Rotich v Kemoi (Suing as the Administrator of the Estate of Timothy Kipngeno Kemoi (Deceased)) (Civil Appeal E011 of 2025) [2025] KEHC 11384 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11384 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

CIVIL APPEAL E011 OF 2025

JK SERGON, J

JULY 31, 2025

BETWEEN

EZEKIEL ROTICH ..... APPELLANT

AND

MERCY CHELANGAT KEMOI ..... RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF TIMOTHY KIPNGENO KEMOI (DECEASED)

(Being an appeal against the Judgment of the Hon. J.M. Munguti (SPM) in Kericho Cm - Civil Suit No. E238 of 2022 delivered on 2nd February 2025)

JUDGMENT

1. The instant appeal stems from a lower court judgment in Kericho Chief Magistrate's Court, Civil Case No. E238 of 2022 Mercy Chelangat Kemoi [suing as the administrator and/or personal representative of the estate of the late Timothy Kipngeni Kemoi] versus Ezekiel Rotich wherein judgment was entered in favour of the respondent herein who was awarded Kshs. 3,661,283/= plus costs of the suit and interest at court rates.

2. The Appellant being dissatisfied with the judgment and decree of the trial court preferred an appeal and filed a memorandum of appeal against the judgment/decree on both quantum and liability on the following principal grounds;

    [i] That the Learned Magistrate misdirected himself when he failed to consider the appellants submissions on both points of law and facts.

    [ii] That the Learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

[iii] That the Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 3,661,283/- for damages under the *law reform Act*, damages under the *fatal accidents Act* and special damages hence arriving at a wrong finding putting into consideration the age of the deceased, nature of work and evidence produced before Court by the Respondent and as such awarded an excessive amount.

[iv] That the Learned Magistrate erred in law and fact by awarding the Respondent an inordinately high quantum as damages in the circumstances of this case.

[v] That the Learned Magistrate erred in law and fact by finding that the Appellant was 100% liable for the accident when there was no sufficient evidence produced.

[vi] That the Learned Magistrate erred in fact and in Law in failing to consider the Appellant's Submissions on quantum and liability and legal authorities relied upon in support thereof.

[vii] That the Learned Magistrate erred in law and fact by overly relying on the Respondents' submissions which were not relevant and without addressing his mind to the circumstance of the case.

[viii] That the Learned Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

[ix] That the Learned Magistrate erred in fact and in law by failing to appreciate the evidence tendered by the Appellant in his defence.

3. The matter came up for hearing and this court directed that the appeal be disposed of by written submissions.

4. The Appellant contended that the trial court erred in the apportionment of liability. The learned trial magistrate also totally disregarded the appellant's witness's testimony wherein he stated that it is the deceased who, without a riding license, was trying to overtake him from the wrong side of the road thus raising the issue of contributory negligence and further that the appellant was arrested and released without being charged with a traffic offence as he was not found liable for causing the accident herein. The Appellant therefore submitted that to apportion 100% liability to the appellant in the circumstances was misguided and thereby a ground for the interference by this appellate court as it was biased and against the weight of the evidence adduced.

5. The Appellant contested the award of Kshs. 200,000/= for pain and suffering was unreasonable, excessive and a misapprehension of the evidence tendered which points to the fact that the deceased died immediately at the scene of the accident. As a result, the appellant therefore submitted that the aforementioned amount should be reduced to Kshs. 20,000/= and cited a decision in Eldama Ravine High Court, Civil Appeal No. E005 of Osanya and Anor [suing as the legal representative and administrator of the estate of Wycliff Kandia Osanya versus Mangrove Tree Tours and Travel Limited [2025] KEHC 4257 [KLR] where it was held that, "In view of the fact that the deceased died instantly... I will award Kshs 20,000 under pain and suffering."

6. The Appellant contested the award of Kshs. 344,000/= as funeral expenses in the face of lack of duly stamped receipts and the fact that the learned magistrate awarded special damages with no receipts of the same as strict proof and therefore the same was based on the wrong principles and carelessly made thus should be set aside in its entirety.

