



Satwant v Wacheke (Suing as the Personal Representative of the Estate of Charles Gikuhi Sikamoi) & another (Civil Appeal 62 of 2019) [2023] KEHC 1335 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 62 OF 2019
MW MUIGAI, J
FEBRUARY 16, 2023**

BETWEEN

DHANJAL SINGH SATWANT APPELLANT

AND

ANNASTACIA WAITHERA WACHEKE (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES GIKUHI SIKAMOI) 1ST RESPONDENT

SHIVA CARRIERS LIMITED 2ND RESPONDENT

(BEING AN APPEAL FROM JUDGMENT OF THE HON A.G KIBIRU DELIVERED ON THE 27TH DAY OF MARCH 2019 IN MACHAKOS CMCC NO 77 OF 2017)

JUDGMENT

TRIAL COURT RECORD

PLAINT

1. This cause of action arose on 22nd March 2014 at around 8 pm or thereabout. Charles Gikuhi Sikamoi (deceased) was lawfully travelling as a passenger in a private Motor Vehicle registration number KBY 333N Benz (Hereinafter referred to as “the Benz”) along Mombasa-Nairobi road around Masimba area when motor vehicle registration number KBL 961 ZC 626 8(hereinafter referred to as “the prime mover”) allegedly owned by the 1st Defendant that was driven , managed and controlled by an agent and/ or servant of the 1st and 3rd Defendant in the course and scope of his employment by the said Defendants so negligently drove the same causing it to violently hit the Benz causing Charles Gikuhi Sikamoi to sustain injuries that led to his death.
2. The Complaint dated February 13, 2017, the negligence of the 1st and 3rd defendant was particularized as follows;



- a. Failing to employ qualified and trained drivers
 - b. Failing to ensure that the driver drove with moderate speed as required by the law.
 - c. Failing to ensure that the driver observed all traffic rules and regulations.
3. Negligence on the part of the 2nd Defendant was particularized as follows;
- a. Failing to keep any proper look out or have any sufficient regard for other lawful users of the road generally and the Plaintiff in particular.
 - b. Driving at a speed that was excessive in the circumstances.
 - c. Failing to stop in time or at all so as to avoid the accident
 - d. Failing to slow down, stop, swerve, brake or in any other way maneuver the said motor vehicle under his control so as to avoid the said accident.
 - e. Failing to adhere to the provisions of the Highway Code.
4. The dependents of the deceased were Anastacia Waithera Wacheke and Venessa Njoki, the wife and daughter of the deceased respectively.
5. The Plaintiff averred that the deceased was 29 years old at the time of his death and was in good health. He was a revenue officer earning Kshs 73,000 per month and by his death, his estate has suffered loss and damages.
6. Special damages were particularized as follows
- a. Funeral Expenses to be given at the hearing
 - b. Letters of administration Kshs 1,000
 - c. Certificate of death Kshs 100
 - d. Police abstract Kshs 200
 - e. Post mortem expenses Kshs 2,500
- Total Kshs 3,800
7. The Plaintiff sought the following prayers;
- a. General damages under the *Law Reform Act* and the *Fatal Accident Act*
 - b. Special Damages for Kshs 3800
 - c. Costs of the suit
 - d. Interest on a,b and c as such rated as the court may deem fit to grant until payment in full
 - e. Any other reliefs that the honourable court may deem fit and just to grant.

Defence

8. The 1st Defendant filed a statement of defence on 2nd of March 2018 denying the contents of the Plaintiff and contended that if the accident occurred then it was caused solely by the negligence of the plaintiff.
9. The particulars of the Plaintiff's negligence were enumerated as;



- a. Unlawfully entering M/V registration number KBY 333N
 - b. Failing to wear safety belts provided
 - c. Distracting the driver
 - d. Alighting out of a moving vehicle
 - e. Causing the accident.
10. The 1st Defendant denied there being negligence on its part and averred that the same occurred due to an inevitable accident. The 1st defendant contested the jurisdiction and averred that the matter lies within the jurisdiction of Makindu Law courts. He urged the court to dismiss the suit with costs.
11. The 2nd defendant filed a defence dated March 30, 2017 in which he denied the contents of the plaint and averred that if the accident occurred it was wholly caused by the negligence of the 1st and 3rd Defendants. In addition to the particulars of negligence of the 1st and 3rd Defendants in the Plaint, the 2nd Defendant added the following particulars;
- a. Overtaking along the said road when it was unsafe to do so and thereby causing the collision
 - b. Failing to keep any or any proper look out and/or to have any sufficient regard for the other road users.
 - c. Failing to apply brakes in sufficient time or at all to avert the said accident
 - d. Failing to see motor vehicle registration number KBY 33N in sufficient time or at all and thereby colliding with the said motor vehicle.
 - e. Failing to slow down, to stop, to swerve or in any other way whatsoever to control the said motor vehicle to avoid the collision.
12. The 3rd Defendant file any response.
13. The Plaintiff filed a response to the 1st and 2nd Defendant's defence denying any negligence on its part and reiterating the contents of the Plaint. He averred that the expected award under the Law Reform Act and the Fatal Accident Act exceeds that of the jurisdiction of Makindu law courts thus necessitating filing of the suit in Machakos.

