



Gojah & another (Suing on their own Behalf and as the Administrators of the Estate of the Late Michael Otieno Gojah) v Reliable Freight Services Limited (Civil Appeal E113 of 2023) [2025] KEHC 2494 (KLR) (Civ) (12 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2494 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E113 OF 2023
GL NZIOKA, J
FEBRUARY 12, 2025

BETWEEN

CORNELIA AKOTH GOJAH 1ST APPELLANT

JOSEPH GOJAH ARAN 2ND APPELLANT

SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE MICHAEL OTIENO GOJAH

AND

RELIABLE FREIGHT SERVICES LIMITED RESPONDENT

(Being an appeal from the decision of Honourable J. Ndengeri Principal Magistrate delivered on 16th November 2023 vide Naivasha CMCC No. 123B of 2020)

JUDGMENT

1. By a plaint dated 29th January, 2020 the plaintiffs (herein “the appellants”) sued the defendant (herein “the respondent”) seeking for orders as here below reproduced: -
 - a. Special damages of Kshs. 198,050.
 - b. Damages under the *Fatal Accidents Act* for the benefit of the aforesaid dependents of the deceased and damages under the *Law Reform Act* for the benefit of the estate of the deceased for pain and suffering before death and loss of expectation of life.
 - c. Costs of the suit and interest on (a) and (b) above at court rates.
 - d. Such other relief that this Honourable court deems fit to grant.



2. The appellants' claim arose from a road accident that occurred on 13th May 2017, wherein one Michael Otieno Gojah (herein "the deceased plaintiff") was fatally injured. It is averred that the deceased plaintiff was at the material time travelling as a lawful fare paying passenger on the motor vehicle KCG 992C.
3. That the subject motor vehicle was involved in the accident with motor vehicle registration No. KCD 816S, owned by the respondent and driven at the material time by its agent. Thus, the respondent is sued under vicarious liability for the negligence of its agent.
4. It is alleged that the respondent's agent drove the subject vehicle negligently as per the particulars of negligence stated at paragraph four (4) of the plaint.
5. It is further averred that the deceased was survived by his parents Joseph Gojah Aran and Cornelia Akoth Gojah. Further that, he was undertaking a plant operator's course at the National Youth Service Yatta Field Station at the time of his death.
6. However, the suit was opposed by the respondent vide a statement of defence dated 19th February 2021, wherein the respondent denied the occurrence of the accident and/or owning the subject motor vehicle registration No. KCD 816S.
7. The respondent further denied the pleadings that the deceased suffered fatal injuries in the course of the accident and so are the particulars of negligence attributed to the respondent's driver.
8. However, the respondent averred on a without prejudice basis that, if the accident occurred, which it denied, then it was wholly caused or substantially contributed to by the driver of motor vehicle registration number KCG 992C, as per the particulars of negligence stated at paragraph 5 of the statement of defence.
9. Further that in the alternative and without prejudice to the foregoing, the respondent blamed the deceased for solely causing and/or substantially contributing to the cause of the accident and the fatal injuries he sustained, as per the particulars of negligence under paragraph 6 of the statement of defence.
10. The matter proceeded to full hearing. The appellants case was supported by the evidence of (PW1) No. 80635 PC Paul Komen attached to Gilgil Police Station. He produced the police abstract as plaintiff exhibit 4, on behalf of PC Ogweno the Investigating officer who was transferred in the year 2019.
11. (PW1) No. 80635 PC Paul Komen testified that the particulars in the police abstract confirm that indeed an accident occurred on 13th May 2017 at around 02:30hrs between an Isuzu bus KCG 992G in which the deceased was a passenger and a trailer registration No. KCD 816D.
12. The appellant's case was further supported by the evidence of the mother of the deceased plaintiff (PW2) Cornelia Akoth Gojah who adopted her witness statement wherein she states that, on 12th May 2017, the deceased informed her that he was travelling from Nairobi to Ahero aboard bus registration No. KCG 992C and would be arriving at around 5:00am. However, by 6:00am he had not arrived and attempts to reach him through his mobile phone were futile as his phone was off.
13. That at about 7:00am she heard news over the radio that there had been an accident at Soysambu area along the Nakuru - Gilgil Road and travelled to Gilgil Police Station. That she was referred to Chiromo Mortuary for DNA test as the bodies of the victims were badly burnt. That, the DNA test was conducted on 16th May 2017, whereby the deceased plaintiff's body was identified and released for burial.



