



**Osanya & another (Suing as the Legal Rep and Admin of the Estate of Wycliff  
Kandia Osanya (DCD)) v Mangrove Tree Tours & Travel Limited (Civil  
Appeal E005 of 2023) [2025] KEHC 4257 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4257 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDAMA RAVINE  
CIVIL APPEAL E005 OF 2023  
RB NGETICH, J  
MARCH 20, 2025**

**BETWEEN**

**RAEL ONGAYA OSANYA & ELICTLNA OSANYA ..... APPELLANT  
SUING AS THE LEGAL REP AND ADMIN OF THE ESTATE OF WYCLIFF  
KANDIA OSANYA (DCD)**

**AND**

**MANGROVE TREE TOURS & TRAVEL LIMITED ..... RESPONDENT**

***(THIS IS AN APPEAL FROM THE JUDGMENT AND DECREE OF  
HONOURABLE SENIOR PRINCIPAL MAGISTRATE IN ELDAMA  
RAVINE CC NO. E16 OF 2021 DELIVERED ON 31ST JANUARY 2023)***

**JUDGMENT**

1. The appellants herein who were plaintiffs in the trial court, filed suit as administrators of the estate of the late Wycliff Kandia Osanya Ismael claiming general and special damages for the benefit of the estate of the deceased who was involved in a fatal road traffic accident on 31<sup>st</sup> October 2020 while driving motor vehicle Reg. No. KCY 663D along Eldoret-Nakuru road.
2. The primary suit was dismissed on 31<sup>st</sup> August, 2023 for want of proof on a balance of probability and the plaintiff being dissatisfied with the said judgment of the trial court, preferred this appeal against the defendant /respondent on the following grounds: -
  - i. That the learned trial magistrate erred in law and in fact by finding and holding that the Appellant did not discharge his burden of proof as required by the law and the decision made was made against the weight of evidence that was adduced thereby occasioning miscarriage of justice.



- ii. The learned trial magistrate erred in law and in fact by wholly absolving the Respondent from blame which finding was against the evidence that was tendered thereby occasioning miscarriage of justice.
  - iii. The learned trial magistrate erred in law and in fact by dismissing the appellant's suit when the deceased was a passenger who never had control of either of the motor vehicles which were involved in the accident.
  - iv. The learned trial magistrate erred in law and fact by failing to make any finding in regard to third party.
  - v. The learned trial magistrates erred in law and in fact by dismissing the Appellant's claim without making any finding on quantum.
  - vi. The learned trial magistrate's decision albeit, discretionary one was plainly wrong.
3. The Appeal was canvassed by way of written submissions. The Appellant submits that they reiterate that the trial magistrate did not appropriately take into account the evidence on record in finding that the appellant had not proved her case on a balance of probability as required under the law so as to warrant her being awarded the prayers she sought. The appellant in arguing this appeal consolidate the following grounds as issues for determination by this court.
- i. Whether the learned trial magistrate erred in fact by failing to appreciate the standard of proof in civil cases.
  - ii. Whether the learned trial magistrate erred in law and in fact by not making a finding on Quantum.
4. On whether the learned trial magistrate erred in fact by failing to appreciate the standard of proof in civil cases, they submit that pursuant to the Provisions of Section 107 of the *Evidence Act* Cap 80, it is trite law that whoever makes allegations on a fact is under duty to prove the truth of the allegations made for him to obtain judgment in his favor.
5. They submit that the appellant in her pleadings outlined particulars of negligence on the part of the defendant's driver, servant and/or agent. That the Appellant called witnesses in support of her claim, a duty which she duly discharged in making her case and she proved that the Respondent was negligent as alleged.
6. Further, that PW1 and PW3 did not witness the accident take place, but PW2, the eye witness did. That the evidence of the witnesses who testified were of probative value to the appellant's case; for instance, PW1 who was the plaintiff/Appellant testified that the deceased was her son. That her statement was adopted as her evidence in chief and she narrated how she learned about the demise of her son on that fateful date. She produced exhibits in support of her case and it was her evidence that the Respondent's Motor vehicle KCK 400Q caused the death of her son.
7. The appellants further submit that PW3 PC Purity Sakoma attached at Timboroa Traffic Base told the court that the investigations about the accident had not been completed when the police abstract was issued. Generally, PW3's testimony indicated that she could not tell which driver was to be blamed for the accident.
8. That DWI IP Albanus Mutunga Muindi in his testimony produced the investigation diary (defence exhibit 2) and told the court that the driver of KCY 663D was to blame for the accident as per the police abstract produced (plaintiff exhibit 7) and on cross examination, he told the court he was relying



