



**Crispas v Mboya & another (Suing as the legal representatives & administrators of the Estate of Francis mboya Ezekia - Deceased) (Civil Appeal E262 of 2020) [2023] KEHC 27389 (KLR) (Civ) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27389 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E262 OF 2020**

**DO CHEPKWONY, J**

**JULY 4, 2023**

**BETWEEN**

**COLLINS DEMBA CRISPAS ..... APPELLANT**

**AND**

**EMMY MAKHUNGU MBOYA ..... 1<sup>ST</sup> RESPONDENT**

**PURITY SAVALA MBOYA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES & ADMINISTRATORS OF THE  
ESTATE OF FRANCIS MBOYA EZEKIA - DECEASED**

*(Being an Appeal from the Judgment and decree of Hon. B. J. Ofisi (RM)  
delivered on 7th October 2020 in Milimani CMCC No. 7509 of 2012.)*

**JUDGMENT**

**Background**

1. The Plaintiffs/Respondents initiated this suit before the trial court by way of a Plaint dated 20<sup>th</sup> July, 2018, filed in court on 22<sup>nd</sup> August, 2018. The Respondents sought the following reliefs against the Defendant/ Appellant:-
  - a. Damages for lost years and dependency, loss of expectation of life and pain and suffering.
  - b. Kshs 207,255.00
  - c. Costs of this suit.
  - d. Interest on (a) and (b) above.



2. In their Complaint dated 26<sup>th</sup> February 2018, the Respondent pleaded that the deceased was a lawful pedestrian along Waiyaki way at Loresho junction when the Appellant managed and or controlled the Motor Vehicle Registration Number KBV 241Q so negligently, carelessly and or recklessly that it encroached on the way of the deceased, hit him and threw him off the road causing him fatal injuries.
3. According to the Respondents, the accident was caused by the negligence on the part of the Appellant as particularized in their Complaint as follows;
  - a. Driving at a speed that was excessive in the circumstances.
  - b. Driving without due care and attention to the safety of other road users.
  - c. Failing to keep any or any proper look or at all.
  - d. Failing to keep the vehicle on the road.
  - e. Driving on the wrong side of the road.
  - f. Failing to slow down, swerve, stop or in any other way act so as to avoid the accident.
4. According to the Respondents, it is as a result of the accident that the deceased's estate suffered special damages amounting to Kshs 207,255/=.
5. The deceased died at the age of 47 years and had worked as a Waiter at Gipsy bar and restaurant where he was earning a salary of Kshs 15,000/= and Kshs 10,000/= in tips per month. He was survived by five dependents, namely; Emmy Makungu Mboya, Nelson Miti Mboya, Purity Savala Mboya, Sharon Ingumbe Mboya and Carlos Chimaisi Mboya.
6. In response to the Respondents' Complaint, the Appellant entered appearance and filed statement of defence dated 29<sup>th</sup> November, 2018 filed in court on even date. The Appellant denied the contents of the Complaint as pleaded and attributed the negligence or contribution of the accident to the deceased. The Appellant particularized the negligence as follows;
  - a. Failing to exercise reasonable care and attention while crossing and walking on the road.
  - b. Failure to use pedestrian foot path for his own safety while crossing the road.
  - c. Failing to move aside and or exercise due regard and give way to Motor Vehicle Registration Number KBV 241Q.
  - d. Walking in the lawful path of motor vehicle KBV 241Q.
  - e. Failing to heed to the warning signs of the Motor Vehicle Registration No KBV 241Q.
  - f. Being reckless and disregarding his own safety.
  - g. Being generally careless and negligent.
  - h. Failure to use the nearest pedestrian foot bridge for his own safety *volenti non fit injuria*.
7. The Appellant asked the trial court to dismiss the suit with costs.

### **Evidence**

8. The matter proceeded for hearing on 3<sup>rd</sup> August, 2020. In her testimony, PW1, Emmy Makungu Mboya adopted her witness statement dated 22<sup>nd</sup> August, 2018 as her evidence in-chief. She produced the documents as they appear in the list of documents dated 20<sup>th</sup> July, 2018 as Exhibits 1-18. It was



her evidence that she received a call from her daughter on 26<sup>th</sup> February, 2018 whereby she informed her that they had been involved in a road traffic accident and the deceased had been rushed to Kikuyu Hospital. She rushed to Kikuyu Hospital and found the deceased had succumbed. PW1 went on to state that on 27<sup>th</sup> August, 2018, a post mortem examination was conducted. On the same day she reported the accident at Kabete Police station and was issued with a funeral gathering permit together with a burial permit. It was her evidence that the deceased worked as a waiter at Gipsy Bar and Restaurant where he was earning a monthly salary of Kshs 15,000/= and Kshs 10,000/= in tips. The deceased died at the age of 47 years and leaving behind five dependents.

