Registered Trustees of African Divine Church Boyani Headquarters & another v Martim (Suing as the Administrator and Legal Representative of the Estate of Wesly Kirwa (Deceased)) (Civil Appeal 20 of 2023) [2025] KEHC 5462 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5462 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL APPEAL 20 OF 2023

JN KAMAU, J

APRIL 24, 2025

BETWEEN

THE REGISTERED TRUSTEES OF AFRICAN DIVINE CHURCH BOYANI HEADQUARTERS ..... 1ST APPELLANT

JOHN SAIYA ..... 2ND APPELLANT

AND

MARGARET JEPKEMBOI MARTIM ..... RESPONDENT

SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF WESLY KIRWA (DECEASED)

(Being an appeal from the Judgment and Decree of Hon S.Ongeri (SPM) delivered at Vihiga in the Senior Principal Magistrate's Court Civil Case No 85 of 2020 on 24th July 2023)

JUDGMENT

Introduction

1. In his decision of 24th July 2023, the Learned Trial Magistrate, Hon S. Ongeri, Senior Principal Magistrate found the Appellants liable for the fatal injuries that Wesly Kirwa (hereinafter referred to as "the deceased")sustained and entered Judgment in favour of the Respondent against the Appellants in the following terms:-

    Pain and suffering Kshs 30,000/=

    Loss of expectation of life Kshs 100,000/=

    Loss of dependency Kshs 1,927,800/=

    Special damagesKshs 363,170/=

Kshs 2,420,920/=

Plus costs of the suit and interest.

2. Being aggrieved by the said decision, on 9th August 2023, the Appellants herein filed a Memorandum of Appeal dated 8th August 2023. They relied on nine (9) Grounds of Appeal.

3. Their Written Submissions were dated and filed 10th February 2025 while those of the Respondent were dated and filed on 28th October 2024. The Judgment herein is based on the said parties' Written Submissions that they relied on in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

   a. Whether or not the Learned Trial Magistrate's Judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.

   b. Whether or not the Learned Trial Magistrate erred in finding the Appellant wholly liable for the accident;

   c. Whether or not the quantum that was awarded was excessive in the circumstances warranting interference by this court.

7. The court deemed it prudent to address the issues under the following distinct heads.

I. Order 21 Rule 4 of the Civil Procudure Rules

8. Ground of Appeal No (1) was dealt with under this head.

9. The Appellants did not submit on this issue. On her part, the Respondent submitted that the Trial Court's Judgment delivered on 24th July 2023 provided a summary of the case, summary of the evidence presented as well as the issues for determination. They added that the Trial Court provided its analysis of the issues as well as reasoning before eventually issuing its final decision. It was her contention that the Appellants had not demonstrated in what manner the said Judgment had not met the provisions of Order 21 Rule 4 of the Civil Procedure Rules.

10. In that regard, she placed reliance on the case of *Osoro & Another vs Onyango(Civil Appeal 14 of 2022)* [2023]KEHC 23578 (KLR) whereby a similar issue was raised and it was held that the trial court had taken its time to write a concise judgment which captured the necessary facts of the dispute before it. She pleaded with this court that in the event it found the Trial Court not to have complied with the provisions of Order 21 Rule 4 of the Civil Procedure Rules, then in the interest of justice, it should

proceed to determine the matters herein finally as it had access to the lower court file as well as the record of appeal.

11. She further relied on the case of Miyogo vs Muhindi (Suing as legal representatives of the Estate of Boaz Owuor Opuge (Deceased) & Another(Civil Appeal E024 of 2020)[2023] KEHC 292 (KLR) where it was held that courts should handle all matters presented before them for the purpose of attaining several aims amongst them being the just determination of the proceedings and the efficient disposal of the business of the court.

12. Notably, judgments must comply with Order 21 Rule 4 of the Civil Procedure Rules, 2010. The same provides that:-

> "Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons thereof."

13. A perusal of the Trial Court's Judgment delivered on 24th July 2023 showed that the Trial Court complied with Order 21 Rule 4 of the Civil Procedure Rules. To that extent, this court agreed with the Respondent that the Appellants did not demonstrate how the Trial Court failed to comply with the said Order. As they did not submit on this issue, this court did not wish to belabour the point.

14. In the premises foregoing, Ground of Appeal No (1) was not merited and the same be and is hereby dismissed.

II. Liability

15. Grounds of Appeal Nos (2) and (7) were dealt with under this head.

16. The Appellants submitted that the Trial Court relied on the evidence of David Kosi (hereinafter referred to as "PW 2") and No 59708 Police Constable John Koech (hereinafter referred to as "PW 3") to find them wholly liable for the fatal injuries that the deceased sustained. They blamed the deceased wholly because he was over-speeding (sic) and failed to observe traffic rules by not seeing that Ephraim Mhanda Ohoga (hereinafter referred to as "DW 1") had indicated his intention to turn.

17. They asserted that PW 2 could not tell whether or not DW 1 had indicated and further that PW 3 failed to produce the sketch map that had been drawn by the previous Investigation Officer to clearly describe the scene of the accident.

18. They pointed out that DW 1 was acquitted in Traffic Case No 76 of 2019 which he said not all the Respondent's witnesses were aware of its outcome. It was their contention that the issue of liability was not well determined by the Trial Court as the evidence on record was not on balance of probabilities for them to have been condemned to pay damages, costs and interest. They urged the court to allow their appeal.

19. On her part, the Respondent submitted that it was trite law that a case was determined on a balance of probability. She asserted that the Trial Court found that the Appellants' subject Motor Vehicle was to blame for the accident as it failed to give way when it had a statutory duty to do so. She argued that the Appellants did not present any evidence in support of their allegation that their driver was not liable and that deceased was at fault for the accident.

20. She pointed out that the only evidence by the Appellant was that of DW 1 which was that the deceased appeared out of nowhere and that DW 1 was acquitted of the traffic charge. She was categorical that the Appellants were required by Section 107 and Section 109 of the *Evidence Act* to present evidence

from the criminal proceedings (sic) to prove that DW 1 was indeed not found guilty for causing death by reckless driving.

21. She asserted that DW 1 was discharged after witnesses failed to attend court. She was emphatic that a discharge under Section 86 of the *Criminal Procedure Code* was not the same as an acquittal and that the State was at liberty to reinstate the charges against an accused person at any time. She added that the Ruling was not on the issue of DW 1's guilt.

22. In this regard, she placed reliance on the case of Akamba Public Road Services Limited & Mulili Yuta Kingoku vs Jacinta Ndinda Mutisya, Mohamed Sheikh Omar Bindaahman & Said Abdalla[2015]KEHC 7272 (KLR) where the court held that a statement from a witness could not be taken to be proper evidence of the existence and conclusion of a traffic court case in a case where the proceedings of an alleged traffic case were not produced in evidence.

23. She asserted that in any event, criminal and civil proceedings that emanated from the same cause of action were separate and distinct cases which had different standards of proof. She added that even if there had been an acquittal in the traffic case, the same was not binding on the trial court which was required by law to make its own analysis based on the facts and evidence presented before it.

24. She further cited the case of Haza Tours & Solomon Mwenda vs Peter Mworia M'arimi (Suing as the administrator of the estate of Irene Gaciuki (Deceased) & Simon Mwirigi[2018]eKLR where it was held that a court trying a civil case was not bound by the judgment of the criminal court.

25. She was emphatic that the Trial Court correctly took into consideration the evidence presented by both parties and found the Appellants wholly liable for the accident as they did not produce any evidence showing the deceased's culpability for the accident or any evidence in support of their case.

26. Notably, the Respondent testified that on 4th September 2019, the deceased was lawfully cycling along Kisumu-Kakamega Highway when the driver of the Appellants' Motor Vehicle Registration Number KBY 782X (hereinafter referred to as "the subject Motor Vehicle") carelessly managed the said subject Motor Vehicle that it veered off its lane and collided with the deceased's Motor Cycle as a result of which the deceased suffered severe bodily injuries to which he succumbed.

27. PW 2 told the Trial Court that on the material day, he and the deceased were riding their Motor Cycles from Kiboswa heading to Gambogi when suddenly at Gamarega Junction, the subject Motor Vehicle appeared in front of the deceased and hit him while he was on his lane. He pointed out that the said subject Motor Vehicle was heading to Kiboswa. He blamed DW I who was the driver of the said subject Motor Vehicle for having caused the accident.

28. On his part, PW 3 stated that DW 1 failed to give way to the deceased, as a result of which there was a head-on collision.

29. DW 1's evidence was that he was the driver of the subject Motor Vehicle on the material date. He stated that he was driving on his right lane and did not see the deceased. He told the court that when he made the right turn, the deceased hit him on the left side of his car and the impact threw him off the Motor Cycle and he fell in front of it.

30. In its Judgment, the Trial Court held that DW 1 had a statutory duty to give way to oncoming vehicles but he failed to do so. It added that he underestimated the speed of approaching road users and failed to exercise great caution.

31. Considering all the foregoing, this court found the testimony of the Respondent's witnesses to have been more believable as they were credible, plausible and consistent. They were also not shaken during

cross-examination. On the other hand, it found the Appellants to have been economical with the truth and DW I's testimony to also have been evasive and selective.

