Abdulrahman (Suing as the personal representative of the Estate of Issa Mohammed Idhan - Deceased) v Oyugi & another (Civil Appeal E1393 of 2023) [2025] KEHC 4407 (KLR) (Civil) (3 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4407 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1393 OF 2023

TW OUYA, J

APRIL 3, 2025

BETWEEN

SHAMSHA SHEIKH ABDULRAHMAN (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ISSA MOHAMMED IDHAN - DECEASED) ..... APPELLANT

AND

JAMES OKELLO OYUGI ..... 1ST RESPONDENT

THE STANDARD GROUP LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgement and decree of Hon. C.M Njagi, P.M, in Milimani Commercial Court Civil suit E10398 of 2021)

JUDGMENT

1. The present appeal challenges the judgement of the lower court, in which the appellant was awarded general and special damages to the tune of Kshs. 645, 666, for a road traffic accident which occurred on 25th December, 2018, involving Issa Mohammed Idhan, now deceased, and Motor Vehicle registration KCJ 706X (the suit vehicle); which was allegedly being driven and/or controlled in a negligent manner by the 1st respondent in his capacity as the driver or agent of Standard Group Limited, the 2nd respondent herein.

2. In the plaint dated the 13th of August, 2021, the appellant who is the personal representative of the deceased, alleged that as a result of the accident which was caused by the respondents on the 25th of December, 2018; the deceased sustained fatal injuries which he succumbed to on the same day while undergoing treatment at Kenyatta National Hospital.

3. The appellant sought for general damages under the Law Reforms Act and *Fatal Accidents Act* together with special damages and costs of the suit plus interest. The particulars of the respondents' negligence were pleaded in paragraph 5 of the plaint.

4. In the statement of defence dated the 28th of September, 2021, the respondents denied the allegations of negligence that had been levelled against them by the appellant and put her to strict proof. In the alternative and on a without prejudice basis, the respondents alleged that if the accident occurred, then it was solely caused or substantially contributed by the negligence of the deceased.

5. After a full trial, the learned trial magistrate found that the deceased and the respondents were equally to blame for the occurrence of the accident and proceeded to assess damages as follows:

   i. Pain and suffering -Kshs. 50,000;

   ii. Loss of expectation of Life-Kshs. 100,000;

   iii. Loss of dependency-Kshs.1, 085, 832;

   iv. Special damages-Kshs. 55,500;

   Total- Kshs1, 291, 332

   Less 50% liability-Kshs. 645,666.

6. The appellant was dissatisfied with the trial court's findings on both liability and quantum, and she proffered an appeal to this court vide a Memorandum of Appeal dated the 13th of December, 2023.

7. In their Memorandum of Appeal, the appellant advanced a total of four (4) grounds of appeal wherein she faulted the learned trial magistrate for apportioning liability equally between the deceased and the respondents despite the weight of evidence on record, settled law, precedent and practice; and for awarding damages that are so manifestly low, without considering the factor of inflation and passage of time, as well as for failing to award the appellant costs of the suit in the lower court.

8. The appellant further blamed the trial court for failing to consider and apply her written submissions and authorities quoted before arriving at her decision.

9. On the above grounds, the appellant urged this court to find the respondents 100% liable for the accident and enhance the general damages awarded by the trial court to reflect modern trends, while considering the factor of inflation and passage of time. The appellant also requested to be awarded costs in the lower court and in this appeal.

10. The appeal was prosecuted by way of written submissions following directions issued by this court on the 5th of June 2024; which both parties duly filed.

11. In her written submissions dated the 24th of May, 2024, the appellant contended that there was overwhelming evidence on record to prove that the 1st respondent was over speeding at the time that the accident occurred, as such, he was unable to swerve or stop the vehicle in time to avoid hitting the deceased. He submitted that in spite of the trial court taking note of the fact that the 1st respondent was over speeding, it proceeded to apportion liability equally between the deceased and respondents simply because there was no zebra crossing where the deceased was crossing the road; which is not a defence for hitting the deceased, given that the 1st respondent had an obligation to consider other road users and anticipate that there are other people using the road while driving his vehicle.

12. The appellant in his submissions urged this court to set aside the apportionment of liability by the trial court and find that the 1st respondent was 100% to blame for the occurrence of the accident.

13. On the issue of quantum, the appellant submitted that the award of Kshs.50,000 by the trial court as damages for pain and suffering was manifestly low, and the same should be substituted with an award of Kshs.500,000 considering that the deceased died several hours after the occurrence of the accident.

14. On the award for loss of dependency, the appellant contended that a court, when determining a multiplier, should be guided by amongst other factors, the age of the deceased, the balance of earning life, the age of the dependant, and the vicissitudes of life; and that whereas the appellant had proposed a multiplier of 28 years and the respondents a multiplier of 20 years, the trial court chose to rely on the proposal made by the respondents as opposed to that made by the appellant without giving any reasons or justification for adopting the said multiplier. The appellant urged this court to adopt a multiplier of 28 years to determine the award for loss of dependency, given that the deceased was 32 years and of good health at the time of his death.