Hearing

Plaintiff's Case

14. The Plaintiff called three witness. PW1 was Anastacia Waithera Waceke. She said she knew Charles Gikuhi Sikamoi who was her late husband passed away on 22/3/2014. She said he met his death in a road accident along Mombasa road, she did not know the exact place of the accident. The motor vehicles involved in the accident are KBY 333N , Mercedes Saloon car, in which the deceased was a passenger and a truck from Shiva Carriers, KBL 961Q ZC 6268 Shama make. She said she was in conversation with him shortly before the accident and the person who recovered his phone called her, she asked to talk to him which he did though he was in pain. She then called his office and asked for assistance and an ambulance was discharged, by the time she got back from her uncle, he had been taken to Makindu from Kilome.
15. He traveled from Makindu to Kilome. He was working with KRA as a revenue officer based in Kisumu. He was a graduate of Moi University, he graduated in 2010, a certified CPA holder, a certified financial



analyst and certified Information System Analyst. He was also a businessman running Rosika Trading Company Limited engaged in import and sale of motor vehicles. She said they had a daughter aged 8 months at the time of the death of deceased called Venessa Njoki who was 5 years and a few months at the time. The deceased had a father and mother, Joel Kani Ole Sikamoi and Rose Njoki Sikamoi. The child was attending PP2 at Jonathan Gloag Academy Nairobi. It was her testimony that the deceased was stuck in the motor vehicle that caught fire and he died 5 hours after the accident. She produced a letter from KRA for promotion of deceased to Revenue Officer 1 in 2014, the salary was Kshs 67,000, house allowance was Kshs 28,000 and transport allowance was Kshs 15,000. She stated that at the time of his death, the salary was Kshs 146,000 gross with a basic salary of Kshs 73,000, House allowance Kshs 28,000, transport allowance was Kshs 15,000, leave allowance of Kshs 30,000.

16. It was her testimony that the accident as reported to Makindu Police station and the police abstract was issued. A post mortem was carried out, she produced a search certificate for KBL 961Q registered under Shiva Carriers limited and another for KBY 333N registered under the name of the 2nd defendant. She said the deceased was buried 2/4/2014 and they incurred expenses of Kshs 450,000, she did not have a receipt for the same. She said the deceased was the breadwinner, that they had just settled and had a baby. He was 29 years and she was 27 years by then. She prayed for compensation for the loss and stated that she had been left with the responsibility to look after a child without a father and husband. His parents were depending on him, they lost a son and they had educated him. She said that she gathered from police and site visit, the truck was overtaking and the deceased was seated at the back seat.
17. She produced the following documents;
 - a. Letters of administration
 - b. Marriage certificate
 - c. Death certificate
 - d. Chief's letter
 - e. Letter from KRA dated 3rd September 2013
 - f. KRA 9
 - g. Post mortem report
 - h. Motor vehicle search KBL 961Q
 - i. Motor vehicle search for KBY 333N
18. Upon Cross- examination, she stated that she is also a graduate from Moi University doing freelance accounting. At the time of his death, she was employed at KPMG, EA based in Nairobi and they were both contributing to family though her income was negligible. She talked to the deceased and eye witness who took him to hospital. She understood the motor vehicle had three occupants, the others were burnt beyond recognition. After the collision, motor vehicle caught fire and she saw it at the police station. The deceased had a minor burn on face. She did not have documents showing the deceased was a director of Rosika company, she did not produce documents of the deceased qualifications. She said the school fees for the child is Kshs. 60,000 per year and it is a struggle to pay. She said the exhibit does not show the deductions and she did not witness the accident.
19. When PW1 was cross examined by Njuguna Advocate for the 2nd defendant, she stated that the deceased was a passenger. He told her that he drove motor vehicle to Mtito Andei and handed over to his colleague, that they talked before the accident and she was aware he had gone to pick motor vehicle



