PAE (Suing as the Administrator & next of kin to EMK - Deceased) v Amenya (Civil Appeal E15 of 2023) [2025] KEHC 3476 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3476 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL E15 OF 2023

AC MRIMA, J

MARCH 21, 2025

BETWEEN

PAE (SUING AS THE ADMINISTRATOR & NEXT OF KIN TO EMK - DECEASED) ..... APPELLANT

AND

DAVID AMENYA ..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. A. Kassim (RM) in Kitale Chief Magistrates Civil Case No. 307 of 2014 delivered on 27th March 2022)

JUDGMENT

Background:

1. Pamela Ajema Evayo, the Appellant herein, instituted Kitale Chief Magistrates Civil Case No. 307 of 2014 [hereinafter referred to as 'the suit'] against David Amenya, the Respondent herein, by way of a Plaint dated 21st November 2014. She sought compensation for the death of her daughter, Esther Malesi Kidiga [hereinafter referred to as 'the Deceased'] which she claimed, was caused by the motor vehicle registration No. KAV 895K, (hereinafter referred to as 'the motor vehicle') belonging to David Amenya, the Respondent herein.

2. It was her case that on 6th May 2014, the deceased was lawfully walking along Kapenguria-Kitale road at Kibomet when the Respondent, who was the driver or servant or agent, negligently drove the motor vehicle that it veered off the road and knocked down her daughter leading to her death. The Appellant particularized negligence by pleading that; the Respondent drove at an excessive speed, failed to drive with due care, drove on the wrong side of the road in a zig zag manner, failed to slow down and drove a defective vehicle. The Appellant posited that the deceased was 7 years at the time of her death and would have grown up to earn at least Kshs. 40,000/- per month and be of assistance to her. On the foregoing, the Appellant claimed damages for pain and suffering and for loss of expectation of life.

3. The Respondent challenged the claim through the Statement of Defence dated 21st July 2015. He denied the suit in its entirety. He pleaded that he was a stranger to the allegations and put the Appellant to strict proof. The Respondent posited that since he was not the registered owner of the motor vehicle and since the alleged driver was not his lawful, authorized driver, employee or servant the negligence attributed to him could not make him liable. The Respondent denied that the Appellant was the mother of the deceased and the claim that she would have grown to earn a salary of Kshs, 40,000/- was also denied.

4. The Respondent asserted that if at all there was an accident, it was wholly attributable to the negligence of the deceased. He set out the particulars by claiming that the deceased was playing on the road at a busy area; that the deceased was left on the road without proper instructions; crossed the road without ascertaining that it was safe to do so; played on the road without a guardian and disregarded the provisions of the Highway code and the *Traffic Act*.

5. The suit was tried. At the trial, the Appellant and No. 67202 PC Kenneth Chebii testified in support of the Appellant's case. The Respondent also testified in defence. Upon analysing the evidence, the trial Court was of the finding that the Appellant had not proved her case to the required standard. The learned trial Magistrate observed that none the Appellant's witnesses could ascertain which vehicle caused the accident. It also was of the finding that since the Respondent was acquitted in the traffic case, the Respondent was wrongly prosecuted. Accordingly, it dismissed the Appellant's case with costs.

The Appeal:

6. Dissatisfied with the findings of the trial Court, the Appellant preferred the instant appeal and urged the following grounds: -

    1. That the learned trial magistrate erred in law and in fact by dismissing the Plaintiff's case on account of lack of eye witnesses without adhering to the dictates and provisions of *Evidence Act* on corroboration.

    2. That the learned trial magistrate erred in law and in fact by failing to analyze the entire evidence on record before arriving at an erroneous decision.

    3. That the learned trial magistrate erred in law and in fact by failing to recognize that that appellant had proven negligence on the part of the respondent.

    4. That the learned trial magistrate erred in law and in fact by only considering the defendant's evidence and written submissions in his judgment and disregarding the submissions of the Appellant.

    5. That the learned trial magistrate erred in law and in fact by entirely dismissing the Plaintiff's case without considering the Plaintiff's oral evidence and evaluating the entire evidence tendered in Court.

