



**Kool v Kinyanjui & another (Suing as the Legal Representative
of the Estate of James Muniu - Deceased) & another (Civil Appeal
E005 of 2022) [2023] KEHC 17630 (KLR) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E005 OF 2022
F GIKONYO, J
MAY 22, 2023**

BETWEEN

DANIEL KILESI KOOL APPELLANT

AND

**MARY NJERI KINYANJUI & ZACHARIA MUNYOROKI (SUING AS
THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES MUNIU -
DECEASED) 1ST RESPONDENT**

DAVID WAINAINA 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. S. Mungai (C. M)
Delivered on 17th May 2022 in Narok CMCC No. 134B of 2022)*

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No 134B of 2022 delivered on the May 17, 2022 in which the trial court made awards as follows: -
 - a. Pain and suffering Kshs 30,000/=
 - b. Loss of expectation of life Kshs 100,000/=
 - c. Loss of Dependency Kshs 2,714,400/=
 - d. Special damages = 130,550/=Total = 2,974,950/=
- e. plus, cost of this suit and interest on all the awards calculated at the prevailing court rates.



2. The memorandum of appeal dated May 29, 2022 cited fourteen (14) grounds of appeal which relate to; i) liability and ii) quantum of damages.

Background

3. The suit arose from a road traffic accident, which occurred along Narok-Bomet road near Texas petrol station on March 20, 2020 involving a motorcycle registration no xxxx and a motor vehicle registration no xxxx. The motor vehicle knocked the motor cycle. The Pillion passenger sustained fatal injuries.
4. The issue of liability was determined in CMCC NO 135 OF 2020 whose evidence the parties adopted. The said suit dealt with the suit accident where the plaintiff was the rider of the suit motor cycle carrying the deceased who succumbed to the injuries which he sustained as a result of the appellant's suit vehicle knocked the motorcycle. The defendant was found to be 100% liable for authoring the suit accident. No liability was attributed to the third party or the respondent.

Appellant's Case

5. The Appellant did not testify or call any witnesses.
6. The appellant, however, submitted in support of the appeal, that the third party did not have a valid riding license and had no insurance for his motor cycle. That the third party in his testimony confirmed that his motor cycle was uninsured.
7. The appellant submitted that failure to by the police to charge the third party does not absolve the third party rider from blame and does not make him a competent rider as he did not possess a license or a certificate of insurance.
8. The appellant submitted that PW2, confirmed that he was not an investigating officer and did not have the police file. According to the police abstract did not blame the appellant. Therefore, the 1st respondent should have tendered evidence that the appellant was to blame.
9. The appellant submitted that, the mere fact that he did not call any witness does not shift the burden of proof from the 1st respondent.
10. The appellant urged this court to dismiss the 1st respondent's case with costs to the appellant and/ or contributory negligence in ratio of 50: 50 between the third party and the appellant.
11. The appellant submitted on quantum; that life expectancy is 45 years or even less. Further that this court should take into account the uncertainties and vicissitudes of life.
12. The appellant urged this court to work out loss of dependency as follows;
$$\text{Kshs } 13572 \times 15 \times 12 \times 2 / 3 = \text{Kshs } 1,628,640/=$$
13. The appellant submitted that where the beneficiaries are the same under both the Law Reform Act and Fatal Accidents Act, then the award of loss of expectation of life ought to be deducted.
14. The appellant urged this court to find that an award of Kshs 70,000 as reasonable loss of expectation of life.
15. The appellant relied on the following authorities;
 - i. *Selle Vs Associated Motor Boat Company Limited*
 - ii. *Jacob Momanyi Orioki V Kevian Kenya Ltd [2018] eKLR.*



