

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. E015 OF 2024

EZEKIEL KIPKOECH TERER & BENJAMIN KIPRONO TERER

(suing as the Legal Representatives of the estate of

Sharon Chebet (Deceased).....

APPELLANTS

VERSUS

EDGAR NYABENGI OTEMA

RESPONDENT

*(Being an Appeal from the Judgment of Resident Magistrate,
Michuki M. at the Magistrate's Court at Bomet, Civil Suit Number
E183 of 2022)*

J U D G M E N T

1. The Appellants (then Plaintiffs) as the Legal Representatives and of the deceased Sharon Chebet, sued the Appellant

(then Defendant) for general and special damages that arose from an accident which occurred on 9th July 2022.

2. In its Judgement dated 11th July 2024, the trial court dismissed the Appellants' claim stating that they had not proved their case.

3. Being aggrieved with the Judgment of the trial court, the Appellants filed their Memorandum of Appeal dated 19th July 2024 appealing against the whole Judgement.

4. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify.

5. I hereby proceed to summarise the case in the trial court and the parties' respective submissions in the present Appeal.

The Plaintiffs'/Appellants' case.

6. Through their Complaint dated 21st September 2022 the Appellants stated that the deceased Sharon Chebet was involved in an accident on 9th June 2022. That she was run over by a tractor registration number KCE 276T.
7. It was the Appellants' case that the Respondent was negligent in causing the accident. The particulars of the negligence were stated in paragraph 4 of the Complaint. That as a result of the accident, Sharon Chebet suffered fatal injuries.
8. The Appellants prayed for special and general damages against the Appellant under the Fatal Accidents Act and the Law Reform Act.

9. Through their written submissions dated 14th November 2025, Appellants submitted that failure to plead the particulars of the driver was not fatal. That they proved that the Respondent's car caused the accident. He relied on **Kenya Bus Service Ltd vs Dina Kawira Humphrey [2003] KECA 179 (KLR), Lake Flowers vs Cila Francklyn Onyango Ngonga & another [2008] KECA 54 (KLR) et.al.**

10. It was the Appellants' submission that a person in control of a motor vehicle need not necessarily have an agent relationship with the registered owner of the motor vehicle for vicarious liability to arise. They relied on **Board of Governors of Kangubiri Girls High School & another vs Jane Wanjiku Muriithi & another [2014] KECA 224 (KLR)**. That where it has been proved that a motor vehicle caused an accident, the registered owner was responsible. They relied on **Kansa vs Solanki (1969) EA 318 et.al.**

The Defendant's/Respondent's case.

11. Through his statement of defence dated 7th December 2022, the Respondent denied the occurrence of the accident on 9th June 2022 and further denied being the registered owner of motor vehicle registration number KCE 276T.

12. It was the Respondent's case that if the accident occurred then it was caused by the negligence of the deceased. The particulars of negligence were contained in paragraph 4 of the Defence.

13. Through his undated written submissions, the Respondent submitted that the Appellants failed to provide any evidence linking the driver to the Respondent. That there was no evidence to demonstrate the existence of an employer-employee relationship between himself and the driver. It relied on **Joel v Morison [1834] EWHC KB J39, Paul Muthui Mwavu vs Whitestone (K) Ltd (2015) eKLR et.al.**

14. It was the Respondent's submission that the deceased was the author of her misfortune. That the deceased failed to take reasonable care and was guilty of high contributory negligence. He relied on **Mohamed Farrah vs Kenya Ports Authority (1988) 2KAR 283, Nance v British Columbia Electric Ryco Ltd (1951) AC 601 et.al.**

15. The Respondent submitted that the deceased's decision to operate on a road reserve and an area inherently fraught with danger. That this conduct signified contributory negligence and the deceased ought to bear some liability.

16. I have gone through and carefully considered the Record of Appeal dated 5th October 2024, the Appellant's written submissions dated 28th April 2025 and the Respondent's undated written submissions. The only issue that I have sieved for my determination was whether the trial court erred when dismissing the Appellants' suit.

Liability.

17. In regards to liability, Ezekiel Kipkoech Terer (PW2) testified that he was the deceased's husband. PW2 testified that on the material day, he heard screams from the market area and when he arrived, he found motor vehicle registration number KCE 276T on the side of the road. PW2 further testified that the subject motor vehicle had knocked down and run over the deceased causing her fatal injuries. PW2 blamed the driver of the subject motor vehicle for causing the accident. PW2's testimony remained uncontroverted upon cross examination.

18. PW2 produced the Motor Vehicle Copy of Records as **P. Exh 5**. I have looked at the exhibit and it stated that motor vehicle registration number KCE 276T was registered in the Respondent's name.

19. Betty Chepkemoi (PW3) testified as an eye witness. PW3 further stated that on the material day, she saw the subject

motor vehicle coming towards their direction. PW3 testified that the motor vehicle hit the bumps and hit the deceased. PW3 blamed the driver of the motor vehicle for causing the accident. PW3's testimony remained uncontroverted upon cross examination.

