



REPUBLIC OF KENYA



KENYA LAW
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**Mose & another v Kakai (Civil Appeal 33 of 2022)
[2025] KEHC 1766 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 33 OF 2022
RPV WENDO, J
FEBRUARY 27, 2025**

BETWEEN

CLINTON NYANDIEKA MOSE 1ST APPELLANT

SAMUEL WAIGANJO 2ND APPELLANT

AND

SUSAN NELIMA KAKAI RESPONDENT

JUDGMENT

1. This appeal arises from the judgement of S.K. Mutai (SPM) dated 24/10/2022. The appellants, Clinton Nyandieka Mose and Samuel Waiganjo were the defendants in the lower court while the Respondent, Susan Nelima Kakai suing as the personal representative of the Estate of Juma Ndova (deceased) was the plaintiff. The deceased lost his life after being involved in a road traffic accident.
2. According to the averments made in the plaint dated 15/1/2020 the road traffic accident was allegedly caused by the negligence of the second appellant who was the authorized driver of the 1st appellant; that the accident occurred on Kitale-Kwanza Road at Kwa Mudavadi area. The Respondents prayed for general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* as well as costs of the suit and interest.
3. The appellants entered appearance and filed a statement of defence dated 9/8/2021 in which all the particulars of negligence, against the appellants were denied. The matter proceeded to hearing and judgment was entered against the appellants at 100% on liability. The trial court entered judgement against the appellants as follows⁷
 1. Pain and suffering Kshs.30,000/=
 2. Loss of expectation to life – Kshs.120,000/=
 3. Damages under the *Fatal Accidents Act* at 20,000/= X 33 X 2/3 X12 Kshs. 5,280,000



4. Special damages Kshs.61,875/=
 5. Funeral expenses Kshs.50,000/=

Total - 5,541,875/=
 6. plus, costs and interest of the suit.
4. The appellants are aggrieved by the trial court's decision on both liability and quantum which provoked this appeal. In the Memorandum of Appeal dated 11/8/2023, and filed by Onyinkwa Advocate on behalf of the appellants, advanced nine grounds of appeal which were condensed into two issues as hereunder;
1. Who was to blame for the accident and to what extent? (Grounds 1-3)
 2. What damages are payable (if any)?
5. By consent of the parties, it was agreed that the appeal be canvassed by way of written submissions. The said directions were given on 2/10/2023 and the appellants filed their submissions on 9/10/2023. On 5/11/2024, Counsel for the appellant, Miss Nyabuto informed the court that the Respondent had also filed submissions, on 18/10/2023 but none had been placed on the file and on that date, the respondents Counsel Mr. Gacathi was absent though notified of the mention date.
6. This being a first appeal, this court has a duty to subject all the evidence and material placed before the trial court for a fresh and exhaustive examination, and evaluation and draw its own independent conclusions. This court is guided by the decision of *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123; *Peters V Sunday Post Limited* [1958] EA424. In the *Selle* case, the court stated thus; "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect".
7. The appellants' Counsel, Onyinkwa Advocates, argued two (2) issues in their submissions, which are,
1. Who was to blame for the accident and to what extent grounds 1-3?
 2. What damages are awardable grounds 4-9
8. The case before the trial court;
- The Respondent called a total of four (4) witnesses. PW1 PC Vincent Nyakundi Nyamari of Kitale Traffic Base, who produced the police abstract issued following the fatal road accident which occurred on 20/11/2020 on Kwanza Road between Motor vehicle KBA 654C Toyota Saloon and motor cycle Registration No. KMEB 965G Honda, where the rider, Jeremiah and his passenger died. He did not investigate the case and said the investigations were still pending,
9. PW2 Susan Nelima is the mother of the deceased Jeremiah. She did not witness the accident, but confirmed that the son was born in 1990, was a motor cycle rider and earned Kshs.20,000/= per month and that he had a wife with children.
10. PW3 Daniel Were Edumwa adopted his pre-recorded statement dated 15/1/2021 he stated that he was travelling on motor cycle on 20/3/2020 about 8.00 p.m. coming from Kitale when the vehicle KBA 654C was driven so carelessly that it went ahead, hit the motor cycle KMEB 965G while it was off the