- iii. [Godfrey Wamalwa Wamba & Another V Kyalo Wambua \[2018\] eKLR](#)
- iv. Section 103B of the [Traffic Act](#)
- v. [Joseph Muthuri V Nicholas Kinoti Kibera \[2022\] eKLR](#)
- vi. [Calistus Juma Makhanu V Mumias Sugar Co Ltd & Another \[2021\] eKLR.](#)
- vii. [Henry Shikhonga Wamukoya \(Suing as the Administrator / legal representative of the estate of Elphas Wakhule Wamukoya\(deceased\) V Makokha Sylvestr \[2019\] eKLR.](#)
- viii. [Nandwa Vs Kenya Kazi Ltd \(1988\) eKLR](#) cited from Hendisian Vs Henry I Jentins & Sons (1970 AC 282 E 301.
- ix. [Njoki Kamau & Another V Eliud Mburu Mwaniki \[2021\] eKLR.](#)
- x. [Lakhamshi Vs Attorney General \(1971\) EA 118, 120 spry VP.](#)
- xi. [Anne Wambui Ndirithu Vs Joseph Kiprono Ropkoi 7 Anor \(2004\) eKLR.](#)
- xii. [Rose Munyasa & Another V Daphton Kirombp & Another \[2014\] eKLR.](#)
- xiii. [Wilson Karuta Gatana V Beth Nyaruiru Karega \[2021\] eKLR.](#)
- xiv. [Simon Mwangi Mureithi V Martin O Shikuku & 3 Others \[2005\] eKLR.](#)
- xv. [Awale Transporterd Limited V Dorcas Wamaita Maina & Another \[2021\] eKLR.](#)
- xvi. [Alex Koech & Another V Mary N Odhiambo \(suing as the legal representative of the estate of Erick Juma Odhiambo , deceased\) \[2018\] eKLR](#)
- xvii. [Asba Mohamed Swaleh V Kennedy Bindi Muriungi & Another \[2021\] eKLR](#)
- xviii. [Kemfro Vs AM Lubia 91982-1988\) KAR 727.](#)
- xix. [Gesare Ogega V Aiko Kebiba \(Suing as the father and legal representative of the estate of Alice Bochere Aiko - deceased \) \[2015\] eKLR](#)
- xx. [Godana Guyo Halake & Another V Patrick Ndeli Ndoli & Another \[2017\] eKLR](#)

Respondent's Case

16. The evidence of PW1, David Wainaina and PW2, police officer in Narok CMCC no 135 of 2020 was adopted in this matter.
17. PW3, Mary Njeri the Respondent testified in support of her case.
18. The respondent testified that the deceased was aged 35 years. The deceased died in hospital. He was a business man as a mechanic earning Kshs 30,000/= monthly. She however did not have documents to support her claim on income.
19. The respondent submitted that the learned trial magistrate's determination on liability was well guided and this court should uphold it. If the appellant was dissatisfied with the determination on liability they ought to have appealed the decision in CMCC NO 135 of 2020. Further that the appellant did not present any tangible evidence before the court.



20. The respondent submitted that the learned magistrate's award on pain and suffering was well guided and urged this court to uphold the same. The deceased died while receiving treatment at Narok County Hospital and as such did not die on the spot.
21. The respondent submitted that the learned magistrate was well guided by the submissions of the parties as well as the regulations of Wages (Agricultural Industry) (amendment) order 2018 while making the award for loss of dependency by using a multiplicand of 2/3 the proposed minimum wage was Kshs 13,572.90. The deceased was a bread winner, a multiplier of 25 years which was informed by the retirement age in Kenya that is 60 years. As such the calculation of; $13,572 \times 25 \times \frac{2}{3} = 2,714,400/=$
22. The respondent submitted that the award of Kshs 100,000 is sufficient compensation for loss of expectation of life. The appellant in the lower court submitted that Kshs 100,000/= would be sufficient compensation for loss of expectation of life.
23. The respondent relied on the following authorities;
 - i. [Mary Nderi Marigii Versus Peter Macharia 7 Anor \[2016\] eKLR.](#)
 - ii. [Gateway Insurance Co Ltd V Jamila Suleiman & Another \[2018\] eKLR.](#)
 - iii. [Motex Knitwear Limited Vs Gopitex Knitwear Mills Limited Nairobi \(Milimani\) HCCC NO 834 of 2002](#) cited the case of Autar Singh Bahra and Another Vs Raju Govindji, HCCC No 548 of 1998
 - iv. [Halsbury's laws of England 4th, Ed Vol 12](#) (10 page 348-883.
 - v. [Paul Kioko V Samuel G Karinga & 2 Others \[2012\] eKLR.](#)
 - vi. [Mildred Aori Odunga Vs Hussein Dairy Limited \[2010\] eKLR.](#)
 - vii. Alex Koech & Another V Mary N Odhiambo (suing as the legal representative of the estate of Erick Juma Odhiambo, Deceased 0 [2018] eKLR.

Analysis And Determination

Duty of court

24. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.
25. The first Appellate Court should therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of Selle & Anor – Vs- Associate Motor Boat Co Ltd 1968 EA 123.

Issues

26. I have considered the written submissions by the appellant and the respondent. I have also considered the pleadings. Arising therefrom, are two issues, namely: liability and quantum of damages.

Liability

27. On the one hand, the appellant blames the third party (the rider of the motor cycle) for the accident mainly because he did not have a riding license. According to them, he was not competent rider. The appellant however, did not call any witness.



28. On the other hand, the respondent and the third party blames the appellant for the accident for overtaking and hitting the motor cycle.
29. How do courts resolve such tension in evidence?
30. The court depends on the facts of the case- entertain the account of each side; and thereafter, weigh, check and put the two streams of evidence into the fact-base scale and the law, thereby arriving at a valid and just result.
31. The court will draw upon the evidence to determine where liability lies.

