



Cooperative & 3 others v Kamau (Suing as the Personal Representative of the Estate of James Mwangi Kamau - Deceased) (Civil Appeal 112 of 2023) [2024] KEHC 14777 (KLR) (Civ) (14 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14777 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CIVIL
CIVIL APPEAL 112 OF 2023
CM KARIUKI, J
NOVEMBER 14, 2024**

BETWEEN

**UNAITAS SAVINGS AND CREDIT COOPERATIVE 1ST APPELLANT
JOSEPH WARUINGI WANGECI 2ND APPELLANT
JOSEPH MAINA KAITHUMA 3RD APPELLANT
JOHN KARANJA MAINA 4TH APPELLANT**

AND

HANNAH WANJIRU KAMAU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES MWANGI KAMAU - DECEASED) RESPONDENT

JUDGMENT

1. The Respondent herein filed a suit against the Appellant vide a plaint dated 8th November 2021 in the Principal Magistrate Court at Engineer. The suit was for prayers for damages, costs, and interest of the suit. The said suit arose from allegations of negligence by the Appellant's authorized drivers, servants, and/or agents. The Respondent proceeded to enumerate the particulars of negligence, which the Appellant expressly denied vide their statement of defense dated 17th November 2021.
2. The matter proceeded to a full hearing before the Honorable D.N. Sure (SRM). The Respondent, in advancing her case, called three witnesses, whereas the Appellant called one witness. Judgment was entered in favor of the Respondent on 12th January 2021, with the Court awarding general damages in the sum of Kshs. 1, 565,629. The Appellant, being aggrieved by the said Judgment, lodged the instant Appeal vide a memorandum of Appeal dated 15th July 2022. The Appellant cited the following grounds of Appeal:-



- i. That the Honorable Learned Magistrate erred in law and, in fact, in finding the 1, 2, 3, and 4 Appellants liable to the tune of 100%.
 - ii. The Honorable Learned Magistrate erred in law and fact, disregarding the overwhelming evidence tendered by the defense and further failing to apportion liability between the Appellants and the deceased.
 - iii. The Honorable learned Magistrate erred in law and fact, failing to find that the deceased was the author of his misfortune.
 - iv. The Honorable learned Magistrate erred in law and, in fact, relied on extraneous evidence to decide on liability.
 - v. That the Honorable learned Magistrate erred in law and fact in the assessment of damages payable.
 - vi. That the Honorable Learned Magistrate erred in law and fact in awarding loss of expectation of life to the Respondent amounting to Kshs. 200,000/-
 - vii. That the Honorable Learned Magistrate erred in law and fact in adopting a multiplier of 42 years for a 28-year-old deceased and failing to take into consideration the uncertainties of life
 - viii. That the Honorable learned Magistrate misdirected herself by failing to consider the evidence and the submissions by the Appellants while arriving at the Judgment.
3. The parties were directed to canvass Appeal via submissions.

Appellants' Written Submissions

a. Did the Appellants demonstrate their case on a balance of probability?

4. The Appellant submitted that the principal prosecution witness in the matter was the eye witness who testified as PW2. He told the Court that he was riding behind the deceased at a distance of about 300 meters when he saw an oncoming motor vehicle registration KCK 139F overtaking a motor vehicle that was in front of it. It was the PW2's further evidence that before the driver of motor vehicle KCK 139F could fully rejoin his lawful, the motorcycle registration KMFL 741M hit the rear side of the motor vehicle KCK 139F.
5. Further, during cross-examination, PW2 told the Court that the point of the collision on the road between motorcycle registration KMFL 741M and motor vehicle KCK 741F was near the white lane on the motorcycle lane. PW-1 was PC. George Odhiambo, who produced the police abstract. He stated in evidence that he got to the scene of the accident about 45 minutes after it had occurred. It was also his evidence that the motorcycle registration KMFL 741M was lying across the road (See page 62, lines 10-12 of the record of Appeal). It was his further evidence that the deceased had been moved from the road as passersby and well-wishers tried to resuscitate him.
6. Upon cross-examination, PW1 stated that the motorcycle registration KMFL 741M was lying across the road, touching both lanes.
7. On the other hand, it was stated that the 4th Appellant adopted his witness statement and testified that he was driving along the Njabini Magumu road on his lawful lane when the motorcycle registration number KMFL 741M, which was on the oncoming lane, lost control and hit his motor vehicle on the rear right side. He further testified that he was not overtaking any motor vehicle or trying to rejoin the road. He further testified that the rider fell in the middle of the road during his cross-examination. He



