Kamau v Mumo (Suing as the Personal Representative of the Estate of Eliud Mumo Kuira - Deceased) ((Suing as the Personal Representative of the Estate of Eliud Mumo Kuira - Deceased)) (Civil Appeal 18 of 2019) [2025] KEHC 7745 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7745 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 18 OF 2019

JK NG'ARNG'AR, J

JUNE 5, 2025

BETWEEN

PAUL KAMAU ..... APPELLANT

AND

BEATRICE WANJIKU ELIUD MUMO ..... RESPONDENT

(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIUD MUMO KUIRA - DECEASED)

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kerugoya (Hon. E.O. Wambo, SRM.) delivered on 12th March 2019 in CMCC NO. 47 OF 2014)

JUDGMENT

1. The respondent filed a plaint dated 4th March 2014 pursuant to the *Law Reform Act* and the *Fatal Accidents Act*. She averred that the appellant was the owner of the motor vehicle registration number KAG 494T Toyota Hilux Pick up. On 9th August 2017 the deceased, Francis Kariuki Gichuki was cycling along Makutano-Embu Road when at research area, the appellant drove his vehicle so negligently that an accident occurred. The deceased suffered fatal injuries. The respondent blamed the appellant for causing the accident on account of negligence that was particularized in paragraph 4 of her plaint.

2. She continued that at the time of his death; the deceased was an 80-year-old man in good health. He was a rice farmer earning Kshs. 480,000.00 annually. That the deceased was survived by one wife and eight children. She therefore claimed for general damages, special damages of Kshs. 10,200, costs and interest of the suit.

3. In its judgment dated 12th March 2019, the trial court found that the appellant was 50% liable. The respondent was resultantly awarded Kshs. 20,000.00 for pain and suffering, Kshs. 100,000.00 for loss of

expectation of life, Kshs. 1,500,000.00 for loss of dependency and special damages of Kshs. 10,000.00 together with costs and interest of the suit.

4. It is those findings that have precipitated this appeal. In his memorandum of appeal dated 12th April 2019, the appellant raised six grounds challenging the impugned judgment. The said grounds are abridged as follows: the respondent's suit was time barred; the learned magistrate relied on the evidence of a discredited eye witness and as a result, erroneously found him 50% liable for the accident; and the award on loss of dependency was grossly and inordinately high. For those reasons, he urged this court to allow his appeal, set aside the findings on liability and quantum, reassess the evidence on liability to find that the deceased was to blame for the accident and costs of the appeal.

5. The appeal was canvassed by way of written submissions. The appellant's written submissions dated 18th October 2023 argued that contrary to the trial court's findings, the respondent had not met the criteria set out in section 27 of the *Limitation of Actions Act*. This is because the negligence acts complained of occurred on 9th August 2007 but the respondent only filed suit on 6th March 2014. He submitted that since the respondent failed to demonstrate that the material facts relating to the cause of action were not within her knowledge, she was not deserving of filing suit out of time. He urged this court to find that the suit was time barred.

6. Turning to liability, the appellant submitted that there was no eye witness to testify as to the circumstances leading up to the accident. As such, none of the particulars of negligence acts complained of were actualized at trial. Be that as it may, the testimony of DW1, the appellant's driver, did confirm that the deceased encroached onto his lawful lane and was negligent while cycling. That though DW1 took all necessary steps, it was too little too late. Lastly, on loss of dependency, he submitted that the respondent was entitled to the sum of Kshs. 50,000.00 since he was likely depending on his children for support. For this presupposition, he relied on the case of Nairobi Civil Appeal No. 142 of 2003; Loice Wanjiku Kangunda vs. Julius Gachau Mwangi and Amazon Energy Limited vs. Josephine Martha Musyoka & another [2019] eKLR.

7. The respondent opposed the appeal. She filed her written submissions dated 29th November 2023. She conceded that though the suit was filed out of time, she filed an application for leave to prosecution suit out of time. That application was granted by the court on its merits. In addition, no appeal was lodged against that decision. On liability, the respondent submitted that the trial court properly exercised its discretion in apportioning liability in the interest of fairness. She added that had the respondent been driving at reasonable speeds, the accident would not have occurred. In any event, the appellant admitted to occurrence of the accident and further admitted seeing the deceased before he was knocked down. She urged this court not to interfere with those findings. On the award of damages, the respondent submitted that the same was a reasonable assessment and the trial court accorded itself within the principles set out. She prayed that the appeal be dismissed with costs.

