



Omose v Ayuma (Suing as the legal representative of the Estate of the Late Jared Orina Nyareru - Deceased) (Civil Appeal E059 of 2024) [2025] KEHC 2970 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2970 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E059 OF 2024
DKN MAGARE, J
MARCH 6, 2025**

BETWEEN

PETER OMOSE APPELLANT

AND

MARY AYUMA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JARED ORINA NYARERU - DECEASED) RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of Hon. C.C. Rono (RM) given on 21.3.2024 in Kisii CMCC No. E845 of 2022. The Respondent was the plaintiff in the lower court in a suit she filed claiming damages under the Law Reform Act and Fatal Accidents Act.
2. The matter was heard and determined on 21.3.2024 where the court made the following awards in favour of the Respondent against the Appellant herein:
 - a. Liability 100% against the Appellant
 - b. Loss of dependency – 3,456,000/=
 - c. Pain and suffering - 100,000/=
 - d. Loss of expectation of life - 100,000/=
 - e. Special damages – 153,050/=
 - Total Ksh. 3,809,050/=
 - f. Costs and interest
3. The Appellant raised the following issues in his Memorandum of Appeal:
 - a. Liability



- b. Locus standi
 - c. Quantum of damages in particular
 - i. Loss of dependency, in particular, Ksh 6,000/= as the multiplier.
 - ii. Pain and suffering
4. The Appellant filed 8 grounds of appeal. I shall not deal with the issue of submissions as it is not a serious issue, as courts do not deal with trial issues. This is aptly enunciated in the maxim of *de minimis non curat lex*. The court of appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

5. The filing of repetitive issues is contrary to Order 42 Rule 1 of the Civil Procedure Rules which provides as follows:
- 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
6. The Court of Appeal had this to say about compliance with Rule 86 [now rule 88] of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the



appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

7. The court abhors repetitiveness of grounds of appeal which tend to cloud the issues in controversy. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor the repetitiveness of grounds of appeal, which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

Pleadings

8. The Respondent pleaded that the deceased was lawfully riding KMEB 289A along Kisii-Kilgoris road on 24.1.2022. the Appellant was driving motor vehicle registration number KBK 128L along the said road. The said vehicle is said to have lost control and knocked the motorcycle. This resulted in the demise of the deceased herein.
9. The deceased is said to have left 3 dependents: a widow and 2 minors. Their ages are not given in the complaint. However, the particulars for the 3 sons are in the chief's letter and birth certificates. One minor was born at 6 years, while another was 3 years. Special damages were particularized and proved. There is no appeal in respect thereto. The record indicates that the widow was barely 30 years old as of 2022.
10. The Respondent claimed damages under the *Law Reform Act* and *Fatal Accidents Act*, funeral expenses and general damages for pain and suffering and loss of amenities. The plaint was amended on 10.2.2023 to include Peter Orose, the Appellant herein as the driver of the said motor vehicle.
11. The Appellant filed a defense on 10.3.2023. He denied the occurrence of the accident, and blamed the Respondent. They also blamed separately the rider of the motorcycle. There does not appear to be proceedings or documents where the 2nd Defendant participated.

Evidence

12. The Respondent's witnesses started testifying on 9.11.2023, where PW1, 77170 CPL Moses Kasere testified that he was attached to the Kisii Traffic Base. He recalled the accident on 24.1.2022 at 2.20 pm, where the deceased was fatally injured. He recalled the accident was reported and investigated by PC Rono. The Appellant was driving the motor vehicle while the deceased was driving the motorcycle. They were headed in opposite directions. The motor vehicle had a brake failure and lost control and swerved to the right feeder road. This resulted in the deceased being injured and eventually succumbing to the said injuries. The Appellant took the deceased to hospital for treatment; he later succumbed. The driver was intended to be charged with dangerous driving. On cross-examination, he stated that the driver was charged in Kisii Traffic Case No E022 of 2022.



13. The Respondent testified and produced 13 exhibits. She relied on her amended statement dated 10.2.2023. On cross-examination, she stated that the deceased died on 24.1.2022 at night at Kisii Teaching and Referral Hospital at about 2000 hours. The deceased was a teacher at Matongo Secondary. The Respondent was recalled to produce the receipt for 11,000/= as exhibit 6 and a TSC certificate as exhibit 11. The Appellant closed his case without calling any witnesses.