14. PW2 Cornelia averred that at the time of his demise, the deceased was undertaking a course as a Plant operator at the National Youth Service Yatta Field Station. Further, he was in good health and did not complain of any ailments.
15. At the close of the appellants' case, the respondent called one witness Vernard Mwangemi Mwachai, the driver of motor vehicle registration KCD 816S at the material time. He adopted his statement and testified that on the material date at around 02:30Hrs he was driving the subject vehicle along the Gilgil – Nakuru Highway. That, the bus registration KCG 992C overtook him at a road block and attempted to overtake another vehicle but there was a trailer coming from the opposite direction.
16. That, the bus driver tried to come back to its rightful lane but could not manage and was hit by the oncoming trailer on the right side and then the bus hit his vehicle on the spare fuel tank damaging the tyre and axles. That, the driver of the bus escaped but he assisted passengers in the bus.
17. However, the defence witness conceded that he was charged with the offence of careless driving and fined but was not charged with causing death of the deceased.
18. At the conclusion of the matter, the parties filed their respective submissions and by a judgment dated, 16th November 2023, the trial court held that deceased plaintiff had not proved any liability against the respondent due to insufficient evidence and dismissed the appellants' claim in its entirety.
19. However, the appellants are aggrieved by the decision of the trial and appeals against it on the following grounds: -
 - a. That the learned Magistrate erred in fact by holding that the appellants herein had not proved negligence yet the deceased was a passenger in one of the vehicles involved in the accident.
 - b. That the learned Magistrate erred in law and in fact by failing to hold that the fact that the respondent's driver had been charged in a court of law for dangerous driving denoted the aspect of culpability on the part of the said driver.
 - c. That the learned Magistrate erred in law and in fact by failing to consider that the balance of proof required in civil cases is on a balance of probability and not beyond reasonable doubt applicable in criminal Cases.
 - d. That the learned Magistrate erred in law and in fact by holding that since the defendant driver had been charged with the offence of careless driving and not causing death he was not to blame for the accident.
 - e. That the learned Magistrate erred in law and in fact by holding that the plaintiff ought to have provided certified copies of the traffic case for it to know which vehicles were involved in the accident.
 - f. That the learned Magistrate erred in law and in fact by failing to indicate what award she would have made in the event the estate of the deceased proved their case.
20. As a result, the appellants seek for orders that the appeal be allowed, the judgment of the lower court be set aside, and the court assess quantum. Further, they be granted costs of the appeal.
21. The appeal was disposed of vide filing of submissions. The appellants in submissions dated 22nd August 2024 cited the case of, Christine Kalama vs Jane Wanja Njeru & Another (2021) eKLR where the High Court cited the cases(s) of; Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal (1988) RTR 298 and laid out the elements of negligence as; the existence of a duty of