- at Mombasa imported by Rosika Limited for a customer. She said Yusuf worked for her husband and from the reports, motor vehicle had three passengers. She visited the scene of the accident around April, about 30 days after the accident. She said the driver of the truck was to blame for the accident.
20. In re-examination, she stated that the deceased was taking care of the family and following his demise, she was quite disturbed mentally and with a young baby she was unable to continue working. She spoke to the deceased several times from morning all through the journey and shortly after the accident. The two occupants of the front seat were burnt beyond recognition.
 21. Joel Munyao was PW2, He adopted his statement of 21/5/2018 in which he had stated that on March 22, 2014 at around 5pm he was coming from Kiboko, Makindu on his way to Emali at Senior Staff next to A.P Training College or camp and on reaching there he found an accident had happened involving a lorry registration number KBL 961Q ZC 6268 and Mercedes Benz registration number KBY 333N. The Mercedes had 3 people, a driver and 2 passengers, it caught fire on impact. He broke the door of the Mercedes to save the passenger who was at the back seat. He said the rest of the public was just watching and talking. He heard eye witnesses say that the lorry was overtaking a car when it collided with the Mercedes head on.
 22. He said he did not find the owner of the lorry, he fled. He removed the deceased from the burning car and tried to put him in his car to take him to hospital but before he could do so an ambulance heading Makindu direction arrived and he requested the driver to take the deceased to Kilome Nursing Home and he followed the ambulance. He said the deceased passed away at Kilome Nursing home and he told the doctors he was a Good Samaritan. He took the deceased's phone and wallet and became aware that he was called Charles Gikuihi Sikamoi . He informed relatives who were calling and told them that the deceased was at Kilome Nursing Home. Lastly, he stated that shortly before the deceased died, some people from Kenya Revenue Authority came to the ambulance and tried to resuscitate him without success. They took the body to Montezuma Funeral home Nairobi where he met the deceased's wife, Annastasia and his father and handed over the deceased's wallet and phone to the wife.
 23. Upon Cross- examination, he stated that he arrived at the scene immediately after the accident and found Mercedes Benz on fire and the lorry was at the scene. He assisted the deceased who was seated at the back and he was taken to hospital. He said he arrived at 4.30 to 5.00pm and ambulance came shortly thereafter, it took about 15- 20 minutes. He contended that he followed the ambulance to Kilome hospital about 5 km away, the deceased was attended to and he was there
 24. PW3 was PC Raphael Muinde attached to Makindu Police Station, he had file No. IAR(F) 12/14 in respect of an accident along Nairobi- Mombasa highway on 22/3/2014 at a place called Masimba involving motor vehicle KBY 333N Mercedes Benz Saloon and KBL 961Q ZC 6268 Sachman trailer. He stated that the motor vehicle KBY 333N had 3 passengers; Charles Gakui, Stella Moraa and Yusuf Maraga, the driver.
 25. He produced the police abstract and stated that investigations were conducted and it was concluded the driver of motor vehicle KBY 333N was to blame. He told the court that the file was taken to Makindu Law Court and the Court determined that deceased driver was to blame. A sketch plan was drawn and it showed positions of motor vehicles at the time of the accident, the Mercedes Benz was on its lane as one faces Nairobi and the lorry on the other lane heading Mombasa direction. He produced the police file as an exhibit.
 26. Upon cross- examination, he stated that the police file contains a sub- file from ODPP, that from the report, driver of the trailer was heading to Mombasa direction and as per the report and sketch plan, he was on his lane. At the scene, there was a fleet of motor vehicles and the Mercedes was overtaking at high speed making the driver of the trailer to stop in the middle of the road. He stated that the



statement says that the driver of the Mercedes Benz drove off the road on the left of the trailer before all of a sudden getting back to the road, he rammed the Prime mover if the trailer at an angle line before coming to a halt. It says the driver of trailer observed everything as the trailer had stopped. He indicated that no negligence is attributed to the driver of KBL and the inquest blamed driver of Mercedes Benz and stated he was author of his own misfortune.

27. He also stated that he was not the Investigating officer and did not visit the scene.
28. Upon Re-examination, he stated that the owner if the motor vehicle KBY is not indicated.

