

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E955 OF 2024

STEPHENS GAITA NJUGUNA..... 1ST APPELLANT

BENARD NDUNGU NDICHU..... 2ND APPELLANT

-VERSUS-

PETER KARIUKI WANYOIKE & SISTER ESTHER

**WANDIA GATHANGA(Suing as the legal
administrator of the estate of the late) & KENNETH**

WANYOIKE KARIKI Deceased..... RESPONDENT

*(Being an appeal from the judgment of Hon. C. K. Cheptoo (PM) in
CMCC No. E3561 of 2021 delivered on 26th July, 2024)*

JUDGMENT

- 1) The Respondents in this appeal were the plaintiffs in Milimani CMCC No. E3561 of 2022 where they sued the appellants seeking general damages and special damages under the Law Reform Act and the Fatal Accidents Act.
- 2) The claim was in respect of the estate of KENNETH WANYOIKE who sustained fatal injuries on 4/10/2021 when he was hit by motor vehicle registration no. KBB 759A at Muthaiga round around about opposite Muthaiga police station.

- 3) PW 2 was an eye witness. He said the deceased was crossing the road at a zebra crossing when the motor vehicle hit him and he died on the spot.
- 4) The deceased was working as a conductor at Githiga travelers sacco earning kshs.30,000 per month.
- 5) The deceased was survived by his parents and two siblings.
- 6) The deceased died at the age of 21 years.
- 7) The trial court found the appellants 100% liable in negligence and assessed damages as follows;

<i>General damages for pain & suffering</i>	<i>kshs.40,000</i>
<i>Loss of expectation of life</i>	<i>kshs.100,000</i>
<i>Loss of dependency</i>	<i>kshs.3,960,000</i>
<i>Special damages</i>	<i>kshs.122,250</i>
<i>Total</i>	<i>ksh.4,222,250</i>

- 8) The appellants have appealed against the said judgment on the following grounds;
 - i. The learned magistrate erred in law and fact in finding the appellant 100% liable for causing the accident.***
 - ii. The learned magistrate erred in law and fact by awarding damages which are excessively high.***

iii. The learned magistrate erred in law and fact by failing to appreciate the submissions filed by the appellant on quantum and liability.

- 9) The parties filed written submissions as follows; the appellants submitted that there is a reciprocal duty of care owed by all road users.
- 10) The appellants argued that by disregarding the fundamental principle that road safety is a shared responsibility the trial court misapplied the law on duty of care and created a precedent that is both inequitable and legally unsound.
- 11) All road users whether motorists, cyclists or pedestrians must exercise caution and vigilance in equal measure.
- 12) The appellants submitted that the deceased was in fact the architect of his own misfortune. The police abstract indicated that the matter was still under investigations.
- 13) This indicated that investigating officers having assessed the available evidence found no conclusive evidence that indicated that the appellants bore sole responsibility for the accident.

- 14) The appellants argued that the respondents did not adequately discharge their burden of proof as there was absence of clear and credible evidence to substantiate their claims.
- 15) The appellants added that where the evidence is inconclusive it is both fair and just to attribute liability proportionately.
- 16) The appellants further submitted that the damages awarded were excessive.
- 17) On pain and suffering the appellants argued that from the post mortem report the deceased died from multiple organ failure due to blunt forced trauma indicating instantaneous death.
- 18) In the circumstances the appellants proposed that the award be reduced to Kshs. 20,000 and in support cited **Kimunya Abednego v Zipporah Musyoka [2019] eKLR** where the court awarded Kshs. 20,000 for pain and suffering where the deceased died on the same day as the accident.
- 19) On loss of expectation of life the appellants argued that the deceased was 21 years old and proposed the award be reduced to Kshs. 100,000 and in support cited **Mercy Huriuki**

& another v Samuel Mwangi Nduau & Anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR) where the court observed that:

"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/."

- 20) On loss of dependency the appellants submitted that the letter by Githiga Sacco dated 23rd august 2023 lacks the specific employment dates, role or pay slips.
- 21) Further there are no tax records, bank statements or testimony from the sacco's HR manager.
- 22) The appellant argued further that the trial court applied excessive multiplier of 33 years as the court assumed retirement age to be 54 years.

- 23) It argued that the court did not consider the informal sector realities where conductors/tout retire by 50 due to physical demands.
- 24) The appellant therefore proposed a multiplier of 25 years instead and argued that the ration adopted by the court was fair and proposed dependency be calculated as follows;
 $\text{Kshs. } 15,000 \times 12 \times 25 \times 1/3 = \text{Kshs. } 1,500,000.$
- 25) The respondent alternatively submitted that an award of Kshs 5,102,250 as general damages for pain and suffering, loss of expectation for life and loss of dependency would be reasonable to compensate the Respondent.
- 26) The deceased died at age 21 leaving behind four dependents. He was working at Githiga Travelers Sacco earning a monthly salary of Ksh 30,000 as evidence in the letter dated 23rd August 2023 by the Githiga Travellers SACCO.
- 27) He was in good health before his death. He could have worked and retired in the year 2060 at the age of 60 years and maybe do some other business. Hence a multiplier of 39years i.e. $30000 \times 12 \times 39 \times 1/3 = 4,680,000.$

28) On pain and suffering the respondent submitted that the deceased sustained fatal injuries which subjected him to suffering before he died and thus proposed Kshs. 100,000 as sufficient.