- care, breach of that duty, a causal connection between the breach and the damage, and foreseeability of the particular type of damage caused.
22. The appellants submitted that, the learned trial Magistrate erred by not considering the totality of evidence adduced and therefore failed to determine whether the evidence met the threshold established in the case of; Christine Kalama vs Jane Wanja Njeru & Another (supra).
 23. The appellants argued that, the respondent's driver had a duty of care which he breached by failing to keep a proper lookout and/or drive prudently which led to the accident in which the deceased lost his life.
 24. That PW1 Cornelia adduced evidence that the deceased was a passenger in bus registration No. KCG 992C while, PW2 PC Komen confirmed the occurrence of the accident and that the respondent's driver was charged with the offence of careless driving and fined Kshs. 10,000.
 25. That in the case of; Baker v Market Harborough in his trial Co-operative Society Ltd (1953) 1 WLR 1472 as cited in the case of Christine Kalama vs Jane Wanja Njeru & Another (supra) it was stated that the defendants cannot escape liability as proof of collusion is sufficient to call on the defendant to give an answer. That even if neither driver gave evidence the court would find that both drivers are to blame for causing the accident.
 26. The appellants submitted that, despite the respondent's witness DW1 Vernard blaming the driver of the bus registration No. KCG 992C for causing the accident, the owners of the said bus were not a party to the suit as the respondent entered a consent removing them from the case after taking out a third-party notice against them.
 27. Further, that the defence witness (DW1) admitted that he was charged with an offence of careless driving, pleaded guilty to the offence and fined. The appellants submitted that, the charge of careless driving connotes a degree of negligence and it was not open for the respondent to deny its driver was negligent and caused the accident and then escape liability in a civil case.
 28. Further that section 47A of the *Evidence Act* (Cap 80) Laws of Kenya provides that the final judgment in a criminal case which declares a person guilty of an offence shall be conclusive evidence that such person was so convicted was guilty.
 29. Furthermore, in the case of Civil Appeal 389 of 2019 Murigi & Another vs Mwangi & Another the High Court applied the provisions of section 47A and stated that in accident cases, a conviction implies negligence of the person so convicted and they cannot therefore deny negligence or claim to be completely blameless and assert that another person was blameworthy.
 30. That, the fact that the respondent's driver was not charged with the offence of causing death should not be used against the estate of the deceased as the decision to charge is at the discretion of the police and prosecution.
 31. The appellants faulted the trial Magistrate for holding that the appellant ought to have provided certified copies of the traffic case to assist the court know which vehicles were involved in the accident. That, the certified copies of the proceedings would not be of much help as the respondent's driver pleaded guilty and was fined.
 32. That in addition, the failure by PW1 PC Komen to avail the sketch map was not fatal as the sketch map would only have indicated the point of impact which would have only assisted the trial court to determine the level of contribution by a third party.



33. Lastly the appellants faulted the trial Magistrate for failing to assess damages despite dismissing their suit. The appellants reiterated their submissions in the trial court on quantum and submitted that under the head of pain and suffering, a sum of Kshs. 100,000 was adequate as the deceased was in a lot of pain and anguish despite passing on a few minutes after the accident.
34. That on the claim of loss of expectation of life, the appellants submitted that the deceased would have lived a long and healthy life and worked for a long period of time. The appellants proposed a sum of Kshs. 100,000 and relied on the case of; Taita Taveta University College vs Rugut & Maritim (suing as the Administrators of the estate of the late Cosmas Kipserem Kipkoech (2022) eKLR where the High Court awarded Kshs. 100,000 under for a similar claim.
35. For loss of dependency, the appellants submitted that at the time of his death, the deceased was studying to become a plant operator and urged the court to adopt a sum of Kshs. 17,447.15, being the minimum wage as per Legal Notice 112. Further, that the appellants as the deceased was not married a multiplicand of 1/3 be applied.
36. On the multiplier, it was submitted the deceased was twenty-three (23) years at the time of his death and that as his profession was not risky and/or dangerous he would have been productive until the age of sixty (60) years and therefore the appellants proposed a multiplier of thirty seven (37) years and relied on Civil Appeal No. 37 of 2018 Volcan Holding Ltd vs Joseph Musabas Birari (suing as the Administrators of the estate of the Robinson Wakhisi Musabasi (2020) eKLR where the High Court adopted a multiplier of thirty seven (37) years where the deceased was 23 years old. Consequently the appellants proposed loss of dependency be calculated as follows: $17,447 \times 37 \times 12 \times 1/3 = \text{Kshs. } 2,582,156$
37. On special damages, the appellants submitted that they pleaded and proved the sum of Kshs. 198,050 through the production of receipts.
38. However, the respondents in submissions 22nd August 2024, argued that the appellants did not produce sufficient evidence on liability to partly or wholly blame the respondent or its driver for causing the accident. That, PW1 PC Komen was not the investigating officer and did not visit the scene of the accident therefore there was no evidence of the point of impact.
39. Further, PW1 testified that the police abstract did not apportion any blame on the respondent or anyone and therefore investigations were inconclusive. Furthermore, PW2 Cornelia did not witness the accident and did not know how the accident occurred.
40. The respondent argued that, only its witness DW1 Vernand was an eye witness and laid the blame on the driver of the bus registration No. KCG 992C for causing the accident and was therefore the only credible witness as to how the accident occurred. That, DW1's testimony was not rebutted by the appellants' witnesses' evidence. Additionally, the defence witness was not charged with the offence of causing death by dangerous driving.
41. On quantum, the respondent proposed a sum of Kshs. 10,000 for pain and suffering arguing that the deceased died on the spot and cannot be said to have suffered for long. Reliance was placed on the case of; Florence Awour Owuoth vs Paul Jackton Ombayo [2020] eKLR where the High Court awarded Kshs. 10,000 for pain and suffering where the deceased died on the spot.
42. On quantum under the head of loss of expectation of life, the respondent concurred with the appellants on the proposed a sum of Kshs. 100,000 and cited the case of, Taita Taveta University College vs Rugut & Maritim (suing as the Administrators of the estate of the late Cosmas Kipserem Kipkoech (supra).



