



**Nderitu & another v Chesire (Suing as The Legal Representatives
of the Estate of Moses Kipkew Chesire - Deceased) (Civil Appeal
E981 of 2023) [2025] KEHC 7169 (KLR) (Civ) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E981 OF 2023

AC MRIMA, J

MAY 30, 2025

BETWEEN

JUSTIN KIHORO NDERITU 1ST APPELLANT

BENSON MIJANDE MBITHUKA 2ND APPELLANT

AND

**KIMOI KIGEN ZEPHANIAH CHESIRE (SUING AS THE LEGAL
REPRESENTATIVES OF THE ESTATE OF MOSES KIPKEW CHESIRE -
DECEASED) RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. G. Omodho
(Principal Magistrate) delivered on 26th May, 2023 in Nairobi
[Milimani] Chief Magistrates Commercial Case No. E8534 of 2021)*

JUDGMENT

1. By a Plaint dated 21st May 2021, Kimoi Kigen Zephaniah Chesire, the Respondent herein, as a Legal representative of the Estate of Moses Kipkew Chesire sued Justin Kihoro Nderitu and Benson Mijande Mbithuka, the Appellants herein in Nairobi [Milimani] Chief Magistrates Commercial Civil Suit No. E8534 of 2021 [hereinafter referred as ‘the suit’] for general damages, special damages, costs and interests as result of a road traffic accident that occurred on 16th February 2020 that claimed the life of Moses Kipkew Chesire [hereinafter referred to as ‘the deceased’].
2. It was the Respondent’s case that the 1st Appellant, who was the driver of the motor vehicle registration number KCP 083N Mitsubishi FH, [hereinafter referred to as ‘the lorry’] registered and insured in the name of the 2nd Appellant, was solely liable for the accident in issue. He pleaded that the 2nd Appellant



was vicariously liable for the actions and omissions of the 1st Appellant as he was his authorized driver, servant and/or agent.

3. The Appellants vehemently denied liability of the said accident by filing a Statement of defence dated 11th August 2021. The suit was canvassed by way of oral evidence. The Respondent called three witnesses; P.C Ogonyo George [PW1], one Edward Nduati [PW2] AN eye witness and Zephania Kibkebut, [PW3], a brother to the deceased. The Appellants called one Jairus Nderitu [DW1], who was the driver of the lorry.
4. At the close of parties' respective cases, the trial Court rendered its judgment on 8th September 2023 in favour of the Respondent in the following terms: -
 - a. Liability - 100%
 - b. Pain and Suffering – Kshs. 200,000/=
 - c. Loss of life expectation – Kshs. 100,000/=
 - d. Loss of dependency – Kshs. 1,695,892.80/=
 - e. Special damages – Kshs. 44,510/=
 - f. Funeral expenses - Kshs. 60,000/=
 - Total - Kshs. 2,100,402/80
 - g. Costs and interests
5. Aggrieved by the judgment, the Appellants filed a Memorandum of Appeal dated 21st September 2023 and raised the following grounds:-
 1. The learned trial magistrate erred in law and misdirected himself when he failed to consider the appellants submissions on both points of law and facts.
 2. The learned magistrate erred in law and in fact in finding the appellants 100% liable despite their being evidence on the contrary.
 3. The learned magistrate erred in law and in fact in awarding pain and suffering Kshs.200,000 loss of expectation of life Kshs.100,00,loss of dependency Kshs.1,695,892.80 as general damages,Kshs.60,000/= as funeral expenses and special damages of Kshs.44,510/= plus costs and interests.
 4. The learned magistrate erred in law and in fact in finding the amount awarded by assessing the same against the height of evidence on record.
 5. The learned magistrate erred in law and in fact in unduly disregarding the judicial authorities cited by the appellants instead relied on the authorities cited by the respondent which were unrelated to the actual claim by the respondent.
 6. The learned magistrate erred in law and in fact in unduly the evidence adduced in trial.
6. The Appellants prayed that the judgment of the trial Court be set aside and the award made be re-assessed. In bolstering the appeal, the Appellants filed written submissions dated 26th March 2025 where they cited several decisions in support of their position.
7. Opposing the appeal, the Respondent filed his written submissions dated 2nd April 2025 relying on several decisions to persuade this Court to dismiss the appeal with costs for lack of merit.



8. As the first appellate Court, this Court is under a duty to revisit the evidence on the record, evaluate it and arrive at its own conclusion. The locus classicus case of *Selle and Another vs Associated Motor Boat Co. Ltd* (1968) (EA 123) is alive on this issue. Further, this Court appreciates the settled principle in *Mwanasokoni vs Kenya Bus Service Ltd* (1982-88) 1KAR 78 and *Kiruga vs Kiruga and Another* that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.
9. Having carefully considered the record, the parties' submissions and rival arguments, the following issues arise for determination: -
 - i. Whether the trial Court erred in finding the Appellants wholly liable;
 - ii. Whether the assessment and award of damages was erroneous.
10. A consideration of the issues follows.