32. It was evident that DW 1 turned right suddenly and recklessly without prior indication or signal endangering other road users who included the deceased. He obstructed him leading to the collision which caused his death. PW 2 and PW 3 confirmed that the accident was a head-on collision and occurred on the deceased cyclist's lane.

33. Notably, DW 1 owed other road users the duty of care to stop and give way at the junction before proceeding when the road was clear. He would not have failed to see the deceased. His conduct in driving and/or managing the subject Motor Vehicle fell below the standard of care or skill of a competent and experienced driver, in relation to the manner of driving and to the relevant circumstances of the case.

34. The Appellants did not tender any evidence to show that he was acquitted in Traffic Case No 76 of 2019. He did in fact admit during cross-examination that he was discharged because witnesses did not appear in court. His assertion that he was discharged in the said Traffic Case No 76 of 2019 did not therefore amount to an acquittal as he could be charged afresh in the event the Prosecution traced witnesses to testify in the said case.

35. Be that as it may, the deceased could not also have escaped liability for the accident. The fact that he hit the Appellants' subject Motor Vehicle on the left side and sustained fatal injuries was evidence of the high speed that he may have been riding the subject Motor Cycle. If he was driving at a reasonable speed and he was wearing a helmet as PW 2 told the Trial Court, the injuries might not have been fatal. He could have perhaps been able to take evasive action to avoid the folly of DW 1.

36. Indeed, all road users owed a duty of care to other road users including exercising caution to those who were reckless on the roads. A driver of a motor vehicle could not, for instance, run over a person who was drunk and walking in the middle of the road merely because he was careless and irresponsible. The driver owed him a duty of care irrespective of his recklessness.

37. In this regard, this court found and held that apportionment of liability at 85%- 15% in favour of the deceased herein was reasonable in the circumstances of the case herein.

38. In the premises, Grounds of Appeal Nos (2) and (7) were merited and the same be and are hereby allowed.

III. Quantum

39. Ground of Appeal No (2), (3), (4) and (8) were dealt with under this head.

40. This court did not disturb the Trial Court's awards for pain and suffering and loss of expectation of life under the *Law Reform Act* Cap 26 (Laws of Kenya) as the same were not contested. The Appellants focus was on the award for loss of dependency which this court dealt with under the following separate and distinct heads.

Damages under the *Fatal Accidents Act*

A. Dependency Ratio

41. The dependency ratio was not contested. This court did not disturb the Trial Court's dependency ratio of 1/3 as the deceased was unmarried.

A. Multiplicand

42. The Appellants argued that while the Trial Court relied on the Certificate produced showing that the deceased was a trained plant operator, there was no guarantee that he would work as one during his lifetime as he was at the time of his death, a boda boda rider. They asserted that loss of dependency ought to have been calculated on what he was earning as a boda boda rider which was not proven by any witnesses. They were emphatic that there was no evidence to prove that he was the owner of Motor Cycle Registration Number KMEV 036J (hereinafter referred to as "the subject Motor Cycle") or if he was employed by the owner of the said subject Motor Cycle.

43. They opined that the deceased could not have earned Kshs 3,000/= per day as he was not the owner of the said subject Motor Cycle. They proposed an average of Kshs 300/= per day that was paid to boda boda riders who were employed. They submitted that a monthly income of Ksh 7,800/= was sufficient to compensate the deceased's estate. Their computation of the award of loss of dependency was Kshs 468,000/= made up as follows:-

    7,800 x 35 x 12 x 1/3 Kshs 468,000/=

44. On her part, the Respondent submitted that it was trite law that an award of damages was a matter of discretion of the Trial Court which an appellate court would not interfere with an award unless it was shown that the same was not exercised judicially or that irrelevant factors were taken into account as was held in the cases of Peter M. Kariuki vs Attorney General[2014] KECA 713 (KLR) and Kemfro Africa Ltd vs Lubia & Another 1987 (KLR).

45. She urged this court to maintain the minimum wage for a plant operator as was prescribed under the Regulation of Wages (Building and Construction) Order, 2012. Her evidence was that the deceased graduated from Sensei Institute of Technology where he had completed a course on Plant Operation and had been looking for a job even as he engaged in his boda boda business. She adduced a copy of a Certificate from the said Institute and Letter of Recommendation to confirm his qualifications.

46. She further submitted that the deceased would have been able to gain employment in his area of training and would have been entitled to a minimum wage of Kshs 495/= per day which would have added up to a salary of Kshs 13,770/= per month under the Regulation of Wages Order (Building and Construction Industry)Order, 2012 which was the amount that the Trial Court applied.