Defence Case

29. The 1st defendant did not call any witness
30. At this point, the Plaintiff made an application to withdraw the case against the 3rd defendant which was allowed.
31. The 2nd defendant called two witnesses. DW1 was Pius Kithinji Njeru working with Zakache Security Services as an investigator. He said that he made the report dated 30/5/2014 which he produced. He indicated that he was not involved in the investigations and the author of the report has since left the company. The conclusion was that motor vehicle KBL 961Q caused the accident as he was overtaking.
32. Upon cross examination, he stated that the investigations confirmed occurrence of the accident and KBY 333N was owned by Satwart Sign Dhanjal, the driver was Yusuf Mayanga . That Charles Gakuhi Sikamoi is listed as a victim who did not survive the accident. His next of kin is listed as Anastasia Waithera Wanjiku and a dependent Venessa Njoki Sikamoi. He stated that as per their investigations, the driver of KBL 961Q was to blame. He indicated that they recorded the statement of KBY 333N who confirmed the motor vehicle was his and he had sent Charles Gikuhi to pick it from Mombasa.
33. Upon cross examination by Ms. Kavita, he stated that he did not prepare the report, he did not hear the police testify and the report was prepared on 30/3/2014. At that time, the case was pending under investigations. He could not confirm what the police said.
34. The statement by the 2nd Defendant was adopted as his evidence. In the unsigned statement, he states that he bought Mercedes Benz KBY 33N from Rosika Trading Company in Mombasa, insured it with GA Insurance Limited Mombasa branch and then sent his friend Charles Gakuhi to bring the vehicle to Mombasa. He was involved in an accident at Makindu along Mombasa Nairobi road.

Trial Court Judgment

35. The Trial Court made its determination based on three issues. As to who was liable for the accident, it was found that the only eye witness being the driver of lorry KBL 961Q ZC 6268 was not called to testify and the evidence of the police (PW3) and the investigators (DW1) was not based on any direct but circumstantial evidence. The trial court found that each driver contributed to the accident. Liability was apportioned at 50% for each driver. It also found that there was no evidence that the deceased who was a passenger seated on the back seat contributed to the accident. The 2nd defendant was also found vicariously liable as he admitted in his statement that he had sent the deceased to collect his motor vehicle KBT 333N from Mombasa. There was no evidence that the driver in control of the motor vehicle was not authorized driver or that he was not competent to driver.
36. The trial court awarded damages as follows;
 - a. Pain and suffering Kshs 50,000



- b. Loss of expectation of life Kshs 150,000
 - c. Loss of dependency using a multiplication of 25 years and a net income of 77,000 and a dependency ration of 2/3 awarded Kshs 15,400,000
37. As regards special damages, the trial court found that the same had not been proved as pleaded and the funeral expenses were not supported by any documents, and awarded of Kshs 80,000 as a reasonable amount for burial/funeral expense. The court also awarded costs and interest to the Plaintiff.
38. In summary, judgment was entered in favour of the Plaintiff as follows;
- a. Pain and suffering Kshs 50,000
 - b. Loss of expectation of life Kshs 150,000
 - c. Loss of dependency Kshs 15,400,000
 - d. Funeral expenses Kshs 80,000
- Total KSHS 15,680,000
- e. Costs
 - f. Interest
39. Liability was apportioned at 50% each for the 1st and 2nd Defendant

The Appeal

40. Dissatisfied by this judgment, the 1st and 2nd appellants filed separate memorandum of appeal.
41. The 1st appellant's appeal was dated April 16, 2019 and sought the following orders;
- a. That the appeal herein be allowed and the judgment of the subordinate court be set aside and the suit in the subordinate court be dismissed with costs.
- Or in the alternative
- b. The quantum of damages be varied and reduced to the extent that this honourable court deems fit.
 - c. The costs of this Appeal Be Awarded To The Appellant in any event.
42. This appeal is founded on the following grounds, that;
- a. The learned trial magistrate erred in law and in fact in finding the appellant vicariously liable for the actions of the driver of motor vehicle registration number KBT 333N yet the instructions to drive the said motor vehicle as per the evidence on record had been issued by the deceased herein.
 - b. The learned trial magistrate erred in law and in fact in failing to find that the Appellant had no knowledge or the authority to drive given by the deceased to the driver of motor vehicle registration number KBT 333 N or the said driver was the deceased's agent.
 - c. The learned trial magistrate erred in law and in fact in considering other extraneous matters in respect of authority to drive motor vehicle registration number KBT 333N in his judgement.



