



Cheruiyot & another v GOO & another (Civil Appeal E004 & E005 of 2023 (Consolidated)) [2025] KEHC 7237 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7237 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E004 & E005 OF 2023 (CONSOLIDATED)**

BM MUSYOKI, J

MAY 23, 2025

BETWEEN

CHARLES KIPROP CHERUIYOT 1ST APPELLANT

RAI CEMENT LIMITED 2ND APPELLANT

AND

GOO RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E005 OF 2023**

BETWEEN

CHARLES KIPROP CHERUIYOT 1ST APPELLANT

RAI CEMENT LIMITED 2ND APPELLANT

AND

MOO RESPONDENT

(Being appeals from judgment and decree of the Chief Magistrate’s Court at Kisumu (S.N. Telewa SRM) in civil suits numbers E097 of 2021 and E098 of 2021 dated 7th December 2022)

JUDGMENT

1. The respondents in both appeals commenced their respective suits against the appellants in the lower court claiming special and general damages on behalf of the estate of their late sons (CO in civil suit number E097 of 2021 and GO in suit number E98 of 2021). The cause of action was an accident which occurred on 12th August 2020 along Awasi-Ahero road in which CO (hereinafter referred to



as 'C') and GO (hereinafter referred to as 'G') were fatally injured when the 2nd appellant's motor vehicle registration number KCL 928M being driven by the 1st appellant allegedly rammed motor cycle registration number KMES 174D which was being ridden by George with Camlus as a pillion passenger.

2. After full hearing of the suits which were heard together, the Honourable Magistrate found the appellants 100 per cent liable and awarded damages to the respondents as follows;

Respondent in civil appeal number E004 of 2023

- a. pain and suffering Kshs 20,000.00;
- b. loss of expectation of life Kshs 100,000.00;
- c. under *Fatal Accidents Act* Kshs 2,000,000.00;
- d. special damages Kshs 64,040.00; and
- e. costs of the suit and interest.

Respondent in civil appeal number E005 of 2023

- a. pain and suffering Kshs 20,000.00;
- b. loss of expectation of life Kshs 100,000.00;
- c. under *Fatal Accidents Act* Kshs 2,080,000.00;
- d. special damages Kshs 26,840.00; and
- e. costs of the suit and interest.

3. The judgement triggered this appeal vide memorandums of appeal dated 12th January 2023 each with seven grounds which in summary fault the Magistrate on both liability and quantum. The appellants have submitted that some grounds of appeal do not raise valid grounds of appeal because they have not stated in which way the Honourable Magistrate was wrong. I do not find this argument merited as in my opinion, the grounds as drawn are sufficient for the court and the respondents to appreciate what the appellants' grievances are. Grounds of appeal are not supposed to be argumentative and it is enough for the appellants to state in general terms what their complaints are.
4. This is a first appeal and as it has been held in many judicial authorities, this court is under an obligation to revisit and re-evaluate the evidence produced by the parties in the lower court and come to its own independent conclusion but give allowance to the fact that it did not have the advantage of taking the evidence first hand or observing the demeanour the witnesses.
5. In order for me to re-evaluate the evidence produced in the trial court, it is important for this court to reproduce the testimony and evidence of the parties. Other than the testimony of the respondents, all the other witnesses including appellants' were common in both cases.
6. The respondent in appeal number E004 told the court that C who was 17 years at the date of his death was his son. He told the court that on the date of the accident, he received a call from Ahero police station informing him that C had been involved in an accident upon which he proceeded to the police station from where he was informed that he had passed away. The deceased was in form two. The deceased left behind his father and mother. The witness produced documents contained in his list of documents dated 17th March 2021. The witness added that the deceased used to assist him in farming and that he was a basketball player and bright in school.