Liability:

11. The Appellants submitted that the trial Court erred in finding them wholly liable for the accident when it ought to have been the deceased. The Appellants reiterated that the deceased was the one to be fully blamed for the accident which resulted into his own death as a result of negligence attributed on his part. Relying on the evidence of DW1, they submitted that the witness stated that the deceased attempted to abruptly cross the road without confirming that it was safe to do so and further that the road did not have a zebra crossing. DW1 further averred that he was not driving the lorry at a high speed and did not veer off the road as claimed by the Respondent. The Appellants further called into question the testimony of PW1 who was the police officer who produced the police abstract when he stated that no party was to blame for the accident as investigations were still underway. Additionally, they submitted that PW1 was neither an eye witness nor visited the scene of the accident to determine who caused the accident. The Appellants also raised concerns about the testimony of PW2, the eye witness and averred that the testimony lacked credibility for the reason that he walked 3 metres behind the deceased and, therefore, he might have been obstructed by other pedestrians walking on the road, thereby hindering his ability to clearly see ahead. The Appellants further submitted that the testimony of PW2 was never corroborated and as such, the trial Court erred in holding them wholly liable noting that PW1 even confirmed that the matter was still under investigations.
12. The Appellants, therefore, urged this Court to allow the appeal on liability.
13. The Respondent opposed the appeal. He submitted that DW1 although confirmed that he was the driver of the lorry at the time of the accident, he did not submit any evidence of probative value that would rebut the evidence of PW2 who was the eye witness. Secondly, the Respondents called into question the speed at which he drove the lorry noting from his testimony that he could not do anything to prevent the accident from occurring. The Respondent further submitted that the testimony of PW2 had high probative value noting that he was at the scene of the accident when it occurred. For these reasons, the Respondent prayed that the finding of the trial Court on liability be upheld.
14. This Court has had the liberty to go through the record. A review of the evidence of PW1 confirms that he was not the investigating officer in the matter, but one PC Siele who had since been transferred. PW1 further confirmed that according to the police records, the matter was still pending investigations. PW2 confirmed that he was at the scene of the accident and reiterated that DW1 lost control of the lorry and hit the deceased. On cross-examination, PW2 stated that the lorry was driven too fast that it almost hit him too.



15. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, the Court had the following to say: -
- ... when a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.
16. Further, in *Mary Njeri Murigi vs. Peter Macharia and Another* (2016) eKLR, the Court held that: -
- ... A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.
17. The above caution on the driver of a vehicle does not ipso facto absolve a pedestrian from any liability in the event of an accident. Liability is a factual issue and its determination solely depends on how the evidence unfolds.
18. A police officer investigating an accident has special duties to discharge, both in the interest of the law and also for the sake of justice. Such officer must endeavour to fairly unravel how the accident occurred without favouring any party in any manner whatsoever. Apart from undertaking the investigations, the outcome of the investigations ought to be availed to the parties and the Court to aid a Court in determining any matter arising from the accident. In undertaking such duties, an officer must remain well aware of the calling in Articles 10, 19, 21, 232, 238, 244 among other provisions of *the Constitution*. When an officer fails to discharge the above duties, an injustice or injustices is/are caused to either one, some or all the parties involved in the accident.
19. In this matter, despite the accident having occurred on 16th February 2020, investigations thereof were still undergoing in February 2023 when PW1 testified in Court. That was a period of 3 years later. The trial Court did not, therefore, have the advantage of the police investigations or such evidence on how the accident occurred. The police abstract did not do much. What was left to the Court was the evidence of two persons; the driver of the lorry [DW1] and an eye-witness [PW2]. Both witnesses gave their divergent versions on how the accident occurred.
20. DW1 asserted that the deceased dashed onto the road without ascertaining that it was safe to do so such that it was impossible for DW1 to avoid the accident and that the deceased was hit on the second lane of the road. On his part, PW2 stated that he was waking behind the deceased about 3 metres and the lorry which was being driven at a high speed lost control and hit the deceased. PW2 did not state the point of impact; whether it was on or off the road. Such would have aided the Court in ascertaining which version of evidence was more credible. As matters stand, the evidence of DW1 on the point of impact to be on the second lane of the road stands. It is, therefore, the case that the deceased was crossing the road and was not hit off the road. The deceased, hence, walked from off the road onto the second lane. In doing so, even if he dashed as alleged, still DW1 would have seen him and avoided hitting him unless he drove the lorry at a high speed. Needless to say, DW1's evidence would have carried more weight had the deceased been hit on the first lane. In such circumstances, DW1 has to bear a higher liability than the deceased. This Court finds that since the deceased crossed the road on a point which was not a zebra crossing, then he ought to have been more careful and ensure that he would not be on the path of travel of an oncoming vehicle. To that end, the deceased must also bear a certain degree of liability. Accordingly, by considering the above evidence, liability is hereby apportioned at 30% against the deceased and 70% against the Appellants.



