

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E193 OF 2023

SIMON KAMAU KAMAMA.....
APPELLANT

IRENE WANJIKU KAMAU.....
APPELLANT

**(Both suing as legal representatives of the estate of
STEPHEN MAINA KAMAU)**

VERSUS

GABRIEL NG'ANG'A1ST
RESPONDENT

IRENE WANJIKU KAMAU.....2ND
RESPONDENT

*(Being an appeal from the judgment and decree of the
Magistrates court at Ruiru by Hon CA Otieno dated 28th
February 2023 in Civil Case No. E364 of 2022)*

JUDGEMENT

1. The Appellants by a Plaint dated 2nd February 2022 sought compensation following a fatal road traffic accident resulting in the death of the deceased. It was averred that on 10th October 2021 the deceased was a lawful pedestrian beside the road along Thika superhighway near Kahawa Wendani when motor vehicle registration number KCV 164V (CR-V Honda S. Wagon) driven by the 1st Defendant lost control, veered off the road and hit the deceased resulting in fatal injuries.
2. The deceased was survived by his father, brother and sister and the family incurred special damages of Kshs. 196, 950.00 being Post mortem, Death Certificate, Letters of Administration, Funeral expense, Police abstract and motor

vehicle search. The Appellants also sought damages both under the Fatal Accidents Act and the law reform Act.

3. The Respondent denied the claim and in the alternative pleaded contributory negligence as the deceased failed to use the designated footbridge and instead jumped over the guard rails while attempting to cross the dual highway.
4. The matter proceeded to trial where PW1 Corporal Samuel Kirimi testified that the accident occurred on 10.10.2021 at around 7.30pm along the Thika Super Highway while the deceased was crossing the road. The accident was reported by the driver of the subject motor vehicle and a police abstract issued to the father of the deceased. Although there was a foot bridge at the scene of the accident, there was no road barrier. PW1 did not visit the scene of the accident. had the driver applied brakes, he might have saved the pedestrian's life.
5. PW2 SIMON KAMAU testified that he was the father of the deceased and his death has left him vulnerable as the deceased was a bread winner to the family. Prior to his death, the deceased was involved in the business of selling electronics making an average of Kshs. 30,000.00 per month. The deceased would give him Kshs. 15,000.00 to Kshs. 20,000.00 monthly.
6. PW3 FAITH WANJIRU NYAMBURA, testified that she was at the scene of the accident and saw the accident occurring in real time. She was standing by the road side when motor vehicle registration number KCV 164V changed lanes from the middle lane to the 1st lane where the deceased was standing, the vehicle then swerved back to the middle lane having hit the deceased on the 1st lane. She had no knowledge of the deceased prior to the accident. The driver sped away after the accident, while police officers visited the scene and took away the body of the deceased. She visited the polices station in January 2022 and not

immediately after the accident. she could not recall the make of the car.

7. DW1 GABRIEL NG'ANG'A KAMAU testified that he was driving towards Gertrude's hospital Muthaiga in 10.10.2021 when a white car overtook him on the left, he saw a flash on the left side causing him to swerve to the right and stopped 100metres away. The person landed on the left side of his windscreen. He maintained that the person must have been knocked by the white car that overtaken him. He was driving at about 50km/h and did not expect to see any pedestrian at that point as the area has a foot bridge. He stopped and reported the matter to the police station.
8. The trial court relied on **Joseph Muturi Koimburi v Mercy Wahaki Mugo (2006) eKLR** in finding the deceased wholly liable for the accident for the fact that he was hit while crossing the road at a non-designated point.
9. On damages, the trial court found that it would have opted for a lump sum award of Kshs. 2,000,000.00 as general damages under the Fatal Accident's Act taking into account the award in **Kisumu HCCA 75 of 2015 Mombasa Maize Millers Ltd Vs WIM** cited in **David Mbuba & another v Victoria Mwongeli Kimwalu & another**. The court would have also awarded the special damages as pleaded and proved.
10. Aggrieved and dissatisfied with the decision of the trial court, the appellants lodged the instant appeal, raising twelve grounds of appeal all premised around the finding on liability.
11. The Appellants therefore prayed that the appeal be allowed and the judgment of the trial court be set aside.
12. The court directed that the appeal be canvassed through submissions.