further testified that he left the scene when he realized that the other boda riders might harm him as they were getting agitated by the minute.

8. Reliance was placed on William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526, Sally Kibii And Another vs. Francis Ogaro [2012] eKLR

b) Did the Appellant establish negligence by the Respondent?

9. The Appellants contended that the Respondent states that the accident was fortuitous and occurred without any negligence on the part of the deceased. Apart from the fact that the accident took place and in the absence of any corroborative evidence of an independent eye witness, the evidence of PW2 as to how the accident has been controverted by the evidence of DW1, who also witnessed the accident.
10. Reliance was placed on Florence Rebecca Kalume vs. Coastline Safaris & Another [1996] eKLR, Starpack Industries vs. James Mbithi Munyao [2005] eKLR, Civil Appeal No.57 of 2007 Nzoia Sugar Company Limited vs David Nalyanya [2008] eKLR.

c) Did the Appellant prove her case on a balance of probability?

11. It is the Appellants' submission that the Respondent did not prove their case on a balance of probability. Reliance was placed on Sections 107 & 109 of the Evidence Act, Kiema Muthuku V Kenya Cargo Handling Services

d) Duty of the Appellate Court

12. The Appellant submitted that the trial court, as the honorable trial magistrate, acted upon the wrong principle and made an award that was inordinately high, warranting disturbance by the honorable Court. Reliance was placed on Butt v. Khan [1981] KLR 349, Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR
13. It was argued that in as much as the award of general damages is an exercise of the Court's discretion, such discretion must be exercised with the guidance of similar cases. Reliance was placed on Odinga Jacktone Ouma vs. Maureen Achieng Odera [2016] eKLR

Loss of expectation of life

14. As regards the award for loss of expectation of life, the Appellant proposed the sum of Kshs. 70,000/= relying on the case of David Bore vs. Johnson Masika (2004) eKLR, where the Court did not make an award under the Law Reform Act because the same would amount to a duplication of awards since an award had already been made under the Fatal Accidents Act. The Appellants further urged the honorable Court to apply the same rule in the current suit.
15. Further reliance was placed on Kemfro vs C.A.M. Lubia & Olive Lubia (1982-1988) KAR 727, Chen Wembo & 2 Others, Vikk & Another (suing as the legal representatives and administrators of the estate of CRK (Deceased) [2017] eKLR
16. They urged the Court to assess downwards the award of under this head to Kshs. Seventy thousand from that of Kshs. 200,000/- and find the same to have been excessive in the circumstances.

Loss of dependency.

17. As for the loss of dependency, the trial court adopted a multiplier of 42 without giving any reasons. The Appellant submitted for the adoption of 22 years as the multiplier. The Appellant relied on the Court's decision in Henry Lamata & Anor vs. Gladys Makena Gitonga & Ano. (2018) eKLR, where



the Court reviewed a multiplier of 32 years to 22 years while taking into account that life expectancy has gone down over the years. They urged the Court to review the multiplier to 22 years as there was no evidence that the deceased was in good health and that he would have lived to get to sixty years.

18. In conclusion, the Appellants averred that the honorable Magistrate misdirected herself by failing to consider the Appellants' evidence on liability and failing to consider the Appellants' submissions. They prayed that the Court be pleased to assess the trial court's award downwards under the multiplier and loss of expectation of life awardable to the Respondent and that the Respondent pays the costs of this Appeal and those of the trial court.

