



REPUBLIC OF KENYA



KENYA LAW

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Jeram Constructors Limited & another v Nyandika (Suing as the Personal Representative of the Estate of Peter Kiptonui Kirui (Deceased)) (Civil Appeal E045 of 2023) [2025] KEHC 9615 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9615 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E045 OF 2023
JK NG'ARNG'AR, J
JULY 3, 2025**

BETWEEN

JERAM CONSTRUCTORS LIMITED 1ST APPELLANT

DAVID MUTAI NDUNGU 2ND APPELLANT

AND

LINET KEMUNTO NYANDIKA RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER
KIPTONUI KIRUI (DECEASED)**

*(Being an Appeal from the Judgment of Senior Principal Magistrate,
Muleka E. at the Magistrate's Court at Sotik, Civil Suit Number 35 of 2020)*

JUDGMENT

1. The Respondent (then Plaintiff) as the Personal Representative of the deceased Peter Kiptonui Kirui, sued the Appellants (then Defendants) for general and special damages that arose when the deceased was fatally knocked down by motor vehicle registration number KCQ 058Q on 8th October 2019 along Sotik-Litein road.
2. The trial court conducted a hearing where the Respondent called two witnesses and the Appellants called two witnesses in aid of their defence.
3. In its Judgement delivered on 22nd August 2023, the trial court awarded the Respondents a net award of Kshs 7,763,955/=.



4. Being aggrieved with the Judgment of the trial court, the Appellants filed their Memorandum of Appeal dated 30th August 2023 appealing against the apportionment of liability and the award on damages.
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, but in doing so, to have in mind that I neither heard nor saw the witnesses testify.
6. I hereby proceed to summarise the case in the trial court and the parties' respective submissions in the present Appeal.

The Plaintiff's/Respondent's case.

7. Through her Complaint dated 23rd June 2020, the Respondent stated that the deceased Peter Kiptonui Kirui was involved in a road traffic accident on 8th October 2019. That he was hit by motor vehicle registration number KCQ 058Q while walking along Sotik-Litein road. It was her case that the 1st Appellant was the registered owner of the said motor vehicle.
8. It was the Respondent's case that the Appellants were negligent in the accident. The particulars of the negligence were stated in paragraph 5 of the Complaint. That as a result of the accident, Peter Kiptonui Kirui suffered fatal injuries.
9. The Respondents prayed for special and general Damages against the Appellant under the *Fatal Accidents Act* and the *Law Reform Act*.
10. In their written submissions dated 25th March 2025, the Appellants submitted that the deceased was the author of his misfortune and was to be blamed entirely for causing the accident. That the trial court erred in finding that the driver was 70% liable for causing the accident. It was their further submission that the driver of the motor vehicle was not negligent as he tried to avoid the accident by swerving. They relied on *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another* (2005) 1 EA 334 and *Palace Investment Ltd vs Geoffrey Kariuki Mwenda & another* (2018) eKLR.
11. On the award on damages, the Appellants submitted that the award of Kshs 100,000/= for pain and suffering was excessive and they proposed an award of Kshs 20,000/=. The Appellants further submitted that the award of Kshs 150,000/= was excessive and proposed an award of Kshs 80,000/=.
12. Under the head of loss of dependency, the Appellants submitted that the award of Kshs 10,640,000/= was excessive. That the Respondent did not prove that the deceased earned Kshs 70,000/= and urged they urged this court to use the minimum wage of Kshs 5,436.90/=. The Appellants further submitted that after factoring in the vagaries and vicissitudes of life, this court should use the multiplier of 13 years and a dependency ratio of 1/3 which would bring the total to Kshs 282,718.8/=.

The Appellants'/Defendants case.

13. Through their statement of defence dated 28th July 2020, the Appellants denied the occurrence of the accident on 8th October 2019 and further denied being the registered owner of motor vehicle registration number KCQ 058Q.
14. It was the Appellants' case that if the accident occurred then it was caused by the negligence and carelessness of the deceased. The particulars of negligence were contained in paragraph 7 of the Defence.



15. Through her written submissions dated 17th February 2025, the Respondent submitted that there was nothing that demonstrated that the deceased was to blame for causing the accident and that the trial court was correct when it apportioned liability in the ratio of 70:30 in her favour.
16. On damages, the Respondent submitted that an award on damages was in the trial court's discretion and that the trial court did not err when it used the multiplicand of Kshs 70,000/=, a multiplier of 19 years and a dependency ratio of 2/3. She relied on *Mildred Aori Odunga vs Hussein Dairy Limited* (2010) eKLR and *Jacob Ayiga Maruja & another vs Simeane Obayo* (2005) eKLR.
17. I have gone through and carefully considered the Record of Appeal, the supplementary Record of Appeal, the Appellants' written submissions dated 25th March 2025 and the Respondents' written submissions dated 17th February 2025. The only issue that I have sieved for my determination was whether the trial court erred in its findings on liability and quantum.

