

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO E098 OF 2023(CONSOLIDATED WITH
HCCA NO. 105 OF 2023)

JOSHUA MASILA CHARLES (Suing as the legal representative and administrator as father of the estate of **RAYMOND MUSYOKA MASILA**).....

APPELLANT

VERSUS

BENSON KWEYU CHENGWI.....

RESPONDENT

(Being an appeal against the judgment of Honourable Magistrate C. Maundu (CM) delivered on the 16th August 2023 in Bungoma Chief Magistrate's Court Civil Case No E295 of 2021)

JUDGMENT

- 1.** This appeal challenges the apportionment of liability, while the respondent, by way of cross-appeal, contests the award of damages.
- 2.** The background to the appeal is that the deceased, Raymond Musyoka Masila, sustained fatal injuries on **26/9/2020**. He was a pillion passenger aboard a motorcycle with registration number **KMES 115Z** heading towards Kanduyi direction from Bungoma town. The driver of the respondent's motor vehicle, **KCW 782P**, coming from the opposite direction at the Sharrif's area, negligently drove his vehicle, causing it to lose control, veer off its path, encroach on the appellant's lawful lane, and thereby violently hit the deceased.

3. The trial court awarded liability in favour of the appellant as against the respondent at the ratio of **90:10** and also awarded damages as follows:

a) Pain and suffering	Kshs 500,000/-
b) Loss of expectation of Life	Kshs 100,000/-
c) Loss of dependency	Kshs 1,500,000/-
d) Special damages	<u>Kshs 2,382,309/-</u>
Total	Kshs 4,482,309
Less 10% contribution	Kshs 448,230.90
Net figure	Kshs 4,034,078/-.

4. The appellant, dissatisfied with the lower court's finding on liability, has filed this suit on the following grounds:

- i. The learned magistrate erred in fact and in law in apportioning liability when the victim was a minor aged 13 years.*
- ii. The learned magistrate erred in fact and in law in apportioning liability when the victim was a pillion passenger and did not contribute to the accident.*
- iii. The learned magistrate erred in fact and in law in apportioning liability when the victim was negligent.*
- iv. The learned magistrate erred in fact and in law for arriving at a decision that was not supported by evidence of the parties.*
- v. The learned magistrate erred in fact and in law in subjecting the special damages to contribution.*

5. The appellant has urged the court to find the respondent 100% liable for the accident and that the court should not subject special damages to contribution.

6. The appeal provoked the respondent to file a notice of cross-appeal, where he challenged the judgment on the following grounds:

- 1. That the learned trial magistrate misdirected himself in treating the evidence and the submissions on quantum before him and consequently coming to a wrong conclusion on the same.*
- 2. That the learned trial magistrate misdirected himself in ignoring the principles applicable and the relevant authorities on quantum cited in the written submissions presented filed by the appellant and failed to totally consider the appellant's submissions and authorities.*
- 3. That the learned trial magistrate erred in awarding a sum of Kshs 500,000 under the head of pain and suffering, by failing to apply precedent and the circumstances of this particular case hence arriving at an excessive award under head of damages;*
- 4. That the learned trial magistrate erred in awarding a sum of Kshs 500,000 under the head pain and suffering, by failing to apply precedents and the circumstances of this particular case hence arriving at an excessive award under this head of damages;*
- 5. That the learned trial magistrate erred in awarding a sum of Kshs 1,500,000 in respect of loss of dependency by failing to apply the correct principles in determining the same hence arrived at an erroneous assessment or estimate of damages which was inordinately high in the*

circumstance was excessive in the circumstance occasioning miscarriage of justice.

6. *That the learned trial magistrate erred in awarding a sum of Kshs 2,382,309 in respect of special damages, yet only Kshs 444,380 had been proven by the respondent, hence greatly prejudicing the appellant.*

7. *That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unsustainable in law.*

6. The appellant, in his submissions, has identified the following issues for the court's determination:

a) Whether the learned magistrate erred in law and in fact in apportioning liability at the ratio of **90:10** in favour of the appellant as against the respondent.

b) Whether the learned magistrate erred in subjecting special damages to the apportionment of liability

c) Whether the trial magistrate erred in making the award of Kshs 500,000 for pain and suffering, Kshs 1,500,000/- for loss of dependency and Kshs 2,382,309 in special damages

7. On the first issue, it was submitted that the deceased was 13 years old, a pillion passenger, therefore, not in control of the motorcycle. The appellant cited the case of **Baro Ngo Sevelius Yophen v Jared Ndemo (2020) eKLR**, where the court stated:

"11. There is no contention that the respondent was a pillion passenger. It was not shown how his failure to wear a helmet or how the fact that there were two pillion

passengers on the motorcycle would have contributed to the occurrence of the accident. As a pillion passenger, the respondent had no control of the motor cycle and could not have done anything to cause or avoid the accident.