- d. The learned trial magistrate erred in law and in fact in failing to consider and appreciate the judicial authorities submitted by the appellant on vicarious liability.
 - e. The learned trial magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before him and therefore finding the appellant liable.
43. The 2nd appellant's appeal is dated April 17, 2019 seeking the following orders that ;
- a. This appeal be allowed
 - b. The judgment of the honourable trial magistrate be set aside and/or substituted with a dismissal of case against the Appellant
 - c. The judgement of the honourable trial magistrate be set aside and/ or substituted with a lower apportionment of liability against the Appellant
 - d. The judgement of the honourable trial magistrate be set aside and/ or substituted with a lower award in quantum of damages
 - e. The costs of this Appeal and that of the trial court be awarded to the Appellant.
44. This appeal is founded on the following grounds, that;
- a. The learned trial magistrate erred in law and in fact in apportioning liability between the defendants at the ratio of 50:50
 - b. The learned trial magistrate erred in law and in fact in apportioning liability at 50% in light of the evidence adduced.
 - c. The learned trial magistrate erred in law and in fact by failing to take into account the evidence produced by PW3 exonerating the Appellant herein from blame.
 - d. The learned trial magistrate erred in law and in fact in awarding general damages under the Fatal Accident Act and Law Reform Act totaling to Kshs 15,680,000 which were inordinately high in the circumstances of the case.
 - e. The Learned Trial Magistrate erred in law and in fact in failing to take into consideration the Appellant's submissions and authorities on record on liability and quantum.
 - f. The learned trial magistrate erred in law and in fact in considering evidence that was never on record and issuing judgement on presumptions and issues not established in evidence.
 - g. The learned trial magistrate's judgment was unjust against the weight of evidence, submissions and authorities relied upon by the 1st defendant and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.
45. The appeals were consolidated canvassed by way of written submissions. For ease of reference, Dhanjal Singh Satawant is the 1st appellant and Shiva Carriers Limited the 2nd appellant.

1st Appellant Submissions

46. The 1st appellant filled submissions on February 1, 2022 in which counsel contended while relying on section 107 of the Evidence Act, that he who alleges must prove. It was submitted that from the evidence on record, the issue of liability was oscillating between the drivers of motor vehicle registration number KBL 961Q and KBY 333N and Yusuf Mayanga was driving KBT 333N. The 1st Appellant took issue vicarious liability and while relying on the cases of John Nderi Wamugi v Rubesh Okumu Otiangaka &



- 5 other* (2015)eKLR and *Equator Distributors v Joel Muriru & 3 others* (2018) eKLR. The 1st Appellant submitted that he did not issue any instruction to Mr. Yusuf who was the driver at the time of the accident but had sent Charles Gikuhi to bring the said motor vehicle that he had bought from Rosika Trading Company in Mombasa to Kisumu where he was based. Further, that Mr Yusuf and the lady on board the Mercedes Benz were strangers to him. It was reiterated that there was no employer-employee or principal-agent relationship between the appellant and the later Yusuf. The court was urged to find that the 1st appellant was not vicariously liable for the accident. To buttress this point, reliance was placed on the case of *Tabitha Ndithu Kinyua v Francis Mutua Mbuvi & another* (2007) & 2014.
47. On loss of dependency, the 1st appellant submitted that the Trial court used a multiplicand of 25 years instead of 29 years which was the age of the deceased at the time of his death. While relying on the case of *PNM v Telkom Kenya Limited & 2 others* (2015) eKLR it was submitted that the statutory requirement is 60 years.
 48. It was contended that PW1 stated that the deceased operated a clearing and forwarding company namely Rosika Trading Company Limited and this was buttressed in the police abstract dated May 2, 2014 and April 14, 2014. In the 1st appellants opinion, it was not certain whether the deceased would work at KRA until retirement age or stop working at KRA to concentrate on his company.
 49. The 1st appellant took issue with the dependency ratio of 2/3 and contended that the deceased was survived by the respondent and 8 months old child. That he was the breadwinner as per PW1's testimony and PW1 also contributed to the house expenses since she was working as an accountant at KPMG. It was submitted that a multiplier of ½ ought to have been applied. The 1st appellant indicated that he had no issue with the net income of the deceased being Kshs 77,000 after statutory deductions.
 50. It was submitted that failure to discount the award under the *Law Reform Act* from the ultimate award made a double award to the 1st respondent who was both a personal representative of the estate of the deceased and the dependent of the deceased. Reliance was placed on the case of *Paul Ouma v Sarah Akini and Monica Acheng Were (suing as the legal representative in the estate of Paul Otieno Were (Deceased))* [2018]eKLR.
 51. On special damages, it was submitted that PW1 did not ascertain the claim for funeral expenses or produce receipts for the same and thus the award of Kshs 80,000 was an error. Reliance was placed on the cases of *Judy Njura Kathuri (estate of Thomas Vubiru Agade v KPLC* [2017] eKLR, *James Thiongo Gitbiri v Nduati Njuguna* [2012] eKLR, *Marwanga Jeffern v Jeckton Ochieng* [2015] eKLR
 52. Lastly, it was submitted that the Trial Court did not take into account the statutory limit under the *Insurance (Motor Vehicle Third Party Risks), Act* cap 405 and awarded general damages beyond the limit.