    6. That the learned trial magistrate erred in law and in fact by relying on the hearsay evidence which was adduced by the Respondent.

    7. That the learned trial magistrate erred in law and in fact in finding that the Respondent vehicle Reg. No. KAV 895K did not cause the accident leading to the demise of Esther Malesi Kidiga – deceased on 06.05.2014 while there was no evidence from the defence to controvert the Plaintiff's testimony.

8. That the learned trial magistrate erred in law and in fact in predisposing his mind to a position favourable to the Respondent against the Appellant and thereby arrived at a wrong decision.

9. That the learned trial magistrate erred in law and in fact in failing to find that the Respondent evidence was full of inconsistencies and falsehood thus unreliable.

10. That the learned trial magistrate erred in law and in fact in considering issues that were neither raised, pleaded nor submitted upon by the Respondent while making his decision.

11. That the learned trial magistrate erred in law and in fact in failing to find that the Appellant had proved her case on a balance of probability as requires by the law.

12. That the learned trial magistrate erred in law and in fact in applying wrong principles of law in arriving at his Judgment and failing to find that the Respondent's submissions did not raise satisfactory defence against the Appellant's claim.

The Appellant's submissions:

7. In her written submissions dated 6th May 2024, the Appellant faulted the trial Magistrate for finding that the Respondent was not liable when it in fact produced a Police abstract as an exhibit where the Respondent was charged in Traffic Case No. 1372 of 2014 for the offence of permitting defective vehicle on the road and failing to keep the records of the driver. The Appellant submitted that there was no doubt that the accident occurred on 6th May 2014. It was her case that there was no evidence which was adduced by the Respondent to dispute the documentary evidence that the Respondent was the owner of the motor vehicle.

8. The Appellant referred to the decision of the Court of Appeal in Joel Muga Opija -vs- East Africa Sea Food Limited (2013) eKLR where it was observed as follows: -

> .... In any case, in our view, an exhibit is evidence and in this case, the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence.

9. The Appellant submitted that there was no evidence that the Respondent was acquitted in the traffic case. It was its case that the fact that the motor vehicle was driven impliedly or expressly with the permission of the Respondent, it made the Respondent vicariously liable.

10. Despite there being no eye witness, the Appellant urged the Court find persuasion in the principle of res-ipsa loquitor. To that end, the Court of Appeal decision in Margaret Waithera Amina -vs- Michael K. Kimaru (2017) eKLR was relied upon where it was observed: -

> For the doctrine to apply, there must be reasonable evidence of negligence but where the thing is shown to be under the management of defendant or his servant and the accident in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care.

11. The Appellant further drew support from the Court of Appeal decision in the case of Abbay Abubakar Haji -vs- Marain Agencies Company & Another to urge the Court not to allow the case to collapse because there was no eye witness. As regards the deceased's lost years, the Appellant claimed that she

had a bright future which entitled her to and award. It was submitted that the deceased was 9 years with bright future at school, and a source of joy to the Appellant. To buttress that fact, the case of Sheikh Mushtaq Hassan -vs- Nathan Mwangi Kamau Transported & Others (1982-88) 1 KAR 946 was referred to. On the claim of loss of dependence, the Appellant asserted that the deceased was a bright student who would have worked to earn an income and taken care of his parents. Reference was made to her report book which was produced as an exhibit. It was submitted that a minimum wage of Kshs. 10,000/- would be appropriate and would have worked to the age of 60 years. It was proposed that a multiplier of 53 years ought to be adopted. In the alternative, the Appellant urged that a global figure of Kshs. 2,000,000/- would be appropriate.

12. In conclusion, it was the Appellant's case that she was entitled to special damages of Kshs. 80,000/- since it was specifically pleaded and proved. The decision in Premier Dairy Limited -vs- Amarjit Singh & Another (2013) eKLR was relied upon to draw the Court's attention to the exceptions thereon.

13. In the end, the Appellant prayed that the appeal be allowed and the order dismissing the suit be set-aside and this Court finds the Respondent liable and to award appropriate damages.

