Abdillah & another v Anyimus (Suing as the Personal Representative of the Estate of John Ariemo Akuma) (Civil Appeal E014 of 2023) [2025] KEHC 10272 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL APPEAL E014 OF 2023

WA OKWANY, J

JULY 10, 2025

BETWEEN

EBRAHIM ABDILLAH ..... 1ST APPELLANT

DANIEL NYAKUNDI OGETO ..... 2ND APPELLANT

AND

MARY MENGWE ANYIMUS ..... RESPONDENT

SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN ARIEMO AKUMA

(Being an Appeal from the Judgment and Decree at the Chief Magistrate's Court in Nyamira CMCC No. 172 of 2016 delivered by Hon. W.K. Chepseba, Chief Magistrate on 20th April 2023)

JUDGMENT

1. The Respondents sued the Appellants before the trial court seeking the following reliefs: -
    a. Damages under the *Fatal Accidents Act*
    b. Damages under the *Law Reform Act*
    c. Costs of the suit
    d. Interests on (a) and (b) above at court rates.
2. The Respondent's case was that on or about 25th February 2016 the deceased, John Ariemo Akuma, was lawfully riding a motorcycle Registration No. KMDG 249R when, at Tombe Shopping Centre, the Defendants by themselves, servant and/or agents controlled motor vehicle Registration No. KBA 870H so recklessly and negligently thereby allowing it to knock the motorcycle as a result of which the deceased sustained fatal injuries.

3. The Appellants filed their Statement of Defence dated 24th February 2017 in which they denied the averments made in the Plaint after which the matter was set down for hearing. The Plaintiff called a total of 3 witnesses and produced the following exhibits: -

    1. Witness summons – P.Exh 1
    2. Police Abstract - P.Exh 2
    3. Chief's Letter - P.Exh 3
    4. Death Certificate - P.Exh 4
    5. Birth Certificate for Austine Anyimu - P.Exh 5
    6. Birth Certificate for Desmond Mokaya - P.Exh 6
    7. Letters of Administration Ad Litem - P.Exh 7
    8. Receipt for Legal Fees for obtaining Grant - P.Exh 8
    9. Post Mortem Report - P.Exh 9
    10. Motor Vehicle Search - P.Exh 10(a)
    11. Receipt - P.Exh 10(b)
    12. Demand Letter - P.Exh 11
    13. Post Mortem Report - P.Exh 12

4. The Appellants/Defendants called one witness and produced the OB 11/25/2/2016 (D.Exh1).

5. At the conclusion of the trial, the learned magistrate entered judgement for the Respondent as follows: -

    Liability at 100% against the Appellants

    Pain and Suffering – Kshs. 30,000/=

    Loss of Expectation of Life - Kshs. 100,000/=

    Lost Years – Kshs. 1,600,000/=

    Special Damages – Kshs. 65,000/=

    Total – Kshs. 1,795,000/=

    Costs and interests of the suit

6. Aggrieved by the trial court's judgment, the Appellants filed the instant appeal through a Memorandum of Appeal dated 16th May 2023 challenging the entire judgment on liability and quantum. They listed the following grounds of appeal: -

    1. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendants without considering the circumstances of the case.
    2. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendants whereas the Police Abstract produced as the Plaintiff's Exhibit indicated that the matter was still pending under investigation.

3. The Learned Trial Magistrate erred in fact and in law by apportioning 100% liability to the Defendants whereas DW1 gave evidence that the rider was also overtaking when the accident occurred.

4. That the Learned Trial Magistrate erred in law and fact in adopting a multiplicand of Kshs. 10,000/= under the loss of dependency without proper justification.

5. That the Learned Trial Magistrate erred in law and in fact in awarding Kshs. 1,600,000/= under the loss of expectation of life which was overly excessive.

6. That the Learned Trial Magistrate erred in law and in fact in failing to pay regard to decisions filed alongside the defendants' submissions that were guiding in the amount of quantum that is appropriate and applicable in similar injuries as the case he was deciding.

7. That the Learned Trial Magistrate's exercise of discretion in the assessment of quantum was injudicious.

7. The Appeal was canvassed by way of written submission which I have considered,

8. The duty of a first appellate was stated by the Court of Appeal in the case of Kamau vs. Mungai & Another [2006] 1LR 150 thus:-

> " This being a first appeal it was the duty of the Court of Appeal to re-evaluate the evidence, asses it and reach its own conclusions remembering that it had neither seen nor heard the witness and hence making due allowance for it...
>
> A Court on Appeal will not normally interfere with a finding of fact by the trial Court in a civil or criminal case unless it is based on evidence or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did..."

Analysis and Determination

9. I have considered the Record of Appeal and parties' rival submissions. I find that the mains issue for determination is whether the trial court arrived at the correct finding on liability and quantum.

Liability

10. The question on liability is thus who is to blame for the accident?

11. In Michael Hubert Kloss & Another vs. David Soreney & 5 Others [2009] eKLR the Court of Appeal stated that: -

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows: "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a Court of law this question must be decided as a properly instructed and reasonable jury would decide it....."The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults

> which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

12. The Appellants contested the trial court's finding on liability at 100% against them. They noted that the Police Abstract (P. Exh 2) indicated that investigations were still ongoing and argued that the deceased contributed to the accident by overtaking when it was not safe to do so.

