Oruko v Samo & another (Suing as the Legal Representatives and Administrators in the Estate of Tom Odhiambo Samo) (Civil Appeal E080 of 2022) [2025] KEHC 8800 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8800 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E080 OF 2022

BM MUSYOKI, J

JUNE 20, 2025

BETWEEN

KENNEDY ORUKO ..... APPELLANT

AND

JARED SAMO ..... 1ST RESPONDENT

LORINE AUMA ODHIAMBO ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS IN THE ESTATE OF TOM ODHIAMBO SAMO

(Being an appeal from judgment and decree in the Principal Magistrate's Court at Tamu (P.K. Rugut) civil case number E064 of 2021 dated 30th June 2022)

JUDGMENT

1. This is an appeal and cross appeal against the judgment of the lower court in which the trial court entered judgment on liability at 70:30 in favour of the respondent and awarded special and general damages as follows;
    1. Pain and suffering Kshs 80,000.00
    2. Loss of expectation of life Kshs 100,000.00
    3. Loss of dependency Kshs 2,171,664.00
2. The genesis of the matter was an accident that occurred on 2-04-2021 involving the appellant's motor vehicle registration number KBS 721K and the deceased along Awasi-Ahero road which resulted to injuries leading to the deceased's demise. Both parties were aggrieved by and dissatisfied with the judgment of the trial court and preferred this appeal and cross appeal on the following grounds;

1. Appeal

    1. The learned Magistrate erred in law and in fact by finding that the appellants were 70 per cent liable for the accident, which was the subject matter of the suit.

    2. The learned Magistrate erred in fact and law in failing to consider the defendant's submissions on the issue of liability.

    3. The learned Magistrate erred in fact and law in failing to consider the evidence which was tendered by the defence on liability during the hearing of the suit and the submissions filed.

    4. The learned Magistrate erred in fact and law in failing to consider the defendant's submissions on quantum.

    5. The learned Magistrate erred in awarding the sum of Ksh. 2,171,664/= by way of general damages under the head loss of dependency to the respondents.

    6. The learned Magistrate erred in law and in fact in using a multiplicand of Kshs. 13,572,90 as earning for the deceased while the same was not proved and had no basis whatsoever.

    7. The learned Magistrate considered extraneous circumstances to arrive at the erred finding in law and fact.

    8. The learned Magistrate erred in fact and in law in disregarding the appellant's submissions on both liability and quantum.

    9. The learned Magistrate's finding was not supported by evidence on record and no sufficient reasons for the findings were given.

2. Cross appeal

    1. The learned trial Magistrate erred in law and in fact by disregarding the appellant's submissions on the issue of liability and quantum hence occasioning a miscarriage of justice by arriving at an erroneous conclusion.

    2. The learned trial Magistrate erred in law and in fact by finding that the deceased was trying to hitch a ride from a moving vehicle when none of the witnesses who testified during hearing saw the deceased doing so.

    3. The Magistrate erred in law and in fact when she heavily relied on the evidence of the defendant and his witnesses to the detriment of the plaintiff who availed an eye witness who witnessed the accident hence arriving at a misplaced and unjust finding.

    4. The learned Magistrate erred in law and in fact when she found that the deceased was 30 per cent liable for the accident when the facts adduced into evidence by the eye witness and the police suggested an absence of contribution by the deceased to the said accident.

    5. The learned Magistrate erred in law and in fact when she made a grossly low and erroneous awards on pain and suffering and loss of life which awards were not in tandem with the underpinning principles informing awards under those heads thus occasioning a miscarriage of justice.

3. From the above memorandums, it is discernable that the appellant has challenged liability and damages under the head of loss of dependency while the respondents have appealed against both labiality and damages under the head of pain and suffering and loss of expectation of life. I will deal with the appeal and cross appeal together.

4. This being a first appeal, I have an obligation to re-evaluate and re-analyse the evidence as produced in the trial court and come into my own independent conclusion but giving allowance to the fact that I did not have the advantage of taking the evidence of the witnesses and observing their demeanour.

5 The respondents called two witnesses. The first one was the 1st respondent who told the court that the deceased who was her husband was involved in an accident while walking along Awasi-Ahero road between 8.00 and 9.00 pm on 2-04-2021. She confirmed that she did not witness the accident. She added that the deceased left behind four children and produced their birth certificates. She stated further that the deceased who died at 36 was a jack of all trades including brokerage in ballast in Kisumu, plumping and touting depending on the market. She added that the deceased used to earn approximately between Kshs 20,000.00 and Kshs 30,000.00 per month. She described the deceased as hardworking, responsible and caring.

6. In conclusion of her evidence in chief, the witness produced a copy of her identity card, grant of letters of administration, death certificate, the deceased's children's birth certificates, post-mortem report, police abstract and demand letter. She however stated in cross examination that she had no document to prove that the deceased earned the said Kshs 20,000,00 to 30,000.00.