29) On loss of expectation of life the respondent submitted that the deceased had a father, mother, brother and sister hence the proposed Ksh 200,000.

30) The respondent relied on the case of **M'inoti & Another (suing as the legal representative of Charles Kithinji Ringera) V Gitonga & Another (civil Appeal E143 of KEHC 3180 (KLR))** where the Honorable court awarded ksh 200,000 to the family of the deceased instead of the conventional amount of Ksh.100,000 after considering the trend and Inflation of the Kenya shilling.

31) They submitted that an award of Ksh 200,000 would be sufficient to compensate the Respondent for loss of dependency.

32) The issues for determination in this appeal are as follows;

- (i) **Whether the learned trial magistrate erred in law and fact in finding the Appellants 100% liable for the accident that caused the death of Kenneth Wanyoike.**
- (ii) **Whether the quantum of damages awarded by the trial court was inordinately high, warranting this Court's intervention.**

33) This is a first appeal, and this Court's duty, as established in **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123**, is to re-evaluate and re-assess the evidence adduced before the trial court and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify.

34) On the first issue regarding liability, I find no merit in the Appellants' contention that the trial magistrate erred in attributing 100% liability to them.

35) The evidence on record, particularly the testimony of PW2 who was an eyewitness, was clear that the deceased was crossing the road at a designated zebra crossing when he was hit by motor vehicle registration number KBB 759A.

- 36) A zebra crossing confers a right of way and a heightened duty of care upon motorists approaching it.
- 37) A pedestrian on a zebra crossing has an almost absolute right of way. The Appellants' argument on shared responsibility, while generally sound, cannot absolve a driver who fails to exercise due care at such a critical point.
- 38) The police abstract's notation that investigations were ongoing does not, as the Appellants suggest, exonerate them or create a presumption of shared blame.
- 39) The burden of proof in civil cases is on a balance of probabilities, and the Respondents discharged this burden through the eyewitness account.
- 40) The trial court's finding on liability was anchored on this credible evidence, and I see no reason to disturb it.
- 41) Concerning the second issue on quantum, I have carefully considered the submissions on each head of damages.
- 42) On the award for pain and suffering, the post-mortem report indicates the cause of death as "*multiple organ failure due to blunt force trauma.*"

- 43) While it is probable that death was not instantaneous, the period of conscious suffering was evidently brief.
- 44) The conventional award in such circumstances is modest. Consequently, the award of Kshs. 40,000 by the trial court is set aside and substituted with an award of Kshs. 20,000.
- 45) As for loss of expectation of life, the conventional award has long been standardized at Kshs. 100,000 in many cases. The award of Kshs. 100,000 made by the trial court is therefore upheld.
- 46) The most substantial contention relates to the award for loss of dependency.
- 47) The trial court adopted a multiplicand of Kshs. 30,000 based on a letter from Githiga Travellers SACCO.
- 48) While such a letter, in the absence of contrary evidence, can form a reasonable basis for establishing earnings in the informal sector, the multiplier of 33 years requires scrutiny.
- 49) The deceased was 21 years old. The trial court's assumption of a retirement age of 54 appears arbitrary and unsupported by evidence regarding the nature of his work as a conductor.

- 50) The courts have consistently held that the choice of a multiplier is an exercise of discretion based on the circumstances of each case, including the nature of employment, life expectancy, and vicissitudes of life.
- 51) Multipliers should be reasonable and reflect the realities of the Kenyan context. Considering the informal and physically demanding nature of the deceased's employment, a multiplier of 25 years is more reasonable and just.
- 52) Adopting the widely accepted dependency ratio of 1/3 for a single unmarried young man, the calculation shall be: Kshs. 20,000 (1/3 of Kshs. 30,000) x 12 months x 25 years = Kshs. 3,000,000.
- 53) Finally, the award of special damages in the sum of Kshs. 122,250 was specifically pleaded and proved through production of receipts and is hereby upheld.
- 54) In the final tally, the damages award is reassessed as follows:
- a) Pain and Suffering: Kshs. 20,000
 - b) Loss of Expectation of Life: Kshs. 100,000
 - c) Loss of Dependency: Kshs. 3,000,000

d) Special Damages: Kshs. 122,250

Total: **Kshs. 3,242,250**

55) Accordingly, the appeal partially succeeds only to the extent of the reassessment of quantum as set out above.

56) The judgment of the trial court on liability is affirmed.

57) Each party to bear its own costs of this Appeal.

58) Orders to issue accordingly.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this **22nd day of January, 2026.**

.....
A. N. ONGERI
JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent