



**Ogeto v Korir & another (Suing as legal representatives of the Estate of Shandaphine Cherotich) (Civil Appeal E051 of 2023) [2025] KEHC 4213 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4213 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E051 OF 2023  
JK NG'ARNG'AR, J  
APRIL 3, 2025**

**BETWEEN**

**NICODEMUS NYAATA OGETO ..... APPELLANT**

**AND**

**SIMON KIPYEGON KORIR & GEOFFREY KIPROTICH YEGON (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF SHANDAPHINE CHEROTICH) ..... 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 Kepha Nyakora Getembe (then Defendant) for general and special damages arising out of a road which occurred on 5th March 2018 along Bomet-Kaplong 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 Defendant) thereby occasioning fatal injuries to the deceased. The Respondents blamed the Defendant for causing the accident.
2. On the other hand, the Defendant 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 the Appellant and stated the Appellant 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 Defendant (Kepha Nyakora Getembe) and 30% liability against the deceased, Shandaphine Cherotich. 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 3rd October 2023 appealing against whole Judgement and relied on the following grounds:-
  - I. That the learned Magistrate erred in law and fact by apportioning 35% liability to the 1st third party without considering the circumstances of the case.
  - II. That the learned Magistrate erred in law and fact by apportioning 35% liability to the 1st third party whereas the police file confirmed that the motorcyclist was to blame.
  - III. That the learned Magistrate erred in law and fact by apportioning 35% liability to the 1st third party whereas DW2, DW3 and the 1st third party witness absolved the 1st third party from blame.
  - IV. That the learned Magistrate erred in law and fact in the assessment of quantum thereby giving an award on quantum on general damages of Kshs 1,703,079/= that was overly in excess in the circumstances of the case.
  - V. That the learned Magistrate erred in law and fact in failing to pay regard to decisions filed alongside the 1st third party's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.
  - VI. That the learned Magistrate's exercise of discretion in assessment of quantum was injudicious.
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. This principle was espoused in the Court of Appeal case of *Gitobu Imanyara & 2 others v Attorney General* [2016] KECA 557 (KLR) where it was held:-

“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 allowances in this respect”

### **The Respondents' case**

6. Through their Complaint dated 6th June 2018, the Respondents stated that the deceased 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 Kepha Nyakora Getembe (then Defendant).
7. It was the Respondents' case that the Defendant was negligent in the accident. The particulars of the negligence were stated in paragraph 4 of the 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. He 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 Defendant's case.**

12. Through his amended Statement of Defence dated 17th August 2018, the Defendant 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 the Appellant (then 1st third party).
13. It was the Defendant'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 the Defence.
14. The Defendant then instituted third party proceedings against the Appellant.

#### **The Appellant's case.**

15. In his defence dated 14th January 2019, the Appellant 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 KBM 153Y. He denied that he was to blame for causing the accident and stated that the Defendant and the motorcycle rider were negligent in causing the accident. The particulars of the negligence were contained in paragraph 9 of his Defence.
16. The Appellant stated that the Defendant (Kepha Nyakora Getmebe) was to blame for causing the accident.
17. As at the time of writing this Judgement, the Appellant had not filed his written submissions as directed by the court.
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.

#### **Liability.**

19. Under this heading, the circumstances of the accident had to be described before the trial court through testimony to enable the trial court apportion liability. Simon Kipyegon Korir testified as PW1 and stated that he witnessed the accident. That on the material day at around 7.30 p.m., he saw two motor vehicles coming from Bomet towards Sotik and a motorcycle was in front of the two vehicles. PW1 testified that the motorcycle wanted to turn to the right side of the road but was unable to due to an oncoming vehicle. That motor vehicle registration number KCB 321S that was behind the motorcycle hit the motorcycle causing the death of one person on the spot and the other injured person was taken to hospital. PW1 reiterated his testimony upon cross examination and further testified that even



though the accident occurred at 7.30 p.m., he was able to see clearly as there was moonlight and light from the other vehicles.