Respondent's Submissions

19. Ground 1, 2, 3, 4 - the Honorable Learned Magistrate erred in law and fact in finding the 1st, 2nd, 3rd, and 4th Appellants liable to the tune of 100%.
20. It was submitted that the trial magistrate was correct in finding the Appellants jointly and severally liable in full regard to the evidence produced by both parties. The award was arrived at after the learned Magistrate carefully examined the evidence admitted. The witnesses for the Respondent provided a clear picture as to how the accident occurred. PW2, who was an independent witness, saw the Appellant's motor vehicle overtaking carelessly and, in trying to avert the accident, negligently rammed against the deceased's motorcycle. The collision occurred in the lawful lane of the rider(deceased)
21. PW I, who was the Investigating Officer Corporal George Odhiambo, testified that the deceased's body was on its rightful lane and produced a sketch plan showing there were indeed blood stains on the rider's lawful lane. The Respondent's motor vehicle was not in the accident scene as the driver left fearing for his safety.
22. It was DW1's evidence that he was driving towards Magumu, and the rider was in the opposite direction. He stated that the motorcycle hit the lorry on the right side and averred he was not overtaking. Further, he left the lorry at the accident scene and never returned. It was averred that the defense did not avail any independent witness to corroborate their version of events as to the occurrence of the accident and did not avail any evidence (inspection certificate) showing that the lorry was hit from behind.
23. The Respondent contended that the Burden of proof on the Respondent was discharged and was well proved on a balance of probabilities. The Burden of proof thus shifted to the Appellants to disprove the same.
24. Section 107, 109 & 112 of the *Evidence Act*, Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334
25. It was asserted that the independent witness PW2 painted a picture that did augur with the sketch maps and the point of collision on the lorry. DW1 was at a loss to explain why the collision had occurred at the deceased's lawful lane and urged the Court not to rely on the sketch maps. The deceased was not the author of his misfortune but rather a victim of the Respondent's driver's careless driving. Further, the learned Magistrate was correct in having found that DW1 was unhelpful to the Court in establishing what had happened and why the collision was on the deceased's lane, as in line with the sketch maps.
26. The Respondent argued that the Appellants' had failed to demonstrate how the Learned Magistrate relied on extraneous evidence. The learned Magistrate relied on the evidence tendered by the witnesses for the Respondent as well as that of the Appellant's driver.



Ground e, f, g & h

Pain and suffering.

27. They prayed for the award of Kshs. Fifty thousand for pain and suffering to be upheld.
28. Reliance was placed on the cases of *Acceler Global Logistics Co Ltd v Beatrice Syonzau Mwasya and another* (Both suing on behalf of the Estate of Mwanzia Muthama Munguti (Deceased) [2020] eKLR, *Sukari Industries Limited vs Clyde Machimbo Juma, Homa Bay HCCA No. 68 of 2015* [2016] eKLR

Loss of expectation of life

29. The Respondent concurred with the lower Court's decision and urged this honorable Court to allow the same in consideration of inflation. The deceased died aged 28 years and had prospects of living longer. Reliance was placed on *Cromwell Mzame v Zablon Mwanyumba Lalu* (Suing as Administrator of the estate of Allen Warito Lalu (Deceased) & another [2022] eKLR, *Patrick Kariuki Muiruri & 3 Others vs Attorney General* [2018] eKLR