7. PW2 was PC Edward Koima who stated that the driver of the motor vehicle was the only witness to the accident. Most of his testimony was what he was told by the driver of the motor vehicle although he told the court that he established that the driver was negligent as he ought to have seen somebody hanging on his motor vehicle and avoid the accident.

8. In cross-examination, he stated that if the police had gotten an eye and independent witness, they would have charged the driver with causing death by dangerous driving. He added that none of the people who were at the scene was willing to testify. He added that he was not the investigations officer but he participated in the investigations including visiting the scene and attending the post mortem.

9. PW3 was one Nanga Odhiambo who stated that he was a boda boda rider in Awasi and that on 2-04-2021, he witnessed the deceased being run down by a ruthless lorry driver. According to him, on the fateful day, the deceased was about to board a motor cycle to home when the appellant's motor vehicle appeared at the bus stop. It hooted at the deceased since they worked together in the business of buying and selling ballast. The deceased was a broker in ballast as well as a tout.

10. He told the court that the deceased first went to the driver's side, then went briefly and came back with two people who he saw board the lorry. He then went to the driver's side and as he was still talking to the driver, the driver suddenly too off causing the right side of the vehicle to violently hit the deceased who fell on the road and the vehicle's rear tyres ran over him. According to the witness, it appeared that they had disagreed and the driver was attempting to take off without satisfying the demands of the deceased.

11. Some motor cyclists stopped the driver from driving away and he stopped and rushed to the police station where he sought refuge from the raging crowd. He added that the vehicle was not in motion when the deceased was clinging onto its right-side mirror.

12. In cross examination, the witness stated that he was at the scene and he knew the deceased. He added that he was not aware of any traffic case and had not been called to testify in court or record a statement. He added that the stage was well lit and he could see well as there was electricity.

13. The appellant called only one witness who was the driver of the motor vehicle by the name George Ochieng Okoth. He told the court that the accident occurred at 8 pm. He said that he did not know the deceased. The witness said that on the fateful day, he had come from Chulaimbo to deliver building materials. He said that it was raining and he had closed his windows and when he reached Awasi, he slowed down at a bump. He alleged that he was driving at 40 kilometers per hour when he felt that the vehicle had ran over something. He stopped and alighted and found that it was a person then he crossed over and called police officers of Awasi police station. He alleged further that there was no one at the scene and no one witnessed the accident and that he has never been charged with a traffic offence.

14. In cross-examination, he stated that he was the only one who recorded statement with the police. He stated that he did not know one Chares Ouma and he was alone in the vehicle. He added that the deceased tried boarding the vehicle from the side and that he could not see the deceased from the side mirror.

15. DW2 was one Charles Ouma who told the court that he knew the deceased since their childhood days. He also stated that he was an agent of the appellant and he also knew DW1 though not well but he knew that he was the driver of the motor vehicle. He added that, he was called from home after the accident and when he got to scene, he did not find the deceased there and heard people say that the deceased saw a motor vehicle KBS and thought that it was the one they used to work in and he jumped on to it and hung on the side mirror and he fell and was run over. In cross examination, he insisted that there were people at the scene of the accident as people were at the stage waiting for vehicles.

16. I have read the submissions of the appellant dated 2nd April 2024 and those of the respondents dated 18th March 2024 and the authorities cited therein. I proceed to deal with the issues raised in the appeal and the cross appeal as follows.

Liability

17. The Honourable Magistrate after analyzing the evidence found that, there was proof that the deceased was trying to steal a ride but the driver was also supposed to be more careful. In my analysis, I find DW1 as untruthful witness. He insisted that he did not know Charles Ouma yet the said Charles Ouma who was a defence witness just like him and said to have been the manager of the same vehicle DW1 was riding told the court that they were acquainted. Again, the witness alleged and maintained that there were no people at the stage yet all the other witnesses including DW2 stated that there were people who stopped DW1 and alerted him of having run over the deceased. He at first told the court in his evidence in chief that he just heard the vehicle running over something then in cross examination, he changed and stated that the deceased was trying to board the vehicle. In his written statements, he stated that there were witnesses at the scene who told the police that the victim was running after and trying to hop onto the vehicle from the rear side when he slipped.

18. Due to the above inconsistencies, I would treat the evidence of DW1 with caution and hold that the driver must have seen the deceased. The evidence of DW2 was hearsay as he did not see what happened. In the circumstances the court should determine the issue of liability based on the evidence of PW3 who saw what happened.

19. PW3 testified that he saw the deceased move from one side to another while at the stage talking to the driver. The deceased had come with some people who boarded the vehicle then the he went to talk to the driver. The evidence adduced by the respondent was clear that the deceased was a ballast broker in the stage and the motor vehicle was also used to transport ballast. This in my mind is an indication that the deceased and the driver were acquainted if not colleagues in the business.

20. While it may not be certain that the deceased was stealing a ride, the circumstances of the accident as narrated by the police officer and PW3 point to the fact that the deceased also contributed to the accident. PW3 is on record telling the court that the deceased was talking to DW1 while clinging on the side mirror. He should have been careful and talked to the driver while at a safe distance.