8. I have considered the parties written submissions, examined the memorandum of appeal and record of appeal and analyzed the law. My duty as a first appellate court was well enunciated by Kneller, JA. (as he then was) in the case of Mwangi vs. Wambugu [1984] LR 453 in the following words:

> " This is a first (and only) appeal so this court is obliged to reconsider the evidence, assess it and make appropriate conclusion about it, remembering we have not seen or heard the witnesses and making due allowance for this: Selle & another Vs. Associated Motor Boat Company Ltd. & others [1968] EA 123. 126 (CA - Z) and Williamsons Diamonds Ltd. Vs. Brown [1970] EA 1,12 CA-T)"

9. Before going into the merits of the suit in the evidence adduced, the appellant challenged the competency or otherwise of the suit and it is important to address that issue at the onset. This is because if it succeeds, then on account of technicalities, this court will not need to look at the merits or demerits of the suit at trial as it would have no recourse for doing so. The appellant complained that the suit was time barred and failed to fall within the exceptions of section 27 of the *Limitation of Actions Act*. It is conceded by both parties that the negligent acts complained of took place on 9th August 2007. However, the suit was only filed on 16th March 2014. Section 4 (2) of the *Limitation of Actions Act* provides that:

> "An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."

10. The respondent, cognizant of the statute of limitation, filed an application dated 22nd October 2023, seeking to file the suit out of time. That application was granted on 22nd January 2014 upon the court being satisfied that proper reasons had been furnished to file suit out of time. Section 27 of the Act gives a court discretion to extend time to file a cause of action out of time where the court is satisfied with the reasons for the delay. This was the holding of the Court of Appeal in the case of Willis Onditi Odhiambo vs. Gateway Insurance Co Ltd [2014] KECA 186 (KLR) that held:

> "In Mary Osundwa - V - Nzoia Sugar Company Limited [2002) eKLR, Osiemo, J., had, with the consent of the parties, granted extension of time to file suit retrospectively. Notwithstanding that the parties had consented, on appeal this Court said of Section 27 (1) of the *Limitation of Actions Act*:
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> "This Section clearly lays down the circumstances in which the court would have jurisdiction to extend time. That action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The Section does not give jurisdiction to the court to extend time for filing suit in cases involving contract or any other causes of action other than those in tort. Accordingly Osiemo, J. had no jurisdiction to extend time as he purported to do on 28th May, 1991. That the order was by consent can be neither here nor there; the parties could not confer jurisdiction on the judge by their consent." (Emphasis ours)
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> That decision correctly interpreted the provisions of Section 27(1) of the *Limitation of Actions Act* and there is no basis to depart from the same."

11. Furthermore, as rightfully pointed out by the respondent, that order was never appealed or set aside by the appellant. In its judgment, the trial court found that the delay in filing suit was not deliberate and/or intentional. For that reason, the suit was determined on its merits. The trial court addressed itself on the issue. I therefore see no reason to disturb those findings. Thus, the appeal on this issue lacks merit and it is hereby dismissed.

12. The record before me shows that the following emerged at the trial court when the suit proceeded for hearing: PW1 Bernard Kuira Mumo, the deceased's son testified that his father Eliud Mumo Kuira was lawfully pedal cycling along the Makutano-Embu Road on 9th August 2007. At research area, the appellant's vehicle registration number KAG 494 Toyota Hilux Pick Up hit the deceased who died. He did not witness the accident.

13. At the time of his death, the deceased was 80 years old. He was in good health. He was a rice farmer earning Kshs. 480,000.00 per year. He was survived by Beatrice Wanjiku Eliud Mumo – wife; Bernard

Kuira Mumo – son; Daniel Wanjohi Mumo – son; Samuel Warui Mumo - son; James Njuki Mumo – son; Simon Gathuki Mumo – son; Eunice Wanjiru Mumo – daughter; Mary Wangechi Mumo – daughter and Nancy Wanjira Mumo – daughter. He confirmed that they were not all dependent on the deceased.

14. On those grounds, PW1 claimed for damages under the *Law Reform Act* and the *Fatal Accidents Act*. In support of the respondent's claim, PW1 produced the police abstract, limited grant issued on 16th July 2007, receipt for Kshs. 10,000.00, demand letter dated 12th February 2014 and order dated 22nd January 2014.