47. In this regard, she cited the case of Mungai vs Lucy Nduta Mukuha (Suing as administrator and/or personal representative of the Estate of Duncan Wangugi (Deceased) Civil Appeal 26 of 2017)[2022] KEHC 12691(KLR) where the High Court upheld the finding of the trial court on the issue of a deceased's income based on his training certificates as proof of income.

48. So as to determine what was the appropriate multiplicand in this matter, this court had due regard to the case of Jacob Ayiga Maruja & Another vs Simeon Obayo [2005] eKLR where the Court of Appeal rendered itself on the question of failure to adduce proof of income. It stated that it did not subscribe to the view that the only way to prove the profession of a person had to be by the production of certificates and that the only way of proving earnings was by production of documents as this would occasion a lot of injustice to very many Kenyans who were illiterate and kept no records yet they earned their livelihood in various ways.

49. In that case, the Court of Appeal found that the evidence of the respondent therein and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.

50. In the absence of any contrary evidence from the Appellants, this court was persuaded to believe the Respondent's testimony that the deceased was a trained Plant Operator as was evidenced by his Certificate of Completion dated 5th February 2018 from Sensei Institute of Technology.

51. Under the Labour Institutions (Building and Construction Industry (Wages) Order *Legal Notice No 20 of 2013* which was applicable Regulation herein as the deceased died in the year 2019 when it was still in force, the minimum wage of a Plant Operator was Kshs 495/= per day. This translated to a monthly salary of Kshs 13,770/= which the Trial Court relied on. Having determined that the deceased was a trained Plant Operator and had certification from Sensei Institute, a sum of Kshs 13,770/= was not unreasonable as he could not be deemed to have been at the level to earn a minimum wage, which was applicable to general labourers who may be unskilled. The Appellants' proposal of Kshs 7,800/= was on the lower side and they failed to explain how they arrived at it.

52. However, as the deceased had not yet been employed as a Plant Operator and was engaged in the boda boda business, this court reduced the multiplicand of Kshs 13,770/= to Kshs 10,000/= as there were possibilities of him not being engaged as a Plant Operator in his lifetime, However, since he had certification of plant operation, there was also a possibility of him being employed as a Plant Operator. He was young and had a whole life ahead of him. The award of Kshs 10,000/= was a compromise.

C. Multiplier

53. The Appellants did not submit on this issue. On her part, the Respondent submitted that considering the deceased's young age, a multiplier of thirty-five (35) years was appropriate. In this regard, she relied on the case of Annalisa Muigai & Another vs Beatrice Waithera Gitiri & Another [2020]eKLR where the court used a multiplier of thirty-five (35) years where the deceased was aged thirty (30) years at the time of his death.

54. This court had due regard to the case of Kenya Wildlife Services vs Geoffrey Gichuru Mwaura [2018] eKLR where it was held that in arriving at a multiplier, courts take the vagaries of life into consideration but there was no clear-cut approach.

55. In determining the multiplier applicable in this case, this court considered the following cases:-

    1. Board of Governors of Kangubiri Girls High School & Another vs Jane Wanjiku & Another[2014]eKLR

       A multiplier of twenty-five (25) years was applied where the deceased was twenty-seven (27) years old at the time of death.

    2. Kenya Power & Lighting Company Limited vs James Muli Kyalo & Another [2020] eKLR

       The appellate court reduced the multiplier from twenty- five (25) years to twenty (20) years where the deceased was twenty nine (29) years old at the time of death.

    3. In Ngania *& 2 others v Adulu (Suing as the Legal Representative of the Estate of Clinton Morgan Kiprotich) (Civil Appeal E005 of 2023*) [2024] KEHC 4005 (KLR) (25 April 2024) (Judgment)

       The High Court upheld a multiplier of twenty (20) years for a twenty-nine (29) year old deceased.

56. Based on the above-cited cases among others, it appeared that a multiplier between twenty (20) years to twenty-five (25) years was applied across the board for deceased persons of the aged between twenty-seven (27) to twenty-nine (29) years old at the time of death.

57. Courts are guided by comparable cases to arrive at conclusions that are not so wide apart as to cause inconsistency and confusion to those relying on the decisions. Towards this end, this court found and held that a multiplier of thirty-five (35) years by the Trial Court was unreasonable in the circumstances of the case. As the deceased died at the age of twenty-seven (27) years old at the time of death, this court found that a multiplier of twenty (22) years would be appropriate in the circumstances.