9. In cross examination, PW1 stated that the name indicated in the receipts Exhibits 3 and 4 is her brother in law Josphat Chimaisi and she had given him the money to pay. The receipt for the coffin was not produced and the transport costs were given as Kshs 100,000/= as evidenced in the produced bus hire agreement. She stated that the employment verification letter was not dated and she did not avail the pay slip. She also stated that she did not produce receipts to prove that the deceased earned Kshs 10,000/= as tips.
10. During re-examination, PW1 stated that she was not issued with the pay slips but was issued with a letter confirming that he was their employee. She also produced documents confirming that the children were in school.
11. PW2-Purity Savala Mboya, stated that she is a student at Kenya Medical Training College. She adopted her witness statement dated 20<sup>th</sup> July, 2018 as her evidence in-chief. In her evidence, PW2 stated that she was with the deceased on 26<sup>th</sup> February, 2018 whereby they had taken her daughter for an eye checkup at Lions eye clinic at Loresho. That they had looked on both sides of the road and established that it was safe to cross and started crossing. The road was clear and there were no vehicles on the road. That suddenly Motor Vehicle Registration Number KBV 241Q appeared and knocked the deceased as she managed to jump away from its reach.
12. When cross examined, PW2 stated she has crossed that road at Kangemi several times and that on that day they crossed at a designated area where people cross. She also stated that there is a footbridge a few meters away. In re-examination, she reiterated that they crossed at a designated area for crossing.
13. DW1-Collins Demba Crispas adopted his witness statement dated 14<sup>th</sup> March, 2019 as his evidence in chief. He stated that he was driving at 50kph in the inner lane of the dual carriage way. That as he approached Loresho junction, there was a bus that had stopped partially on his left side on the road and slightly ahead. He said that when the bus started moving, he had caught up with it, when suddenly a male pedestrian appeared running in front of the bus. DW1 stated that he applied emergency brakes and tried to swerve to the right but the distance was too short and unfortunately the pedestrian was hit by his left side panel. It was his evidence that he did not expect the pedestrian to dash in front of the moving bus. He blamed the Plaintiff for causing the accident by disregarding the traffic rules and for failing to ascertain that the road was clear before attempting to cross thus endangering his life and safety as well as the safety of other road users.
14. On cross examination, DW1 stated that he was the driver when the accident occurred. He confirmed that he hit the deceased. He also stated that he never met PW1 and PW2 at the police station. During re-examination, he stated that he could not avoid the accident.
15. At the close of the hearing, parties filed their respective submissions in support and in opposition of the case. And upon careful consideration of the evidence and the submissions of the parties, the trial court delivered its Judgment on 7<sup>th</sup> October, 2020. In the said Judgment, the trial court found the Appellant 100% liable for the accident and proceeded to award damages for the Respondents as follows;