Of police abstract

32. Notably, important evidence which would substantiate these allegations by the parties herein is the result of the police investigations. But, PW2 merely stated that the matter is pending investigations. It is lamentable that the police file does not have the report on results of investigations.

Other evidence

33. That notwithstanding, the evidence show that the accident herein involved a motor vehicle and a motorcycle. The respondent and the third party stated that the motor vehicle was heading towards Narok direction while the motor cycle was heading towards the Bomet direction. The motor vehicle while overtaking knocked the motorcycle on its lane. The rider of the motor cycle in his statement stated that he tried to avoid the accident by riding on the far end of the road but the driver was unable to control his motor vehicle because he was driving at a high speed.
34. The evidence by the PW1 called by the respondent supports the narrative by the respondent. When I place the evidence on legal scale of balance of probabilities, it is more probable than not that the motor vehicle driver was overtaking and hit the rider on the rider's correct lane. Before overtaking, the driver is under a duty to confirming that the road is clear. The driver herein did not do so, thus, he overtook dangerously and carelessly.
35. According to the third party, he tried to avoid the accident by riding at the extreme end of the road but the appellant was unable to control his vehicle because he was driving too fast. This piece of evidence was not controverted.
36. Therefore, despite denial by the appellant, and assertion that the rider did not have a riding license, I am unable to find any evidence to lay blame of the accident upon the third party rider. The appellant did not call any evidence to support their claim that the rider contributed to the accident. The evidence show that the driver of the motor vehicle herein was solely to blame for the accident.
37. Accordingly, the trial court did not err in finding the driver of the motor vehicle 100% liable. The appeal on liability fails and is dismissed.

Quantum

38. According to the Court of Appeal in *Bashir Ahmed Butt vs Uwais Ahmed Khan (1982-88) KAR* :-
'An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.'



39. The appellant has challenged the award of Kshs 100, 000/- for loss of expectation of life. He died in hospital. This amount is almost conventional now. In any event, I do not find it to be excessive. I uphold it.
40. No challenge has been made on the award of pain and suffering at Kshs 30,000/-. Death occurred at the hospital as the deceased was receiving treatment in relation to the injuries sustained from the accident. This award is reasonable. I uphold it.
41. The major contest is in the award of the dependency, and particularly the multiplier and multiplicand. The dependency ratio was not however disputed, and I will adopt it.

Calculation of dependency

42. Simply put; the formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants. See *Beatrice Wangui Thairu -Vs- Hon Ezekiel Barngetuny & Another Nairobi HCCC No 1638 Of 1988 (UR)*

Multiplicand

43. The Appellant has not challenged the issue of the multiplicand. The trial court adopted the multiplicand of Kshs 13572/= being the minimum wage as per the regulations of wages (Agricultural Industry) Amendment) order 2018.
44. I have looked at the oral testimony of PW3. Indeed, there is no proof of the exact earnings of the deceased. However, it was proved that he was a mechanic and was working for gain. It is possible for one to hold a paid job without formal documentation on the actual income or earnings by the person, particularly in informal employment. See [*Jacob Ayiga Maruya & Another V Simeon Obaya \[2005\] eKLR*](#)
45. In this case, there was proof that the deceased was a mechanic as stated by PW3 and earned therefrom. This fact was not disputed. Practice is that minimum wage can be adopted in the circumstances. The trial magistrate adopted the minimum wage of Kshs 13,572/= as per the regulation of wages (Agricultural Industry) Order 2018. In light of the evidence adduced, the trial court was justified in adopting minimum wage of Kshs 13,572/= per month.

Multiplier and dependency ratio

46. The Appellant has not challenged the dependency ratio but was dissatisfied with the multiplier applied by the trial court. I have considered the opposing submissions in this respect.
47. The appellant submitted that a multiplier of 25 years awarded by the trial magistrate exceeded the current life expectancy of 45 years. The deceased was 35 years at the time of his death. Taking into account the uncertainties of life the appellant proposed a multiplier of 15 years.
48. Nothing guarantees employment up to 70 years of age. Frailty of human body or ill health or other eventualities may curtail a person's employment. Similarly, private companies are known to retire employees at an early age or the statutory age provided for civil servants. Therefore, in the discretion of the court, a multiplier of 25 years is reasonable.
49. I therefore, uphold the award on dependency made by the trial court.



50. The award on special damages was not challenged and therefore, the same is upheld.
51. All the other awards not specifically set aside remain as awarded by the trial court.
52. The appeal on both quantum and liability fails.
53. The respondent shall have costs and interest on the award.
54. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
22ND DAY OF MAY, 2023**

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F. GIKONYO M.

JUDGE

IN THE PRESENCE OF:

Mr. Kasaso – CA

Tanga for Matiri for appellant

Gikenye for Respondent - absent