15. On the issue of the multiplicand used by the trial court to determine the income of the deceased, the appellant in her submissions faulted the learned trial magistrate for categorizing the deceased as a general labourer and for using a multiplicand of Kshs. 13, 572.90, which it had adopted from the regulations of wages (General) (amendment) Order, 2018; instead of using Kshs. 34, 302. 75, which is the minimum wage for a driver operating a heavy commercial vehicle in Kenya based on the Regulations of Wages (General) (amendment) Order 2022.

16. The appellant urged this court to set aside the award of Kshs. 1, 085, 832 by the trial court for loss of dependency and substitute it with an award of Kshs. 3, 841, 908, calculated as follows Kshs. 34, 302.75x 28 x 12 x 1/3= 3, 841, 908.

17. On the special damages awarded by the trial court for funeral expenses, the appellant faulted the learned trial magistrate for awarding her Kshs. 5, 500 for burial expenses. She submitted that they incurred a lot of expenses while organizing the funeral of the deceased; as such the said award should be substituted with a sum of Kshs. 295, 700.

18. Regarding costs, the appellant submitted that she is entitled to the costs of the suit, given the lower court's findings that she had discharged her burden of proof and therefore a successful litigant.

19. In their written submissions, the respondents cross-appealed the appellant's appeal wherein they faulted the learned trial magistrate for finding that the respondents were liable for the occurrence of the accident without any evidence. They urged this court to set aside the trial court's findings and dismiss the appellant's suit with costs.

20. It was the respondents' submission that the accident occurred at a section of the road that is not a designated pedestrian crossing area, and given that the said road is a busy highway, the deceased was aware of the risk of crossing the road and voluntarily assumed the risk of being hit by a vehicle when he crossed the highway at an undesignated point.

21. The respondents further submitted that they ought to be exonerated from any blame for the occurrence of the accident, as the said accident was contributed to by actions of the deceased who crossed the road at an undesignated section of the highway, as such, liability ought to be attributed solely to him.

22. On the issue of quantum, the respondents submitted that Kshs. 10,000 would be adequate compensation as an award for damages for pain and suffering, owing to the fact that the deceased died on the same day that the accident occurred. The respondents contended that the appellant ought not to have been awarded special damages for funeral expenses, considering that she did not adduce any documents before the trial court to support her claim.

23. Regarding the award for loss of expectation of life, the appellant submitted that a sum of Kshs. 50,000 would suffice under this head, given that the appellant had failed to prove that the deceased was 32 years old at the time of his death or that he was earning an income as a driver in Qatar. On the award for loss of dependency, the respondents supported the award made by the trial court, and submitted that the said award should be upheld, given that the appellant had failed to adduce proof that the deceased had been residing outside the country or that he was a driver of a heavy commercial vehicle as alleged.

24. On the issue of costs, the appellant urged this court to overturn the findings of the trial court on liability and dismiss the primary suit together with the appeal with costs to the respondent.

25. This being a first appeal, it is an appeal on both facts and the law, as such, this court, as a first appellate court has a duty to reconsider, re-evaluate and re-analyse the evidence adduced at the trial court, and come to its own conclusion on whether or not the findings of the trial court should be upheld, all the while bearing in mind that unlike the trial court, this court did not have the advantage of seeing or hearing the witnesses, and to make due allowance in that respect.

26. This duty was reiterated by the Court of Appeal in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR; as follows:

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 allowances in this respect."

27. Guided by the aforesaid duty, I have carefully considered the grounds of appeal, the evidence presented before the trial court and the written submissions filed on behalf of both parties. I have also read the Judgement of the learned trial magistrate. Having done so, I find that two key issues emerge for determination in this appeal which are;

    i. Whether the apportionment of liability by the learned trial magistrate should be upheld; and

    ii. Whether the learned trial magistrate erred in law or fact when making the award on both general and special damages.

28. Turning now to the first issue, it is a well-established legal principle, that apportionment of blame is a matter of discretion which an appellate court will interfere with only when it is clearly wrong, or based on no evidence or was based on the application of wrong principles.

29. This principle was restated by the court of appeal in the case of Khambi and Another versus Mahithi and Another (1968) EA 70 as follows:

> " It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge."

30. Further in Isabella Wanjiru Karangu versus Washington Malele Civil Appeal No. 50 of 1981 (1983) KLR 142; the Court of Appeal stated that:

> " I agree with what Law JA said in Malde v Angira Civil Appeal No 12 of 1982 (unreported) that apportionment of blame represents an exercise of a discretion with which this court will interfere only when it is clearly wrong, or based on no evidence at all nor did he apply a wrong principle."

