



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sirya v Bakari & another (Legal Representatives of the Estate of Martin Kenga Karisa (Deceased))  
(Civil Appeal E119 of 2023) [2024] KEHC 12064 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12064 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL E119 OF 2023  
SM GITHINJI, J  
OCTOBER 8, 2024**

**BETWEEN**

**JUSTUS KAHINDI SIRYA ..... APPELLANT**

**AND**

**SIDI KARISA BAKARI ..... 1<sup>ST</sup> RESPONDENT**

**NICHOLUS KENGA KARISA ..... 2<sup>ND</sup> RESPONDENT**

**LEGAL REPRESENTATIVES OF THE ESTATE OF MARTIN KENGA KARISA  
(DECEASED)**

*(Being an appeal from the Judgment of Hon. J. Ongondo - SPM  
delivered on 19th July, 2023 in Malindi CMCC No. E318 of 2022)*

## **JUDGMENT**

1. Before the trial court was a claim commenced by a plaintiff filed on 14<sup>th</sup> November, 2022, in which the Respondents herein (the plaintiffs in the trial court) sued the appellant herein seeking general damages, special damages together with costs of the suit and interest thereon for a road traffic accident that occurred on 15<sup>th</sup> July, 2022 where the deceased was lawfully riding Motorcycle Registration No. KMFH 589V. The circumstances of the accident being that the defendant and or his authorized driver, agent and or servant so negligently drove, managed and or controlled motor vehicle Registration No. KCD 795X that the same lost control, veered off its lane and hit the motor cycle and as a result the deceased sustained fatal injuries.

### **The Appeal**

2. The appeal before this court is against the lower court finding that the defendant was 100% liable for the accident. The judgment was delivered on July, 19, 2023. Aggrieved by the judgment, the appellant filed a memorandum of appeal on the 2<sup>nd</sup> day of August, 2023. The grounds of appeal are that: -



1. That the Learned Trial Magistrate erred in law and fact and misdirected himself in using the multiplier method of computing loss of dependency when there was no evidence to support a finding on the appropriate multiplier and multiplicand thereby giving an inordinately high award.
  2. That the Learned Trial Magistrate erred in law by awarding an excessive award as pain and suffering which award is unsupported by law.
  3. That the Learned Trial Magistrate erred in law by awarding an excessive award as loss of expectation of life which award is unsupported by law.
  4. That the Learned Trial Magistrate erred in law by awarding an excessive award as funeral expenses and special damages which award was erroneous in the circumstances.
  5. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate and consider the Appellant's submissions on quantum of damages.
- 3 The appellant seeks to have the appeal allowed and the Judgment of the lower court against the Appellant set aside wholly, and the costs of both the appeal and the suit in the lower court be awarded to the Appellant.

### **Summary of the Evidence**

4. PW1 PC Jonathan Mwendwa No. 86096 from Malindi Traffic Section told the court that the accident which occurred on 15<sup>th</sup> July, 2022 at Taifa Millers along Posta- Uhuru Garden Road involved motor vehicle registration number KCD 795X Honda driven by Justus Kahindi Sirya and motorcycle registration KMFH 589V Boxer Bajaj ridden by the Plaintiff.
5. It is his testimony that the driver of the motor vehicle lost control while driving on the opposite direction and veered off the road where he hit an electricity post. That as a result the rider of the motorcycle sustained serious injuries and was rushed to Malindi hospital where he succumbed to injuries. He also testified that he visited the scene with PC Ngome, drew sketch plans and eventually after investigations, blamed the driver of KCD 795X for causing the accident.
6. He stated that the point of impact was towards Posta, that the deceased was on his lane, the motor vehicle veered off its lane to the deceased lane. That the deceased tried to veer to the left to avoid the accident but the vehicle was at a high speed hence the collision. The police abstract dated 1<sup>st</sup> September, 2022 was produced as Plaintiff Exhibit No. 1.
7. On cross-examination, he told the court that he was co-investigating officer with PC Ngome. He confirmed that he drew the sketch plan but they are not filed. He also stated that the impact was at the front right side of the vehicle from middle. He also added that the motor vehicle hit an electricity pole.
8. PW2 Sidi Karisa Bakaritold the court that she recorded a statement dated 31<sup>st</sup> October, 2022. It was adopted as her evidence in chief. The filed documents were produced as Exhibits as per the list of documents dated 31<sup>st</sup> October, 2022.
9. On cross examination by Mwangeka Advocate, she stated that the deceased was an electrician. That the motorcycle belonged to him and made Kshs. 20,000 as an electrician and Kshs. 2,500 from the boda boda business.
10. PW3 Nicholus Kenga Karisaadopted his statement dated 31<sup>st</sup> October, 2022 as his evidence in chief.