The Respondent's case:

14. The Respondent challenged the appeal through written submissions dated 8th July 2024. At the outset, it was its case that the learned trial Magistrate was correct in its finding and acted on the correct principles. On the issue as to who was liable for the accident, the Respondent submitted that no one witnessed the accident. He stated that when the appellant arrived at the scene, the deceased had already been knocked down and taken to hospital. It was also his case that Police investigation documents were never produced in court and as such negligence was not established linking the Respondent to the accident.

15. The Respondent contended that the Appellant failed to establish its case on a balance of probability. He stated that he was not driving the motor vehicle at the time of the accident as he had left it with the mechanic when the accident occurred. He stated that the mechanic drove it without his permission. The Respondent submitted that damages were not available to the appellant since there was no fault in his part. As regards, special damages, it was its case that the Appellant failed to plead and prove and as such cannot be awarded.

16. The Respondent prayed that the appeal be dismissed with costs.

Analysis:

17. From the foregoing discourse, the following issues arise for determination: -

    i. Whether there was an accident.

    ii. Whether the accident involved the Respondent's car and resulted in the death of the deceased.

    iii. Whether the Respondent is liable for the accident.

    iv. Reliefs, is any.

18. Before dealing with the above issues, it is important for this Court to recall its duty on appeal. This Court's role, as a first appellate Court, is well established. The Court of Appeal in Susan Munyi -vs- Keshar Shiani [2013] eKLR observed thus: -

> .... As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess,

weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

19. Similarly, in Abok James Odera t/a AJ Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates [2013] eKLR the Court set out the role of a first appellate court in the following terms: -

> .... This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.

20. Speaking to the advantage the trial Court has in observing the witnesses and the need for the appellate Court to exercise restraint while differing with the findings of fact, the Court of Appeal of East Africa in Peters -vs- Sunday Post Limited (1958) E.A 424, observed as follows: -

> ... It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has the advantage of seeing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whenever the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.

21. With the foregoing, this Court will now deal with the issues raised in this appeal.

a. Whether an accident occurred:

22. When the Appellant took to the stand, she testified as PW1. It was her evidence that on 6th May 2014, she visited the scene where had been an accident and found the motor vehicle KAV 895K. Its driver had escaped but the vehicle was towed to the Police Station. It was her further testimony that the deceased had alighted from a van and was on her way home.

23. No. 67202 PC Kenneth Chebii was PW2. It was his evidence that he was attached to Kitale Traffic Office and his duty included investigation of traffic accidents. He testified that on 6th May 2014, an accident occurred at 6.30pm along Kitale – Kapenguria road involving motor vehicle registration number KAV 795K, Toyota station wagon. On cross-examination, he stated that he visited the scene at 6.45pm and that the motor vehicle was there but its driver was not.

24. When the Respondent testified, he did not deny the that the accident involving his vehicle happened on the 6th May 2014. He only stated that he left his car for thirty minutes to get a mechanic. On-going back to where the vehicle was, he was arrested. He expressly stated that as follows: -

    I did not disappear after the accident

25. From a re-assessment of the evidence, this Court is convinced that indeed an accident happened. All the witnesses in the case, including the Respondent herein conceded that there was an accident.

26. The issue is, therefore, emphatically resolved in the affirmative.

b. Whether the accident involved the Respondent's car and resulted in the death of the deceased:

27. When the accident happened, PW1 visited the scene. She saw the vehicle registration No. KAV 895K still at the scene. Similarly, when PW2, the traffic Police Officer, visited the scene, the very motor

vehicle was still there. A search conducted by the Appellant at the Registrar of Motor Vehicles was produced as an exhibit. As at the time of the accident, the motor vehicle KAV 895K was registered to the Respondent herein. Despite the Respondent's denial that the motor vehicle was not his, the evidence directly contradicts that position.

28. Further, the Police Abstract produced by PW2 fortified the incidence of the accident. It indicated that the accident reported was in respect of the vehicle KAV 895K and Esther Malesi, the deceased. The exhibit shows that the Respondent herein is the owner.