on police records and that he did not trace the police file. That he further testified that the accident is subject of inquest but he could not tell the reference of the inquest file.

9. The Appellant reiterates that it was erroneous for the court to find and conclude that the evidence by PW3 was contradictory and relied on the case of Peter Kanithi Kimunna v Aden Guvo Haro (2074) eKLR, for the proposition that a police abstract is proof that the occurrence of an accident was reported to a particular police station.
10. That the evidence tendered by PW3 and DW1 is clearly at variance, that it is trite law that parties are bound by their pleadings and for this reason, the appellant's and the respondent's evidence in regard to the issue of negligence is in variance, they pray that this Honourable court sets aside the decision of the trial court in dismissing the appellants claim under this limb and replace it by apportioning liability in the ratio of 50%:50% as against the respondent.
11. On the 2<sup>nd</sup> issue regarding assessment of damages, the appellants submit that the trial court did not assess any damages for the reason that it had dismissed the suit and it was manifestly erroneous on the face of the binding decision in Frida A-vanda & Ezekiel Onduru Okech v Titus Kachu Mbugua J2015/ 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.”
12. That Starting with the head of loss of expectation of life, the appellant proposed Kshs. 300,000/- while respondent proposed Kshs. 80,000/=. Under pain and suffering the appellant proposed Kshs.50, 000/= while the respondent proposed Kshs, 10,000/=. Under loss of years/dependency the appellant proposed Kshs.6, 192,9961= while the respondent proposed 576,2761=. That the appellant produced the following documents as proof of specials;-Receipt for limited grant (PEX NO. 3) Kshs. 35, 000/=-Receipt for transport of body and coffin (PEX NO.7) Kshs. 85, 000/--Receipt for mortuary expenses (PEX NO.4) Kshs. 4,500/=-Receipt for copy of records (PEX NO. 8) Kshs. 550/=

TOTAL Kshs.125, 0501=

13. That in summary the total figure that the Appellant prays is Kshs.6, 668,046/= less 50% contribution. Net due Kshs.3, 334,023/=.
14. They urge this court to make the following findings:
  - i. Set aside the finding of the trial court and substitute the same with an order entering judgment in favour of the Appellant.
  - ii. Make a finding in regards to quantum.
  - iii. Award the Appellant costs of this Appeal and those of the subordinate court.
  - iv. Award interest at the rate of 14% p.a and direct that interest on general damages do run from (judgment of the lower court 31/01/2023) while that of special damages do run from 8/04/2021(date of filing of the suit before the lower court).

### **Respondent's Submissions**

15. The Respondent submits that the issue for determination is whether the Appellant discharged the burden of proof as required by law and submit that the Appellant instituted the current suit vide Plaintiff dated 12<sup>th</sup> January, 2021 in which she alleges that on or about 31<sup>st</sup> day of October , 2020 while the



deceased was lawfully aboard motor vehicle registration number KCY 663 D along Eldoret Nakuru highway particularly at Kahoya area when the Defendant's agents, servants and /or driver negligently drove and/or managed motor vehicle registration number KCK 400 Q that knocked the motor vehicle KCY 663D in which the deceased was aboard causing serious bodily injuries which he succumbed to and prayed for General damages, Special damages, Costs of the suit and interest.