21. The respondents have argued that the court should impute negligence against the drover because he tried to run away. There are many reasons for a driver who has been involved in an accident may attempt to escape the scene. It may not necessarily be because he was negligent. In Wayo & another (Suing on Behalf of the Estate of Benjamin Wayo Sailoki- Deceased) v Bwire (2025) KECA 866 (KLR), the Court of Appeal held that;

> 'In the same vein, we are also convinced that the mere fact that the driver ran away from the scene does not impute blame on his part.'

22. Whether or not he was stealing a ride, the fact remains that he was not careful and cannot escape blame. In these circumstances, the Honourable Magistrate was right in finding the deceased to have contributed to the accident. I see no reason to disturb the trial court's finding on liability.

Pain and suffering and loss of expectation of life

23. In their submissions, the respondents seem to have abandoned their cross-appeal on these heads because they have suggested that I uphold the decision of the trial Magistrate to award Kshs 80,000.00 for pain and suffering while they have not said anything on loss of expectation of life. However, since the appellant has submitted on the same, this court will analyse whether it should interfere with the award.

24. PW2 testified that the deceased died the following day at 12.30 am but the death certificate indicates that the deceased died on the same day of accident. There is no evidence that he was admitted to hospital and noting that the accident was at 8 pm and the next day was four hours away, it is safe to assume that he died within the four hours. Even taking the 12.30 am stated by the police officer as the time of death, that would translate to a period of four and half hours after the accident.

25. The respondents did not produce any documents to show the nature of injuries the deceased sustained and the court cannot tell the magnitude of pain he may have suffered before he died. Damages for pain and suffering in fatal accident cases are meant to compensate for the intensity of pain the deceased suffered before they passed on while damages under loss of expectation of life is a lumpsum figure to ameliorate the life opportunities lost. Comparable authorities put the damages pain and suffering for a deceased who died the same day of accident between Kshs 20,000.00 and Kshs 100,000.00 and for loss of expectation life in the region of Kshs 100,000.00 to Kshs 200,000.00.

26. In Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing as the Legal Adminstrator of the Estate of the late Robert Mwangi) (2019) KEHC 9014 (KLR), Honourable Justice F. Muchemi held that;

> '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.'

27. In similar case of West Kenya Sugar Co. Limited v Philip Julaya (Suing as the administrator and personal representative of the Estate of James Julaya Sumba (2019) KEHC 6121 (KLR), Honourable Justice J. Njagi while handling an appeal on loss of expectation of life held that;

> 'There are therefore some High Court authorities to support the award made by the learned trial magistrate. It has not been shown that the trial court used the wrong principles in making the award for loss of expectation of life. That this court may have made a different award if it had tried the matter itself is not a ground for setting aside the award. It is therefore my considered view that the award of Ksh. 200,000/= for loss of expectation of life was not excessive.'

28. Based on the above comparable authorities, I hold that the amounts awarded by the Honourable Magistrate were within the acceptable and comparable range and the same should not be upset.

Loss of dependency

29. The contention in the head is the approach the Magistrate applied. The Honourable Magistrate applied the multiplier approach which the respondent has no issues with. The appellant claims that the appropriate approach should have been the global approach because there was no proof of income.

30. A trial court has discretion to choose the approach it would adopt depending on the circumstances of each case. The global approach is best suited where there is no proof of known income or it is not ascertainable what was the nature of the work the deceased used to do. However, there is no formula cast in the stone which the court should use to decide the approach it would adopt. If the court has some indication of the nature of work the deceased was engaged in, it has discretion to use the multiplier approach and apply minimum wage.

31. In the matter before me, there was evidence from both the appellant's and the respondents' witnesses that the deceased was a ballast broker and a tout at Awasi. He used to do this business with other people including the appellant's lorry. He had four children and a wife and obviously he took something home for their maintenance and upkeep. Birth certificates were produced to show that the deceased had children aged between two and half to 13 years.

32. Based on the above, it is my position that the trial court was justified in finding that on a balance of probabilities, the deceased was working as a broker and a tout. The evidence adduced shows that the deceased even died in the job. Not every income should attract documentation as we have a very big population in the country that is in the informal sector. If the courts were to insist on strict proof of occupation by way of documentation, it will be living out of reality of the society in which it lives in. A court of law should not act as if it were ignorant of the realities of the society and life.

33. Even if this court was to adopt a global approach, the sum of Kshs 600,000.00 as proposed by the appellant would be too low for a person who toiled for his five-member family and hopefully had another half-life ahead of him. In view of this, I find the appeal on loss of dependency unmerited.

Conclusion.

34. Having said the above, it is my finding that the court exercised its discretion properly by adopting the multiplier approach. The damages for pain and suffering and loss of expectation of life were adequate considering the circumstances of the case. I also hold that determination on liability was proper.

35. The upshot of all the above is that the appeal and cross-appeal lack merits and I proceed to dismiss them. Each party shall bear their own costs of this matter.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Nyangano for the appellant and Miss Okumu for the respondent.