Liability

18. The Respondent (PW1) testified that her husband, Peter Kiptonui Kirui (deceased) was fatally hit by motor vehicle registration number KCQ 058Q while walking along Sotik-Litein road. PW1 blamed the driver of the motor vehicle for causing the accident. When she was cross examined, she testified that she did not witness the accident.
19. No. 106229 PC Timothy Koech Kimutai (PW2) confirmed the occurrence of the accident and testified that the accident occurred when the deceased was attempting to cross the road. PW2 produced a Police Abstract as P. Exh 9. I have looked at the Police Abstract and it indicated that the matter was still being investigated. When PW2 was cross examined, he testified that he was not the investigating officer.
20. On the other hand, Evans Ongwae Saeta (DW1) blamed the deceased for causing the accident. DW1 testified that as he was driving, he noticed a group of people on the side of the road who appeared to have disagreements. That suddenly the deceased ran into the road and despite his attempts at swerving to avoid a collision, he hit the deceased. When DW1 was cross examined, he testified that he hit the deceased but did not blame the deceased.
21. No. 93261 PC Diana Bosibori (DW2) testified that the deceased boarded a motorcycle and there was an attempted robbery. DW2 further testified that when the deceased tried to ask for help, the driver of the motor vehicle thought he was being attacked and he sped off killing the deceased. When DW2 was cross examined, she testified that she was not the investigating officer and could not describe the circumstances of the accident.
22. In analysing the above evidence, the only people who could describe the circumstances of the accident was the investigating officer or the driver (DW1). It is clear that the Respondent (PW1), No. 106229 PC Timothy Koech Kimutai (PW2) and No. 93261 PC Diana Bosibori (DW2) did not witness the accident. Neither PW2 nor DW2 were investigating officers. The driver's (DW1) testimony was contradictory as in his testimony, he described the circumstances which painted the deceased as fully liable in causing the accident but when he was cross examined, he testified that he did not blame the deceased for causing the accident.
23. From the above, it is difficult for this court to determine the circumstances of the accident. In the circumstances thereof, this court is at a loss on whom to blame for causing the accident. In *Hussein Omar Farah v Lento Agencies* [2006] KECA 388 (KLR), the Court of Appeal observed that: -

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the



question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.....”

24. Flowing from the above, it is my finding that the deceased and the Appellants were equally to blame for the accident and liability is thereby apportioned at 50:50.

Quantum

25. With regard to the award on damages, the trial court awarded the Respondent a net award of Kshs 7,763,955/=.

26. In regard to the pain and suffering, the trial court awarded the conventional figure of Kshs 100,000/=. The Appellants stated that this award was excessive and proposed an award of Kshs 20,000/= while the Respondent stated that the award was just and fair. 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”.

27. Linet Kemunto Nyandika (PW1) produced a death certificate as P. Exh1. The Death Certificate indicated that the deceased died on the material day (8th October 2019) at Kapkatet Hospital. This meant that the deceased did not die on the spot after he was hit but died later on in hospital. I therefore find that the deceased suffered some pain before he died. I am thus satisfied with the trial court’s award of Kshs 100,000/= under this head.

28. On the loss of expectation of life, I uphold the award of Kshs 150,000/=.

29. Under the head 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.

30. The trial court awarded the Respondent Kshs 10,640,000/= by using a monthly wage of Kshs 70,000/=, a multiplier of 19 years and a ratio of 2/3.

31. I have considered the evidence and it was stated by the deceased’s wife, Linet Kemunto Nyandika (PW1) that the deceased was a teacher who used to earn Kshs 70,000/= per month. The same was pleaded in the Plaintiff.

32. I have gone through the record and I have note that there was no proof of income from the exhibits that the Respondent produced in court. With respect to the trial court, I find 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 Mwiti 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.”

33. The Appellants proposed an award of Kshs 282,718.80/= under this head while the Respondent submitted that the trial court did not fall into error when it awarded Kshs 10,640,000/= as loss of dependency.
34. In determining an award under this head, I have considered the parties’ proposals under this head, the fact that the deceased died aged 41 years old and the fact that the deceased was survived by a widow and three children. Having considered the above, it is my finding that the award of Kshs 10,640,000/= was excessive. I will therefore be guided by the global award approach and make an award of Kshs 2,500,000/=.
35. With regard to special damages, the Respondent stated that she had incurred the following: -
 - i. Ad litem Kshs 20,000/=
 - ii. Motor Vehicle Search Kshs 550/=
 - iii. Funeral announcement Kshs 3,815/=
 - iv. Coffin Kshs 25,000/=
 - v. Transport expenses Kshs 16,000/=
 - vi. Trolley and lowering gear Kshs 3,000/=
 - vii. Tents and chairs Kshs 3,000/=
 - viii. Catering expenses Kshs 30,000/=
36. I have gone through the receipts that were produced by the Respondent in the trial court. I have found the receipts marked as P. Exh 2b, P. Exh 6a, P. Exh 6b and P. Exh 7b to confirm the expenses incurred by the Respondent.
37. On the other funeral expenses, 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.
38. Flowing from the above, it is my finding that the trial court did not err when it awarded Kshs 101,365/= as special damages and I uphold the same.



39. In the final analysis, it is my finding that there is a reason for this court to interfere with the trial court's award on general and special damages. This then translates to the final award as: -

Pain and suffering Kshs 100,000/=

Loss of expectation of life Kshs 150,000/=

Loss of dependency Kshs 2,500,000/=

Add special damages Kshs 101,365/=

Kshs 2,851,365/=

Less 50% Contribution Kshs 1,425,682.50/=

Kshs 1,425,682.50/=

40. In the end, the Appeal dated 30th August 2023 is allowed. The Appellants shall have the costs of this Appeal while the costs of the main suit shall remain as awarded by the trial court.

41. 30 days stay is granted.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 3RD DAY OF JULY, 2025.

.....

J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of Moraa for the Appellant Matara for the Respondent and Siele and Susan (Court Assistants)