16. That the Defendant vide it's defence dated 29<sup>th</sup> April, 2021 denied the allegations of negligence against the defendant and/or it's driver or agent and stated that the accident was solely caused by the driver of the motor vehicle KCY 663 D and prayed that the suit be dismissed with costs.
17. The Respondent submits that the Appellant failed to prove her case as against the Defendant on a balance of probability and the Court proceeded to dismiss with costs and urged this Court to find as such and relied on the case of Muriungi Knaoru Jeremiah Vs Stephen ungu M'mwarabua [2015] eKLR.
18. The Respondent submits that the legal burden is discharged by the way of evidence and it is trite law that the onus of proof is that he who alleges must proof and relied on the case of Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd (1991).

“There is as yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the Defendant where claim is based on negligence”.

19. The Respondent submitted that in respect to proposed damages had the appellant proved her case on a balance of probabilities the trial court did not assess damages upon making a finding that the plaintiff/Appellant failed to prove her case on a balance of probabilities. In respect to loss of dependency, given that the Appellant did not and/or failed to prove the monthly income of the deceased, they shall go by the minimum wage in rural area as the deceased lived in Mumias which is Kshs. 7, 240.951= for general labourer as there was no evidence indicating that he was a trained professional and assessment of damages should be as follows: -
  - i. Pain and Suffering - Kshs. 10, 000/= (died on the spot).
  - ii. Loss of life and expectation - Kshs. 80,000/=.
  - iii. Loss of dependency (7.240.95x 20 x12 x 2/3) - Kshs. 576,2761=.Total \_ Kshs. 666, 276 /=.
20. The Respondent proposed multiplicand of 20 years considering life's other vicissitudes not restricted to ill health that could cut short working life of the deceased.They urge the court to uphold the findings of the trial court and dismiss the appeal with costs as the Appellant failed to call credible evidence to prove that the accident was caused by the negligence of the Respondent.

### **Analysis And Determination**

21. This being the first appellate court,the Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.



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 demeanor of a witness is inconsistent with the evidence in the case generally."

22. In view of the above, an appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278).
23. From the trial court record, the occurrence of an accident involving motor vehicle registration number KCY 663D and KCK400Q is not disputed. Further, it is not further disputed that the deceased was a passenger in the accident vehicle and that he succumbed to the injuries. What I wish to consider is whether the trial court erred in the finding on liability. In respect, to assessment of damages, there is no doubt that the trial magistrate was required to make a finding on liability even if she arrived at a finding to dismiss the matter on liability. Parties had submitted on assessment of damages.
24. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

25. The Appellant by his plaint averred at paragraphs 4 and 5 that:-

"4. On or about the 31<sup>st</sup> day of October, 2020, while the deceased was lawfully driving motor vehicle Registration No. KCY 663 D along Eldoret-Nakuru Highway particularly at Kohaya area or thereabout when the Defendant's agent, servant and or driver so negligently drove or managed motor vehicle registration No. KCK 400Q that it knocked the motor vehicle that the deceased was driving thereby causing him to sustain serious bodily injuries as a result of which he succumbed.

26. That the said accident was caused by negligence of the defendant, and the defendant is vicariously liable and particulars of negligence on the part of the driver of motor vehicle reg. No. KCK400Q are as hereunder:-



- a. Failure to apply brakes, slow down or stop altogether so as to avoid ramming into the motor vehicle Reg. No. KCY 663 D.
- b. Failure to swerve or make any maneuver to avoid the accident.
- c. Driving into the lane of oncoming motor vehicle.
- d. Changing lanes haphazardly.
- e. Endangering the lives of the occupants of motor vehicle Reg. No.KCY 663D.
- f. Failing to heed to road traffic rules.
- g. Driving without taking into consideration the nature of the road and the flow of the traffic that was prevailing at the time of the accident.

As a result of the said negligence the deceased sustained fatal injuries as a result of which the deceased's family suffered a loss and therefore claims damages both general damages and special damages.