7. The Appellant contested the loss of dependency, the deceased was 34 years of age at the time of his death and the trial court ought to have used a multiplicand of 2/3 of his earnings for the estate with a

proposed multiplier of 26. However, the trial magistrate based the multiplier on the wrong principles as the trial magistrate as per record of appeal considered that the life expectancy in Kenya ranges from 65-68... The Appellant maintained that multipliers are supposed to be calculated based on the retirement age of Kenya which is 60 years. As such, the entire calculation under loss of dependency makes easy prey to interference by this appellate court. They cited the decision in Vihiga High Court, Civil Appeal No. 24 of 2021, Njuka versus Gituma [2022] KEHC 13849 [KLR] where it was held, "On multiplier, the standard approach is to rely on the official age of retirement, which is now 60 years old. However,...vagaries and vicissitudes of life are brought to bear, reducing the age of retirement."

8. The Appellant contests the award of Kshs. 200,000/= as loss of expectation of life under this head "based on cited decisions", neither one of which was quoted. The Appellant maintained that the said amount is thus an imaginary figure and disproportionate to the case at hand and comparable awards set by precedent. The Appellant cited Busia High Court, Civil Appeal No. E043 of 2021, Ouma & Anor versus Wanyama & Anor suing as the administrators of the estate of Evans Wanyama [Deceased] [2023] KEHC 19282 [KLR] where it was held, "On the loss of expectation of life, the conventional award is Kshs. 100,000.00... The loss of expectation of life is reduced to Kshs 100,000.00." The appellant argued that the award under this head was given with no reference to decisions related to accident claims and citing no case law, they submitted that the same was erroneous and the same should therefore be reduced to the conventional award of Kshs. 100,000/= .

9. The Respondent filed submissions and maintained that this being a first appeal, it is the duty of this honorable court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to arrive at a different finding. The Respondent cited the Court of Appeal in Njoroge v Republic [1987] KLR 19:- "As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect [see Pandya v R [1957] EA 336, Ruwalla v R [1957] EA 570]."

10. The Respondent contended that the Learned trial magistrate awarded 100% upon considering the evidence that was presented before him, during trial it came out that the post mortem report from Kapkatet Sub-County Hospital Timothy Kipngeno Kemoi [deceased] died as a result fatal injuries caused by the road traffic accident that occurred on 30.6.2021. During cross-examination, Dw. 1 confirmed that the distance between his Motor Vehicle KCK 175F and motorcycle KMEE 33IT prior the accident was very close, he creatively used the word "an inch" to describe the distance. Dw. 1 also admitted that he did not take any measures such as slowing down, stopping and/or swerving to avoid the aforesaid accident, rather he continued with his journey as usual maintaining the same speed. Dw. 1 testified that soon after the accident other motorbike riders started stoning him and even broke the motor vehicle's mirror causing him to flee the accident scene for his safety and that he was not formally charged as the matter was still pending investigations. The Respondent maintained that in the circumstances of this case, there was no eye witness and no sketch of the scene of accident, therefore the only reasonable inference is that Dw. 1 hit the rider of motorcycle KMEE 33IT, from the left rear side of the motor vehicle KCK 175F and the said rider lost control of his motorcycle and fell to the mudguard of the left rear wheel of motor vehicle KCK 175F [petroleum tanker].

11. The Respondent maintained that for the award of loss of expectation of life, the learned trial magistrate considered that the deceased person herein was a healthy and able young man who died in his prime at the age of 34 years stated and that he was a tea-plucker and the sole breadwinner of his family of

two young children. The Respondent contended that whereas she had proposed an award of Kshs. 300,000/= for loss of expectation of life relying on the case of Daniel Kuria Nganga v Nairobi City Council [2013] eKLR the Learned trial Court awarded Kshs. 200,000/- which was way below what she had prayed for.

