



Chepngetich & another (Suing as the Legal Representatives of the Estate of Benard Kipkoech Maritim - Deceased) v Akshar General Enterprise Ltd (Civil Appeal E017 of 2022) [2025] KEHC 5611 (KLR) (6 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5611 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E017 OF 2022
JK NG'ARNG'AR, J
MAY 6, 2025**

BETWEEN

WINNIE CHEPNGETICH 1ST APPELLANT

MARITIM ARAP TESOT 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF BENARD
KIPKOECH MARITIM - DECEASED**

AND

AKSHAR GENERAL ENTERPRISE LTD RESPONDENT

*(Being an Appeal from the Judgment of Resident Magistrate, Michuki
M. at the Magistrate's Court at Bomet, Civil Suit Number 75 of 2019)*

JUDGMENT

1. The Appellants [then Plaintiffs] as the legal representatives of the deceased Benard Kipkoech Maritim, sued the Respondent [then Defendant] for general and special damages that arose when the deceased was allegedly involved in a fatal road traffic accident on 8th September 2018 along Bomet-Kaplong road.
2. Th trial commenced with the Appellants calling three witness and the Respondent called one witness before closing their respective cases.
3. In its Judgement delivered on 10th July 2024, the trial court dismissed the Appellants' [then Plaintiffs] case stating that the Appellants had failed to prove their claim.
4. Being aggrieved with the Judgment of the trial court, the Appellants filed his Memorandum of Appeal dated 22nd July 2024 appealing against the whole Judgement. The Appellants wanted this court to set aside the trial court Judgement and enter a fresh Judgment in their favour.



5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions. This principle was espoused in the Court of Appeal case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.
6. I hereby proceed to summarize the parties' cases in the trial court and their respective submissions in the present Appeal.

The Appellants/Plaintiffs' case.

7. Through their Amended Complaint dated 7th January 2020, the Appellants stated that the deceased Benard Kipkoech Maritim was involved in a road traffic accident on 8th September 2018. That the deceased was hit from behind by motor vehicle registration number KAU 986D as he walked along Bomet-Kaplong road. It was his case that the Respondent was the registered or beneficial owners of motor vehicle registration Number KAU 986D.
8. It was the Appellants' case that the Respondent was negligent in the accident. The particulars of the negligence were stated in paragraph 5 of the Amended Complaint. That as a result of the accident, Benard Kipkoech Maritim suffered fatal injuries.
9. The Appellants prayed for special and general damages against the Respondent.
10. Through their written submissions dated 12th March 2025, the Appellants submitted that they proved that the accident occurred on 8th September 2018 and the deceased succumbed to his injuries. That they also proved that the Respondent's motor vehicle was involved in the said accident and that the Respondent was vicariously liable for the acts of his driver. They relied on Paul Muthui Mwavu v Whitestone [K] Ltd [2015] eKLR. The Appellants further submitted that the Respondent should be held 100% liable for causing the accident.
11. It was the Appellants' submission that they were entitled to damages. On pain and suffering, they proposed an award of Kshs 250,000/=. They submitted that the deceased underwent severe pain and suffering before succumbing to his injuries a few hours later. They relied on Beatrice Mukulu Kang'uta & another v Silverstone Quarry limited & another [2016] eKLR.
12. On loss of expectation of life, they proposed an award of Kshs 500,000/=. They submitted that the deceased was of good health before he died and was aged 28 years at the time of his death. They relied on Stella Nasimiyu Wangila & another v Raphael Oduro Wanyamah [2016] eKLR.
13. On the loss of dependency, they proposed a monthly income of Kshs 40,000/=: a multiplier of 37 years and a dependency ratio of 2/3 which would total to an award of Kshs 11,840,000/=. In the alternative, they submitted that this court could adopt the minimum wage of a casual labourer at Kshs 15,403/=: a multiplier of 37 years and a dependency ratio of 2/3 which would total to an award of Kshs 4,559,288/=:
14. It was the Appellants' submission that they proved special damages and wanted this court to award them Kshs 354,780/=:

The Respondent/Defendant's case

15. Through his statement of defence dated 11th November 2019, the Respondent denied that it was the registered owner of motor vehicle registration Number KAU 986D and further denied that the said motor vehicle was under its management and control.