- road. Later in cross examination, however, he stated that he arrived at the scene when the accident had already occurred outside the road.
11. PW4 Ruth Naliaka, the wife of the deceased said they had one child and that they spent Kshs.50,000/= on funeral expenses.
 12. The appellants called one witness DW1 Samuel Waiganjo Njunge who was the driver of the accident vehicle. He admitted having been driving from Kitale on 20/3/2020 when the rider who was ahead of him entered the road without indicating. He blamed the rider for the accident. He was not charged with the traffic offence.
 13. On the issue liability, (grounds (1-3)), it was submitted that the respondent failed to prove his case on a balance of probabilities; that PW1, a Police Officer was not the Investigating Officer and had not visited the scene nor did he have the police file and stated that the matter was still under investigation; that PW1 could not tell the circumstances of the accident Counsel relied on the case of Ismael Nyasimi & Another VS. David Onchangu Orioki (2018) eKLR and Evans Mogire Omwansa VS. Benard Otieno Omollo & another (2016) eKLR where court observed that evidence of the police officer who is not the Investigating officer is hearsay and of no assistance to prove causation save that production of the abstract that confirms occurrence of an accident. As respects PW2, the Respondent, it was submitted that she did not witness the accident and hence could not tell how the accident occurred. The counsel faulted the trial court's judgment for making reliance on the testimonies of PW1 and 2; that there is no evidence to support the court's finding that the motor vehicle rammed into the rear of motor cycle KMEB 965G; that the appellant's position is that the rider suddenly joined the main road without indicating his intention to do so; that since it was unclear how the accident occurred the trial court should have interrogated the surrounding circumstances which the court failed to do.
 14. As regards PW3's testimony, it was submitted that he came to the scene after the occurrence of the accident. The appellants urged that the court should have interrogated how the accident occurred while both the vehicle and motor cycle were moving the same direction. Counsel urged the court to dismiss the respondent's claim
 15. On quantum Counsel submitted that the appellate court can only interfere with the award where the trial court applied wrong principles. On pain and suffering, Counsel submitted that the award was on the higher side and should have been Kshs.10,000/=
 16. On dependency ratio, Counsel urged that the deceased was twenty-seven (27) years with two children as per PW2 and 4's testimonies though they did not produce any documentary evidence as proof; that the onus lay on the respondent to prove that he had children and that the ratio of 2/3 would apply as held in Petronilla Muli VS. Richard Muindi Savi and another (2021) e KLR and Dickson Taabu Ogutu VS. Festus Akolo & Another (2020) eKLR.
 17. Guided by the case of Board of Governors of Kangubiri Girls High School & another, the Counsel suggested a multiplier of twenty-five (25) years.
 18. As regards the multiplicand, it was submitted that the figure of Kshs.20,000/= that was awarded by the trial court had no basis because though the witnesses stated that the deceased was a motor cycle rider, no evidence was adduced to prove the same and the court should have adopted the statutory minimum wage as provided in Minimum wages (Amendment order) bill guidelines which is Kshs. 7,200/=. Counsel relied on the decision of Gachoki Gachuri suing as legal Representative of the Estate of James Kinyua Gachoki (deceased) Vs. John Ngiga Njagi (2015) eKLR where the court held that where there is no proof of income the court will adopt the minimum wage as per Regulations of wages (General) Amendment Order.



