



**Better Short Messages Services v Ibembi (Suing as the Legal Administrator
of the Estate of Geoffrey Ongare Juma) (Civil Appeal E193 of 2024)
[2025] KEHC 13766 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E193 OF 2024
EN MAINA, J
SEPTEMBER 25, 2025**

BETWEEN

BETTER SHORT MESSAGES SERVICES APPELLANT

AND

ANNE OMWIRIHA IBEMBI RESPONDENT

**SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF GEOFFREY
ONGARE JUMA**

*(Being an Appeal against the Judgment of the Honourable S. Kandie (Resident
Magistrate) Mavoko Law Courts in CMCC no. E030 of 2022 delivered on 25/06/2024)*

JUDGMENT

1. This is an appeal on the twin issues of liability and quantum of damages awarded to the Respondent in the court below, for fatal injuries suffered by Geoffrey Ongare Juma (deceased). The said injuries are attributed to negligence on the part of the Appellant, his servants and/or employees. The Appellant however denied any negligence on his part and blamed the deceased for the accident.
2. Briefly, the Respondent's case was that on 25th January 2019, the deceased was driving a tuktuk registration number KTWB 549A along Namanga road when the driver of motor vehicle registration number KCL 031 R Lorry drove so negligently and carelessly that it ran over tuktuk KTWB 549A and as a result the deceased suffered fatal injuries and died on 26th January 2019.
3. PW1 who was the wife of the deceased stated that she was fully dependent on the deceased thus she sought for compensation. She testified that she did not witness the accident.
4. DW1 adopted his statement and upon cross examination he stated that he saw the tuktuk before the accident, that it turned up abruptly he tried to break but did not manage.



5. After considering the evidence and submissions by both sides the trial Magistrate found it a fact that defendant the appellant herein had acted negligently and found it 100 percent liable and awarded the Respondents a sum of Kshs.2,154,182/- broken down as follows: -Pain and suffering - Kshs. 50,000.00Loss of expectation of life - Kshs. 100,000.00 andLoss of dependency - Kshs 2,003,632.00Special damages - Kshs 550Costs and interest.
6. Aggrieved by the Judgment, the Appellant lodged this appeal on grounds that: -
 - a. The learned magistrate erred in both facts and in law in awarding excessive damages not commensurate with the injuries pleaded and without any legal or evidential justification.
 - b. The learned magistrate erred in both facts and in by not considering the written facts, evidence, submissions made and the case law filed by the appellant.
 - b. The learned magistrate erred by failing to apportion liability between the appellant and the respondent
7. The appeal was canvassed by way of written submissions.

Submissions

8. Learned Counsel for the Appellant submitted that the trial court erred in fact when it misinterpreted the evidence presented by the appellant thus made a finding that was unsupported by facts. Reliance was placed on the case of Jamal Ramadhan Yusuf & another v Ruth Achieng Onditi & another [2010] eKLR, Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR).
9. Counsel reiterated that the Appellant was not negligent and submitted that liability ought not to have been apportioned to the appellant but they were to be found liable, the deceased ought to have been apportioned 80 % liability for contributory negligence and urged the court to apportion liability equally.
10. On quantum it was submitted that damages under pain and suffering were manifestly excessive considering the deceased died on the spot and that an award of kshs 10,000 would be adequate. On loss of expectation of life it was submitted that an award of kshs 50,000 would have sufficed.
11. On the award of loss of dependency it was submitted that the trial court applied erroneous principles in calculation of the multiplicand and that 20 years was excessive considering the vicissitudes of life, given the nature of business the deceased engaged in and that a global sum of kshs 500,000 would suffice or that a multiplicand of 8 years would suffice.
12. On their part, learned Counsel for the Respondent raised three issues: apportionment of liability, the quantum of damages and the costs of the suit.
13. On liability it was submitted that it was rightly apportioned at 100 percent as the appellant was negligently driving on the road resulting to fatal injuries to the deceased.
14. Counsel cited the case of Nandwa vs Kenya Kazi Limited [1988] eKLR to support his submissions in regard to the doctrine of res ipsa loquitor.
15. Counsel also relied on the case of Stapley vs Gypsum Mines Ltd 2 (1953) AC 663, and submitted that the question of liability is determined by applying common sense to the facts of a particular case to be able to discern the party liable for the accident.