7. PW2 was one Christine Ouma, a businesswoman trading in vegetables. She testified that on 12-08-2021 at about 6.30 am, she was waiting for a matatu at a place called Mboya with intention of going to Kisumu when she saw two boys on a motor bike and a trailer behind them. The trailer hit the boys who fell down and the trailer ran over them. She remained categorical that the driver of the truck hit the boys from behind while they were on the left side of the road from Kisumu side. According to her, the truck was driving very fast. She gave the registration number of the truck as KCL 928M/ZA 6120.
8. The witness stated further that she did not know the two boys before the accident. She added that the trailer was attempting to overtake and she could not tell the exact speed the trailer was moving at. She added that the shopping center had two buildings on the right and she could not recall whether there were bumps. After the accident, the bodies lay on the left side.
9. The appellants called three witnesses. The first one was the 1st appellant who told the court that he was the driver of the motor vehicle on the material date. He stated that he was driving at a speed of between 30-40 kilometers per hour and that there were bumps ahead of him and denied that he was overtaking. He added that he was flagged down by unknown passerby and alerted that he had rammed two people on a motor bike and the passenger passed on immediately. He stopped the truck and went to the nearby police station and the police went with him to the scene. He was instructed to take the truck to the police station and was released on cash bail of Kshs 20,000.00. He added that he was never charged in court and the cash bail was later refunded to him. He confirmed that he had seen the rider and the passenger before the accident occurred. According to him the rider of the motor cycle was to blame.
10. DW2, an insurance investigator stated that he had investigated the accident under instructions from the appellant's insurers. He produced his report dated 14-04-2021. According to him, the motor cycle rammed the rear of the truck and that the driver did not notice that there was an accident. He added that he got his information on which he based his report from the appellants, the police station and visit and observation of the scene.
11. The third witness for the appellants was Constable James Ayore based at Ahero police station. He stated that him and three colleagues went to the scene immediately after the accident was reported. At the scene, they found two people lying on the road, a rider and his pillion passenger. He stated that he, at the scene interviewed one Okongo Oby who is said to have seen what happened. According to him, the truck had no damages while the motor cycle had a lot of damages.
12. According to DW3, the motor cycle was on the left side of the road outside the white line with one passenger and a sack of maize. He stated that the rider hit the truck which was carrying 600,000 bags of cement. The motor cycle fell and hit the middle side of the lorry at the axle and was run over. He produced a police abstract and a copy of motor vehicle inspection report. He admitted that he went to the scene twice and on the second visit, the scene had been interfered with. On cross examination, he said that the rider was slightly off the road. He said that he was not the investigations officer and added that the investigations officer had suggested that the rider contributed to the accident.
13. The appeals were heard by way of written submissions. I have read the submissions of the appellant dated 20-05-2024. The submissions were in single a set and although the same were titled as appeal number E004 of 2023 only, their body bespeak of the facts in civil appeal number E005 of 2023. The respondents have filed two sets of submission for each appeal.
14. Judging from the submissions and the evidence of the parties, although it was denied, the occurrence of the accident is no longer in dispute. The appellant's own witnesses confirmed that the accident occurred and C and George sustained fatal injuries as a result. What remained for the court's decision



was determination of who was to blame for the accident and what damages if any were awardable to the estates of the deceased persons.

15. None of the appellant's witnesses gave an account of how the accident occurred. The 1st appellant who was the driver claimed to have been flagged down by people he did not know who told him that he had run over some two people one of whom passed on immediately. It is not indicated how long he had gone before he was informed that he had been involved in the accident. It is also not clear whether the people who flagged him down had pursued him or they were ahead of him and if they were ahead, how they came to know that an accident occurred.
16. In my view the fact that the 1st appellant did not notice that he had been involved in such a serious accident means that he was inattentive on the road which translates to negligence or recklessness. Even after he was informed of the accident, he went straight to the police instead of first going back to confirm. This is indicative of a driver who knew that he had caused an accident and felt that he had to go to the police first before returning to the scene.
17. The police officer who testified claimed that he had interviewed a witness one Okong'o who had seen what had happened. No statement from the said witness was produced neither was he called to testify. The same police officer stated that the accident was outside the white line but was quick to blame the rider without giving the basis for his opinion.
18. The only eye witness who gave an account of what happened was PW2. I have gone through her evidence and I am convinced that the same is consistent with the scene of the accident as narrated by DW3. The motor cycle is said to have been off the road outside the white lane. PW2 and DW3 are in agreement that the rider and his passenger were run over by the truck. The appellant suggested that the rider hit the truck from behind. It is not possible for a rider to be run over by a truck which he hits from behind. The 1st appellant is on record saying that he had seen the rider before the accident happened. This to me means that the motor cycle was ahead of him and gives credence to the narrative by PW2 that he was attempting to overtake.
19. The appellants submit that PW2 could not tell at what speed the truck was being driven and that the 1st appellant could not have driven it at high speed because it was carrying heavy load. I do not buy this argument. Speed is always relative and depends on the circumstances and environment. A bystander cannot in all imaginations give the speed of a moving vehicle. The vehicle may have been at a speed of 30 to 40 kilometers per hour but the said speed can relatively be high depending on the surroundings and condition of the vehicle now that we are told the truck was carrying 600,000 bags of cement. The appellants also insisted that there were bumps in the area but that alone does not mean that he was moving at a speed that could not cause an accident.
20. Without any account different from what PW2 told the court, and going by what I have stated in the foregoing paragraphs, I find no reason to disturb the trial court's finding on liability. The same is hereby upheld.
21. Turning to quantum, I will start with civil appeal number E004 of 2023. In this appeal, the victim was a 17 year old and said to have been in form two. No evidence was produced or led to prove that he was in school or was a basketball player as alleged by the respondent. When asked about the school report form, PW1 stated that it was at home. It was not indicated what career he was interested in or had capacity to pursue. Similarly, there was no proof of income other than a general statement that he used to do some farming.
22. The appellants argue that the trial Magistrate was wrong in applying the multiplier and multiplicand approach yet there was no proof of earnings or what the deceased aspired to become. They suggested a



global sum of Kshs 500,000.00. However, I find the submissions skewed because the judgment of the trial Magistrate is clear that she applied the global approach. It is not clear where the appellants got the issue of multiplier and multiplicand from but it is apparent that there could have been a mix up with the facts in appeal number E005.

23. It is trite law that, an appellate court will only interfere with the discretion of the trial court if it is convinced that the trial court acted under mistake of law, or acted on wrong principle or failed to take into account a relevant fact or took into account an irrelevant factor. In *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (2022) KEHC 282 (KLR)

The law on circumstances under which an appellate court would interfere with an award of damages is settled. An appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damages.’

24. I have looked at several comparable authorities. In *Francis Odhiambo Nyunia & 2 others v Josephine Malala Owinyi* (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) (2020) KEHC 964 (KLR), the court awarded a global sum of Kshs 1,500,000.00 in respect of a deceased who died at the age of 17 years. In *Charles Makanzie Wambua v Nthoki Munyao & Prudence Munyao* (suing as personal representatives of the Estate of Lilian Katumbi Nthoki (Deceased) (2020) KEHC 9526 (KLR), the deceased was 16 years and Justice GV Odunga upheld a global award for loss of dependency of Kshs 1,320,000.00.
25. The above are recent awards and the cases are fairly comparable to the case of *Camlus*. In the circumstances, I find the sum of Kshs 2,000,000.00 high and representing erroneous estimate. I consider a sum of Kshs 1,500,000.00 adequate under this head and I proceed to replace the award of the trial Magistrate with the said sum.
26. The appellants have not made submissions on the damages under the Law Reforms Act but the respondent submits that this court should enhance damages for pain and suffering to Kshs 100,000.00. The respondent did not file a cross appeal and these submissions are therefore misplaced and I decline to accede to the same.
27. In appeal number E005 of 2023 the respondent told the court that G was a farmer earning approximately Kshs 800 per day. He was 21 years having completed his KCSE in 2018. He was not married but left behind his father and mother. The respondent admitted that he had no evidence that the deceased used to earn any income.
28. The trial court used a multiplier of 20 years, multiplicand of Kshs 13,000.00 and dependency ration of two thirds. The court did not justify or give reasons for the choice of the above formular. There was no iota of evidence to show that the deceased’s parents were depended on him. Not even a general statement to that effect was made. The deceased did not have children or spouse. Other than an unsupported statement that he was engaged in farming, no evidence was produced. Farming activities do not give returns on daily basis because crops and livestock grow and mature in seasons and stages. The trial court did not give reasons for finding Kshs 13,000.00 suitable as the multiplicand. In this regard, I find that the trial court applied wrong principle in arriving at the loss of dependency.



29. Nevertheless, the court appreciates that the deceased may have completed KCSE in 2018 although the results slip listed as document number 8 on the respondent's list of documents was not included in the record of appeal and I do not have the original record of the lower court file. The deceased must have been doing something to earn a living.
30. In view of the above, it is my considered opinion that, the best approach to take in this matter is the same as in civil appeal number E004 of 2023. The ages and circumstances are similar in both cases. There is no proof of earnings and engagement in any gainful activity in both. I take the same approach and award the same sum of Kshs 1,500,000.00 for lost years.
31. It follows therefore that the appeals herein succeed to the extent of award of damages under the *Fatal Accidents Act*. Since the appellants have succeeded partly, I award them half costs of the appeal. The final orders of the court are as follows.
1. Judgments of the trial court in Kisumu Cmcc numbers E097 of 2021 and E098 of 2021 dated 7-12-2022 are hereby set aside and substituted for judgement of this court as in order 2 and 3 below.
 2. In Cmcc number E097 of 2021 (appeal number E004 of 2021), the respondent (plaintiff in the lower court) is awarded damages as follows;
 - a. Pain and suffering Kshs 20,000.00
 - b. Loss of expectation of life Kshs 100,000.00
 - c. Lost years Kshs 1,500,000.00
 - d. Special damages Kshs 64,040.00.00
 - e. Costs of the suit and interest from the date of the trial court's judgment until payment in full.
 3. In Cmcc number E098 of 2021 (appeal number E005 of 2021), the respondent (plaintiff in the lower court) is awarded damages as follows;
 - a. Pain and suffering Kshs 20,000.00
 - b. Loss of expectation of life Kshs 150,000.00
 - c. Lost years Kshs 1,500,000.00
 - d. Special damages Kshs 26,840.00
 - e. Costs of the suit and interest from the date of the trial court's judgment until payment in full.
 4. The appellants are awarded half costs of the appeals.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Wagonda for the appellants and Moss Robumu for the respondents.