31. In this case, PW3, Mr. Ahmed Shariff Noor, who witnessed the occurrence of the accident on the fateful day, testified that the 1st respondent was unable to see the deceased as he was crossing the road, due to the fact that he was driving at a high speed. He also stated that there was no zebra crossing or a foot bridge at the section of the road where the accident occurred, but that there was a foot bridge at Bellevue area, about 1.5 kilometres behind the scene of the accident.

32. James Okello Oyugi, the 1st respondent, who testified as DW1 at the lower court stated that he saw a pedestrian crossing the road at Eka Hotel to the other side of the road, and that traffic was heavy as such he couldn't see well and he knocked down the pedestrian. He testified that he was charged with causing death by dangerous driving, but was later acquitted as the court found that the pedestrian was at fault for crossing at an undesignated pedestrian area.

33. It was DW1's testimony that he was driving below 50km/hr and that there was no bus stage or foot bridge where the accident occurred, and that the footbridge was located 100 meters away from the scene of the accident.

34. From the above testimonies, it is evident that the section of the road where the accident occurred was not a designated pedestrian crossing area, given that there was no foot bridge or zebra crossing at that section of the road, as such, the deceased being a pedestrian, was not authorized to cross the road at that particular point.

35. The 1st respondent on the other hand alleges that he was driving at a speed that was below 50km/hr and that there was heavy traffic on the road at the time the accident occurred. On my part, I am unable to believe the assertions made by the 1st respondent that he was not driving the said vehicle at a high speed.

36. I say so because, if indeed there was heavy traffic at the road and he was driving at speed that is below 50km/hr at the time that the accident occurred, he would have been able to see the deceased as he was crossing the road, and stop or properly control the suit vehicle the moment he noticed the deceased so as to avoid knocking him down. Furthermore, I agree with the learned trial magistrate that the injuries sustained by the deceased were not from a vehicle that was being driven at a speed below 50km/hr as the respondents would like this court to believe; the injuries were clearly from a vehicle being driven at a high speed.

37. Based on the above, I am of the considered view that both the deceased and the respondents are equally to blame for the occurrence of the accident. The deceased ought to have crossed the road at a designated pedestrian crossing area, as such, he failed to take care of his own safety when he chose to cross the highway in an area that had no foot bridge or zebra crossing, despite there being evidence that there was a foot bridge just a few meters from the scene of the accident.

38. The respondent also ought to have driven or controlled the suit vehicle at a speed that would have allowed him to stop or swerve the suit vehicle the moment that he noticed the deceased on the road.

39. Flowing from the forgoing I am of the considered view that the learned trial magistrate cannot be faulted for finding that the deceased and the respondents were equally to blame for the accident, as such, I see no need to interfere with the learned trial magistrate's findings on liability.

40. On the issue of quantum, it is a well settled principle of law, that an appellate court will not easily disturb an award of damages made by a trial court unless it can be show that the trial court acted upon some wrong principles, or misapprehended evidence in some material aspect and so arrived at a figure that was so inordinately high or low as to represent an entirely erroneous estimate.

41. This principle was reiterated in the Court of Appeal case of Catholic Diocese of Kisumu versus Tete [2004] eKLR; as follows:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a difference figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, As by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate (see Kemro v A M Lubia & Olive Lubia (1982-88) 1 KAR 727 and Kitavi v Coast Bottlers Limited [1985]KLR 470)."

42. That being said, the appellant alleges that the learned trial magistrate ought to have awarded her Kshs. 500,000 as general damages for pain and suffering instead of Kshs. 50,000, given that the deceased did not die immediately after the accident as he succumbed to his injuries while undergoing treatment at Kenyatta National Hospital.

43. The respondent on the other hand contended that since the deceased was pronounced dead at the hospital, on the same day that the accident occurred, an award of Kshs. 10,000 would be sufficient compensation.

44. It is trite that damages for pain and suffering are recoverable if the deceased endured pain and suffering from his injuries before his demise. This principle was restated in the case of West Kenya Sugar Company Limited versus Philip Sumba Julaya, Civil appeal no. 7 of 2017; as follows:

> " 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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident."

45. Again, in Hyder Nthenya Musili & another versus China Wu Yi Limited & another (2017) eKLR; the court stated thus: "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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life..... 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."

46. I have perused the evidence on record, and as per the death certificate of the deceased, he died on the 25th December, 2018, which is the same date that the accident occurred. I have also noted from the testimony of the witnesses, more so that of PW2, PC Joseph Wachira, and that of DW1, that the deceased was pronounced dead at the hospital while undergoing treatment.