16. On damages reliance was placed in the case of Livingstone Rawyards Coal Co [1880] 5 app Cas 25 which elaborated the principles of assessment of damages .
17. Counsel cited the cases of Hannah Wangaturi Moche & Another vs Nelson Muya Nairobi HCCC No 4533 of 1993, Joseph Katuga Gathii v World Vision Kenya & others [2010] eKLR, Florence Gathee Miano v Mary Boniface & Jackson Wambua & another [2017] eKLR.
18. It was submitted that a multiplicand of 20 years was not excessive and that it was clear that the court took into consideration the factors it ought to, in awarding kshs 2,154,182

Analysis and determination

19. This appeal revolves around the issue of liability and the quantum of damages. As the first appellate court, I have considered and re-evaluated the evidence that was adduced in the court below while keeping in mind that I did not see or hear the witnesses. I have also considered the rival submissions of the learned counsel for the parties, the cases cited and the law.
20. In the case of Michael Hubert Kloss & another v David Seroney & 5 others [2009] KECA 146 (KLR) the Court of Appeal stated as follows:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. Gypsum Mines Ltd* (2) (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally”

21. In *Khambi and Another vs. Mahithi 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.”

22. There was no eye witness to the accident and as the driver of the tuk tuk died in the accident the only eye witness account is that of the driver of the Appellant’s vehicle. It was his testimony that the collision occurred when the deceased suddenly and unexpectedly and at a high speed made an abrupt right turn as if to make a u-turn and crossed into the path of his vehicle just before the vehicles could bypass each other. He stated that he tried all he could to avoid the accident but it was too late as the reaction time was too brief.



I therefore agree with the Trial Court's apportionment of 100 percent liability on the Appellant. That to me sounds farfetched as the accident could only have happened if the two vehicles were driving on opposite sides but not when they were following each other as they were. If the driver of the Appellant's vehicle was driving slowly as he alleged then he certainly would have managed to avoid the accident. It is my finding that had he acted properly then the accident would not have occurred. I am satisfied therefore that the learned magistrate properly arrived at his finding of 100 percent liability against the Appellant.

23. As regards quantum, in *Woodruff vs. 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 cases 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 reasonably be considered as arising 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.”

24. The appellant took issue with the quantum as awarded under different heads. On award for general damages for pain and suffering it was submitted that the damages were manifestly excessive considering the deceased died on the spot, and that Kshs. 10,000 would be an adequate award considering the suffering was not prolonged.

25. I am persuaded by the holding of the court in the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & Anor* (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR) that:

“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 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”.

26. I find that the sum of kshs 50,000 awarded in this case is within the range of what is accepted and is not inordinately high.

27. On general damages for loss of expectation of life it was submitted that kshs 50,000 would suffice but going by other decided cases, I find no reason to disturb the award of kshs 100,000 under that head.

28. The appellant also took issue with the award for loss of dependency.



The principles which ought to guide a court in awarding damages under this head were dealt with as follows by Ringera, J (as he then was), in the case of Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 where he stated-

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”

The deceased in this case was was 35 years old. He was a tuktuk and must have been earning an income although proof of that income was not proved. In Albert Odawa vs. Gichimu Gichenji Nakuru HCCA No. 15 of 2003, Koome, J (as she then was) expressed herself as hereunder:

“On the issue of loss of dependency, no evidence whatsoever was adduced before the trial court on the deceased’s earnings and thus the multiplicand of Kshs. 8,100.00 was without basis. In the absence of evidence of actual earnings of the deceased, the correct approach would have been to assess the deceased’s income by applying the basic salary, which is paid to unskilled workers, and this would also have been difficult, as the age of the deceased was not stated. So the best option would have been to apply the global award. So an award of Kshs. 400,000.00 awarded.”

29. In my view, a global figure ought not to be resorted to merely because the Plaintiff has failed to prove the deceased’s pleaded earnings. Global awards is generally suitable in cases involving minor and adolescents whose income cannot be ascertain. However, in cases of adults who, it is alleged are earning, there ought to be proof of the same. However, as was held by Court of Appeal in Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

30. In Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR it was held that where income is not proved, the income of an unskilled worker ought to apply. According to the Regulation of Wages (General) (Amendment) Order, 2015 the deceased would fall under the category of general workers whose minimum wage was be Kshs. 10,954.70.



31. Accordingly, I find that it was prudent for the trial court to adopt the minimum wage as it did. In this case, here was evidence that the deceased had some dependants his wife and children hence the award under the said head was proper.

32. The upshot is that I find no fault in the trial court's findings and thus this appeal is unsuccessful.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER, 2025.

E.N. MAINA

JUDGE

In The Presence Of:

Mr. Ndaiga for the Appellant

No appearance for the Respondent

C/A: Geoffrey