20. No. 78721PC Joash Obayi testified as PW2. He testified that the motorcycle registration number KMEJ 087Z had a rider (Davis Rono) and two pillion passengers (Hillary Kiprotich Ngetich and Shadrachine Cherotich) and it was involved in an accident with motor vehicle registration number KCB 321S and motor vehicle registration number KBM 153Y. PW2 produced a Police Abstract as P.Exh 5. When PW2 was cross examined, he testified that he was not the investigating officer and that his testimony was based on the contents of the Police File. He further testified upon cross examination that the motorcycle rider was from Bomet heading towards Kaplong and he collided with the matatu (motor vehicle registration number KBM 153Y), lost control and went ahead and collided with the Toyota Allion (motor vehicle registration number KCB 321S).
21. In his defence, the Defendant (Kepha Nyakora Getembe) testified as DW1. It was his testimony that he did not cause the accident. That on the material day, he was driving motor vehicle registration number KCB 321S heading to Kaplong from Bomet when a Transline Matatu (motor vehicle registration number KBM 153Y) overtook him, hit the motorcycle and the impact threw the motorcycle towards his car and it was hit on the front bumper and on the right headlamp. It was his further testimony that there was no contact between his vehicle (motor vehicle registration number KCB 321S) and the motorcycle.
22. DW1 testified that he blamed the driver of motor vehicle registration number KBM 153Y for causing the accident as the driver drive carelessly. DW1 produced a copy of the motor vehicle search for motor vehicle registration number KBM 153Y as D. Exh 2 which indicated the Appellant as its registered owner. When DW1 was cross examined, he reiterated his testimony and further testified that upon impact, the occupants of the motorcycle were thrown to his rightful lane.
23. Justus Abuga testified as DW2 and further that he was a passenger in motor vehicle registration number KCB 321S. His testimony mirrored DW1's testimony. He reiterated his testimony upon cross examination.
24. No. 93827 PC Judith Atoka testified as DW3. It was her testimony that the rider of the motorcycle was heading from Kaplong to Bomet and the rider left his lane and joined the right side of the road and as a result, hit the oncoming motor vehicle registration number KBM 153Y and also hit motor vehicle registration number KCB 321S. It was DW3's further testimony that the rider of the motor cycle was to blame for causing the accident. When DW3 was cross examined, she testified that she was not the investigating officer.
25. In the Appellant's defence, Samson Pius Nyakambi testified as the driver of motor vehicle registration number KBM 153Y. It was his testimony that on the material day at around 7.30 p.m., he was driving on Kaplong-Kisii road, he saw a motorcycle on his lane and it had not switched on its headlights. It was his further testimony that he evaded the motorcycle that was in front of him and the motorcycle rammed into the vehicle that was behind him i.e. motor vehicle registration number KCB 321S. Samson testified that the rider of the motorcycle was to blame for causing the accident.
26. When Samson Pius Nyakambi was cross examined, he testified that he did not overtake any vehicle and that it was true that the rider collided with his vehicle then it hit the other vehicle.
27. In analysing the above evidence on the circumstances leading to the accident, it is my finding that the testimonies of the two police officers No. 78721PC Joash Obayi testified (PW2) and No. 93827 PC Judith Atoka (DW3) were hearsay evidence. I say so because both police officers confirmed that they



were not the investigating officers and that they relied on the Police File and the Investigation Report of the Investigating Officer who was not called as a witness. The testimonies as such are inadmissible.