20.No. 72792 Reyland Nzai (PW1) testified that the accident occurred on 9th June 2022 along Bomet-Narok road involving the subject motor vehicle and the deceased. He produced an abstract as **P. Exh 4**. I have looked at the exhibit and it confirmed the occurrence of the accident.

21.The Appellants were dissatisfied with the trial court's determination on the issue of liability. In dismissing the suit, the trial court found that the Appellants had not sued the driver of the subject motor vehicle and had failed to establish any agency relationship between the Respondent and his driver. With great respect to the trial court, I disagree with this position. I am of the view that once the ownership of the motor vehicle and the occurrence of the accident had been proved, a presumption arose that the motor vehicle

was being driven by a person whose negligence is assumed by the registered owner. The Court of Appeal in **Lake Flowers v Cila Francklyn Onyango Ngonga & another** [2008] KECA 54 (KLR) held: -

“.....However, it is our view that the failure to sue the appellant’s driver and the omission by the 1st respondent to directly refer to the appellant’s liability as being vicarious was not necessarily fatal to his claim. It is sufficient that the relevant primary facts were pleaded and evidence led to show the owner of the mitsubishi canter and from which vicarious liability can be inferred as a matter of law.”

22. Similarly, in **Richard Mbeva Ngumbi v Attorney General** [2017] KEHC 1371 (KLR), the court held: -

“The trial Magistrate dismissed this suit on the ground that the driver of the accident car had not been enjoined in the suit. The trial Magistrate erred in law in that the driver must not be a necessary party to a suit for negligence to be proved. This was reiterated by the Court of appeal case of Kenya Bus Services Ltd -vs- Humphrey (2003) KLR 665;(2003)2 EA 519, where the court of appeal held inter alia that:

“.....where it is proven that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner, as there mere fact of lending does not of

itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver,”

It is therefore inconsequential to a suit whether the driver had not been enjoined, the trial Magistrate should have gone ahead to determine the issue of quantum, liability having been settled by consent by the parties during the trial.”

23. Flowing from the above, I am satisfied that the Appellants proved their case against the Respondent. They were able to prove that the accident occurred on the material day involving the subject motor vehicle and the Appellant and further, they were able to establish that the subject motor vehicle was owned by the Respondent. It is salient to also note that the Respondent did not call any witness or adduce evidence and the Appellants' evidence remained

unchallenged. To put it clearly, I find the Respondent 100% liable for causing the accident.

Quantum

24. In regard to the pain and suffering and loss of expectation of life, the court in **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)**, stated: -

“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”.

25. I have looked at the Death Certificate produced as **P. Exh 3** and it indicated that the deceased died on the material day being 9th June 2022. The trial court awarded Kshs 40,000/= under this head and Kshs 100,000/= for loss of expectation of life while the Appellant proposed an award of Kshs 100,000/= under pain and suffering and Kshs 100,000/- under loss of expectation of life. The Respondent did not make a proposal.

26. It is my finding that the deceased suffered minimal pain before she died. In the auspices, I find award of Kshs 50,000/= for pain and suffering and Kshs 100,000/= for loss of expectation of life.

27. Under the head 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 the 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 in 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.

28. Under this head the trial court awarded Kshs 1,000,000/=. The Appellant proposed the use of Kshs 14,025.40/= as the multiplicand, a multiplier of 25 years and a dependency ratio of 2/3 totalling to Kshs 2,805,000/=. The Plaintiff stated that

the deceased was a vendor who earned approximately Kshs 6,000/= per day. Ezekiel Kipkoech Terer (PW2) reiterated the same in his testimony. I have gone through the record and I have note that there was no proof of income from the testimony and exhibits that the Appellants produced in court. With that in mind, I find that the safest way to make an award under this head where there is no ascertainable proof of income would be to go the global sum way.

29. In determining the award under this head, I have considered, the fact that the deceased died aged 38 years old and the fact that the deceased was survived by her husband and five children. I will therefore be guided by the global award approach and I uphold the award of Kshs 1,000,000/= as loss of dependency.

30. With regard to special damages, the trial court awarded Kshs 236,191/=. I have looked at the bundle of receipts produced as **P. Exh 6** and I find the claim for special damages as

pleaded and proved. I therefore uphold the award of Kshs 236,191/= as special damages.

31. The final award is translated as follows: -

Pain and suffering	Kshs 50,000/=
Loss of expectation of life	Kshs 100,000/=
Loss of dependency	Kshs 1,000,000/=
Add special damages	Kshs 236,191/=
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Total	Kshs 1,381,191/=

32. In the end, the Appeal dated 19th July 2024 is allowed as the Appellants are awarded Kshs 1,381,191/=. Each party shall bear their costs in the Appeal.

**Judgment delivered, dated and signed at Bomet
this 5th Day of May, 2026.**

.....
HON. JULIUS K. NG'ARNG'AR
JUDGE

Judgment Delivered in the presence of;
Susan/Siele Court Assistant
Oremo for Appellants
Erick Korir for Respondent

ORIGINAL