2ND Appellant Submissions

53. The 2nd appellant, Shiva Carriers Limited, filed submissions on February 23, 2022 in which Counsel submitted on two grounds; liability and quantum.
54. On liability, it was submitted that PW2's evidence on the issue of liability was hearsay and should be disregarded as he was never in the list of witnesses for the police as evidenced by exhibit 10. That following investigations by police officers who visited the scene, the driver of motor vehicle registration KBY 333N Mercedes Benz Saloon case that the deceased herein was travelling in was to blame. It was submitted that the sketch plan produced by PW3 clearly indicated that motor vehicle registration no. KBL 061Q/ZC6268 trailer belonging to the 1st Defendant was on the left lane as one faces Mombasa general direction and therefore on its lane.



55. While relying on the covering report, it was submitted that that the driver of the Mercedes Benz instead drove off the road on the left side of the trailer, before all of a sudden deciding to get back on the road. He rammed the prime mover of the trailer at an angle before coming into a half, both vehicles caught fire due to the impact. He said it beat logic why Yusuf, the driver of motor vehicle registration KBY 333N could not have driven the car off the road completely as earlier attempted or into a nearby shamba and save lives. The Appellant submitted that Yusuf MARANGA drove his vehicle in a manner that was dangerous to other road users which caused his death and that of Charles Gikuihi Shikamoi And Skeeter Moraa Melehi.
56. It was submitted that from the sketch plan, the driver of the trailer did not in any way contribute to the occurrence of the accident and had in fact stopped to give motor vehicle KBL 333N a chance to be driven on his extreme left side of the road. Referring to the inquest, he contended that the court found that the driver of the Mercedes Benz was the author of his own misfortunes and recommended that the police file be closed. It was opined that the trial court ought to have apportioned 100% liability on the 2nd Defendant in CMCC No 77 of 2017. Reliance was placed on the case of *William Recha Songwa (suing as the father and legal representative of the late Manase Reche Songwa(deceased) v Multiple Hauliers (E.A) Limited and 2 others*, Appeal No 109 of 2010.
57. On quantum, it was submitted that Kshs 5,000 would be sufficient for pain and suffering as the deceased died the same day of the accident while relying on the case of *Richard Okutoyi v A.O. Bayasuf & Sons* Mombasa, HCCA No 29 of 1999.
58. It was submitted that Kshs 100,000 was fair and reasonable for loss of expectation of life. On loss of dependency, the appellant contends that the deceased and PW1 were living in a two income household and they both contributed equally to the household. He contended that there was no evidence that the deceased had another business and from his job as a revenue officer with Kenya Revenue Authority, he was earning a gross of Kshs 67,000. The court was urged to adopt a multiplicand ration 1/3 and a multiplier of 20 years due to unknown vagaries of life and the deceased was a public servant and had a net salary of Kshs 35,000. He opined that Kshs 2,800,000 would be sufficient and relied on the case of *Muthike Muciimi Nyaga (Suing as administrator of the estate of James Gitbinji Muthike (deceased) v Dubai Super hardware* (2021) eKLR.
59. As regards special damages, the court was urged not to make any award as the plaintiff pleaded Ksh 3,800, testified that she incurred Kshs 450,000 but did not produce any receipts to support her assertions. Reliance was placed on the case of *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Limited*, Court of Appeal at Kisumu Appeal no 88 of 2002.

Respondent Submissions

60. The Respondent filed consolidated submissions on 28th of September 2022 in which she submitted that nowhere in the defence did Dhanjal Singh Satwant deny knowledge of the driver of motor vehicle KBY No. 333N. In his pleadings, he acknowledged the driver of his motor vehicle but did not admit fault of the accident. From the report produced by the said appellant the particulars of the deceased are provided and it alleges that Yusuf Mayanga was not an employee of the insured. According to the respondent, from the report, the identity card belonging to Yusuf Mayanga was not seen and it is not clear who gave the information about him to the investigator. She opined that Yusuf Mayanga was an agent of the owner of the motor vehicle for the purposes of driving the vehicle to Kisumu. The court was urged to find that Yusuf Mayanga was an employee, servant or agent of Dhanj Singh Satwant She relied on the case of *Rubi Plastics Industries Limited v Khamis Changawa Konde* (20201) eKLR.



61. On liability, it was submitted that the investigator blamed the driver of the third party vehicle, Shiva Carriers Limited while the evidence of PW3 was that the driver of KBL 961 was to blame. The driver of KBY 333N is deceased while the driver of KBL 961 was not called to testify and neither was his statement adopted as evidence. Reference was made to the case of *Husein Omar Farah v Lento Agencies* (2006) eKLR.
62. While relying on the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie shoe store Limited* [2015] eKLR, It was submitted that from the evidence, the deceased was survived by his wife, an infant V.S.S and the deceased was also helping his parents who joined the proceedings as interested parties and who may not benefit directly from the estate of the deceased. Therefore the Trial court did not err in making that award.
63. On pain and suffering, it was submitted that the award was reasonable considering that the deceased was burnt alive and survived the injuries for a few hours. He contended that the amount for loss of expectation was conceded there being no submissions on the same.
64. On loss of dependency, it was submitted that the deceased was 29 years, had just married and started a family. That he had his whole life ahead of him and taking into consideration the vicissitudes of life, there was no evidence that the deceased suffered any lifelong health complications to make an accurate presumption that he would not have lived another 31 years and after 25 years that was used as a multiplier, he would still have 6 years to concentrate on other businesses for the benefit of his family. The Respondent contended that the multiplier of 25years was reasonable in the circumstances.
65. On the dependency ratio, it was submitted that a majority of the deceased income was focused on maintaining his family inclusive of his parents. While relying on the case of *Gordon Ouma Sunda & Another v Adan Abdikadir Omar & another* [2019] eKLR, the award of Kshs 2/3 was reasonable.
66. The court was urged to uphold the sum of Kshs 15,400,000 being a reasonable amount for dependency while relying on the case of Millicent Kuimuri case (*supra*) and *Eliud Papoi Papa v Jogneshkumar Rameshbai Patel & another* [2017]eKLR.
67. On the award being above the statutory limit, it was submitted that the balance ought to be obtained from the insured as has been held by courts. The case of *Justus Mutiga & 2 others v Law Society of Kenya and another* [2018] eKLR was cited.

Determination

68. I have considered both memoranda of appeal on record, the lower court record and the submissions of parties in this matter.
69. This is a first appeal and this court is not necessarily bound to accept the findings of the Trial Court but to make its own independent analysis of the record and the evidence before it noting that it did not have a chance to see nor hear the witnesses and deduce certain facts from their demeanor. This was observed in the case of *Selle v. Associated Motor Boat Co.* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular



circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

70. From the record, it is not in contention that an accident occurred on March 22, 2014 along Mombasa-Nairobi road around Masimba area involving a Schacman Prime Mover KBL 961Q ZC 6268 and a Mercedes Benz KBY 333N Benz that lead to the death of Charles Gikuhi Sikamoi (deceased) who was travelling as a passenger and was aged 29years old working for the Kenya Revenue Authority. The driver of the Mercedes Benz was one Yusuf Mayanga (Deceased). The Respondent did produce copy of records from the National Transport and safety authority indicating that the owner of KBL 961Q Prime mover is Diamond Trust Bank Kenya Limited And Shiva Carriers Limited and the owner of KBY 333N Mercedes Benz is Dhanjal Singh Satwant. This has not been denied by the Appellants. In addition, it is not in contention that the deceased, Charles Sikamoi is survived by the wife, Anastacia Waithera Waceke And Venessa Njoki, the daughter.
71. The issues that then arise are summarized as that of liability, quantum, vicarious liability, special damage and costs.
72. The appeal will be analyzing whether each appellant has proved their case on a balance of probability. In the case of *Evans Nyakwana v. Cleophas Bwana Ongaro* (2015) eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

73. The question of what amounts to proof on a balance of probabilities was discussed in the case of *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 where it was stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

Liability

74. Let us begin with the issue of Liability. The trial court apportioned liability at 50:50 between the appellants which they have both asked this court to relook into. In *Khambi and another v. Mabithi and another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.”



75. According to PW3, the driver of the Mercedes Benz was to blame for the accident while according to DW1, the owner of the lorry was to blame for the accident as he was overtaking. According to the extract of Makindu PMCC Inquest No. 6 of 2015, E.M Muiru, Resident Magistrate stated as follows;

“the court upon reading the police file does note that the driver of the Mercedes Benz KBY 333M was the author of his own misfortune and the court does hereby recommend that the police file be closed”

76. According to the covering report in the police file, the driver of the Sachman motor vehicle while driving saw an oncoming sakiib motor vehicle which was overtaking and he applied emergency brakes. The oncoming car decided to overtake on the far off side (pedestrian lane). He hit the edge of the road and swerved back to the lane where he hit and collided head on with the trailer. It concludes by saying the driver of the Mercedes Benz contributed greatly to the accident.

77. In an event where there are two conflicting reports as to who is to blame for the accident. As was noted in *Lakhamshi v Attorney General*, (1971) E A 118, 120 for such cases which -

“It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

78. I therefore find that in the circumstances, the trial court erred in apportioning liability at 50:50. On a balance of probability, the blame tilts more to the side of the appellant. I therefore substitute liability at 80:20 for the appellant against the respondent.

79. On the issue of vicarious liability, the general presumption is that a vehicle is being driven by the owner of the said motor vehicle or by his authority. This was the position in *Kenya Bus Services Limited v. Humphrey* [2003] KLR 665; [2003] 2 EA 519 where the Court of Appeal held that:

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.”



80. In this case, the Mercedes Benz was being driven by Yusuf whom the 1st Appellant contends he had no employer-employee relationship with. In *Melitus v. Kericho Highland Service Co. Ltd* [1971] EA 318, it was held that:

“Whereas there are cases where the ownership of the vehicle is a material point in deciding the owner’s liability for injuries caused by the driver to a third party, the liability is based not on ownership as such, but on the relationship of the driver to the owner. If there is no nexus between the two, as (for instance) when the vehicle has been stolen, ownership by itself would not create any liability. The question of ownership if material is so only as a factor affecting the more fundamental question of the relationship between the defendant and the driver of the vehicle.”

81. In the case of *Joel v Morison* [1834] EWHC KB J39 it was held that:-

“The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master’s implied commands, when driving on his master’s business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master’s business, the master will not be liable.”

82. It is the 1st appellants evidence that he bought a car from Mombasa and sent his friend, Charles Sikamoi to drive it to Kisumu. He contends that the driver and the other passenger in the car are strangers to him. Unfortunately all the occupants of the Mercedes Benz passed away and it is not clear how the three ended up in the motor vehicle. The 1st Appellant is liable for the collateral negligent act of the deceased by allowing a third party to drive the car. He was still in the course of his duty as an employee. Perhaps if he did not allow someone else to drive, then the accident would not have occurred. There may have been no relationship between the driver and the 1st Appellant but there was a relationship with the Respondent and that is the person whose claim was before the court.

83. As to whether the award for General damages should be reduced or substituted, *Woodruff v. Dupont* [1964] EA 404 it was held by the East African court of appeal that:

“The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.”



84. In *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioko* [2006] eKLR where the Court of Appeal stated that:

“It is generally accepted by Courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case. As Lord Morris stated *H. West & Son Ltd v Shephard* [1964]AC 326 at page 353- ‘The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such the present it is natural and reasonable for any member of an Appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.’”

85. I find no reason to interfere with the award of General damages that was awarded by the lower court.
86. As regards special damages, the Respondent pleaded for Kshs 3,800 and during the hearing indicated that they incurred Kshs 450,000 as funeral expenses but did not produce receipts of the same nor give a breakdown of what the money was for. Special damages must be pleaded and proved, this is trite law. I therefore substitute the award of special damages to that which was proved, Kshs 3,800.
87. In the premises, the Appeal partly succeeds and each party shall bear its own costs.

Disposition

88. The Trial court judgment is substituted as follows;
- a. Liability is apportioned at 80:20 between the 1st and 2nd appellant
 - b. Damages are awarded as follows;
 - a. Pain and suffering Kshs 50,000
 - b. Loss of expectation of life Kshs 150,000
 - c. Loss of dependency Kshs 15,400,000
 - d. Funeral expenses Kshs 3,800Total KSHS 15,593,000
 - e. Costs
 - f. Interest

It is so ordered.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS THIS 16TH FEBRUARY, 2023 (VIRTUAL/PHYSICAL CONFERENCE)

M.W. MUIGAI

JUDGE



In The Presence Of:

Ms Kavita - For The Appellant

No Appearance - For The Respondents

Geoffrey/patrick - Court Assistant(s)

16/2/2023

Ms Kavita: If the Appeal has partly succeeded can we have stay of execution?

COURT: The stay of execution is granted for 30 days.

M.W. MUIGAI

JUDGE

16/2/2023