27. The Respondent filed a statement of defence denying key averments in the plaint, and the particulars of negligence attributed to them. It was further averred that if any accident occurred (which is denied) the same was wholly caused and/or substantially contributed to by the negligence on the part of the deceased while driving motor vehicle registration No. KCY 663D along Eldoret-Nakuru road and particulars of negligence on the part of the deceased are as hereunder:-

- a. Failing to swerve or take any evasive measures to avoid the occurrence of the accident.
- b. Driving a motor vehicle that was unroadworthy.
- c. Driving the said motor without a valid driving license.
- d. Driving the said motor vehicle at an excessive speed in the circumstances.
- e. Failure to have due regard to other road users especially motor vehicle registration No. KCY 663D.
- f. Driving the motor vehicle registration number KCY 663D while drunk and/or intoxicated.
- g. Driving the said motor vehicle carelessly and dangerously on the road.
- h. Being absentminded while driving the said motor vehicle.
- i. Engaging on his mobile phone while driving the said motor vehicle thus having no concentration on the road.

The Defendant further denies the Plaintiff's claim for both general damages, special damages together with the particulars of special damages as pleaded in paragraph 4 of the plaint and puts the plaintiff to strict proof.

28. Record show that on liability, PW1, Rael Ongaya Osanya testified and adopted her statement dated 13<sup>th</sup> January,2021, she stated that the deceased died on the spot. She testified that she was the biological mother of all the children namely Elentine Namalwa, George Saitoti, Brenda Mukhwana, Bramwel Mulongo and Lazarous Junior.
29. Pw2, Kennedy Maina Macharia adopted witness statement dated 7<sup>th</sup> March,2022. He stated that he was the eye witness and that he was driving a lorry from Nakuru direction towards Kitale when he witnessed the accident at Kahoya area involving motor vehicles reg. no. KCY 663D and KCK 400Q



- which were Toyota Probox and Prado respectively. He blamed the driver of motor vehicle registration number KCK 400Q by stating that it swerved to the lane of the probox and the vehicles collided head on. He stated that the driver of the driver of the prado was to blame for driving in high speed and swerving into the lane of Probox.
30. Upon Cross-examination, he stated that he did not record the statement at the Police Station and he was at pains to explain how the Plaintiff or her advocate got his number. He stated that the accident he witnessed was a head on collision and if there was any contrary evidence then that was not the accident he witnessed. When referred to Pexb No. 6 (Police Abstract), he read the result of the investigation which showed that the motor vehicle registration number KCY 663 D was to blame for the accident and charges of causing death by dangerous driving were preferred against the driver. He confirmed that he was not among the witnesses named in the Police Abstract.
  31. PW3, Purity Sakome (PC) testified that she was a Police Officer number 93xxx based at Timboroa Traffic Base. She confirmed that the accident occurred at a place called Kahoya along Eldoret Nakuru Highway involving motor vehicle registration number KCY 663 D Toyota Probox and KCK 400Q Toyota Prado. She went ahead to produce Police Abstract as Pexb No. 7. She stated that PC Jane and PC Wambua were the Investigating Officers /Witnesses and that they were not at the station. That it was a fatal accident and all occupants of motor vehicle registration number KCY 663 D died on the spot. That she could not tell who was to blame for the accident.
  32. Upon Cross-examination on being referred to the Police Abstract she stated that the driver of motor vehicle registration number KCY 663 D was to blame for the accident. She referred to the Investigation diary which was later produced as Dexb No. 1. she read thus The Motor Vehicle registration number KCY 663 D Toyota Probox lost control and swerved on the right as one faced Nakuru direction. There were four passengers on board namely Wyclife Wandia Osanya aged 20 years was the driver, Vincent Onyango 22 years and Ismael Asonga Matakzva aged 29 years and all fatally injured on the spot." She also confirmed that the government had restricted gathering during the Covid pandemic days. From her evidence, it is clear that the driver of motor vehicle KCY 663 D was to blame for the accident.
  33. The Respondent called a total of three witnesses DW1 Inspector Albanus Muindi Mutunga, DW-2, Constantine Pery Mwangi and DW-3 Lenin Alex Kigen.
  34. DW1 testified that he was the Base Commander Timboroa Traffic base. He produced the witness summons issued to him as Dexb No. 1, Investigation diary as Dexb No. 2. He went ahead to read the contents of the Investigation diary thus "The Motor Vehicle registration number KCY 663 D Toyota Prado lost control and swerved on the right as one face Nakuru direction. There were four passengers on board namely Wyclife Wandia Osanya aged 20 years was the driver, Vincent Onyango 22 years and Ismael Asonga Matakwa aged 29 years and all fatally injured on the spot."
  35. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the [Evidence Act](#). The duty of proving averments contained in the plaint on a balance of probabilities lay squarely on the Appellant. In *Karugi & Another V. Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

