, 35% liability against the 1st third party (Kepha Nyakora Getembe) and 30% liability against the deceased, Hillary Kiprotich Ngetich. The trial court further awarded the Respondents a net award of Kshs 1,374,113/= as general and special damages.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed his Memorandum of Appeal dated 4th October 2023 appealing against whole Judgement and relied on the following grounds:-
 - i. That the learned Magistrate erred in law and fact in finding the Appellant liable to the tune of 35% against the weight of the evidence.
 - ii. That the learned Magistrate erred in law and fact in disregarding the overwhelming evidence tendered by the Defence in apportioning liability.
 - iii. That the learned Magistrate erred in fact in failing to find that the 3rd Respondent was liable for the accident herein.
 - iv. That the learned Magistrate erred in law and fact in the assessment of the damages payable.
 - v. That the learned Magistrate misdirected himself by failing to consider and apply some weight on the evidence and the submissions by the Appellant while arriving at the Judgement.
 - vi. That the learned Magistrate erred in law and fact in relying on extraneous evidence in arriving at the decision on liability and quantum.
5. My work as the 1st appellate court is to re-evaluate and re-examine the evidence of the trial court and come to my own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. See *Peters v Sunday Post Ltd (1958) EA 424*.

The Respondents' case

6. Through their Complaint dated 6th June 2018, the Respondents stated that Shandaphine Cherotich was involved in a road accident on 5th March 2018 while aboard motorcycle registration number KMEJ 087Z as a pillion passenger. That the motorcycle was hit by motor vehicle registration number KCB 321S which belonged to the Appellant (then Defendant).
7. It was the Respondents' case that the Appellant was negligent in the accident. The particulars of the negligence were stated in paragraph 4 of their Complaint. That as a result of the accident, Shandaphine Cherotich suffered fatal injuries.
8. The Respondents prayed for Special and General Damages against the Appellant under the *Fatal Accidents Act* and the *Law Reform Act*.
9. In their written submissions dated 22nd August 2024, the Respondents submitted that all the witnesses gave several versions as to how the accident occurred. That the trial court was correct in apportioning liability as it did. He relied on *Easy Coach Limited & another vs Gideon Otieno Oulu & another (2021) eKLR*. They further submitted that the apportionment of liability would only lie against the rider of the motorcycle and not the pillion passenger (Hillary Kiprotich Ngetich). He relied on *West Kenya Sugar Co Limited v Lilian Auma Saya [2020] KEHC 7585 (KLR)*.
10. On the issue of quantum, the Respondents submitted that the award of Kshs 10,000/= as pain and suffering was sufficient. He further submitted that the award of Kshs 200,000/= as loss of expectation of life was not inordinately high and he relied on *Caroline Leah Awino vs Stephen Miheso Ashikoyo (2014) eKLR*.



11. It was the Respondents' submission that the trial court was correct in using Kshs 8,109.90/= as the minimum wage. That the trial court was also correct in adopting the multiplier of 35 years and the dependency ratio of ½. It was the Respondents further submission that the Appeal lacked merit and ought to be dismissed.

The Appellant's case.

12. Through his amended Statement of Defence dated 17th August 2018, the Appellant denied the occurrence of the accident on 5th March 2018 and stated that the accident was between the motorcycle registration number KMEJ 087Z and motor vehicle registration number KBM 153Y which belonged to Nichodemus Nyaata Ogeto (then 1st third party).
13. It was the Appellant's case that if the accident occurred then it was caused by the negligence and carelessness of the rider of the motorcycle and motor vehicle registration number KBM 153Y. The particulars of negligence were contained in paragraph 5 of his Defence.
14. The Appellant then instituted third party proceedings against Nichodemus Nyaata Ogeto.
15. As at the time of writing this Judgement, the Appellant had not filed his written submissions as directed by the court.

The 1st third party's case.

16. In his defence dated 14th January 2019, the 1st third party (Nichodemus Nyaata Ogeto) admitted the occurrence of the accident and further admitted that the accident was between the motorcycle registration number KMEJ 087Z and motor vehicle registration number KCB 321S. He denied that he was to blame for causing the accident and stated that the Appellant and the motorcycle rider were negligent in causing the accident. The particulars of the negligence were contained in paragraph 9 of his Defence.
17. The 1st third party stated that the Appellant was to blame for causing the accident.
18. I have gone through the Record of Appeal and its contents and the Respondents' written submissions dated 22nd August 2024. The only issue that I have sieved for my determination was whether the trial court erred in its findings on liability and quantum.
19. This was a sister file to Bomet High Court Civil Appeal Number E051 of 2023, Nichodemus Nyaata Ogeto vs Simon Kipyegon Korir and Geoffrey Kiprotich Yegon (suing as Legal Representatives of the Estate of Shandaphine Cherotich). These two Appeals arose from a similar Judgment in the trial court. The cause of action was also similar and the only difference between the two Appeals was that the Appellant in the current Appeal was the Defendant in the trial court and the Appellant in Bomet High Court Civil Appeal Number E051 of 2023 was the 1st third party.
20. On the issue of liability, I have already determined the same in Bomet High Court Civil Appeal Number E051 of 2023 where I found that the trial court did not err when it apportioned 30% liability against the deceased, 35% liability against the Appellant and 35% liability against Nichodemus Nyaata Ogeto (then 1st third party). That finding in Bomet High Court Civil Appeal Number E051 of 2023 holds in this Appeal.
21. The same applies to the issue of quantum. In Bomet High Court Civil Appeal Number E051 of 2023, I found that the trial court did not err when it awarded the Respondents Kshs 10,000/= for pain and suffering, Kshs 200,000/= for loss of expectation of life, Kshs 1,703,079/= as loss of dependency and



Kshs 70,000/= as special damages. Thus there was no need for this court to interfere with the award. Similarly, that finding in Bomet High Court Civil Appeal Number E051 of 2023 holds in this Appeal.

22. In the end, it is my finding that the Appeal dated October 4, 2023 has no merit and is dismissed, with costs to the respondents.

23. 30 days stay of execution granted.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 3RD DAY OF APRIL, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Achola for the Appellant, Orayo for the 1st and 2nd Respondents, Karanja for the 3rd Respondent. Siele/Susan (Court Assistant).