43. On loss of dependency, the respondent submitted that the deceased was unemployed at the time of his death and therefore damages for future earnings was speculative as it was not supported by any evidence and cited the case of; *Taita Taveta University College vs Rugut & Maritim* (suing as the Administrators of the estate of the late Cosmas Kipserem Kipkoech (supra) where the High Court stated that it would be speculative to assume that the deceased would have completed college and supported his siblings bearing in mind the uncertainties of life.
44. The respondent proposed that the court adopts a global sum of Kshs. 300,000 and relied on the case of *Multiple Haulier (EA) Ltd & Anor vs William Abiero Ogeda & 2 others* (2016) eKLR where the High Court awarded a global figure of Kshs. 300,000 where the deceased was twenty-one (21) years old.
45. Further, reliance was placed on the case of; *Gilbert Kiamatare Nairi & another* (suing as personal representatives of the Estate of Jackline Sein Lemayain (Deceased) vs *Civiscope limited* [2021] eKLR where the High Court adopted the global sum approach and awarded damages of Kshs. 600,000 for the deceased who was thirty-one (31) years old at the time of death.
46. In addition, the case of; *Wesley Kikoech Kendagor vs Unistar Transporters Ltd* [2007] eKLR, was cited where the deceased was twenty-one (21) years old at the time of his demise and the High Court adopted the global sum approach and awarded damages of Kshs. 500,000.
47. On special damages, the respondent urged the court to dismiss the claim of Kshs. 198,050 arguing that there were no official receipts produced.
48. At the conclusion of the arguments by the parties, I recognize that the 1st appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses as stated by the Court of Appeal in the case of; *Selle & Another vs Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
49. The Court of Appeal thus observed: -

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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 itself 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. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
50. On the issue of liability, I note that from the evidence adduced that it is clear the deceased plaintiff was a passenger travelling in the motor vehicle registration No. KCD 816S and therefore not a driver of any of the motor vehicles involved in the accident including the respondent’s motor vehicle. Consequently, as he was not in control of any of the motor vehicles, he could not have done anything to avoid the accident.
51. Furthermore, as a passenger he cannot be held liable for negligently driving any of the accident vehicles. I note that the respondent pleaded that the deceased was negligent as per particulars of negligence attributed to him however, the same were not supported by any evidence and remained unproved. Even then the only person who could rebut the same is the deceased.



52. In fact, the respondent pleaded that the accident was caused by the driver of the motor vehicle registration No. KCG 992C as evidenced by the particulars of negligence at paragraph 5 of the respondent's statement of defence. In support of that pleading, the respondent filed a chamber summons application dated 3rd February 2022 seeking for leave to issue third party notice. The trial court by an order dated; 19th July 2022 although indicated as dated 23rd April 2022, allowed the application.
53. The court record is not clear of whether the application was heard but the appellants submit that the respondent compromised it. The purpose of the third-party notice is to attribute either full liability or contributory negligence on the part of the third party. That is, if the defendant is found liable, then the third party will either share liability or indemnify the defendant, if the defendant pays the decretal sum.
54. Pursuant to the afore said, the trial court erred in holding that the respondent's agent was not negligent and consequently dismissing the appellants' suit.
55. It is settled law that even where a plaintiff's claim is dismissed an indication on damages be considered. The rational is that if the appellate court holds otherwise then it can review the damages awarded,
56. The issue to consider is whether the court should descend into an arena of assessing damages or not and whether the court will be exercising original or appellate jurisdiction.
57. In that regard I associate myself with the holding in the case of; FOO (Minor Suing Through Next Friend and Father GOO) v Omare [2024] KEHC 7729 (KLR) where the Court stated that: -
 27. On the alleged failure to assess damages that the appellant would have been awarded had he been successful, the trial court did not assess any damages after dismissing the suit despite referring to the authorities relied on by both parties in urging the court to award damages for the injuries sustained by the appellant. That was manifestly erroneous on the face of the binding decision in Frida Agwanda & Ezekiel Onduru Okech v Titus Kagichu Mbugua [2015] eKLR, where the court held that:

“Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment.”
 28. Similarly, in Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, it was observed thus:

“It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.”
 29. With such trite position of the law, I find that there was an obvious error. I reiterate that a trial court has the duty to assess damages even where the suit fails. I will thus perform the duty of the court on first appeal and assess damages”



58. Consequently, I find that it is in the interest of justice not to refer the matter back to the trial court. On claim of pain and suffering, the appellants have proposed a sum of Kshs. 100,000 arguing that the deceased suffered before he succumbed to his injuries. On the other part the respondent proposed a sum of Kshs. 10,000 on account that the deceased died on the spot. The evidence reveals that the deceased died on the spot therefore an award of Kshs 10,000 is justified.
59. On the claim of loss of expectation of life, I note that both parties have proposed a sum of; Kshs 100,000 which I adopted. In that respect the Court, *Kiilu v Namurwa & another* (Suing as the administrators of the Estate of Gladys Nasimiyu Maasika - Deceased) & 2 others [2024] KEHC 16032 (KLR) stated that: -
- “However, conventionally, Courts have awarded Kshs. 100,000/- for loss of expectation of life bearing in mind the award on loss of dependency. The award of Kshs. 200,000/- was, therefore, on the higher side for purposes of this suit. The sum is hereby reviewed downwards to Kshs. 100,000/=.”
60. On the loss of dependency, the appellants submitted that the deceased was undertaking a course as a plant operator with the National Youth Service at Yatta Field Station and would have been employed as such after completion of his studies and therefore they proposed the court adopts the multiplier approach and the minimum wage as per as per Legal Notice No. 112. However, the respondent argued that there was no proof of deceased’s employment and proposed the court adopt a global sum approach.
61. Based on the evidence in the trial court both parties concede that the deceased was not employed. For the court to adopt the minimum wage, it has to be proved that the deceased was working and there is evidence that indeed he was working. The figure being given by the appellants is not supported. To the contrary there is a letter from the National Youth Service confirming that the deceased was still undertaking training and had not qualified as a plant operator. So there is no evidence of monetary income and that he was in employment to even then invoke the minimum wages regulations.
62. Based on the foregoing, the court can only adopt a global sum approach. The question is what amount would be reasonable in this matter?
63. I have considered the Regulation of Wages (General) (Amendment) Order, 2017 and note that had the deceased qualified as a plant operator he would have earned a minimum wage of Kshs. 13,309.80 if working from outside Nairobi. The letter from the Chief indicates that the deceased hailed from Nyando sub-county. Therefore, the afore sum is applicable.
64. Furthermore, there is no dispute that, the deceased was aged twenty-three (23) years old at the time of his death. Indeed, had he completed his training and employed by the National Youth Service, he would be a civil servant due to retire at age sixty (60). However, taking into consideration the vicissitudes and vagaries of life I find a consideration of thirty-two (32) years is reasonable.
65. Further, the deceased was not married and did not have any children but was survived by his parents and therefore I adopt a dependency ratio of 1/3. Taking into account all the above, I award loss of dependency as follows: $13,309.80 \times 32 \times 1/3 = \text{Kshs. } 1,703,654.40$
66. However, as stated afore the deceased was not qualified and it would not be prudent to award the said amount in total. Having considered the deceased was still in training, I have reduced the said sum by 50% and award a global figure of Kshs. 850,000.
67. In conclusion the final award on quantum is as follows:



- a. Pain and suffering-----Kshs 10,000
 - b. Loss of expectation of life-----Kshs 100,000
 - c. Loss of dependency-----Kshs 851,827.50
- Total sum-----Kshs 960,000

Interest is awarded on above sum from date of this judgment to payment in full. Each party to meet its own costs of the appeal.

68. It is so ordered.

DATED, SIGNED AND DELIVERED ON THIS 12TH DAY OF FEBRUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Ndungu H/B for Ms. Amboko for the appellants

Mr. Bore for the respondent

Mr. Komen: court assistant