29. With the foregoing, and in absence of the any evidence controverting the occurrence of the accident and having perused the Certificate of Death of the deceased which was produced as an exhibit, there is no doubt that the Respondent's motor vehicle caused the accident that led to the death of the deceased.

30. The second issue is thus also answered in the affirmative.

c. Whether the Respondent is liable for the accident:

31. Having established in the affirmative that an accident happened involving the Respondent's vehicle and the deceased herein, the issue of liability can be ascertained from the premise of negligence.

32. Negligence has four ingredients to it namely; duty of care, a breach of that duty, injury sustained as a result of breach and the fact that it was reasonably foreseeable that the breach would cause injury. The English Court in Caparo Industries PLC -vs- Dickman {1990} 1 ALL ER 568 neatly summed up the foregoing as follows: -

> .... The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused.
>
> What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighbourhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case.

33. Applying the foregoing principles to the case at hand, it is without doubt that as a car owner, the Respondent owed a duty of care to other road users including pedestrians. From the evidence the Respondent did not drive the vehicle into causing he accident. It broke down and he left it to go fetch a mechanic. In the process, he left the vehicle unattended. When PW2 investigated the incident, he established that the Respondent had left the ignition keys in the car. An unknown person, consequently, drove the vehicle.

34. The legal principle, res-ipsa loquitor, was relied upon by the Appellant. It was discussed in the book by Winfield & Jolowicz on Tort 17th Edition as follows: -

> When used on behalf of a plaintiff it is generally a short way of saying:
>
> I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant ...' There are certain happenings that do not normally

occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer.

35. It is discernible that when the Respondent's car broke down, his failure to have someone watch over it was the first sign of breach of duty of care to other road users. In a more outrageous display of the breach of duty of care, the Respondent made the reckless decision to leave the ignition keys inside the car and since it was driven, he had left it unlocked. The fact that the vehicle was driven was prima facie evidence of negligence. Was it reasonably foreseeable that leaving an unlocked, unattended car by the roadside with the ignition keys inside could tempt someone malicious or menacing to drive or even steal it? Was it foreseeable that the since the car was faulty, such a person would cause an accident? The answer to those pertinent questions is a resounding, yes!

36. In the written submissions, the Respondent conceded that he was not driving the motor vehicle at the time of the accident. He had left it with the mechanic. He claimed it is the mechanic who drove it without his permission. The foregoing claim was without evidence. However, even if it were true that it is the mechanic that caused the accident, the principles discussed in the preceding paragraphs apply mutatis mutandis. Fault still would fall at the doorstep of the Respondent on the basis of the doctrine of vicarious liability.

37. There is, therefore, an irrefutable connection between the deceased's death and the Respondent's actions that meets the standard of proof in civil cases. In Re H (minors) sexual abuse; standard of proof {1996} AC 563 and 505 for the Home Department -vs- Rehman {2003} 1 AC 153 the House of Lords discussed standard of proof as follows: -

    (1). Where the matters in issue are facts, the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability.

    (2). The balance of probability standard means that the Court must be satisfied that the event in question is more likely than not to have occurred.

    (3). The balance of probability standard is a flexible standard. This means that when assessing this probability, the Court will assume that some things are inherently more likely than others."

38. On the basis of the facts and the law, this Court finds that the Respondent was liable for accident. This Court is satisfied that the events in question are more likely not to have occurred had the Respondent been more careful and stood to his duty of care.

39. Having found that the Respondent was liable for the accident, the inevitable question that follows is whether the Respondent was wholly to blame for the accident in the circumstances of this case. Since the victim was 7 years of age and was by herself, manoeuvring the road on her way from school, a portion of contributory negligenmce/liability is attributable to her. She must have contributed to it some way somehow. However, it is important to point out that the Respondent was the adult in this scenario. He bore a greater responsibility. A heavier duty of care rested on him as compared to the minor. That is further reinforced by the fact that the Respondent was charged in Kitale Chief Magistrates Court Traffic Case No. 1372 of 2014 with two offences.