13. The appellant submitted that the trial court's finding was laden with errors of law and in fact that departed from the doctrine of *stare decisis* in wholly apportioning liability on the deceased for the accident and failing to consider the eye witness account of PW3.
14. On quantum, it was submitted that the deceased was entitled to damages for loss of expectation of life under the **Law Reform Act**, damages for pain and suffering which awards should be taken into account in the assessment of damages awardable under the **Fatal Accident Act**. A conventional award for pain and suffering of Kshs. 100,000.00 ought to have been awarded to the deceased who died on the spot under the Law Reform Act. The Appellant thus submitted that the deceased was entitled to damages of Kshs. 2,809,560.00 under both the Fatal Accident's Act and the Law Reform Act.
15. This being a first appeal, the court is under a duty to reconsider and re-evaluate the evidence and draw its own conclusions. The Court must take great exception with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in **Selle and another -vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123** by Sir Clement De Lestang, V. P. as follows:

“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 itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take

account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

16. I have duly considered the pleadings, the evidence adduced before the trial court and the submissions for the counsels representing the parties. The appellant challenges the judgment both on the finding on liability and on the assessment of damages. The issues for determination are thus the following:
 - i. Whether the trial court erred in wholly ascribing liability on the deceased.
 - ii. Whether the assessment of the award was erroneous.
17. The Appellant contended that the trial court erred in holding the deceased liable for the accident despite the overwhelming eye witness account of PW3.
18. It is admitted that the deceased met his death while crossing the Thika Superhighway at a non-designated pedestrian crossing. The Respondent testified that he had no recollection of hitting the deceased as he might have been hit by a certain white car that speedily overtook the Respondent, he was shocked when the deceased landed on the left side of his windscreen.
19. Although the appellant alleged that the Respondent negligently caused the accident by failing to be on the lookout and driving excessively, the Respondent maintained that the deceased might have been hit by someone else and not him. Arguably, none of the parties proved the fault of the other. It is only the fact that the

deceased was hit while crossing the road that was established.

20. While a pedestrian who is hit while crossing the road is said to be an architect of his misfortune, the law enjoins motorists to pay due care and attention when using the road as there are road users who might not wholly abide by the terms of the **Highway Code**.

21. The Court of Appeal in the case of **Hussein Omar Farah v Lento Agencies [2006] eKLR**, stated that:

“It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

22. In the present case, there are two conflicting pleadings as to how the accident in question occurred. Each party insists that the other was to blame. None was however able to establish the fault of the other. This being the case, the proper position was for the trial court to find both parties equally to blame for occasioning the accident. Accordingly, the trial court erred in wholly apportioning blame on the deceased and disregarding the role that might have been played by the Respondent. The appeal on liability is therefore merited. I proceed to apportion liability at 50:50 for the deceased against the Respondent.

23. On quantum, the principles under which an appellate court may disturb an award of damages made by a lower court are well established. The same were espoused by the Court of Appeal in the case of **Arrow Car Ltd vs. Elijah Shamalla Bimomo & 2 Others (2004) eKLR** where it was held thus:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded

by a trial Judge were held by the former court of Appeal of Eastern Africa 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.”

24. The deceased in this case died on the spot and the court made no award for pain and suffering. The Appellant submitted that an award of Kshs. 100,000 would be adequate compensation. In the case of **Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] eKLR**, Mativo, J upheld an award of Kshs. 50,000 where the deceased was said to have died on the spot. In **Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR)**, Sewe J. reduced an award of Ksh.150,000 to Ksh.50,000 for instant death. In **Electrical Link Eastafrica Ltd & another v Munyao & another (Suing as the Next of Kin to and on Behalf of the Estate of) David Munyao - Deceased) (Civil Appeal 471 of 2015) [2023] KEHC 18114 (KLR) (Civ) (16 May 2023)** (Judgment), this court upheld an award of Kshs.50,000 for instant death. In view of these authorities, I find that an award of Kshs. 50,000 would be sufficient under the limb for damages for pain and suffering.
25. The trial court made no award for loss of expectation of life. The conventional award for loss of expectation of life is Kshs.100,000. For example, in **Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe (deceased)) v Rueben Muriuki Kahuha & others (2015) eKLR**, a similar amount was

awarded for loss of expectation of life. I hereby make an award of Kshs. 100,000.

26. The trial court made a global award of Kshs. 2,000,000 under the **Fatal Accident's Act**. Although PW2 alleged that the deceased earned up to Kshs. 50,000, no evidence was led to prove this allegation. Nevertheless, considering that the deceased was merely 35 years old at the time of the accident, I find no reason to disturb the global sum awarded by the trial court as loss of dependency.
27. The upshot of the matter is that the appeal partially succeeds with the finding of liability substituted with a finding of 50:50 for the deceased against the Respondent.
28. Damages for pain and suffering are awarded at Kshs. 50,000.
29. Loss of expectation of life assessed at 100,000.
30. Each party to bear their own costs.

Dated Signed and Delivered virtually this 30th day of April, 2026.

HON. T. W. OUYA
JUDGE

In the presence of:

Makunda for Appellants

No appearance for Respondents

Kelvin/Hamza - Court Assistants