16. The Respondent denied the particulars of negligence levelled against him. That if any accident happened, it was caused solely by the negligence of the Appellants. He particularized the negligence in paragraph 6 of his Defence.
17. Through his written submissions dated 20th March 2025, the Respondent submitted that the Record of Appeal was incompetent and defective as it did not include the Decree and that this court ought to strike out the Record of Appeal. He relied on *Bwana Mohamed Bwana v Silvano Buko Bonaya* [2015] eKLR, *Rachael Wambui Nganga & another v Rahab Wairimu Kamau* [2020] eKLR and *Kilonzo David t/a Silver Bullet Bus Company v Kyalo Kiliku & another* [2018] eKLR.
18. It was the Respondent's case that the Appellants failed to prove their case and that their case was based on mere allegations and hearsay. That they failed to avail a credible witness who witnessed the accident. It was the Respondent's further submission that PW1 was not the investigating officer and therefore had no personal knowledge of how the accident occurred. That in the absence of the investigating officer, a sketch map and the police file, it was difficult for the trial court to establish the circumstances that cause the accident.
19. The Respondent submitted that PW2's testimony was inconsistent. That as per the Police Abstract, the accident occurred at 7.30 p.m. but PW2 testified that the accident occurred at 6 p.m. He further submitted that PW2's testimony did not explain how the Respondent was negligent in causing the accident.
20. It was the Respondent's submission that the damages awarded by the trial court were excessive. On pain and suffering, he proposed an award of Kshs 20,000/=. On loss of expectation of life, he proposed an award of Kshs 100,000/= and on loss of dependency, he proposed a global award of Kshs 800,000/= and he relied on *Bon Ton Limited v Beatrice Kanaga Kereda suing as Administrators of Estate of Richard Alembi Ochenga [Deceased]* [2018] KEHC 8737 [KLR].
21. Regarding special damages, the Respondent submitted the Appellants did not prove funeral expenses and that an award of Kshs 100,000/= would be a reasonable award.
22. I have gone through and carefully considered the Record of Appeal dated 1st October 2024, the Appellants' written submissions and the Respondent's written submissions dated 20th march 2025. The following issues arise for my determination: -
 - i. Whether the Record of Appeal was incompetent
 - ii. Whether the trial court erred in dismissing the Appellants' suit.

i. Whether the Record of Appeal was incompetent

23. The Respondent submitted that the Record of Appeal dated 1st October 2024 should be struck out because the Appellants failed to include the Decree in the Record of Appeal. Order 42 Rule 13[4] of the Civil Procedure Rules provides as follows: -

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- a. the memorandum of appeal;
- b. the pleadings;
- c. the notes of the trial magistrate made at the hearing;



- d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f. the judgment, order or decree appealed from, and, where appropriate, the order [if any] giving leave to appeal:

Provided that—

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs [a], [b] and [f].

24. In the case of *Mukenya Ndunda v Crater Automobiles Limited* [2015] KECA 252 [KLR] the Court of Appeal emphasized that: -

“The power to strike out an appeal or a notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that the party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”

25. I have gone through the Record of Appeal and I note that the Appellant attached the Judgment. In my view, a Decree for purposes of an Appeal is an extract of the decision appealed against which is the Judgment. While it may be improper for a litigant to attach the Judgement appealed against and omit the Decree, I do not find such an omission fatal. I am inclined to agree with the findings in *Nyota Tissue Products v Charles Wanga & 4 Others* [2020] KEHC 6207 [KLR] where the court held that: -

“The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 [f] of the Civil Procedure Rules for the filing of a copy of the “judgment, order or decree appealed from” and does not make it mandatory to attach the judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 [4] [f] of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in *Silver Bullet Bus* case on the point, that it would be too draconian to strike out the appeal in these circumstances.”

26. Similarly, I am persuaded by *Kemei J.* in *CWW* [Suing as personal representative of the estate of *PWK v Mark Kahenya & another* [2020] KEHC 6288 [KLR], where he stated that: -

“I also note that the mentioned Order 42 Rule 13[4] of the Civil Procedure Rules provided that the record of appeal ought to contain “[f] the judgment, order or decree appealed from, and, where appropriate, the order [if any] giving leave to appeal.” This means that firstly the decree or order need not be certified as contradistinguished from the Court of Appeal rules and secondly that either judgement, order or decree can serve and not the order or decree only. A perusal of the record indicates that there is the judgement of the trial court on the record of appeal meaning the challenge posed by the respondent collapses and I find that the appeal is not incompetent for failing to include a certified copy of the decree or order.”



27. When discussing whether a litigant ought to attach both a Judgment and a Decree, Nyakundi J. in *Paul Lawi Lokale v Auto Industries Limited & another* [2020] KEHC 2909 [KLR], stated that: -
- “To my mind, the use of the conjunction “or” suggest that litigants are not mandatorily obliged to attach both the judgement and the decree.”
28. Guided by the aforementioned authorities, I find that it would be too draconian to strike out the Appeal for the lack of a certified Decree. It is also my finding that the Appeal is competent for determination.
- ii. Whether the trial court erred in dismissing the Appellants’ suit.
29. In dismissing the Appellants’ suit, the trial court stated that the Appellants were under a duty to prove their case and they failed as they did not discharge their burden of proof. From the onset, it was undisputed that an accident occurred on 8th September 2018 involving the subject motor vehicle registration number KAU 986D and the deceased, Benard Kipkoech Maritim. The point of divergence between the Appellant’s case and the Respondent’s case in the trial court was to the circumstances that led to the cause of the accident.
30. William Maigo [PW2] testified that he was an eye witness. He testified that on the material day, he was walking with the deceased along Bomet-Kaplong road when motor vehicle registration number KAU 986D hit the deceased from behind killing him on the spot. PW2 further testified that he blamed the driver of the motor vehicle for causing the accident. PW2’s testimony remained uncontroverted upon cross examination.
31. No. 90817 PC Edwin Ratemo [PW1] testified to the fact of the accident occurring. When he was cross examined, he testified that he was not the investigating officer and did not visit the scene. It is my view that PW1’s testimony was unhelpful in terms of determining the cause of the accident. The other prosecution witness was the deceased’s wife, Winny Chepnetich Maritim [PW3] did not witness the accident and similarly, her testimony was unhelpful in terms of determining the cause of the accident.
32. On the other hand, the Respondent called Benjamin Kipnetich Kimoi [DW1] who stated that he was the Respondent’s supervisor. He testified that on the material day, their driver informed him that he saw a drunk person walking carelessly along the road and the driver tried to avoid hitting the drunk person. DW1 further testified that the driver had a bang and when he stopped the motor vehicle and went outside, he found the drunk person had fallen on the vehicle’s rear side and he blamed the deceased for jumping on a moving vehicle.
33. When DW1 was cross examined, he reiterated that the deceased was to blame for the accident as he was drunk. He further testified that he produced a toxicology report to indicate that the deceased was drunk on the material day. I have carefully gone through the trial court record and I have noted that no such report was filed and produced as evidence.
34. The standard of proof in civil cases in on the balance of probabilities. In analysing the evidence above, with much respect to the trial court, it is my view that the Appellants provided sufficient evidence in relation to the circumstances leading to the accident. William Maigo [PW2] was an eye witness and he testified with clarity how the subject motor vehicle hit the deceased from behind and missed him by a whisker and as I stated earlier, his testimony remained uncontroverted after he was cross examined. The Respondent’s witness’s [DW1] testimony was based on what he was told by their driver. DW1’s claim that the deceased was drunk was unsubstantiated and therefore remained an allegation. Further, if it



were true that the deceased was drunk, PW2 who was in the company of the deceased on the material day and at the time of the accident would have been cross examined on the same, but he was not.

35. Flowing from the above, it is my finding that the Appellants discharged their burden of proof. I disagree with the trial court's apportionment of liability in the ratio of 80:20 in favour of the Appellants. This is so because the deceased was hit from behind and it was unjust for the deceased to bear some form of liability. In the circumstances thereof, it is my finding that the Respondent was 100% liable for causing the accident.
36. With regard to the award on damages, even though the trial court dismissed the Appellants' suit, it awarded damages as follows: -
- Pain and suffering Kshs 40,000/=
- Loss of expectation of life Kshs 200,000/=
- Loss of dependency Kshs 1,500,000/=
- Special Damages Kshs 12, 650/=
- Funeral Expenses Kshs 200,000/=
37. The principles upon which an appellate court may alter an award by the trial court have been long settled. In the case of *Johnson Evan Gicheru v Andrew Morton & another* [2005] KECA 16 [KLR], the Court of Appeal stated that: -

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”

38. In regard to pain and suffering, the trial court awarded Kshs 40,000/=. The Appellants proposed an award of Kshs 250,000/= while the Respondent proposed an award of Kshs 20,000/=.
39. From PW2's testimony, the deceased died on the spot. Winny Chepngetich Mutai produced a Death Certificate and Post Mortem Report as P. Exh 5 and P. Exh 8 respectively. The two exhibits indicated that the deceased died on the material day i.e. on 8th September 2018. In the circumstances thereof, I am convinced that the deceased suffered limited pain when the impact occurred. I find the award of Kshs 40,000/= by the trial court for pain and suffering as excessive and I substitute it with an award of Kshs 20,000/=.
40. On the loss of expectation of life, the trial court awarded the Respondents Kshs 200,000/=. The Appellants proposed an award of Kshs 500,000/= while the Respondent proposed an award of Kshs 100,000/=. In *Mercy Muriuki & another v Samuel Mwangi Nduati & Anor* [Suing as the Legal Administrators of the Estate of the late Robert Mwangi] [2019] KEHC 9014 [KLR], Muchemi J. stated: -

“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”.



41. In the circumstances thereof, I find the trial court's award of Kshs 200,000/= to be excessive and I substitute it with an award of Kshs 150,000/=.

42. 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.

43. Under this head, the trial court awarded a global sum of Kshs 1,500,000/= for loss of dependency. The Appellants proposed an award of Kshs 11,840,000/= or in the alternative an award of Kshs 4,559,288/= . The Respondent proposed a global sum award of Kshs 800,000/=

44. I have considered the evidence and it was stated by the deceased's wife, Winny Chepngetich Maritim [PW3] that the deceased was a casual labourer and a farmer who used to earn Kshs 40,000/= per month. However, there was no proof of income from the exhibits that the Appellants produced in court. It is my view that the safest way to make an award under this head where there is no ascertainable proof of income would be to go the global sum way. In *Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi [suing as the Administrator and Personal Representative of Antony Mwititi Gakungu Deceased]* [2020] KEHC 5897 [KLR], the court stated: -

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

45. Similarly in *Moses Mairua Muchiri v Cyrus Maina Macharia [Suing as the personal representative of the estate of Mercy Nzula Maina [deceased]* [2016] KEHC 5958 [KLR], Ngaah J. held as follows: -

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

46. In determining an award under this head, I have considered the parties' proposals under this head, the fact that the deceased died aged 22 years old and the fact that the deceased was survived by a widow, his father and three minors. Having considered the above, it is my finding that the award of Kshs 1,500,000/= was commensurate and just.

47. On special damages, the trial court awarded Kshs 12,650/=. I have looked at the bundle of receipts produced as P. Exh 11 and I am satisfied that the Appellants provided evidence for the expense they



incurred in motor vehicle search, court fees and legal fees. It is therefore my finding that the trial court did not err when it awarded them Kshs 12, 650/= for special damages. The award is upheld.

48. Regarding funeral expenses, the trial court awarded Kshs 200,000/= an amount which the Respondent submitted to be too costly. The Respondent proposed an award of Kshs 100,000/= while the Appellants submitted that the award of Kshs 200,000/= as sufficient.

49. 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.

50. The Court of Appeal, in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] KECA 56 [KLR] stated that: -

“We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc....”

51. Flowing from the above it is my finding that the trial court’s award of Kshs 200,000/= for funeral expenses as proper and I uphold the same.

52. In the final analysis, the amount awarded to the Appellants is as follows: -

- i. Pain and suffering Kshs 20,000/=
 - ii. Loss of expectation of life Kshs 150,000/=
 - iii. Loss of dependency Kshs 1,500,000/=
 - iv. Add special damages Kshs 12,650/=
 - v. Add funeral expenses Kshs 200,000/=
- Total Kshs 1,882,650/=

53. In the end, the Appeal dated 22nd July 2024 succeeds as the Appellants are awarded Kshs 1,882,650/= as general damages.

The Appellants shall have the costs of this Appeal as the costs of the main suit shall remain as awarded by the trial court.

54. 30 days stay granted.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE



Judgement delivered in the presence Mr. Machoka for the Appellants and Mr. Osewe for the Respondent.
Siele/Susan [Court Assistant].