47. Whereas the exact time that the deceased succumbed to his injuries was not disclosed to this court, it is clear that the deceased experienced pain and suffering before he arrived at the hospital and even while undergoing treatment before he finally succumbed to his injuries. Whereas the respondents proposed a sum of Kshs. 10,000 as compensation under this head and the appellant proposed a sum of Kshs. 500,000, I am of the considered view that the award of Kshs. 50,000 by the learned trial magistrate was sufficient compensation under this head and I see no basis for interfering with it.

48. The respondent in his submissions, had urged this court to reduce the award of Kshs. 100,000 made by the trial court for loss of expectation of life and instead substitute it with a sum of Kshs. 50,000.

49. I have noted from the evidence adduced before the trial court that the deceased was a 32-year-old man who neither had a wife nor children. There was no evidence that he was suffering from any health condition before his death, as such it can be presumed that he was a healthy young man; who would have been expected to live for a few more years had his life not been unexpectedly cut short by the said accident. Based on the above, and considering the incidences of inflation in the country, I see no need to interfere with the award made by the trial court under this head.

50. Turning now to the award of general damages under the head loss of dependency, the appellant in this case had testified that the deceased was employed in Qatar as a driver. She however failed to adduce any evidence of such employment or evidence to prove that the deceased was ever trained as a driver or that he had ever travelled to Qatar.

51. Furthermore, I have noted from the evidence of PW2, David Sheikh, who was the uncle of the deceased, that the deceased used to live with him in South B. He made no mention of the deceased ever being employed as a driver in Qatar. As such, I am not convinced that the deceased was employed as a driver in Qatar, earning a monthly income of Kshs. 200,000 as alleged. Aside from this, the death certificate of the deceased indicates that he was unemployed.

52. Being that as it may, it is well settled that Proof of income forms the basis of assessing damages under the head loss of dependency, and where there is absence of proof of any income, the best approach to use in determining the award under this head would be the global sum approach.

53. This position was restated by the court in Frankline Kimathi Baariu & another versus Philip Akungu Mitu Mborothi, Civil appeal 58 of 2019; as follows: "Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

54. Given that no evidence was adduced before the court to prove that the deceased was a driver, or even that he was employed in Qatar as a driver of a heavy commercial vehicle earning a monthly income of Kshs.200,000 per month, the learned trial magistrate should have used the global sum award to assess the damages due to the appellant under the head loss of dependence.

55. Having stated that, the court in Kwamboka (Suing as a dependant and personal representative of the Estate of Albert Nyabongoye Onchiri) versus Okiro & another (Civil Appeal E017 of 2023) [2024] KEHC 8442; awarded the representative of a 35-year-old deceased man who had a wife and no children, and whose earnings could not be ascertained, a global sum of Kshs. 1,000,000 as damages for loss of dependency.

56. Guided by the above authority, I am of the considered view that a global sum of Kshs. 1,000,000 is adequate compensation for loss of dependency. I thereby set aside the award of Kshs. 1, 085, 832 by the trial court under this head, and substitute it instead with an award of Kshs. 1,000,000.

57. Turning now to the special damages for funeral expenses, I have noted that the learned trial magistrate failed to award the appellant any amount for funeral expenses on grounds that they did not provide any receipts to prove the expenses that they used.

58. Whereas it is a principle of law that special damages must not only be pleaded but strictly proved; the courts have often loosened its grip to this requirement when it comes to proving burial expenses.

59. This position was restated by the court of appeal in the case of Capital Fish Kenya Limited versus The Kenya Power & Lighting Company Limited [2016] eKLR; where the court held thus: "We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ..... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc."

60. It was therefore an error on the part of the learned trial magistrate for failing to award the appellant special damages for funeral expenses on grounds that she did not provide receipts to prove the same; whereas she incurred some funeral expenses in order to bury her son. Given the foregoing, I am of the considered view that an amount of Kshs. 100,000 would be sufficient to cover funeral expenses.

61. Based on the above, the appellant's appeal partially succeeds to the extent that she has been awarded a sum of Kshs. 100,000 as funeral expenses.

62. Given that this appeal has partially succeeded, each party shall bear their own costs of the appeal. As regards the costs at the lower court, given that the apportionment of liability by the trial court is upheld by this court, I find no basis to interfere with the trial courts discretion that each party should bear their own costs.

Determination

63. Judgement is hereby entered for the appellant against the respondents as follows:

    i. Liability- 50%:50%;

    ii. General damages for pain and suffering- Kshs. 50,000;

    iii. Loss of expectation of Life-Kshs. 100,000;

    iv. Loss of dependency- Kshs. 1,000,000; and

    v. Special damages-Kshs.155, 500.

    Total 652,750

    vi. Each party shall bear their own costs of the appeal

vii. Each party should bear their own costs of the suit

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF APRIL, 2025

HON. T. W. OUYA

JUDGE

For Appellant.....Musundi

For Respondents.....Ms. Kirimi

Court Assistant.....Jackline