19. Though it was indicated that the respondents filed submissions, none were placed on the file and none were found online. The court will therefore consider all the evidence tendered in the trial court and the appellant's submissions. It is not in dispute that an accident occurred on 20/3/2020 when a collision occurred between motor vehicle KBA 654C Toyota saloon driven by DW1 and a motor cycle KMEB 965G which the deceased was riding.
20. The only outstanding issues are who caused the accident and to what extent and secondly, whether damages are payable, if any.
21. On the issue of liability, it was the duty of the Respondent to prove the allegations of negligence levelled against the appellant on a balance of probabilities. PW2 and 4 did not witness the accident. They only learnt of the accident. PW1, a police officer did not witness the accident too. He did not even visit the scene of the accident. All that PW1 did was produce the police abstract which is the document confirming the occurrence of the accident. I agree with the court's finding about the production of an abstract. The court in *Evans Mugire Omwansa (Supra)* said "The two police officers who produced the police abstracts were not the investigating officers, hence were of no assistance to the court as to the causation save for production of abstracts which confirmed the occurrence of the accident only....."
22. It is the evidence of the Investigating officer that would have shed light on how the accident occurred or who was to blame.
23. PW3's testimony is that the motor cycle was off the road at the time of the collision. Although he admits that he heard a loud bang and on arriving at the scene found both the persons on the motor cycle dead. He could not say with certainty whether the motor cycle had been parked off the road or whether that is the place that both the vehicle and motor cycle landed after the collision.
24. On his part DW1 told the court that the deceased without indicating "suddenly rode into the main road, on my lawful left lane in an attempt to cross the road to the right side.
25. I hooted, flashed my headlights and swerved further left to avoid hitting the motorcycle but unfortunately the rider of the motorcycle also swerved left, as a result we collided".
26. Unfortunately, the deceased being dead, cannot tell what he did prior to the accident. Accidents do not just occur but it must be due to the negligence of one or both of the drivers.
27. The accident occurred at night at about 8.00p.m. The appellant told the court that he was able to hoot, flash lights and swerve to avoid the collision. However, he never applied brakes to avert the accident. From the evidence on record, the deceased and another perished on the spot. In my considered view, the appellant must have been in such high speed that he was unable to control the vehicle, with the impact resulting in instant death that tells how he was driving fast. Even though the Respondent's witnesses did not witness the accident, as pointed out earlier, accidents do not just happen. In my considered view, having failed to do his best to avert the accident, the appellant bears the most blame and I will apportion liability at 80% as against the appellant

Quantum

28. Generally, assessment of damages is not an easy task. A court is supposed to give a reasonable award which is neither extravagant nor oppressive as it is guided by factors such as previous awards for similar injuries and the principles that have been developed by the courts over the years. What constitutes a reasonable award is really an exercise of the courts discretion and will depend on the peculiar facts of each case.



29. As has been held in various decisions, an appellate court must be slow to interfere with the exercise of discretion of a lower court. This principle was affirmed by the Court of Appeal in *Kemfro Africa Ltd -Vs- A.M. Lubia and Another* (1988) KAR 722 where it expressed itself 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. The same position was taken in *Denshire Muteti Wambur V. KPLC* (2013) eKLR.”

30. Guided by the above principles, the court will go ahead to consider the grounds of appeal on damages awarded.

Pain and Suffering:

31. The appellant faulted the award of Kshs.30,000/= for pain and suffering contending that it was too high and an award of Kshs.10,000/= should have been made. The appellant relied on the decision of *Jacinta Ruguru V- Beatrice Muthoni Muthike* (suing as the legal representative of the Estate of the Late Isaac Mutuke Nyaga (2021) e KLR. The court noted that the said damages are designed to compensate the deceased’s estate for the pain and suffering that the deceased endured before death. In [CA 42/2028 Joseph Kiratu Wambua V. SMM and Another](#) suing as legal representative of SMM, the court had this to say of an award for pain and suffering.

“The appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the respondents ought to have been awarded a less sum. In my view, what determines the award under that head is how long the deceased took before he either passed away or lost consciousness..... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, whereas the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.”

32. In the instant case, it seems that the deceased died instantly because PW3 said he had a bang and on reaching the scene, found the deceased already dead. A nominal sum of damages is therefore awardable. Is Kshs.30,000/= on the higher side?
33. In Malindi [CA 17/2015](#) & 18/2015, *Moses Akumba & Another V Hellen Karisa Thoya* 2017 eKLR, the court awarded Kshs.50,000/= on 4/10/2017 for pain and suffering, and observed that even if there was sudden death, it was clear the deceased suffered a lot of pain.
34. Similarly, in Machakos High Court [CA 50/2016](#). *KPLC Ltd -V- Sophie Ngala Malemba & another* (2019) eKLR the deceased died on the spot and the court awarded 3 0,000/= guided by the above authorities, I find that an award of Kshs.30,000/= for pain and suffering was not excessive. I will uphold the award.