15. The appellant called DW1 Paul Kimani Mbuko to the stand. He was the driver of the suit vehicle. His evidence was that on that fateful day, he was driving at 60KPH. On reaching research area at 11:00 a.m., the deceased was seen talking to someone else by the road side. Suddenly, he joined the road, while pedaling on a bicycle pushing it on his lane. DW1 hooted and served to avoid hitting him. However, he was too close and as a result, hit the deceased. DW1 reported the accident at Wang'uru police station. He then rushed the deceased to Kibimbi Health Centre who died while receiving treatment.

16. DW1 recorded a statement at the police station and was later served with a notice of intended prosecution for causing death by dangerous driving. However, the file was closed as there was no evidence to disclose the commission of an offence. DW1 blamed the deceased for heedlessly joining a busy road without ascertaining it was safe to do so and encroached on his lawful path. He prayed that the suit be dismissed with costs.

17. From the record, both parties affirm that an accident occurred on 9th August 2007 at research area involving the deceased, a pedal cyclist, and DW1, the driver of motor vehicle registration number KAG 494T Toyota Hilux Pick up. The accident occurred at 11: 00 a.m. The point of departure however is who is liable for the accident. The only eye witness testimony was that of DW1 who stated that he saw the deceased talking to someone else by the road side. Suddenly, he joined the road, while pedaling on a bicycle pushing it on his lane. DW1 hooted and served to avoid hitting him. However, he was too close and as a result, DW1 hit the deceased. DW1 blamed the deceased for heedlessly joining a busy road without ascertaining it was safe to do so and encroached on his lawful path.

18. From that evidence, I find that indeed DW1 did see the deceased before the accident occurred. In fact, he saw him talking to someone. He then saw the deceased pedal cycling, albeit negligently, as a result of which an accident occurred. It is my finding that even though there is the likely possibility that the deceased was not careful when cycling, an impact with a car driving at slow speeds would not have yielded fatal wounds instantly. In my view, the deceased's injuries were exacerbated by a car suggesting that it was speeding. It is apparent that DW1 was also not careful; otherwise, the accident would not have been as impactful as it was. For those reasons, I find that the trial court was correct in shouldering liability equally on both parties. That finding is upheld.

19. On quantum, it is a firmly established principle of law that this court will not interfere with the award of damages merely because it would have awarded differently. The Court of Appeal in Mariam Maghema Ali vs. Nyambu t/a Sisera Store [1990] eKLR as follows:

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the Appellate Court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a Judge sitting alone, then before the Appellate Court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into

account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

20. In awarding damages under the *Law Reform Act*, the trial court awarded Kshs. 20,000.00 for pain and suffering. I find that this was a proper assessment taking into account the fact that the deceased died while receiving treatment. He must have therefore endured some pain. On damages for loss of expectation of life in the sum of Kshs. 100,000.00 for loss of expectation of life. I find that the said sum was conventional and fair and will therefore not disturb that finding.

21. Taking into account the damages awarded under the *Law Reform Act*, I now consider the damages for loss of dependency. The trial court stated that since the deceased's income was not clear, a colossal sum was to be awarded. The trial court considered that the deceased was 80 years old and was in good health to award Kshs. 1,500,000.00.

22. While the trial court properly applied the global sum approach, I find that the trial magistrate did not lay a basis in justification for the award made. I therefore find that for that reason, this court ought to interfere with that finding. The appellant urged this court to consider the decisions Nairobi Civil Appeal No. 142 of 2003; Loice Wanjiku Kangunda vs. Julius Gachau Mwangi and Amazon Energy Limited vs. Josephine Martha Musyoka & another [2019] eKLR to award Kshs. 50,000.00 under this head. The respondent on her part, urged this court to sustain the findings of the trial court.

23. The appellant only supplied the authority in the Amazon Energy case which this court has considered. In that case, the deceased was 56 years old and left one school going child. The estate was awarded Kshs. 1,475,840.00 on loss of dependency. In this case, the deceased was 80 years of age. He died leaving a wife and nine elderly children who did not depend on him. He was of good health as was established. I therefore find that the award of Kshs. 800,000.00 is a fair assessment on loss of dependency. The same shall be subjected to a 50% apportionment of liability. Accordingly, the appeal partially succeeds to this extent. Since it is partially successful, each party shall bear its own costs.

    It is so ordered.

    30 days stay is granted.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025 IN THE PRESENCE OF;

Mesudi holding brief for the Appellants

Natocho holding brief for the Respondents

Siele /Mark (Court Assistants)

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J. NG'ARNG'AR

JUDGE