Quantum:

21. The Appellants submitted that the award of Kshs.1,695,892.80/= for loss of dependency was inordinately high as no proof of earning was adduced at the trial and consequently the trial Court erred in applying the multiplier approach. In relying on a plethora of cases in their submissions, the Appellants proposed that a global sum of Kshs. 500,000/= would be a reasonable award in the circumstances.
22. The Respondent in relying on the case of Viviane Anyango Onyango and Another vs Charity Wanjiku, submitted that the holding of the Court under loss of dependency was reasonable and should not be interfered with.
23. Ordinarily, a Court is supposed to give a reasonable award that is neither extravagant nor oppressive while considering factors such as previous awards for similar injuries and the principles as developed by Courts. The Court in *Butler vs Butler* (1982) KLR 277 outlined that what constitutes a reasonable award as discretionary upon the Court and will depend on the peculiar facts of each case and that an appellate Court must be slow to interfere with such an exercise of discretion. [See also *Odinga Jacktone Ouma vs Moureen Achieng Odera* (2013) eKLR, *Kemfro Africa Ltd V A.M Lubia and Another* (1988)1 KAR 727, *John Evan Gicheru vs Andrew Morton and Another* (2005) eKLR, *Arrow Car Limited Vs Bimono and 2 others* (2004) 2 KLR 101 and in *Denshire Muteti Wambua vs Kenya Power and Lighting Company Ltd* (2013) eKLR].
24. It is not disputed that the deceased was 46 years and in good health at the time of his death. Additionally, the deceased worked as a security officer. The trial Court, in its judgment, relied on Regulations of Wages (General)(Amendment) Order 2019 to hold that Ksh.15,141.90/= was an appropriate minimum wage for a night guard. Further, the trial Court adopted 14 years multiplier with dependency ratio of 2/3 to arrive at the award of Kshs.1,695,892/80 for loss of dependency. It is trite law that the multiplier is calculated on the expectation of working life of the deceased and the proportion of his net income which he would have made available for his dependents. It is on record that the deceased was survived by two children and the apportionment becomes reasonable.
25. This Court finds no fault on the part of the trial Court in using the multiplier method of assessing damages under the limb of loss of dependency. The Court also correctly settled for the minimum wages as provided in law for security officers.
26. On the multiplier, Courts have variously expressed on the issue. In *Beatrice Nyanchama Obuya vs Hussein Dairy Limited* (2010) eKLR, the Court applied a multiplier of 15 years for a deceased who was 45 years. Similarly, in *Pack Ingredients East Africa v Ouma (Widow Suing as the Legal Representative of the Estate of Michael Ouma Olony - Deceased)* (Civil Appeal E085 of 2023) [2024] the Court adopted a multiplier of 13 years for a 47-year-old deceased. Therefore, the multiplier of 14 years adopted by the trial Court was fair and reasonable and this Court will not disturb it.
27. On the pain and suffering before death, the deceased died 11 days after the accident and the award of Kshs. 200,000/= is reasonable. Likewise, the award on loss of expectation of life at Kshs. 100,000/= cannot be faulted. Further, the Appellants failed to demonstrate how the award of Kshs. 60,000/= for funeral expenses was inordinately high and further how the award of Kshs. 44,510/= in special damages was to be faulted. This Court finds and hold that the trial Court correctly rendered itself on the quantum of damages. Therefore, the appeal on quantum fails save on the apportionment of liability.
28. From the foregoing discussion, the following final orders hereby issue: -



- (a) The appeal on liability succeeds and the order finding the Appellants wholly liable for the accident is hereby set-aside and is substituted with an order finding the deceased liable at 30% against the Appellants at 70%.
- (b) The appeal on quantum is hereby dismissed, but the sums shall be subject to the above apportionment of liability.
- (c) The rest of the orders and awards made by the trial Court and not interfered with on appeal are hereby affirmed.
- (d) As the appeal has partially succeeded, each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MAY, 2025.

A. C. MRIMA

JUDGE

JUdgment virtually delivered in the presence of:

Miss. Ndiara, Learned Counsel for the Appellants.

Miss. Akasi, Learned Counsel for the Respondent.

Amina/Abdirazak – Court Assistant.