Submissions

14. The Appellant argued the appeal orally. He stated that no eyewitness was called. They also stated that the Respondent lacked capacity as there were minor beneficiaries. He stated that no eyewitnesses were called. On quantum, they stated that a sum of 20,000/= will suffice on pain and suffering. They also stated that there was no proof of earnings.

15. The Respondent stated in reply that the amount was proper and that contributory negligence was not proved. They submitted in their two written submissions that the award was proper and that the Respondent had locus standi to institute the suit. They relied on the case of *Kenya Power & Lighting Company Limited v Mwangi (Suing as the Legal Representative of the Estate of Geoffrey Muthii Muthike - Deceased) (Civil Appeal 13 of 2019)* [2023] KEHC 24211 (KLR) (25 October 2023) (Judgment). In that case Muchemi J, stated as follows:

In this matter, the respondent filed a petition for limited grant ad litem vide High Court Misc. Succession Cause No. 188 of 2012 for purposes of filing a civil suit under Section 67(1) of the *Law of Succession Act*. A Limited grant is different from letters of administration of estate in a Succession cause. The respondent obtained a limited grant which does not require two people to be appointed.

18. The appellant has got it all wrong on this ground of appeal. Section 67(1) of the *Law of Succession Act* does not require that the petition be represented by two persons as is the case under Section 58(1) of the Act. The issue was raised before the magistrate and it was fully and rightly addressed. I find no merit in this ground of appeal.

16. They also relied on the case of *In re Estate of Ndirangu Francis Kiago (Deceased) (Succession Cause E501 of 2021)* [2023] KEHC 3245 (KLR) (Family) (18 April 2023), (Ruling), where the court, E K Ogola J, posted as follows:

Where there is a continuing trust and only one person is appointed as an Administrator, the remedy does not lie in revocation of the grant but the court has the discretion to appoint a Co-Administrator as provided by Section 66. The Applicant herein does not fall under the category above since he is the father of the deceased, and since the deceased had a spouse and children, they are the only ones entitled to the estate of the deceased. However, in fulfillment of Section 58, since there exists a continuing trust, the estate should have more than one Administrator.

17. On liability, they stated that the Appellant's case was not tenable after they did not tender evidence. They relied on the cases of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* [2009] eKLR where the court held as follows:-

For this proposition Counsel relied on the case of *Autar Singh Bahra And Another Vs. Raju Govindjl*, HCCC NO. 548 OF 1998 (unreported) where the Hon. Justice Mbaluto stated at page 4 paragraph 4 as follows:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged



but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

I agree with this proposition of law and with the position given by the learned judge in the cited case.

18. They relied on the case of John Wainaina Kagwe v Hussein Dairy Limited [2013] eKLR, where the court of appeal [Githinji, Makhandia & Murgor, JJA] stated as follows;

The respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning, that the allegations in its defence with regard to the blameworthiness of the accident on the appellant either wholly or substantially remained just that, mere allegations. The respondent thus never tendered any evidence to prop up its defence. Whatever the respondent gathered in cross-examination of the appellant and his witnesses could not be said to have built up its defence. As it were therefore, the respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tendered to exonerate it fully from culpability.

Analysis

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

20. The first appellate court will not interfere with the exercise of judicial discretion by the subordinate court unless it is satisfied that its decision is clearly wrong, or that the said court misdirected itself in some material particulars as held in the case of Mbogo and Another vs. Shah [1968] EA 93, where the Court posited that:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

21. The duty of the first Appellate Court was stated in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held as follows:

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

22. The Court is to bear in mind that it had neither seen nor heard the witnesses. The trial court has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of Peters vs Sunday Post Limited [1985] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction



to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

23. The court cannot interfere with discretion unless the lower court, in assessing the damages, or exercising discretion, took into account an irrelevant fact or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high as to amount to an erroneous estimate of damages. The Court of Appeal pronounced itself succinctly on these principles in case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2)* [1985] eKLR, where the Court of Appeal [Kneller, Nyarangi JJA & Chesoni AG JA] posited as follows: -

The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.