13. The evidence presented by the Respondent, through PW1 (an eyewitness), indicated that the deceased was riding his motorcycle lawfully when the accident occurred. The Appellants' witness (DW1) claimed that the deceased was overtaking and attributed contributory negligence to him. It is however instructive to note that the Appellant's witness was neither an eyewitness nor the investigating officer. I find that the testimony of DW1 was not backed by any cogent evidence or an investigation report to prove that the deceased was indeed overtaking or otherwise at fault.

14. The Police Abstract merely indicated that investigations were pending but did not exonerate the Appellants or impute fault on the deceased. The burden of proof lay on the Appellants to show contributory negligence, on a balance of probabilities. I find that they did not discharge this burden.

15. The trial court, evaluated the credibility of the witnesses and the evidence before arriving at the finding on liability at 100% in favour of the Respondent. I am however of the view that in a scenario where there is a collision between a motor vehicle and a motorcyclist, it is only reasonable to expect that the cyclist should have also taken steps to avoid the accident. He could have done this by swerving, slowing down or stopping so as to mitigate any damage or injury to himself. In the instant case, the cyclist died instantly and it is therefore not possible to know his side of the story. I find that, in the circumstances of this case, apportioning liability at 80% to 20% in favour of the Respondent will be fair and just.

Quantum

16. The Appellants challenged the awards made for loss of dependency which, they claimed, was excessive. They also contested the multiplicand adopted by the trial court.

17. The principles to be considered by an appellate on whether or not interfere with the trial court's assessment of quantum of damages were restated by the Court of Appeal in Sheikh Mustag Hassan vs. Nathan Mwangi Kamau Transporters & 5 others [1986] KLR 457 thus:-

> " The Appellate court is only entitled to increase an award of damages by the High court if it is so inordinately low that it represents an entirely erroneous estimate of the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect..... A member of an appellate court when naturally and reasonably says to himself, "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that the other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..... The judges of both courts should recall that inordinately high awards in such cases will lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of everyone in the country".

18. It is trite that in fatal accident claims, the Estate of a deceased person is entitled to damages under the *Law Reform Act* and *Fatal Accidents Act*.

19. Under the *Law Reform Act*, the Court is required to assess damages for pain and suffering and loss of expectation of life. In this case, the trial court assessed the same at Kshs. 30,000/= and Kshs. 100,000/= respectively. PW3 testified that the deceased died on the spot. DW1, on the other hand, stated that the deceased died at the Medical Centre while undergoing treatment. I note that the Post Mortem report did not indicate whether the deceased died on the spot or later. PW2, the Respondent herein testified, on cross-examination, that the deceased died on the spot.

20. The generally accepted principle in such cases is that the court must consider the circumstances of death of a deceased person and award nominal damages where death followed immediately after the accident. Higher awards are however made where the deceased underwent treatment and was subjected to prolonged suffering before succumbing to the injuries. In the present case, the deceased died on the spot and I therefore find no reason to interfere with the trial court's award of Kshs. 30,000/= for pain and suffering.

21. On damages for loss of expectation of life, I am satisfied that the trial court was guided by the conventional sum of Kshs. 100,000/=.

22. Turning to the award under the *Fatal Accidents Act*, the trial court assessed the deceased's monthly income at Kshs. 10,000/= and employed a multiplier of 20 years. The deceased died at the age of 35 years and the dependency ratio was placed at 2/3 since he was survived by a wife and two sons.

23. PW2 testified that her husband was a motor cyclist but on cross-examination, she stated that he was a businessman who earned Kshs. 20,000/= monthly. The trial court awarded Kshs. 1,600,000/=, while adopting a multiplicand of Kshs. 10,000/=.

24. I note that the deceased was 36 years old and in gainful employment as a boda boda operator. Indeed, the deceased died while riding his motorcycle (boda boda). I find that the multiplicand of Kshs. 10,000/= is reasonable and within the range for a person in such informal employment. The court adopted a multiplier of 16 years, which, I also find to be within acceptable bounds based on the deceased's age and working life expectancy.

25. I find no basis for interfering with the trial court's discretion in assessing damages under this head. The award is reasonable and supported by evidence on record.

Special Damages

26. The trial court awarded Kshs. 65,000/=, which was specifically pleaded and proved through receipts. I find that no error arises in the award of special damages.

27. The Appellants also faulted the trial court for not considering their cited authorities. I however find that there is nothing to show that the trial court ignored the cited cases. As I have already stated in this judgment, the discretion in assessment of damages is wide, and as long as the court gives justifiable reasons, an appellate court should not interfere with such discretion unless the award is shown to be inordinately high or low, or based on wrong principles.

28. For the reasons that I have stated in this judgment, I find that the instant appeal is merited, albeit only in respect to the trial court's finding on liability which I hereby set aside and substitute with this court's finding at 80% to 20% in favour of the Respondent. Consequently, I make the following final orders: -

    a. Liability at 80% to 20% against the Appellants

    b. Pain and Suffering – Kshs. 30,000/=

    c. Loss of Expectation of Life - Kshs. 100,000/=

d. Lost Years – Kshs. 1,600,000/=

e. Special Damages – Kshs. 65,000/=

f. Total – Kshs. 1,795,000/=

Less 20% contribution 359000

Net Total 1,436,000

29. Each party shall bear his/her own costs of the appeal. I however award the Respondent interests on the above award at court rates until payment in full.

30. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 10 TH DAY OF JULY 2025.

W. A. OKWANY

JUDGE