28. Further to the above, the Respondents' witness (PW1) did not witness the accident. The Defendant (Kepha Nyakora Getembe) (DW1), his witness Justus Abuga (DW2) and the Appellant's witness Samson Pius Nyakambi gave different versions of the circumstances leading to the accident. Such an occurrence was curious to this court as all the parties were involved in the accident as they were all in the motor vehicles registration numbers KCB 321S and KBM 153Y and should have told a similar account of the circumstances of the accident if they were genuine.
29. It was also clear from the evidence that the rider of the motorcycle registration number KMEJ 087Z had two pillion passengers. The National Transport and Safety Authority (Operation of motorcycles) regulations 2015. Regulation 7(1) provided:-

Responsibilities of a Passenger

- (1) Every passenger in a motorcycle shall —
- (a) properly wear a helmet and reflective jacket whenever being carried on a motorcycle;
  - (b) not board or be carried on a motorcycle that already has a passenger except as provided by Regulation 7 (2) (a);
  - (c) not board or be carried on a motorcycle that is carrying any load;
  - (d) sit astride in the seat fixed behind the rider's seat."

30. The Traffic Act Cap 403 Laws of Kenya provided for the law relating to traffic on the road. Section 68(3) of the Traffic Act provides:-

A failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

31. Section 60 (1) of the Traffic Act provides that:-

It shall not be lawful for more than one person in addition to the driver to be carried on any two-wheeled motorcycle, nor shall it be lawful for any such one person to be so carried otherwise than sitting astride the motorcycle and on a proper seat securely fixed to the motorcycle behind the driver's seat.

32. I am persuaded by Odunga J. (as he then was) in the case of *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] KEHC 1079 (KLR), where he held that:-

"The law does not permit more than one pillion passenger to be carried on a motor cycle. By riding on the said motor cycle against the law, the Respondent exposed himself to danger. Such conduct cannot go un-condemned and it should not be rewarded."

33. In light of the above, I do not find fault with the trial court's apportionment of liability. For the purpose of this Appeal, the Appellant was 35% liable for causing the accident.



## Quantum.

34. It was not disputed that the deceased died as a result of the accident. In their Complaint dated 6th June 2018, the Respondents stated that the deceased's dependants were Simon Korir (Father) and Alice Cheron Ngotwa (Mother). That the deceased died aged 21 years and made approximately Kshs 15,000/= per month. In his testimony, PW1 testified that the deceased was a business lady dealing with cereals and maize and that she was not married. It was PW1's further testimony that the deceased used to assist him at home and buy him food.

35. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-

Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

36. Under loss of dependency, the trial court adopted Kshs 8,109.90/= as the minimum wage. The trial court also adopted a multiplier of 35 years and a dependency ratio of ½ which brought the total under loss of dependency to Kshs 1,703,079/=. This in my view represented a fair award under the circumstances and there was no need for this court to interfere with the award as it was neither inordinately high nor low.

37. The trial court also awarded Kshs 10,000/= for pain and suffering and Kshs 200,000/= for loss of expectation of life. In *Hyder Nthenya Musili & another v China Wu Yi Limited & another* [2017] KEHC 3063 (KLR) Nyamweya J. (as she then was) held that:-

“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 higher damages being awarded if the pain and suffering was prolonged before death.”

38. It is my finding that the award of Kshs 10,000/= for pain and suffering and Kshs 200,000/= for loss of expectation of life was sufficient, reasonable and did not warrant interference by this court.

39. Regarding the special damages, the Respondents pleaded Kshs 20,000/= as an expense towards procuring Letters of Administration and the same was awarded. The Respondents were also awarded Kshs 50,000/ towards funeral expenses. Section 6 of the *Fatal Accidents Act* makes provision for funeral expenses as follows:-

In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in



respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.

40. In the case of Premier Dairy Limited vs Amarjit Singh Sagoo (2013) eKLR , the Court of Appeal stated that:-

“We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issue of record keeping when their primary concern is that a close relative has died”.

41. Flowing from the above, it is my finding that the trial court did not err when it awarded the Respondents Kshs 70,000/= as special damages.

42. In the end, it is my finding that the Appeal dated 3rd October 2023 has no merit and is dismissed with costs to the Respondents. The costs in the original suit shall remain as awarded by the trial court.

**JUDGEMENT DELIVERED, DATED AND SIGNED THIS 3<sup>RD</sup> DAY OF APRIL, 2025.**

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**J.K.NG'ARNG'AR**

**JUDGE**

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