Loss of Dependency

30. The Appellants challenged the use of 42 years as the multiplier, Kshs 24,000/ as the multiplicand, and a dependency ratio of 1/3. On the multiplier, it was averred that the Appellant contended that the multiplier was inordinately high; nevertheless, the Respondent relied on the case of *John Zakayo vs Crown Bus Services* (2021) eKLR. In the instant case, the Court adopted the multiplier by noting that the deceased was 28 years old and a businessman, operating his motorbike, and would remain in his work until the age of 70.
31. On multiplicand, it was submitted that the deceased was a motorbike operator, and documentation was provided to show a receipt for the purchase of the motorbike as well as the delivery note. The Respondent further testified that the deceased was earning around Kshs. 1000 per day, which would translate to Kshs 6,000 a week and which would translate to Kshs.24,000 a month. The Court agreed with the defendant's proposal of Kshs 7,240.95 as the multiplicand, and the same is not opposed. Reliance was placed on *Joseph Ndirangu Thuo & another v Kamau Ngugi* (suing as the legal administrators of the estate of Peter Waweru) [2019] eKLR, *Peter Ngari Njeru v Alchanger Njue Kithogo & Josphat Njue Suing Legal Representatives of Eugenio Muchori Njue Deceased* [2014] eKLR
32. Further, the dependency ratio of 1/3 was unchallenged by the Appellants, and the Court was urged to adopt the same.
33. The Respondent argued that both the Appellants and Respondent were afforded an opportunity to file their respective submissions before the trial court. The trial court took into consideration the submissions filed as the Judgment itself does, in fact, make inferences about them.
34. On double compensation, they relied on *Kemfro Africa Limited t/a "Meru Express Services (1976) Another v. Lubia & Another (No. 2)* [1987] KLR 30, *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased)* [2020] eKLR
35. In conclusion, it was stated that the Appeal by the Appellants lacks merits, and the same should be dismissed with costs to the Respondent.



Analysis and Determination

36. Having carefully considered the evidence adduced before the trial court in its entirety, the grounds of Appeal, the Judgment of the learned trial magistrate, and the parties' submissions filed herein together with all the authorities cited, the main issue that arises for determination is on liability and quantum.
37. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR, the Court of Appeal stated that;
- “An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it, and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”
38. Further, in *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;
- “While an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.”
39. The Appellants asserted that the Honorable Learned Magistrate erred in law and, in fact, in finding the 1, 2, 3, 4 Appellants liable to the tune of 100% and in disregarding the overwhelming evidence tendered by the defense and further failed to apportion liability between the Appellants and the deceased.
40. The Burden of proof as per Section 107 (1), 109, and 112 of the *Evidence Act* states 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.”
41. In the cases of *Nandwa vs. Kenya Kazi Ltd* [1988] KLR 488 and *Regina Wangechi vs. Eldoret Express Co. Ltd* [2008] eKLR, the Court held that:-
- “In an action for negligence, the Burden is always on the plaintiff to prove that the negligence of the defendant caused the accident. However, if in the course of the trial, there is proven a set of facts that raises a prima facie case inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favor unless the defendant provides same answer adequate to displace that inference.”
42. It is undisputed that a road traffic accident did occur on 14th February 2021 along Nyahururu- Njabini Road at Musibao area involving motorcycle registration no. KMFL 741M and Isuzu lorry registration no. KCK139F, the lorry herein, and that the motorcycle rider died as a result of the accident.
43. According to PW1, he stated that he could not ascertain who was to blame for the accident because the scene had been tampered with. However, he produced a sketch plan. PW2 testified that the lorry was heading to Haraka while the rider was in the opposite lane. He stated that it was the lorry that was overtaking, and before he could rejoin his lane, the motorbike hit the rear side of the road. Further, he stated that the motorcycle tried to evade the lorry, but it was too late, and the point of collision was at the rear side of the lorry.