12. The Respondent conceded that for the award of pain and suffering, that it was apparent from the death certificate PExh.6 and the post mortem results that the deceased person died soon after the accident after he was rushed to the hospital. He suffered immense pain before death. The Respondent contended that whereas the Respondent had prayed for the sum of Kshs. 250,000/= as adequate compensation, the Trial Court awarded Kshs. 200,000/= upon analyzing the pain and suffering that the deceased endured. The Respondent contended that the Appellant has not paused any plausible reason to disturb this award.

13. The Respondent conceded that she only produced a payment receipt for Kshs. 170,000/= paid for catering services, Kshs. 50,000/= for coffin and Kshs. 7,500/= for mortuary charges and contended that it is not lost that in any funeral, additional expenses must be incurred and therefore claimed for Kshs. 344,000/= as funeral expenses. The learned trial magistrate while relying on the Court of Appeal decision in Premier Dairy Limited v Amarjit Singh Sagoo & another [2013] eKLR, stated that whenever a party pleads on this limb, it doesn't matter whether supporting evidence has been produced to support the amount that is claimed, burial expenses are always incurred and as such they ought to be granted. The court of appeal stated; - "We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

14. The Respondent contended that for loss of dependency, the trial Court adopted a multiplicand of 2/3 based on the deceased's age. He was 34 years old and he had a young family of 2 children. The Respondent cited the case of Wilham [K] Ltd & Anor v Conceta Nekesa Wamalwa & Anor [Suing as the administrators of the estate of Kelvin Wanjala Misigo] [Nakuru Civil Appeal No. 156 of 2010] where the deceased was a healthy young man whose life was abruptly cut short following an accident. Since there was no evidence that he was suffering from any known illness the court opined he would have remained in employment until he attained the age of 60. In this case Timothy Kipngeno Kenoi [deceased] died at the age of 34 years and according to the post mortem report he was in good health and therefore the learned Trial Court did not err in applying a multiplier of 26 years as the adequate figure in computing loss of dependency. The Respondent reiterated that Timothy Kipngeno Kemoi [deceased] earned his livelihood through tea-plucking. Moreover, he was the sole breadwinner of his family and has two school-going children. The Multiplicand applicable therefore would be 2/3. The Respondent cited the case of Joseph Gatone Karanja v John Okumu Soita & Esther Chepkorir [Suing as admin of the estate of Benard Soita Nyongesa [DCD] [2022] eKLR the court stated as follows; "67. On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a

guiding principle in assessing loss of income." In the instant case the Regulations of Wages [General] [Amendment] Order 2022, Legal Notice No. 125 of 1st July 2022 were in force and the learned trial magistrate relied on, the minimum wage for general labourers was Kshs. 14,025.40/= at the time of the accident; consequently, the Plaintiff was entitled to that figure since he was a general labourer.

15. The Respondent reiterated that the learned trial magistrate never misdirected himself nor failed to consider the submissions of the parties and therefore there is no error on principle that would persuade this court to disturb the judgment of the trial court.

16. Having considered the grounds in the memorandum of appeal, record of appeal and the submissions by the parties the issue [s] for determination is whether the trial court erred in apportioning 100% liability and quantum awarded as general damages and special damages. I have considered the record of appeal and submissions by parties to arrive at a fair and just determination.

17. On the issue of liability, this court has carefully studied the record of appeal and considered the submissions by the parties. It is the appellant's case that the deceased tried to overtake him from the wrong side of the road and further that he was arrested and released without being charged with a traffic offence as he was not found liable for causing the road accident. The appellant contended the trial court was misguided to apportion 100% liability. It is the respondent's case that the appellant whilst on cross examination in the trial court conceded that the motorcycle was inches away from the tanker, yet he made no effort to slow down, stop or swerve, he maintained same speed and thereby hit the rider of the motor cycle and the said rider lost control of his motorcycle thereby occasioning the fatal accident. Based on the proceedings in the trial court, there are different witness accounts as to how the accident in question occurred, there being no eye witness and no sketch of the scene of accident, it is therefore the finding of this court that both parties failed to assist the court to decide who was to blame for causing the accident. In a road traffic accident claim, a court can apportion liability between the drivers involved in an accident where from the evidence adduced the court is unable to determine as which of the drivers is to blame for causing the accident. This was the position taken by the Court of Appeal in the case of Farah v Lento Agencies [2006] 1 KLR 123 the court expressed itself as follows: "In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. 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... The trial court had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame." It is further the finding of this court that the trial court erred in apportioning 100% liability, this court finds that apportionment of liability at 50:50 is justified given the circumstances.