12. For his part, the appellant who was driving his vehicle at the material time had a duty to look out for other road users including the respondent and the motorcycle rider.”

8. On whether special damages should be subjected to apportionment of liability, the appellant cited the cases of **A.O. Bayusuf & Sons Limited v Samuel Njoroge Kamau [2008] KEHC 421(KLR)** and **Swalleh C. Kariuki & Haron Victor Nyongesa v Violet Owiso Okuyu [2021] KEHC 4863 (KLR)**. In both cases, the courts held that special damages due to their specific nature and standards required to prove them should not be subjected to apportionment.

9. On general damages, the appellant submitted that the trial magistrate was correct to make an award of Kshs 500,000/- under the head pain and suffering. It was submitted that the deceased was in hospital and ICU for a period of 1 month and 4 days. He cited the case of **Loise Wairimu Mwangi & another v Joseph Wambue Kamau [2006] eKLR**, where an award of Kshs 200,000/- was made under the head pain and suffering for a person who succumbed to injuries after 43 days.

10. On loss of dependency, the appellant placed reliance on the case of **Kenya Red Cross v IDS (Suing as the legal representative of the Estate of MDR (Deceased) [2020] KEHC 2146 (KLR)**, where the court upheld an award of Kshs

1,300,000/- under this head. Therefore, the award by the trial magistrate was reasonable and not too high as to occasion a miscarriage of justice.

11. On special damages, he argued that special damages were pleaded and proved through various documents or exhibits presented in court.

12. The respondent opposed the appeal. On the issue of liability, he supported the lower court's decision contending that the magistrate had duly considered the testimonies of the witnesses and rightly apportioned liability at the ratio of 90:10. On special damages being subjected to apportionment, he submitted that it was more of an exercise of judicial discretion and the appellant court ought not to interfere with the discretion unless the trial court acted on wrong principles.

13. On the cross-appeal, it was argued that the award under pain and suffering should be reviewed to Kshs 100,000/-. They cited the case of **Sukari Industries Ltd v Clyde Machimbo Juma, Homabay HCCA NO 68 OF 2015 [2016] eKLR** and **Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal administrator of the estate of the late Mwangi) [2019] eKLR.**

14. On loss of dependency, the court was urged to adopt an award of Kshs 700,000. In **Kitale Industries Ltd & Another v Zakayi Nyende & Another [2018] KEHC 209 (KLR)**, a global sum of Kshs 600,000 was awarded where the deceased was 12 years old.

15. On special damages, it was submitted that no receipt for Kshs 16,000/- for the limited grant was produced. The appellant

only filed receipts of Kshs 120,000/- in support of medical expenses, and the receipt of Kshs 150,000/- from TopHill hospital, receipt No 28962, was filed twice. The appellant, in his statement, confirmed that NHIF covered Kshs 250,000/- out of the total bill. Further, Pw1 on cross-examination testified that they had a harambee which raised Kshs 500,000/- to cover medical expenses, and he wished the same not to be refunded to him. It is the respondent's submissions that only Kshs 444,380/- is awardable to the appellant as special damages.

ANALYSIS AND DETERMINATION

16. This being a first appeal, this Court is called to evaluate the evidence and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses (**Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123**).

17. In finding the appellant 10% liable for the accident, the trial court held as follows:

"I note that deceased is a minor and a pillion passenger therefore he cannot be blamed for the actions of the rider. However, the fact that he sustained severe head injuries and that he agreed to board one motorcycle with another pillion passenger, I find that he was negligent in his actions. The head injuries were likely caused by the fact that he was not wearing a helmet. I therefore find the deceased 10% liable."

18. According to the death certificate, the deceased died of a severe head injury. It is evident that had the appellant worn a

helmet, the severity of the injuries would have been mitigated. I therefore find no error in the trial magistrate's finding that the appellant bore 10% liability for the accident.