24. The principles to be considered by this court when deciding on the issues raised on this appeal was laid down in the case of *Ali –vs- Nyambu t/a Sisera stores* [1990] KLR 534 at page 538 quoted with approval of the principles laid down by the Privy Council in *Nance –vs- British Columbia Electric Railways Co. Ltd* [1951]AC 601 at page 613 where it held that:

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (*Flint –vs- Lovell* [1935] 1KB 354) approved by the House of Lords in *Davis –vs- Powell Duffryn Associated Collieries Ltd.* [1941]AC 601.”

25. The former East African Court of Appeal stated as doth in the locus classicus case of *Butt v Khan* [1978] eKLR, KAR where Law JA stated that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This, with respect, is what I think happened in this case. The learned judge attached undue importance to the likelihood of epilepsy developing in the future. To what extent this view influenced him in awarding the amount he in fact awarded is a difficult question to answer.”

26. I now turn to each of the grounds of appeal raised. However, I shall dismiss grounds 4, 7 and 8 as they relate to submissions. Submissions are not evidence upon which anyone can find grounds for appeal. Mwera J succinctly posited as follows when postulating on the role of submissions. He stated that they are a course by which counsel or able litigants focus the court’s attention on those points of the



case that should be given the closest scrutiny to firmly establish a claim, in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

“Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

27. Submissions are not, strictly speaking, part of the case, the absence of which may not do prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang’a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, where the court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

General damages for pain and suffering

28. The main question to be addressed under this head is whether it should be disturbed. The deceased was hit at 1420 hours. He underwent excruciating pain up to his demise at 2200 hours, suffering excruciating pain as to attract the highest possible award under this head. Though general damages for pain and suffering ordinarily range between 10,000/= and 100,000/=, the court has some latitude based on the individual case. In this case, the court awarded the maximum given for a person who suffered much excruciating pain.
29. The evidence on record is that the deceased died over 8 hours later. He cannot be said to have died on the spot. He was taken to hospital and stayed there all those hours. An amount of Ksh.100,000/= was proper in the circumstances. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

“(5) 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 that the sum of Kshs 50,000 awarded under this head is unreasonable.”



30. Consequently, I dismiss the appeal under this head.

Liability

31. The Appellant raised ground that the court erred in holding the Appellant 100% liable for the accident. It must be remembered that the burden of proving the case was on the Respondent. This court appreciates that the philosophy behind the preponderance of probabilities as a standard of proof in civil claims derives from the understanding that in percentage terms, a party, be it claiming or responding, who can establish their case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. Kimaru, J in *William Kabogo Gitau vs. George Thuo & 2 Others* [2010] 1 KLR 526 stated as follows:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

32. In the case of *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Court of Appeal [Karanja, Okwengu & G. B. M. Kariuki, JJ.A] held that:

“Denning J. in *Miller Vs Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

33. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue as stated in the case of *Evans Nyakwana vs. Cleophas Bwana Ongaro* (2015) eKLR, where the court stated as doth:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The Appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

34. This means that the burden of proof is not on the plaintiff alone. The plaintiff bears the burden of proof in proving negligence and damages. However, he only needs to set up a prima facie case in respect of these matters. The question is not whether there is proof beyond reasonable doubt; it is the question of believability. The issues related to liability and the duty to prove the case are on the party that asserts.



The duty is on whoever asserts. On the other hand, there is no duty to prove a negative or an admitted fact. Sections 107, 108 and 109 of the *Evidence Act* provides as doth:

“ 107.

- (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.

108. 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. 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.”

35. The burden of proof falls upon the person alleging it to establish each element of the tort as held in the case of *Treadsetters Tyres Ltd V John Wekesa Wepukhulu* [2010] eKLR, where, Ibrahim J, as he was then allowed an appeal, on negligence and quoted with approval a passage quoted in *Charlesworth & Percy on Negligence*, 9th edition at P. 387 on the question of proof and the burden thereof, where it is stated:

“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

36. The Appellant pleaded that he lost control due to brake failure and hit the deceased on the right side of the road. There was no evidence tendered on the negligence of the deceased. Cogent evidence must be tendered to prove either negligence or contributory negligence. The court dealt with the issue of contributory negligence in the case of *Cadama Builders Limited v Mutamba (Suing as the administrators of the Estate of Philip Musei Ndolo) (Deceased)* (Civil Appeal E093 of 2021) [2022] KEHC 11029 (KLR) (27 July 2022) (Judgment), Kasango J and stated as follows: -

“No evidence at all was adduced which proved negligence on the part of the appellant. I venture to state that just as much as the trial court found the appellant’s pleadings, not supported by oral evidence, remained mere allegations, similarly the respondent’s pleadings remained mere allegations so long as the evidence that was adduced did not prove those pleadings. The Court of Appeal expressed itself in those terms in the case of *Charterhouse Bank Limited (under statutory management) vs Frank Kamau* (2016) eKLR, as follows:-

“We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited,



judgment cannot be entered for the plaintiff merely because the defendant has not testified. 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. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in *Karugi & Another V. Kabiya & 3 Others* (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis.”