Loss of dependency -Kshs 2,000,000/=

Pain and suffering -Kshs 100,000/=

Loss of expectation of life -Kshs 100,000/=

Special damages -Kshs 66,020/=

Total Kshs 2,226,020/=

16. The Respondents were also awarded costs of the suit and interest at court's rate from the date of the Judgment.
17. The Appellant was dissatisfied with the Judgment and decree of the Trial court and proffered an appeal before this court via a Memorandum of Appeal dated 16<sup>th</sup> October, 2020, where the Appellant raises the following grounds of appeal;
- a. That the learned Magistrate erred in law and in fact in apportioning 100% liability against the appellant herein.
  - b. That the learned Magistrate erred in law and in fact in relying in facts without any proof supporting the same.
  - c. That the learned Magistrate erred in law and in fact in finding that no evidence was adduced to show negligence on the part of the deceased.
  - d. That the learned trial Magistrate erred in law and in fact in awarding damages of Kshs 100,000/= for pain and suffering.
  - e. That the learned Magistrate erred in law and in fact in awarding a global sum of Kshs 2,000,000/= for loss of dependency.
  - f. That the learned Magistrate erred in law and in fact in awarding Kshs 2,266,020/= as quantum without any justification to warrant the amount and in total disregard to recent authorities in comparison.
18. The Appellant prays for the following reliefs: -
- a. That the Judgment/decree of the Nairobi Resident Magistrate Hon. B. J. Ofisi dated 7<sup>th</sup> October, 2020 be reviewed and or set aside.
  - b. That the Respondents do bear the costs of this appeal.
19. This appeal was canvassed by way of written submissions. The Appellant complied and filed his submissions dated 10<sup>th</sup> May, 2022 together with a list of authorities dated 20<sup>th</sup> May, 2022. There are no submissions on record on behalf of the Respondents at the time of writing this Judgment. This court will proceed to consider the submissions in determination of the six grounds of appeal raised.

### **Analysis and Determination**

20. Having considered the record of appeal, the grounds of appeal, the submissions by the appellant and the authorities relied upon and the court finds the following issues relevant for determination;
- a. Whether the apportionment of liability at 100% against the appellant was proper; and
  - b. Whether the trial court erred in adopting the global sum approach instead of the multiplier approach.



21. This is a first appeal from the trial court. It is trite law that this court has a duty as the first appellate court to reconsider the evidence, evaluate it and arrive at its own findings. This position was enunciated in the decision of *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, where the court held that:

“.....this 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.”

22. This court’s responsibility is to reconsider the evidence that was previously evaluated by the lower court in the original jurisdiction. This position is anchored under Rule 29 (1) of the [Court of Appeal Rules, 2010](#) which provides as follows;

“On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the court shall have power;

- a. To re-appraise the evidence and to draw inferences of fact;
- b. In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.”

23. Additionally, this court will not normally interfere with a finding of the lower court unless the same is based on wrong principles of fact or law. This was the position as espoused in the case of *Mbogo & another v Shah* [1968] EA 93;

“I think it is well settled that this Court will not interfere which an appellate court should interfere in the exercise of the discretion of a judge with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

24. Further, in the case of *Butt v Khan* [1982-88] KAR 1 it was held that:-

“An appellate court will not disturb an award for damages unless it is 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”.

25. Therefore, being guided by the aforementioned principles, this court proceeds to review the facts and evidence presented before the trial court while keeping in mind that this court did not have the benefit of hearing the witnesses testify before the trial court.



## Whether the apportionment of liability at 100% against the appellant was proper?

26. In determining this issue, it is important to note that the legal burden of proof lies on the person who alleges. This burden is provided for under Section 107 (1) of the *Evidence Act*, as follows:

“Whoever desires any court to give Judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

27. Once the Plaintiff has discharged its burden of proof, it is the Defendant’s responsibility to submit evidence to counter the assertions made by the Plaintiff. This is provided for under Section 109 and 112 of the *Evidence Act* as follows;

Section 109 thereof provides that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

Section 112 provides that;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

28. In the case of *Kirugi & another v Kabiya & 3 others* [1987] KLR 347, the Court of Appeal held that:

“The burden on a Plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. The Plaintiff must adduce evidence which in the absence of rebuttal evidence by the Defendant convinces the court that on a balance of probabilities it proves the claim.”

29. There is no question that an accident happened that resulted in the death of the deceased based on the facts presented. The question that calls for answers by this court is “who was to blame for the accident”.

30. PW2 testified that she was with the deceased at the time the accident occurred on 26<sup>th</sup> February, 2018. She testified that they looked on both sides of the road and established that it was safe to cross and started crossing. According to PW2, the road was clear and there were no vehicles on the road but suddenly, Motor Vehicle Registration Number KBV 241Q appeared and knocked the deceased as she managed to jump away. In cross examination she confirmed that they crossed the road at a designated area where people cross and confirmed that there was a footbridge few meters away.

31. On his part, DW1, the Appellant herein, testified that he was driving at 50kph in the inner lane of the dual carriage way when suddenly a male pedestrian appeared while running in front on the bus. That he applied emergency brakes and tried to swerve to the right but the distance was too short and unfortunately the pedestrian was hit by his left side panel. It was his evidence that he did not expect the pedestrian to dart in front of the moving bus. He blamed the Plaintiff for causing the accident by disregarding the traffic rules and for failing to ascertain that the road was clear before attempting to cross thus endangering his life and safety as well as the safety of other road users. In cross examination he confirmed that he hit the deceased.