Dependency

35. The appellant faults the trial court for applying a dependency ratio of 2/3. PW2 testified that the deceased was married with two children. PW4 testified to being the wife of the deceased. A Chiefs letter was produced to the effect that the deceased was married and had two children. Even if no birth certificates were produced, it is my view that that was sufficient evidence to confirm that deceased was a married man with two children. The deceased was the only bread winner and in my view, the dependency ratio was properly found to be 2/3.
36. In W.N. -V- Kassam Hauliers Ltd (2020) eKLR

The court said “conventionally courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ration of 2/3 on the other hand, they have taken unmarried people to spend more on themselves more than their dependents more so parents hence have apportioned a dependency ration of 1/3 which has over time been enhanced to 1/2.

Multiplier

37. The deceased was aged twenty-seven (27) years old and the court applied a multiplier of thirty-three (33) years. Being a motor cycle rider, and he may have worked even until sixty-five (65) years. However, taking into account the vicissitudes and vagaries of life the trial court used a multiplier of 33 meaning he could have worked till fifty (50) years. In CA.174/2022 General Cargo (Transport) Limited VS Njira Chitumbo Ndeme suing as administrator of the estate of Mwondingo Mkama Bafa (deceased) the deceased was aged twenty-seven (27) and the court found a multiplier of 30 years to be a reasonable award. In my view a multiplier of thirty three (33) years is not unreasonable.

Multiplicand

38. The appellant also faults the multiplicand of Kshs. 20,000/= per month as the deceased’s earnings. The deceased died while riding a motor cycle. However, there is no other evidence to prove that he worked as a motor cycle rider. I do agree with the Respondent that the court should have adopted the statutory minimum wage in accordance with the minimum wage (Amendment Order) Bill guidelines as was held in Gachoki Gachui (suing as legal representative of the estate of James Kinyua Gachoki (2015) eKLR. In this case, the Statutory minimum wage was Kshs. 7,240/= which I will adopt. Dependency therefore works out as follows $7,240/= \times \frac{2}{3} \times 33 \times 12 = 1,911,360$.

Loss of expectation to life.

39. The appellant did not fault the award on loss of expectation to life which was Kshs.120,000/=. I believe it is not contested. The Court of Appeal has held that the damages under the *Law Reform Act* must be deducted from the total award to avoid double compensation to the estate. The Court of Appeal in Eliphaz Mutegi Njeri & another –v- Stanley M Mwari M’atiri Civil Appeal No. 237 of 2004;

“ As regards the failure of the Superior Court to take into consideration the award under the *Fatal Accidents Act* when arriving at the award under the *Law Reform Act*, the principle is that the award under the *Fatal Accidents Act* has to be taken into account when considering awards under the *Law Reform Act*, for the simple reason that the dependents under the *Law Reform Act* are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the *Law Reform Act* states that the damages under this Act are in addition to those made under the *Fatal Accidents Act*, the fact that the same parties benefit from awards



under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards..... Accordingly, the award of Kshs.890,000/= reduced by Kshs. 100,000/= to Kshs.790,000/=”.

40. In *Benedeta Wanjiku –v- Changwon Cheboi & Another HCC 373/2008*, Judge Emukule held, “it is of course correct that both awards for loss of expectation of life and for pain and suffering to the benefit of the deceased’s estate. The awards are therefore capped to a minimum so that the estate does not benefit twice from the same death vide the *Fatal Accidents Act* and the *Law Reform Act*” See also *Transpares (K) Limited & Another -V- S.M.M suing as legal representative of Estate of E.M.M (deceased) 2015 e KLR*.

41. The award on special damages and Funeral expenses were also not contested. In the end, the appeal partly succeeds and the court makes the following award,

1. Liability 80% as against the appellant and 20% against the Respondent.
2. Pain and suffering Kshs.30,000/=
3. Loss of expectations to life 120,000/=
4. Damages under *Fatal Accidents Act* $7,240 \times 33 \times \frac{2}{3} \times 12 =$
1,911.360.00
5. Special damages 61,875.00
6. Funeral expenses 50,000/=

Total; 2,173,235

Less contribution of 20% 434,647

Less damages for loss of expectation

to life under *Law Reform Act* 120,000.00 -

1,738,588.00

1,618,588.00

The appellant will have $\frac{1}{2}$ costs of this appeal. Interest payable from date of Judgement.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 27TH DAY OF FEBRUARY, 2025

R. WENDOH.

JUDGE.

Judgment read in open court virtually, in the presence of

Appellants – Ms. Langat

Respondents – Ms. Masinde`

Juma/Hellen - Court Assistants

