Longelekiyo (Suing on Her Own Behalf and on Behalf of Estate of the Late Kiprop Kabutie (Deceased)) v Kiptanui (Civil Appeal E008 of 2024) [2025] KEHC 4980 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4980 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CIVIL APPEAL E008 OF 2024

RB NGETICH, J

APRIL 23, 2025

BETWEEN

GIDEON KIPCHUMBA LONGELEKIYO .... APPELLANT

SUING ON HER OWN BEHALF AND ON BEHALF OF ESTATE OF THE LATE KIPROP KABUTIE (DECEASED)

AND

AMOS K KIPTANUI .... RESPONDENT

(An appeal from the judgement of the Senior Principal Magistrate's Court at Kabarnet delivered by Hon. P. KOSKEY (S. P.M) on 4th July 2024)

JUDGMENT

1. The appellant who is a legal representative of the estate of the late Kiprop Kabutie (Deceased) filed suit in the lower court against the defendant seeking damages resulting the death of the deceased herein following collision between the deceased's motor cycle registration number KMCP 317Q and the Respondents vehicle registration number KAW 207W on 8th January,2021 along Nakuru – Marigat road. Upon hearing, the trial court dismissed the appellant's/plaintiff's suit and assessed damages which would have been awarded had the plaintiff's suit been successful.

2. Being dissatisfied with the judgment delivered on 4th July 2024 by Hon.Purity Kosgey (SPM), the appellant/plaintiff filed this appeal against the whole judgment on both quantum and liability on following points of law;

   i. That the learned trial Magistrate erred in law by dismissing the appellant's suit whereas negligence against the respondent was proved in trial.

ii. That the learned trial Magistrate erred in law by dismissing the appellant's suit whereas the Respondent failed to discharge the burden of proof so as to warrant a judgment in his favor.

iii. That the learned trial Magistrate erred in law by failing to take into account relevant facts relating to the suit thus arriving at a decision that is wholly erroneous in law and facts.

iv. That the learned trial Magistrate erred in law and in fact by holding the deceased rider 100% liable for causing the accident contrary to the evidence on record and or adduced during trial.

v. That the learned magistrate erred in assessing damages for loss of dependency, failed to apply the correct principles hence arrived at an erroneous estimate of damages which the deceased suffered.

vi. That the learned trial Magistrate erred in law by awarding the sum of Kshs.1,062,122.80/= as general damages which award is excessively low in view of the suffering of death as succumbed by the deceased; thereby deviating from the principle of `stare decisis requiring comparable awards being made for comparable injuries sustained.

vii. That the learned trial Magistrate erred in law and in fact by failing to consider the appellant's submissions and legal authorities and/or precedents on both liability and quantum thereby arriving at a determination which is wholly erroneous in law.

viii. That the learned trial Magistrate erred in law and in fact by failing to consider the evidence adduced by the appellant and his witness thereby arriving at a determination on liability that is wholly erroneous.

ix. That the learned trial Magistrate erred in law and in fact by holding the deceased rider 100% liable for causing the accident without any justification and or reasons.

x. That the learned trial Magistrate erred in law and in fact by holding the deceased rider 100% liable for causing the accident despite glaring inconsistencies that were there, in the accounts of the two primary witnesses who testified in favor of the appellant and respondent respectively.

xi. That the learned trial Magistrate erred in law and in fact by holding that the deceased was 100% to blame for the accident, yet he was hit from the back of his motor-cycle.

xii. That the learned magistrate erred by considering extraneous issues which vitiated her judgment thus arriving at erroneous finding.

3. The appellant prays for orders that;

a. That the judgment of the trial Court on liability be and is hereby set aside and be substituted with the award of this Honorable High court.

b. That the trial Court award on loss of expectation of life and damages under fatal accident Act be and is hereby set aside and substituted with an award of this Honorable Court.

c. That costs of the appeal be borne by the respondent.

4. The Appeal was canvassed by way of written submissions.

Appellant’s Submissions

5. The Appellant submits that the trial court erred by finding the deceased who is a brother to the appellant 100% liable for the accident which took away his life and relied on the case of Michael

Hubert Kloss & another vs David Seroney and 5 others. He urged this court to examine, evaluate and analyze the trial court record and draw its conclusions on whether on a balance of probabilities, the Respondent was not liable and who could be liable.