19. In an appeal on damages, this Court must satisfy that the trial court, in assessing damages, either took into account an irrelevant factor, failed to take into account a relevant one, or that the award made is so inordinately low or so inordinately high as to constitute an entirely erroneous estimate of the damages. (See **Kemfro Africa Limited t/a 'Meru Express Services (1976)' & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR**).

20. On loss of dependency, the trial court only considered the decision cited by the appellant in arriving at the award. He failed to consider the case of **Kitale Industries Ltd & Another v Zakayi Nyende & Another [2018] KEHC 209 (KLR)**, wherein the court awarded a global sum of Kshs. 600,000 in respect of a deceased aged 12 years.

21. The deceased in this case was 13 years old. The recent trends in judicial awards for children of comparable age are as follows:

In **Diana Moraa & James Onsando Mose (suing as the legal representatives of the estate of Jaquine Osoro - Deceased) v Sotik Tea Company (2019) eKLR**, where the deceased was 11 years old and an award of Kshs 600,000 was made for loss of dependency.

In **Ambrose Kiptanui & another v Timona Wekesa (suing as the administrator of the estate of Faith Nafula Wekesa (deceased) [2020] eKLR**, the deceased

died at the age of 11 and the High Court awarded Kshs 500,000/-.

In Charles Maosa v AAA (suing as legal representative of the estate of GOO - Deceased) [2021] eKLR, the deceased was 15 years old and the court awarded Kshs 500,000/-.

In Vertical Construction Limited v Otieno (Civil Appeal E095 of 2021) [2023] KEHC 335 (KLR) (24 January 2023) (Judgment), the deceased was a pupil aged 11 years, and the High Court made a global award of Kshs 800,000/-.

22. Therefore, I set aside the award of **Kshs 1,500,000/-** and substitute it with an award of **Kshs 800,000/-**.

23. On the award of pain suffering, the deceased was hospitalised for slightly over one month before he succumbed to the injuries. Having considered that the court awarded **Kshs 200,000/-** in **Loise Wairimu Mwangi & another v Joseph Wambue Kamau [2006] eKLR**, where the deceased therein succumbed to injuries after 43 days, I find that the award of **Kshs 500,000/-** was excessive. I therefore set it aside, and it is substituted with an award of **Kshs 200,000/-**.

24. On special damages, Pw1 testified that NHIF covered Kshs **250,000/-** of the medical costs and that he should not be refunded Kshs **500,000/-** raised through a harambee.

25. I have carefully looked at the appellant's list of documents and exhibits produced in court. The respondent tendered a receipt evidencing payment of Kshs. 15,000/- for obtaining a limited grant of letters of administration. The receipt from

Lifecare for a CT scan was Kshs 7,000/-. The hospital Bill at Tophill hospital was **Kshs 2,134,929/-**. According to the statement of the bill, the appellant paid **Kshs 1,004,479** through receipts nos. 27187, 28960, 28962, 28963, 28969 and 31268. Pw1 testified that he gave the hospital his title deed and committed to pay the balance of **Kshs 1.6 million** as the deceased's body had been retained. Therefore, the special damages proved were **Kshs 2,124,929** less **Kshs 250,000** paid by NHIF and **Kshs 500,000/-** raised by the harambee. The total hospital bill proved was therefore **Kshs 1,374,929**. The funeral expenses amounted to **193,200/-**. There were receipts in respect of a copy of the records and postage costs of **Kshs 550** and **130**, respectively. Therefore, special damages pleaded and proved were **Kshs 1,590,809/-** and not subject to contribution due to their nature.

26. Consequently, the judgment of the subordinate court is set aside and re-computed as follows:

a) Pain and suffering	Kshs 200,000/-
b) Loss of expectation of Life	Kshs 100,000/-
c) Loss of dependency	<u>Kshs 800,000/-</u>
	Kshs 1,100,000
Less 10% contribution	<u>Kshs</u>
<u>110,000/-</u>	
	Kshs 990,000/-
d) Special damages	<u>Kshs 1,590,809 /-</u>
Total	Kshs
2,580,809/-	

27. Each party to bear its own costs.

**Dated, Signed and Delivered at BUNGOMA this 2nd day
of October 2025**

**R.E. OUGO
JUDGE**

In the presence of:

Mr. Anwar

-For the Appellant

Mr. Olonyi h/b Mr. Owour

-For the Respondent

Wilkister

- C/A

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