



**Little Sisters of St Francis v Kindu & another (Both Sued as the Legal Representatives of the Estate of the Late Benjamin Wanjila Pasiliano) (Civil Appeal E051 of 2021) [2025] KEHC 1160 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1160 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E051 OF 2021  
REA OUGO, J  
FEBRUARY 27, 2025**

**BETWEEN**

**LITTLE SISTERS OF ST FRANCIS ..... APPELLANT**

**AND**

**JANEPHER NASIMIYU KINDU ..... 1<sup>ST</sup> RESPONDENT**

**DENNIS WANGILA WAFULA ..... 2<sup>ND</sup> RESPONDENT**

**BOTH SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE BENJAMIN WANJILA PASILIANO**

*(Being an appeal from the judgment and decree of Hon Mutai delivered on 6/8/2021 in Bungoma CMCC No 414 of 2016)*

**JUDGMENT**

1. The respondent at the subordinate court filed a suit under the *Law Reform Act* and Fatal Accident Act. It was averred that on 14/1/2015 the deceased was riding his motorcycle along Webuye-Bungoma Road, when the appellant's motor vehicle KBM 639P Isuzu Minibus negligently veered off its lane and knocked the deceased. The deceased suffered severe injuries and died. The deceased died at the age of 40 years leaving behind a widow and 9 children. At the time of his death, the deceased was earning Kshs 15,000/- as a boda boda rider.
2. The appellant denied the occurrence of the accident and pleaded in the alternative without prejudice that the deceased was solely or substantially contributed to the accident.
3. At the hearing, Janepher Nasimiyu Kundu (Pw1) testified that she did not witness the accident. She produced the death certificate showing that the deceased was 40 years old at the time of his death. She testified that she was informed of the accident on 12/1/2015.



4. Jane Orry (Pw2) testified that she is attached to the Bungoma Police Station. According to the police abstract, the accident occurred on 14/1/2015. The driver of the motor vehicle KBM 639 was Christopher Simiyu Kangara. The investigating officer was PC Bernard Tanui. On cross-examination, she testified that she was not the investigating officer.
5. Dancan Situma Makhanu (Pw3) testified that on 14/1/2015 he was at the boda boda stage when he witnessed the accident involving motor vehicle KBM 639P and the motorcycle. Both the vehicle and the motor cycle were heading towards Webuye direction from Bungoma. The motorcycle was behind the vehicle. At Sikata area, the driver of the vehicle abruptly and without indicating made a U-turn, turning to the right from the main road causing the deceased to ram into the vehicle. He blamed the driver of the vehicle for causing the accident.
6. The appellant closed its case without calling any witness.
7. The trial magistrate in the end found the appellant 80% liable for the accident and entered judgment as follows:
  - a. Pain and suffering Kshs 40,000/-
  - b. Lost years Kshs 3,360,000/-
  - c. Special Damages Kshs 66,425/-  
Less 25% Kshs 866,606/-  
Total Kshs 2,599,819/-
8. The appellant dissatisfied with the finding of the trial court has filed this instant appeal raising the following grounds:
  1. The learned magistrate erred in law and in fact in finding the appellant liable without evidence to that effect.
  2. That the learned trial magistrate erred in law and fact in failing to consider the defence on record.
  3. That the learned trial magistrate erred in law and fact in awarding damages that were excessive on the circumstance as to amount an erroneous estimate.
  4. The Learned trial magistrate erred in law and in fact in proceeding without having regard to the right of the appellant to be heard.
  5. The learned trial magistrate erred in law and in fact in relying on unfounded multiplicand, multiplier and dependency ratio.
  6. That the learned trial magistrate erred in law and fact by failing to take into account relevant facts and as a result arrived at an erroneous finding.
  7. That the learned trial magistrate erred in law and fact in awarding special damages that were not specifically pleaded and particularly pleaded.
9. The appellant in his submissions argue that the evidence on record show that the motorcycle was neither insured nor registered for purposes of ferrying passengers. There was no evidence that the motorcycle rider was trained therefore, the motorcycle rider should be wholly liable for the accident.



10. On damages, the appellant submits that legal fees should not be part of special damages. It cited the case of *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] (KLR) (24 January 2022) (Judgment) where the court denied an award of legal fees as special damages.
11. It was also submitted that the trial court was not supplied with any documents proving income of the deceased, therefore the method used by the trial court in awarding loss of dependency was erroneous and should be varied.
12. The respondents in their case argue that they proved their case to the required standard and the trial court was correct to find the appellant 80% liable. In any event, the appellant failed to prosecute their case at the lower court and therefore did not controvert the respondent's evidence.
13. The award by the trial court was commensurate to the age, wages and dependants of the deceased. The appellant failed to file submissions before the trial court. The trial court considered the appellant's proposal before making the award and the appeal on quantum therefore lacks merit.
14. The date for the defence hearing was taken by consent but the appellant failed to attend court to prosecute their defence.

### **Analysis And Determination**

15. The only two issues raised in this appeal are whether the respondent proved liability on the part of the appellant and whether the trial magistrate applied wrong principles in awarding damages.
16. On the question of liability, the respondent called 3 witnesses. Pw3 testified that the appellant's driver of the vehicle abruptly and without indication made a U-turn, turning to the right from the main road, causing the deceased to ram into the vehicle. There was no evidence from the appellant as he did not call any witness to testify as to how the accident was occasioned.
17. The appellant has also argued that it was not given an opportunity to present its case, the record is to the contrary. The hearing date was taken on 25/2/2021 by consent of the parties. The advocate of the appellant was present in court. On the hearing date, the appellant was absent and his case was marked as closed. I find that the appellant was given an opportunity to present his case and cannot argue that his right to be heard was violated. Therefore, I find that the respondent proved on a balance of probability that the appellant was responsible for the accident, the 80% liability apportioned by the trial magistrate cannot be faulted.
18. I now turn to consider the award of damages. Circumstances in which an appellate court will interfere with the quantum of damages awarded by a Trial Court were laid out in the case of *Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000* where the Court of Appeal stated as follows:

“...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages.”
19. In this instance, the appellant argues that the method used by the trial court on loss of dependency was erroneous. He cited the case of *Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD*



HCCC NO 19 OF 1997, where the court held that it is better to opt for the principle of lump sum award instead of estimating income in the absence of proper accounting books.

20. The Court of Appeal in *David Mwenda & Another vs Alice Kawira* (suing as the administrator of the estate of John Munyoki Malyunga (Deceased) Civil Appeal No. 109 of 2017(2018) eKLR upheld the use of a multiplier method for a boda-boda operator. It is now settled that documentary evidence is the only way of proving earnings (see *Jacob Ayiga Maruya & Another V. Simeon Obaya* [2005] eKLR). Therefore, I find no error that the trial magistrate applied the multiplier approach in calculating loss of dependency.
21. On the special damage claim, the appellant used the persuasive case of *Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] (KLR) (24 January 2022) (Judgment) to argue that legal fees paid to obtain letters of administration is not a special damage claim. However, I am of the view that they form damages under special damages as they are sums expended toward the deceased's estate.
22. Therefore, having considered the appeal in its entirety, I find that the appeal lacks merit, and the same is hereby dismissed. The respondent shall have the costs of the appeal.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025**

**R.E. OUGO**

**JUDGE**

In the presence of:

Mr. Kipkemboi -For the Appellant

Mr. Okaka h/b Mr. Paul Juma -For the Respondent

Wilkister -C/A