6. The Appellant submits that the trial court blamed the deceased who was riding the motor cycle KMCP 317Q for breach of duty of care by not giving way to the respondent and to buttress their evidence, the respondent asserts that the motorcycle appeared on the left side and hit his vehicle.

7. That Pw2 Police Corporal Abdulahi Ali stated that vehicle driver was driving from Marigat towards Nakuru while the rider was riding from the opposite direction towards Marigat to buttress his assertion that the motor vehicle rammed into motor cycle on its left front headlight causing damage on the left front headlight and left front windscreen.

8. The Respondent Amos K. Kiptanui stated that he was driving past Loboi junction towards Nakuru when suddenly a motor cycle appeared from the left side from Nakuru direction and they collided. He stated that he had a right of way as he was on the main road and blamed the rider for joining the road without checking the oncoming vehicle.

9. That the court in arriving at its determination considered evidence of Pw2 Abdullahi Ali who stated the point of impact was on the lane of the motor vehicle and the motor vehicle was damaged on the left front light which according to him is an indication that the motor vehicle was on its lane. No sketch map was however produced in the court to proof that the motor vehicle of the respondent was indeed on his lawful lane.

10. That it is worth noting that, in determination the court observed that there was no evidence showing that the deceased was hit on his lane or off the road, the nature of injuries sustained by the deceased evidenced by post mortem report dated 22nd of January 2021 demonstrates the true circumstances the deceased perished, the deceased rider of the motorcycle had at least seven fractures which were largely on the head and upper shoulder and there was a clear evidence that both the motor cycle rider and the driver of the motor vehicle were on a collision cause, which caused the untimely fatal accident.

11. The appellant cited the case of Baker vs Market Harboroh Industrial Cooperative ltd (1953) 1 KCR 1472, 1476 where Lord Denning observed inter-alia,

> " Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. They would not escape simply because the court had nothing by which to drawn any distinction between them."

12. Further that the court noted that pw2 Abdulahi Ali stated that he was riding towards Marigat direction from opposite direction when the Prado ramped into incoming motorcycle on its left front headlight and it is worth noting that relying on common sense if the rider of the motor cycle had collided with the motor vehicle, there would be likelihood of bent tyre rims and shredded front tyres and on his opinion the reliance of left front headlights to rule out who collided with whom is defective and inconclusive.

13. The appellant submits that from the foregoing there is high probability that the the driver of the motor vehicle had a higher chance to control the collision either by braking, hooting, flashing lights or going at a low speed as designated in shopping and residential places but he chose to swerve occasioning the accident. He urged this court to find the driver of motor vehicle 100% as on a balance of probability considering the injuries and defects suffered by the deceased is inconsistent with the narrative that the driver was not liable.

14. The appellant further submit that it is undisputable that the rider was knocked from behind occasioning his fall towards the front as the injuries the deceased suffered was majorly on the head and upper part of the abdomen but the point of impact was disputed as Pw2 stated that the accident occurred at Loboi junction and if the rider appeared from the left side and the driver swerved to the right side, the right side of the headlights would have been heat by the motor vehicle; that it's unconceivable to imagine that a rider emerges from the left, the vehicle driver swerve to the right and the left headlights of the motorcycle were damaged. Common sense dictates that the motor vehicle and motor cycle were both properly in the road and they were heading on either opposite or similar direction when the accident occurred. That from the above narrative, the motor vehicle rammed on the motor cycle from behind or front occasioning collision on the left front heed light.

15. The Appellant further submit that the trial magistrate in her determination could not establish whether deceased was hit on his lane or off the road which observation contradicted her observation that the inspection report of motor vehicle KAW 207W and the evidence of Pw2 that the damage was on the left front light of the vehicle inferring that the motor vehicle was on its rightful lane.

16. That to infer a plea of guilty on the part of the respondents, at their submission at page 60 of the record of appeal, the respondents inferred that, the appellant was to be awarded a sum of Kshs. 610,000/= on their own violation. The appellant further submit that it pains both the appellant and entire dependents of the deceased, that the trial court, elected to find the deceased 100% liable for the accident and his death therefor became a double loss to the entire family and clan and they besiege this Court to vary and wipe off the tears of the family of the deceased.

17. The appellant further submits that these inconsistencies of evidence was detrimental in establishing the balance of probability and thus submit that this occasioned the trial court to arrive at a wrong conclusion. They place reliance in the case of Sielle vs Associated Motor Boat Co. (1968).

18. That in his testimony prior to cross-examination and re-examination, the respondent who was the vehicle driver talked of motor cycle appearing from the left side from Nakuru and he asserts that he tried to avoid collision and suddenly becomes argumentative in his words, by saying "I tried avoiding collision but I could not it's not true that the motorcycle was on its lane, the road was clear, the motorcycle appeared from the left side and hit my vehicle".

19. The appellant submits that the argumentative testimony points to coaching or prior preparation by someone to say fabricated facts and the court should not have considered that testimony in establishing probable cause. That one fact stands that the rider of motorcycle was at the road and the driver lost control knocking the rider and swerved to the left.

20. The appellant further submits that the glaring inconsistencies casts doubts on who is liable; that the degree of injuries and defects suffered by the deceased rider and motorcycle points at motor vehicle driver the respondent herein as the one to shoulder 100% liability.

21. On quantum, the appellant submits that the amount awarded was inordinately low given the circumstances surrounding the death and the income the deceased was earning at the time of death; that the deceased was a boda boda rider/ driver and the amount awarded was extremely low.

22. On award under pain and suffering, the appellant submits that the deceased underwent an agonizing pain at the time of his death as he did not die immediate as loosely captured by the evidence of Pw1 Gideon Kipchumba.The appellant relied on the case of Silverstine Quarry limited and another vs Beatrice Mukulu Kanguta(suing as administrator of the estate of Philiph Musyoka Muthoka where the court awarded KSh 300,00 for pain and suffering where deceased was knocked at by a motor vehicle at 6.00 a.m. and passed on at 11.40 a.m;and the case of Wareng High School vs Philomena Kipkering

Metto and Maureen Jemutai (suing as administrators of the estate of Joseph Kiptoo),where the court awarded 180,000 to the deceased rider for pain and suffering; and in light of the foregoing, the appellant submit that an award of KSh.300,000 would be sufficient award for pain and suffering considering that the deceased died hours later.

23. On award under loss of dependency, the appellant relied on the case of Catholic Diocese of Kisumu Vs Sophia Achieng Tele Civil Appeal No.284 Of 2001(2004) 2klr 55 where the court of appeal set out the circumstances under which an appellate court can interfere with an award of damages and submits that the deceased's occupation written in the death certificate and submits that his earnings were estimated to be around KSH.40,000 and relied on the case of Ondigo Gilbert vs Joab Jonah Olunyama(2018)eKLR. He submits that minimum wage for a driver in the year 2018 is KSh 28,822.10. further that evidence adduced show that the deceased was survived by his parents and brother and was confirmed by chief's letter. He submits that the ratio of a third in the multiplicand is inordinately low given that the deceased is survived solely by an unemployed brother and aged parents and urged this court to adopt the ratio of 2/3.

24. The appellant further submit that the deceased was 38 years and a multiplier of 22 would be fair and relied on the case of Pleasant View School limited vs Rose Mutheu Kithoi and anotherg017eKLR, where the court upheld the multiplier of 20 years adopted by the learned trial judge where deceased was aged 36 years of age and the case of Elizabeth Chelagat Tanui and another vs Arthur Mwangi Kanyua (2013) eKLR where the court adopted a multiplier of 18 years where the deceased was aged 36 years. His proposed calculation to be 2/3 (dependency ratio) x KSh 28822.11= (monthly income)x 12(months in one year) X 22(multiplier) =KShs.5 072,689.60.

25. The appellant prays that judgement be entered in favour of the plaintiff against the defendant herein and or severally as follows:

    a. Liability 80% in favour of plaintiffs

    b. Damages for pain and suffering Ksh.200,000/=

    c. Damages for loss of expectations of life Damages for loss of dependency Kshs. 5,072, 689.60

    d. Special damages Kshs. 120,550

    e. Plus costs and interests at court rates with interest on special damages running from the date of filing suit until payment in full while interest on general damages running from the date of judgement until payment in full.

Respondent's Submissions

26. The Respondent submits that there are two issues for determination one is whether the trial court erred in finding on liability and two, whether the trial court did not properly exercise discretion while assessing damages. The respondent further submits that the Appellant is required to establish 3 grounds to warrant the interference with the finding of a fact as set out by the Court of Appeal in Kneller & Hancox Ag JJA in Mkube Vs Nyamuro [1983] KLR, 403-415, at 403.

27. On liability, the Respondent submits that the trial magistrate clearly observed and took into consideration all the evidence as presented before court and well analyzed the same as can be noted at pages 13 of the Record of Appeal and there is no error on decision by the trial court and reiterate their submissions before the trial court on liability particularly at pages 53 to 55 of the Record of Appeal and the finding that the Plaintiff did not prove negligence on part of the Defendant/Respondent was properly arrived at.

28. On whether the finding on liability by the trial Court was based on misapprehension, the Respondent submits that the observation and consideration by the trial magistrate is correct as to the testimonies of witnesses as recorded at pages 22-31 of the Record of Appeal; that the finding was well informed by the testimonies of PW2 and DWI as clearly considered by the trial magistrate in her judgment at page 13 of the Record of Appeal; and the trial magistrate did not act on any wrong principles and none has been demonstrated by the Appellant to warrant the interference of the trial Court's finding and urged this court to dismiss this Appeal with cost as the dismissal of the suit before the trial court was fairly was based on evidence adduced and relied on the case of Benter Atieno Obonyo Vs Anne Nganga and Another[2021]eKLR.

29. In respect to assessment of damages, the Respondent submits that the magistrate's discretion was judiciously applied and the Court considered all the relevant factors and principles applicable in comparable circumstances to come up with the awards that would essentially benefit the Estate of the Deceased had they established a case of negligence against the Defendant. The Respondent urged this court not to interfere with the discretion of the trial Court but uphold its decision and order the appellant to pay Costs of the Appeal to the Respondent.

Analysis And Determination

30. This being the first appeal, I am obligated to re-evaluate the evidence of the trial court and come up with my own conclusion. I am however minded of the fact that unlike the trial court, I did not have the chance to hear witnesses first hand and observe their demeanor, for this I give due allowance. This position was held in the case of Selle & Another Vs. Associated Motor Board Company Ltd. [1968] EA 123, where the court held as follows: -

> " ...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 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..."

31. In view of the above, I have perused and considered the lower court record together with submissions filed herein and find the following as issues for determination: -

    1. How should shoulder liability and to what extend

    2. whether this court should interfere with assessment of damages

How should shoulder liability and to what extend

32. The appellant was required to prove on a balance of probabilities that the Respondent was negligent in driving the vehicle and as a result of the negligence, the deceased sustained fatal injuries. The position as to proof in civil cases was reiterated in the case of Kirugi & Anor v Kabiya & 3 Others [1987] KLR 347 wherein the Court of Appeal stated that the burden is always on the plaintiff to prove his case on a balance of probabilities, and that such burden was not lessened even if the case was heard by way of formal proof.

33. Further, in the case of East Produce (K) Limited v Christopher Astiado Osiro In Civil Appeal No. 43 Of 2001 the court of appeal stated as follows: -

> " It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence." [See Mount Elgon Hardware v Millers C.A. No. 19 of 1996 and Mwaura Mwalo v Akamba Public Road Services Ltd HCC No 5 of 1989].

34. The appellant herein had both the legal and evidential burden to prove the facts alleged on a balance of probabilities. The question therefore is whether the evidence by the appellant was sufficient to prove negligence before the trial court. From record, there is no dispute that an accident occurred involving the vehicle herein and the motorcycle which the deceased herein was riding. Ownership of the vehicle herein was not disputed. It is trite law that all road users owe a duty to use the road diligently so as not to occasion any damage to the other road users. The plaintiff was therefore required to prove on a balance of probabilities, negligence on part of the Respondent/defendant.

35. From evidence adduced before the trial court, PW1, Pw2 and DW1 admitted occurrence of the accident. They however gave different versions on how the accident occurred. PW2 Corporal Abdullahi Ali informed the court that an accident occurred between motor vehicle KAW 207W and motor cycle KMCP 317Q along Nakuru-Marigat road at Loboi junction area and that the vehicle was moving from Marigat direction to Nakuru while the rider was riding from the opposite direction towards Marigat direction and that the motor vehicle rammed into the motor cycle on its left front headlight. He further told the Court that the motor vehicle was damaged on the left front headlight and the left front windscreen.

36. DW1 Amos Kiptanui testified that he was driving past Loboi junction towards Nakuru when suddenly a motor cycle appeared from the left side from Nakuru direction and a collision occurred. He denied that the motor cycle was on its lane. He further stated that the right of way was for the one on the main road and the rider joined the road without checking to see if there was an oncoming vehicle before joining the road.