“ [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”



36. The same court stated in *Eastern Produce (K) Ltd V. Christopher Atiado Osiro* [2006] eKLR, stated that the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant. The court in that case cited the famous decision of *Kiema Mutuku V. Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

“There is as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”

37. In *Gideon Ndungu Nguribu & another v Michael Njagi Karimi* [2017] eKLR the Court of Appeal stated that “determination of liability in a road traffic case is not a scientific affair” and proceeded to quote Lord Reid in *Stapley vs Gypsum Mines Ltd (2)* [1953] A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

38. From the photos produced, the photos show that both vehicles collided at a near right angle with KCK 400 Q hitting KCY 663 on the left co-driver side where it was extensively damaged while KCK 400 Q sustained extensive damage on the front side with both the radiator and bonnet taking the brunt of the impact. This could only have been possible if KCY 663 D had crossed the path of KCK 400 Q in front of KCK 400 Q.

39. DW3 and DW2 who were the driver and passenger in KCK 400 Q were eye witnesses to the accident. They told the court that KCY 663 D lost control and swerved to the right crossing a climbing lane before crossing the path of KCK 400 Q where it was hit resulting in fatalities of all the occupants of KCY 663 D. The testimonies of DW3 and DW2 is consistent with the findings in both the police abstract and investigations diary both produced in evidence

40. The Court of Appeal in *Timsales Limited v Stanley Njihia Macharia* [2016] eKLR discussing the principles of ‘causation’ cited with approval the decision by Musinga J (as he then was) in *South Nyanza Sugar Co. Ltd vs. Wilson Ongumo Nyakwemba* [2008] eKLR quoting *Statpack Industries Limited vs. James Mbithi Munyao HCCA No. 152 of 2003 (UR)* where it was held that:

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone’s negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone’s negligence.”



41. Sections 107 to 109 of the *Evidence Act* provide as follows:

“ 107 Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

42. Record show that pw2 blamed the driver of motor vehicle KCY663 D for the accident as per contents of investigation diary. On the other pw3 in examination in chief said she did not know who was to blame for the accident. However, on cross examination she said the investigation diary showed that driver motor vehicle KCY663D was to blame for the accident. Pw2 testified that he was a driver of a lorry on the same road and he witnessed the accident. He said the driver of KCK400Q swerved to the lane of KCY663D and caused collision. However, in cross examination, he said he was not listed as a witness in police abstract as a witness and that he did not record statement.
43. On the other hand, the defendant’s witnesses blamed the deceased who was driving motor vehicle KCY663D for swerving to the lane of KCK400Q and causing the accident. The defendant’s witnesses DW2 and Dw3 however did not state whether the driver any efforts made by the driver of KCK400Q to avoid the accident. Whether the tried to serve or reduce speed so as to avoid the accident or reduce impact of the accident. It is unfortunate that all the occupants of vehicle KCY663D died in the accident and their version of the occurrence of the accident was unavailable to aid the court.
44. I have also taken note of the location of the damage to the two vehicle and extend of damages leading to fatalities. From record, the damage of motor vehicle KCY663D is on the left co-driver’s side which demonstrate that it had moved to the right and damage on KCK400Q is on the front which show no much effort was made to swerve to avoid the accident. The extent of damages and resulting fatalities clearly show that the two vehicles were moving in high speed. Motor vehicle KCK400Q in my view was however to blame to a great extent. In view of the above, I am of the considered view that a smaller percentage of blame showed have been apportioned to motor vehicle registration number KCK400Q and a greater portion of contribution to motor vehicle KCY663Y. From the following I am inclined to apportion liability at 70: 30. the plaintiff/Appellant to shoulder 70% and the defendant/Respondent 30% liability.
45. Having made finding on liability, my finding will apply in HCA NO.6,7 & 8 ALL OF 2023 and I will proceed to assess damages in respect to each file.