- 11 DW1 Justus Kahindi Siryaadopted the contents of his statement dated 20<sup>th</sup> January, 2023 as his evidence in chief. He further stated that on the day of the accident he was in the company of his cousin David Thoya Baya. He was driving motor vehicle registration No. KCD 795X on his lane of travel along Uhuru Garden Avenue near Taifa Maize Millers depot. According to him, motor cycle Registration Number KMFH 589V joined the main road from a feeder road from his right side of the road and abruptly and without any indication rode to the left side of the road where he was driving.
- 12 He stated that to avoid the accident, he immediately swerved to his right-hand side of the road and later saw the rider of the motorcycle fly off the motorcycle which never came into contact with his motor vehicle as he had swerved to avoid collision. His further testimony is that his motor vehicle then hit an electricity pole which was on the right-hand side of the road and stopped.
- 13 DW2 Daniel Thoyastated that he had recorded a statement dated 20<sup>th</sup> January, 2023 which was adopted as his evidence in chief. It is his further testimony that on the day of the accident, he was in the company of his cousin, the defendant who was driving motor vehicle registration number KCD 795X. He was driving on his lane along Uhuru Garden Avenue near Taifa Maize Millers depot. That in the process, motorcycle registration no. KMFH 589V joined the main road from a feeder road from the right side of the road abruptly and without any indication rode to the left side of the road where the vehicle he was in was being driven.
- 14 He told the court that to avoid the accident, his cousin immediately swerved to the right side of the road and to his surprise, he saw the rider of the motorcycle fly from the motorcycle. Further, that the motor vehicle hit an electricity pole and as a result of the impact he lost consciousness.

### **Analysis and Determination**

- 15 I have carefully considered the appeal herein, it's grounds and the parties' submissions. The court is alive to the fact that it did not hear the witnesses testify nor did it observe their demeanor. This court is also alive to the fact that an appeal is in a way a retrial and the court must therefore reconsider the evidence, evaluate it and draw its own conclusions. In Peter M. Kariuki -vs- Attorney General (2014) eKLR the court held inter alia as follows:

We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”

- 16 In my view, the main issues for determination are;
1. Whether the trial court awarded the respondents amounts that were inordinately high under the headings of loss of dependency, pain and suffering, loss of expectation of life and special damages; and
  2. Whether the appellant was 100% liable for the accident.
- 17 In this appeal, it is clear that the determination of the appeal revolves around the questions of both liability and quantum. In my view, the burden of proof was on the respondent to prove his case on balance of probabilities. Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:

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.”



- 18 In the case of Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another (2005)1 EA 334, the Court of Appeal held that:

As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

- 19 On liability, I have perused the record and note that the accident in question occurred at 3:00a.m according to the witnesses that testified. The evidence on the record is to the effect that the appellant lost control of the vehicle, veered off his left lane and knocked the deceased on the right side of the road. DW1’s evidence is that his motor vehicle then hit an electricity pole which was on the right-hand side of the road and stopped. On cross-examination, he stated that they were going on opposite directions.
- 20 In my view, the accident happened when the appellant lost control and swerved to the Respondent’s Lane to avoid hitting a wall on his left. The trial magistrate did not therefore err in finding the appellant 100% liable for the accident.
- 21 On the issue of quantum, the general principle is that in the assessment of damages a trial court exercises its discretion and the appellate court will not normally interfere with such exercise of discretion unless the trial court either acted on wrong principles, or awarded so excessive or so inordinately low damages or the court considered irrelevant matters or failed to take into consideration relevant matters and as a result arrived at a wrong decision. See *Butler –vs – Butler* (1984) KLR 225 and *Kemfro Africa Ltd t/ a Meru express & Another – vs – A.M. Lubia and another* (1982 – 88) IKAR727). The claim herein is based on the *Law Reform Act* and the *Fatal Accidents Act*. In assessing damages under the *Fatal Accidents Act* Ringera Judge as he then was, in the case of *Beatrice Wangui Thaiiru – vs – Hon. Ezekiel Bargerung & another Nairobi HCCC No. 1638 of 1988 (UR)* stated as follows; -

The principles applicable to an assessment of damages under the *Fatal Accidents Act* are too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

- 22 On the head of loss of dependency, the Trial Magistrate took into consideration the age of the deceased which was 48 years, used a multiplier of 25 years taking into account that the deceased would have worked until the age of 75 years which is acceptable for persons in business. This court also appreciates that the deceased left a wife and children and in my view the used ratio of 2/3 was therefore reasonable. It is trite law that this court can only interfere with the discretion of the trial court if the sum awarded is inordinately low or excessively high. I have carefully examined the record of the trial court and it is vivid that the learned Resident Magistrate considered all the relevant factors including decisions in respect of similar cases.
- 23 On the head of pain, suffering and loss of expectation of life, it is evident that the deceased died while undergoing treatment at the hospital. The generally accepted principle is that very nominal damages



will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case suffering was slightly prolonged since he died the same day while undergoing treatment and I therefore find the award justifiable.

24 On special damages and funeral expenses; It is evident that as per the plaint the Respondent pleaded a sum of Kshs 100,050/= and attached receipts displaying the funeral expenses incurred, and the court fees for the grant. The sum was proved satisfactorily.

25 In the end and on the basis of the foregoing reasons, this appeal is in want of merit; It is dismissed in its entirety with costs to the respondents.

**JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**S.M. GITHINJI**

**JUDGE**

In the Presence of; -

Miss Ondieki holding brief for Mr Omwenga for the Appellant.

Mr Kilonzo for the Respondent.

Miss Ondieki; We pray for 30 days Stay of Execution.

Mr Kilonzo; -There had been orders of Stay. My client has really suffered. We pray the funds held as security be released to the Respondent.

Miss Ondieki; -We need 30 days to advise our client and may be get further directions.

Court;-In a matter for Judgment the funding has mostly two possibilities. Parties should have instructions in advance on whichever possibility. The stay order is declined.

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**S.M. GITHINJI**

**JUDGE**

**8/10/2024**