37. The respondent's argument is that the deceased motor rider suddenly entered the road from a feeder road but even if I were to believe that the motor cycle entered the main road without checking, the driver of the vehicle also had a duty of ensuring that he moved in reasonable speed which would enable him control the vehicle by either stopping or swerving to avoid the accident or reduce the impact. The injuries occasioned to deceased hearing were fatal a clear indication that the vehicle must have been moving in high speed.

38. In cases where how the accident occurred is not clear, the English court in the case Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681 Lord Reid reasoned as follows: -

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as

having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can apply generally."

39. Further in the case of Lakhamshi v the Attorney General (1971), the court of appeal stated that where it cannot be precisely determined who between two drivers was to blame for the accident, the liability is shared equally. production of the scene sketch plan in this case would have been more useful to the court but the parties withheld same. There is therefore no clarity on occurrence of the accident and the circumstances, I am inclined to apportion liability in the ratio of 50:50.

whether this court should interfere with assessment of damages

40. An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.

41. On whether the general damages awarded were too low in the circumstances, the Court of Appeal in the case of Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR had this to say on an appellate court overturning the amount of damages awarded by a trial court: -

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:
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> 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

42. under pain and suffering, the trial court considered that the accident occurred on 8th January,2021 and the deceased died after being rushed to hospital. The trial court having considered the authorities cited by both sides, found that an award of kshs 100,000 would be appropriate herein as the deceased died hours after the accident. Taking into consideration that the deceased did not die immediate and must have experience intense pain before death, I am of the opinion that award of kshs 100,000 under pain and suffering is on the lower side and looking at comparable awards in cases cited, I am inclined to award kshs 200,000.

43. Under the head of loss of expectation of life, from the death certificate, the deceased died at the age of 38. The trial court considered the reasoning of Nyakundi J in the case of Acceler Global Logistics v Gladys Nasambu Waswa & anor (2020)eKLR. The trial court found that the deceased had a whole life ahead of him that was cut short by the accident, and proceeded to award a conventional sum of kshs 200,000 in the circumstances, which too is reasonable in the circumstances.

44. Under loss of dependency, the trial court adopted the multiplier approach while the appellant argued that the court should have granted global award. From the death certificate, the deceased was 38 years old and he was a motor rider. There was no proof of deceased's earnings. In the case of Beatrice W Murage v Consumer Transport Ltd & Anor (2014) eKLR the court of appeal held that the Court should resort to the minimum wage where earnings cannot be established, found that a global award approach would not apply in this case as submitted by the defendant's advocate.

45. Upon perusing the minimum wage in gazette notice dated 19th December,2018 which is applicable herein, found that there is was no specific provision for a rider and therefore took the deceased as a driver under category 6 where the minimum monthly wage is kshs 13,975.30 under all other areas. The sum of kshs 13,975.30 therefore as the multiplicand is reasonable.

46. On the Multiplier, the deceased was aged 38. The plaintiff's Counsel urged the Court to adopt a multiplier of 22 years while relying on the case of VZL & Anor v Chrispine Agunja Mogo (2014)Eklr where the court applied multiplier of 20 years for 37 year old found that a multiplier of 19 would be reasonable. Agree multiplier of 19 years is reasonable and I have no reason to interfere.

47. On the dependency ratio, the deceased was not married and the evidence of PW1 is that he supported his mother. Since the deceased herein was unmarried proceed to adopt a dependency ratio of 1/3 in the circumstances. In my view, the trial magistrate did not err in applying the ratio of 1/3 and I will not therefore interfere. The calculation under this loss of dependency would therefore be as follows:

    13,975.30 X 12 X 19 X 1/3 =1,062,122.80.

48. Special damages were pleaded and proved to the extent of kshs 30,881 which I award.

49. From the foregoing, save for award under pain and suffering, the awards under the other head will remain as assessed by the trial court. The appeal therefore partly succeeds.

50. Final Orders: -

    1. Liability apportioned at 50:50
    2. Damages for pain and suffering enhanced to kshs 200,000
    3. Awards under other heads remain as assessed by the trial court
    4. Each party to bear own costs of appeal.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 23 RD DAY OF APRIL 2025.

....

RACHEL NGETICH

JUDGE

In the presence of :

Momanyi – Court Assistant.

Mr. Kemboi for the Appellant.

No appearance for the Respondent