44. On the other hand, DW1 testified that he was driving towards Magumu, and the rider was in the opposite direction. He stated that before the motorcycle passed him, it hit the lorry on the right back side at the very end. He denied overtaking and or trying to rejoin the road.
45. Accordingly, from the evidence presented before the trial record, the lorry and motorcycle were heading in opposite directions. Taking into account PW2's evidence, who was the only independent witness, and the sketch map produced, I agree with the trial magistrate's finding that the sketch map on the point of collision with the lorry supports PW2's account of how the accident occurred. Additionally, I agree with the trial court's finding that the deceased could not have hit the lorry on the rear right side if he had maintained his lane and that the lorry must have been at an angle when the collision occurred.
46. Furthermore, I find PW2's testimony to be persuasive as to how the accident occurred. In *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526, the Court stated that:-
- “In ordinary civil cases, a case may be determined in favor 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.”
47. Having weighed the evidence presented before the trial court on a balance of probabilities and taking into account PW2's evidence, which the Appellant did not disprove, I am satisfied that DW1 was to blame for the accident and, therefore, uphold the trial court's finding that that the Appellants were 100% liable jointly and severally.
48. Whether the trial magistrate misdirected herself in the assessment of damages or loss of expectation of life, the Appellants urged the Court to assess the award under this head to Kshs downwards. 70,000 from that of Kshs. 200,000/- and find the same to have been excessive in the circumstances. Further, it was argued that as for loss of dependency, the trial court adopted a multiplier of 42 years without giving any reasons. The Appellants submitted for the adoption of 22 years as the multiplier.
49. In the case of *Kemfro Africa Limited t/a 'Meru Express Services [1976]'* & Another vs. *Lubia & Another (No. 2)* [1987] KLR, the Court of Appeal held as follows:-
- “.... The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”
50. The conventional award for loss of expectation of life is Kshs.100,000/= as was observed by the Court in *Hyder Nthenya Musili & Another vs. China Wu Yi Limited & Another* [2017] eKLR where it was held as follows: -
- “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.... The generally accepted principle, therefore, is that very nominal damages will be awarded on these two heads of damages if the death follows immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000/= while for pain and suffering, the awards range from Kshs.10,000/= to



Kshs.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

51. The trial court awarded Kshs. 200,000/- under this head, which the Appellants contended was excessive and proposed Kshs. 70,000/-. Taking into account the case mentioned above and in view of the fact that the deceased did not suffer for a protracted period, I find that an award of Kshs. 200,000 was inordinately high and found that an award of Kshs. 100,000/- would have been more appropriate under the circumstances. Therefore, I substitute the award under loss of expectation of life from Kshs 200,000/= to Kshs 100,000/-
52. On the award for loss of dependency, the Appellants suggested the adoption of 22 years as the multiplier. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-
- Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents, and child if the person, whose death so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and every such action the Court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the Court by its Judgment shall find and direct.
53. The deceased was 28 years old at the time of his death. The trial court adopted a multiplier of 42 and a dependency ratio of 1/3 and awarded the Respondent Kshs. 1,226,479.6/-. The dependency ratio is 1/3 and multiplied by Kshs. 7,240.95/- was not contested by the Appellants, and I will, therefore, maintain the same.
54. Turning to the question of the multiplier, it is my view that the statutory retirement age in Kenya is 60 years, and therefore, it is my finding that the deceased had around 32 years of active working life. In that case, taking into consideration the vicissitudes of life, I find that the award of 42 years as the multiplier by the trial court was on the higher side, and I am inclined to reduce it to 32 years. Therefore, the award of loss of dependency shall be Kshs. 7,240.95/- x 12 x 32 x 1/3 = Kshs. 926,841.6/-
55. In the end, the Appeal herein partly succeeds, and the following final orders do as a result of this issue as follows: -
- i. Liability against the Appellants at 100%
 - ii. Pain and suffering – Kshs. 50,000/-
 - iii. Loss of expectation of life – Kshs. 100,000/-
 - iv. Loss of dependency – Kshs. 926,841.6/-
 - v. Special damages - Kshs. 99,150/-
- TOTAL-KSH 1,175,992
- vi. Each party shall bear their costs in the Appeal, whereas the Appellants shall bear the costs in the trial court.
 - vii. Appeal be heard on a priority basis.

JUDGMENT, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 14TH DAY OF NOVEMBER 024.



.....

CHARLES KARIUKI

JUDGE