Loss of dependency

37. The Appellant raised the ground that the court erred in law in awarding manifestly excessive general damages for loss of dependency. They also blamed the court for adopting a multiplicand of Kshs. 6,000/= as the deceased’s monthly income. Regarding dependency, George Dulu J, in the case of *Leonard O. Ekisa & another v Major K. Birgen* [2005] eKLR, stated as follows:

With regard to dependency, I have to rely on the case of *Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988* (unreported), in which Ringera J. as he then was, held at page 248-

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

The learned Judge went further to state on the same page that -

“I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in *Bor –vs- Onduu* [1982- 1992] 2 K.A.R. 288”

38. The idea that there must be exact certificates on how the earning were made is both foreign and un-African. The Court of Appeal in *Civil Appeal No. 167 of 2002 Ayiga Maruja & Another -vs- Simeone Obayo* (2005) eKLR observed;

.... We do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate,



keep no records and that earn their livelihood in various ways. If documentary evidence is available that it well and good. But we reject any contention that only documentary evidence can prove these things.

39. Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of *Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another* as cited by the Court of Appeal for Eastern Africa in *Radhakrishen M. Khemaney v. Mrs. Lachaba Murlidhar* (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows:

"I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Prances Hayes and others against Chunibhai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:

"The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."

Upon an appeal against this judgment this court held ([1957] RA. 748 (C.A.):

"That the method of assessment of damages adopted by the learned chief justice was correct."

40. Courts are not compelled to adopt multiplier method in cases where the exercise is a grope in the dark; speculation on the important aspects of lost years or dependency. This was well stated by Ringera J (as he then was) in the case of *Kwanzia Vs Ngalali Mutua & another* that:

"The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

41. In this case, noting that the deceased was a businessman of some sort, with some income and adult children, the youngest being 18 and who never bothered to testify on loss of dependency, I find both formulae suggested by the parties an exercise in conjecture, hyperbole, and guess work. A sum of Kshs. 1,920,000/= suggested is simply on the lower side while a sum of Kshs. 7,200,000/= is excessive in the circumstances.



42. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v. Shepherd* [1964] AC.326 (supra) where it was stated that:
- ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
- In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.....”
43. Paraphrased to this case, the payment is not for the killing of the deceased as no amount of money can replace a human being. No amount of payment can ameliorate the permanent scar felt by the families. However, from the insuring public perspective, the awards are for moderation of pain suffered and compensate for loss of dependency.
44. No other issue was raised. In the circumstances, the appeal on loss of dependency is dismissed.
45. On the issue of locus standi, although well answered, it is not an issue pleaded in the lower court. Order 2 rule 4 requires such issues to be pleaded.
- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
- (b) which, if not specifically pleaded, might take the opposite party by surprise;
- r
- (c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
46. The net effect is that the said ground is otiose and belated. The court cannot deal with the same at this stage.
47. On costs, costs follow the event. The results are mixed. The issue of costs is governed by Section 27 of the *Civil procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.



- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
48. The court has discretion to award costs. In this case the court is guided by the Supreme Court, which set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
49. Consequently, the entire appeal is untenable and is accordingly dismissed with costs of Ksh 165,000/=.

Determination

50. Consequently, I make the following orders: -
- a. The entire appeal is dismissed for lack of merit with costs of Ksh.165,000/=.
 - b. Award of general damages for loss of dependency is set aside and in lieu thereof, I substitute with a sum of Kshs. 3,000,000/=.
 - c. Right of appeal 14 days.
 - d. 30 days stay of execution.
 - e. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025.

Judgment Delivered Through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Munji for the Appellant

Ms. Ndemo for the Respondent

Court Assistant – Michael