IV. Special Damages

58. Ground of Appeal Nos (5) and (6) were dealt with under this head.

59. The Respondent did not submit on this issue. On their part, the Appellants asserted that although the Respondent proved special damages of Kshs 363, 170/=, the deceased was to blame for the fatal injuries that he sustained as he was negligent and they thus ought not be condemned to pay the same.

60. Having found the Appellants to have been largely to blame for the fatal injuries that the deceased sustained, they could not fail to reimburse the Respondent special damages. Even so, the court was called upon to interrogate the nature of special damages that could be reimbursed. It noted that there were receipts in the sum of Kshs 187,820/= consisting of flour, cooking oil, water, sugar, sodas, rice, Rocyo, steel wool, milk, tissue and tea leaves. The other claim was for cows in the sum of Kshs 92,600/=.

61. While family and friends could spend whatever amount they wished in a funeral, it was the considered view of this court that the estate of a deceased person only ought to be compensated for the basic items of a funeral. The burden of how the family of a deceased chose to mourn a deceased could not be transferred to the person who caused his or her death. It would be punitive and unreasonable to order a refund of colossal sums of money to the family of an affluent person or to a family that found a need to give the deceased what had come to be referred to as a "befitting send off." Courts were called to exercise restraint to reimburse extravagant expenses that were incurred in a funeral. Indeed, this court took judicial notice that in African customs, contributions for funerals largely came from extended family and friends which relieved a lot of burden from immediate members of a deceased.

62. It is for that reason that this court disallowed the sum of Kshs 362,520/= and awarded the Respondent a sum of Kshs 82,100/= made up as follows:-

    Mortuary charges Kshs 11,000/=

    Coffin Kshs 21,000/=

    Hearse Kshs 20,000 /=

    Death Certificate Kshs 100/=

    Ad LitemKshs 30,000/=

    Kshs 82,100/=

63. Although there were no receipts to prove payment of legal fees to obtain the Grant of Letters of Administration Ad Litem, this court allowed the figure because in the Appellants' Written Submissions, they had conceded that the Respondent had indeed proven a sum of Kshs 363,170/= being the special damages.

64. In the circumstances foregoing, this court found Grounds of Appeal Nos (5) and (6) to have been partly merited.

V. Interest

65. Ground of Appeal No (9) was dealt with under this head.

66. The Appellants did not submit on this issue. On her part, the Respondent argued that the Appellants had not explained in what manner the Trial Court erred in awarding her interest and the same was not vague as the Appellants had stated in their Ground of Appeal. She urged this court to uphold the Trial Court's Judgment and dismiss the Appellant's appeal.

67. The basis and rationale of awarding interest on general damages from the date of judgment is premised on the ground that a plaintiff will not have been kept away from his monies because none would have been ascertainable at the time of institution of the suit. In the case of Shariff Salim & Another vs Malundu Kikava [1989] eKLR, the Court of Appeal rendered itself as follows: -

> " There is no gainsaying the fact under Section 26 of the *Civil Procedure Act*, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court."

68. Whereas the Trial Court had the discretion to awarding interest to the Respondent, it ought to have been specific as to when interest on the award under *Law Reform Act*, *Fatal Accidents Act* and the special damages ought to have accrued. Left as it was, this court agreed with the Appellants that the award of interest by the Trial Court was vague and could be a point of argument between the parties as the time of calculating the interest that was payable.

69. In the premises foregoing, Ground of Appeal No (9) was merited and the same be and is hereby allowed.

Disposition

70. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 9th August 2023 was partially merited. The effect of this is that the Judgment of Kshs 2,420,920/= that was entered by the Learned Trial Magistrate in Vihiga PMCC No 85 of 2020 on 24th July 2023 in favour of the Respondent herein against the Appellants herein be and is hereby set aside and/or vacated and the same be and is hereby replaced with a decision that Judgment be and is hereby entered in favour of the Respondent herein against the Appellants herein for the sum of Kshs 928,285/= made up as follows:-

Loss of Dependency Kshs 880,000/=

1/3 x 10,000 x 12 x 22

Loss of expectation of life Kshs 100,000/=

Pain and Suffering Kshs 30,000/=

Damages Kshs 82,100/=

Kshs 1,092,100/=

Less 15% contribution Kshs 163,815/=

Kshs 928,285/=

Plus costs and interest thereon at court rates. For the avoidance of doubt, interest on special damages will accrue from the date of filing suit while damages under the *Law Reform Act* Cap 26 (Laws of

Kenya) and under the *Fatal Accidents Act* Cap 32 (Laws of Kenya) will accrue interest from the date of judgment of the lower court until payment in full.

71. As the Appellants were partly successful in their Appeal, each party will bear its own costs of the Appeal herein.

72. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF APRIL 2025

J. KAMAU

JUDGE