40. Whereas the outcome of the traffic case is unknown, and even by taking that the traffic case was dismissed, the dismissal without more, is not to say that the Respondent would not be liable in civil proceedings based on negligence. The reason being that the standard of proof in a traffic case is higher than in a civil claim.

41. With tremendous respect, the trial Magistrate fell into error in drawing the conclusion that the ownership of the vehicle was not proved when there was, at least the evidence of a motor vehicle search

further to an admission of ownership by the Respondent. The Court further erred by dismissing the suit on the basis of a criminal case that was allegedly concluded in favour of the Respondent, a fact that was without evidence.

42. It is apparent that had the trial Court trailed the chain of events and appropriately considered the concept of negligence, then it would have found the Respondent liable. By taking all the relevant considerations into play, this Court finds the Respondent 80% liable for the accident. The deceased would shoulder 20% on account of contributory negligence.

d. Reliefs:

43. Having settled the issue of liability on the part of the Respondent, this Court will now deal with the aspect of reliefs which in this case takes the form of damages. In assessing the damages for pain and suffering before death, this Court will be guided by Hyder Nthenya Musili & Another -vs- China Wu Yi Limited & Another [2017] eKLR, it was observed: -

> ...as regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death...

44. In this case, whereas it is not apparent the period of time the deceased took before she died, the evidence is that PW1 found her in the hospital and that she died the same evening. Therefore, she may not have endured pain and suffering for long. I shall award a nominal damage of Kshs. 50,000/-.

45. As regards loss of expectation of life, the guiding principle was enunciated in Benham -vs- Gambling [1941] AC 157 where the Court held as follows: -

> ... In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects. (emphasis added).

46. In Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR the Court made remarks on the general figure to award under this head. It stated: -

> ... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000/- while pain and suffering the awards range from Kshs.10,000/- with higher damages being awarded if the pain and suffering was prolonged before death.

47. Guided by the foregoing, I find that an award of Kshs. 100,000/- would be an appropriate amount in this case.

48. Regarding loss of dependency or lost years under the *Fatal Accidents Act*, the deceased was aged 7 years old and still in lower school. There is no evidence that she would have lived to work and earn the alleged Kshs. 10,000/- monthly. In a case like the one at hand, a global award suffices rather than attempting the mathematical method which applies in cases where income is ascertainable. Having said so, a child holds a very important position in a family regardless of age. On one hand, an adult child may take part in supporting the family through work related activities and on the other hand, a minor child is important in, at least, assisting in household chores or by even carrying along the family lineage. As said, therefore, every child is important in a family set up. In this case, going by the various decisions on record alongside many other relevant ones, and taking cognisance of the fact that the estate has already been awarded damages under the limb of loss of expectation of life, a figure of Kshs. 700,000/= will suffice under this limb.

49. The claim of special damages was not pleaded and neither was it specifically proved. It therefore fails.

50. The appeal, hence, principally succeeds.

Disposition:

51. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

52. In the end, the following final orders hereby issue: -

    a. The appeal succeeds and the order dismissing Kitale Chief Magistrates Civil Case No. 307 of 2014 is hereby set-aside.

    b. Judgment be and is hereby entered in Kitale Chief Magistrates Civil Case No. 307 of 2014 favour of the Appellant herein, Pamela Ajema Evayo, against the Respondent herein, David Amenya, as follows: -

        i. Liability apportioned at 20% and 80% in favour of the Deceased as against the Respondent.

        ii. Pain and suffering - Kshs. 50,000/-

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

        iv. Loss of Dependency - Kshs. 700,000/DIVISION -

            Sub Total: Kshs. 850,000/-

            Less 20% contribution Kshs. 170,000/-

            Net Total Kshs. 680,000/DIVISION -

    c. The above sum shall attract interest at Court rates from the date the suit was dismissed, that is on 27th March 2022, until payment.

    d. The Appellant shall also be awarded the costs of the suit and the appeal.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF MARCH, 2025.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of

Mr. Kagunza, Learned Counsel for the Appellant.

Miss. Masinde, Learned Counsel for the Respondent.

Chemosop/Duke – Court Assistants.