32. I have perused the record and note that the police abstract issued on 3<sup>rd</sup> April, 2018 on the results of investigations indicates the same as pending under investigations abbreviated as P.U.I. Further, no



police officer was called to testify to clarify on the status of the pending investigations. Based on the police abstract, there was no evidence as to who was to blame for the accident. Such evidence was pivotal to buttress the Respondents' case.

33. In this court's considered view, the evidence of PW2 who was at the scene of the accident needed to be corroborated by at least the evidence of the Investigating Officer to explain the results of investigations. As a result, it is this court's humble opinion that the Respondents did not adequately establish the Appellant's negligent acts or omissions, a result of which the court is unable to hold the Appellant entirely accountable for the accident at 100%. Therefore, on the issue of liability, the court is of the considered view that 80% be shouldered by the Appellant and 20% on the Respondents' part would be appropriate in the circumstances.

### **Whether the trial court erred in adopting the global sum approach instead of the multiplier approach?**

34. The choice of adopting the mode of assessing damages is a matter of court's discretion. In the case of *Board of Governors of Kangubiri Girls High School & another v Jane Wanjiku Muriithi & another* [2014] eKLR, which cited with approval the case of *Cornelia Eliane Wamba v Shreeji Enterprises Ltd. & others*- HCCC No 754 of 2005, where it was held as follows;

“The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.”

35. Regarding the question of damages granted in accordance with the *Law Reform Act*, this court is guided by the case of *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR, where the court noted that:-

“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

36. In the instant appeal, none of the witnesses stated whether the deceased passed away on the spot or how long it took for him to pass away. This court is therefore guided by the certificate of death which shows the place of death as Waiyaki way, Kangemi. It is thus appropriate to find that the deceased died at the scene of the accident simply put on the spot. In the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, the court stated as follows: -

“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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

37. In the case of *Antony Njoroge Ng'ang'a (Legal representative of the Estate of the late Fred Nganga Njoroge aka Fred Ng'ang'a Njoroge) v James Kinyanjui Mwangi & 2 others* [2022] eKLR, where the



deceased died on 28<sup>th</sup> April 2018 while the accident occurred on 27<sup>th</sup> April 2018, the court awarded Kshs 30,000/= for pain and suffering.

38. In view of the above decisions, this court believes that the Trial Court's Judgment of Kshs 100,000/= was excessively high for pain and suffering in light of the aforementioned precedents and in light of the fact that this court has been urged to exercise its discretion when considering the award by the trial court. The court therefore finds that an award on pain and suffering was on the higher scale and vary the same with an award of Kshs 50,000/=.

39. In regard to loss of dependency, the trial court adopted the global approach and awarded Kshs 2,000,000/=. The trial court relied on the case of *Mary Khayesi & another v Mwilu Malungu & another* [1999]eKLR, where the court stated that;

“As regards the income of the deceased, where there are no bank statements showing his earnings, it is better to opt for the principle of lump sum award instead of estimating his income in the absence of proper accounting books.”

40. In the instant appeal, although the deceased worked as a Waiter at Gipsy bar and Restaurant, there was no evidence of earnings. The Respondents produced an undated letter from the deceased's employer but no pay slip was presented to confirm his earnings. Therefore in the absence of such evidence, this court finds that the trial court was right in adopting the global ward approach in assessment of damages.

41. In the case of *Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased)* [2020] eKLR,

“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.”

42. Accordingly, the court allows the appeal partially and proceeds to set aside the lower court Judgment and substitutes it with a Judgment for the Respondents as follows;

Loss of dependency -Kshs 2,000,000/=

Pain and suffering -Kshs 50,000/=

Loss of expectation of life -Kshs 100,000/=

Special damages -Kshs 66,020/=

Total Kshs 2,176,020/=

Less 20% -Kshs 435,204/=

Balance -Kshs 1,740,816/=

43. The Respondents are awarded interest on the Judgment before the trial court from the date of Judgment till payment in full.

44. Each party shall however meet their own costs of this appeal.



It is so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4TH DAY OF ...JULY... 2023.**

**D.O CHEPKWONY**

**JUDGE**

In the presence of:

No appearance for and either party

Court Assistant – Mwenda