18. On the issue as to whether the general damages awarded for pain and suffering, loss of expectation of life and loss of dependency were excessively high thereby warranting interference of this court.

19. On pain and suffering, this court has perused the record, it is apparent from the death certificate PExh.6 and the post mortem results that the deceased person died soon after the accident after he was rushed to the hospital. This court has considered comparative awards, in the case of Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No 68 of 2015 [2016] eKLR the court pronounced itself as follows on damages awarded for pain and suffering; "On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring

immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that the sum of Kshs 50,000 awarded under this head is unreasonable." It is, therefore, my considered view and decision, that the award of Kshs. 200,000 by the trial court for pain and suffering is excessively high and I hereby reduce the same to Kshs. 100,000 as is reasonable in the circumstances of the case.

20. On loss of expectation of life, this court has considered various precedents for the award for loss of expectation of life and finds that the award of Kshs. 200,000 awarded by the trial court to be unreasonably high in the circumstances in the case. This Court will, hence, be guided by Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, where the Court stated as follows on the awards for pain and suffering and loss of life: - "... As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death... 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..." I hereby reduce the same to Kshs. 100,000 as is reasonable in the circumstances of the case.

21. On the award of the loss of dependency, this court finds that the trial court rightfully adopted a multiplicand of 2/3 based on the deceased's age and the fact that he had a young family. The trial magistrate adopted a multiplier of 26 noting that the deceased was an able young man who died in his prime at the age of 34 years. In proceedings before the trial court the plaintiff stated that the deceased was a tea plucker, however, she did not avail payslips as proof of the same therefore the learned trial magistrate relied on the minimum wage for general labourers was Kshs. 14,025.40/= at the time of the accident. Therefore, there is no need to interfere with the trial court's award on loss of dependency which is hereby worked out as follows: Kshs. 2,917,283.20/- [14,025.40 x 12 x 26 x 2/3].

22. On the issue as to whether the trial court erred in awarding special damages that were pleaded but not proven. Special damages are a unique breed of compensation, it is trite law that special damages must not only be specifically pleaded but also be strictly proved. The Court of Appeal in Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd [1992] KLR 177 stated that: "The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded." The Respondent pleaded for a sum of Kshs. 344,000 for funeral expenses but in her bundle of documents produced payment receipts for the following items; Ksh. 550 for a search, Kshs. 170,000/= paid for catering services, Kshs. 50,000/= for coffin and Kshs. 7,500/= for mortuary charges. I therefore find that the learned magistrate erred in awarding Kshs. 344,000, I hereby allow the appeal on special damages and award Kshs. 228, 050/= as special damages.

23. In the end, I find that the appeal is meritorious. The Judgment of the Trial Court is set aside and substituted it with Judgment on Appeal as follows:-

    a. Liability assessed at 50:50

b. Pain and suffering Kshs 100,000/-

c. Loss of expectation of life Kshs 100,000/-

d. Loss of dependency Kshs 2,917,283.20/-

e. Special damages Kshs 228, 050/-

Sub Total: Kshs 3,445,333.20/-

Less 50% contribution

Grand Total: Kshs 1,722,666.60/-

24. Since the appeal has partly succeeded, each party to bear their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 31ST DAY OF JULY, 2025.

J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Mugumya for the Appellant

Mwita for the Respondent