## Assessment Of Damages

46. From record, the deceased herein Wycliff Kandia Osanya died on the spot. There is no doubt however the he suffered intense pain from the injuries before he died. Under this head, I note from trial court's submissions the plaintiff proposed Kshs 50,000 and cited Kisumu HCC no.375 of 199 Maurice Odiwuor Ogada (suing as legal representative of Jane Dorothy Anyango) case of will award Kshs 10,000, vs John Juma Obungu & Another where the court awarded Kshs 50,000 where the deceased died hours after the accident. The defendant proposed Kshs 10,000. In view of the fact that the deceased died instantly and considering that the case cited was decided in the 1999, I will award Kshs 20,000 under pain and suffering. Under loss of expectation of life, the plaintiff proposed Kshs 300,000 while the defendant proposed Kshs 80,000. Under this head I will award Kshs 100,000.
47. Under loss of dependency, from record, the deceased was 30 years old. Considering that there are other factors that may affect the quality and length of life, I will use a multiplier of 25 years. In respect to earnings, the plaintiff in her written statement dated 13<sup>th</sup> January 2021 which she adopted as her evidence stated that the deceased who was her husband was a driver earning Kshs 30,000. She however did not produce any document to confirm the deceased's earning. I take note of the fact that it was confirmed in evidence that the deceased was driving motor vehicle KCY 663 D at the time of the accident and do therefore believe that he was a driver and will adopt wage of a driver in the year 2021 as multiplicand which was Kshs 18,936 per month. In respect to dependency ratio, the deceased left behind a wife and children who depended on him and I will therefore adopt dependency of 2/3. Loss of dependency will therefore be

### Loss of dependency $Kshs\ 18,936 \times 25 \times 12 \times 2/3 = 3,787,200$

48. From the plaint, the plaintiff pleaded for Kshs 125,050. She produced receipts for items hereunder: -
- a. Filing succession.....Kshs 35,000
  - b. Mortuary fee.....Kshs 4,500
  - c. Coffin..... kshs30,000
  - d. Hearse..... Kshs 55,000
  - e. Search for motor vehicle records...Kshs 550
- Total.....Kshs 125,050
49. From the foregoing I award damages as hereunder: -
- a. Pain and suffering..... Kshs 20,000
  - b. Loss of expectation of life.....Kshs 100,000
  - c. Loss of dependency..... Kshs 3,787,200
  - d. Special damages.....Kshs 125,050
- GRAND TOTAL.....Kshs 4,032,250
- Less 70%.....(kshs 2,822,575)
- Net..... Kshs 1,209,675



50. I therefore enter judgment for the plaintiff/Appellant against the defendant/Respondent for Kshs 1,209,675 plus costs and interest.

51. Final Orders: -

1. Liability apportioned at 70:30. The plaintiff/Appellant to shoulder 70 liability and Defendant/ Respondent 30 liability.
2. Judgement is entered for Appellant/plaintiff against the defendant/Respondent for Kshs 1,209,675.
3. Costs of both trial and appeal court to be paid to the appellant.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 20<sup>TH</sup> DAY OF MARCH 2025.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Ms. Isiboe holding brief for Muhara for Respondent.

Ms. Akinyi holding brief for Mukiso for Appellant.

CA, Karanja.

