



**Ndichu & another v Kariuki (Suing as the Legal Representative
of the Estate of the Late Gachau Gibson Mathenge) (Civil Appeal
E372 of 2024) [2025] KEHC 4198 (KLR) (Civ) (1 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4198 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E372 OF 2024

LP KASSAN, J

APRIL 1, 2025

BETWEEN

SOLOMON KINYANJUI NDICHU 1ST APPELLANT

PETER WAMUNYU KAMAU 2ND APPELLANT

AND

ESTHER NJERI KARIUKI RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
GACHAU GIBSON MATHENGE**

*(Being an appeal from the judgment and decree of the Honourable I.N. Barasa
(PM) delivered on 22.02.2024 from Nairobi Milimani CMCC No E2977 of 2022)*

JUDGMENT

1. The trial magistrate, following the plaint filed by the Respondent and the subsequent defence and a full hearing, entered the following judgment in favour of the Respondent:
 - a. Liability is entered 100% against the 1st Defendant, and the 2nd Defendant is vicariously liable.
 - b. General damages for pain & suffering at Kshs 25,000/=.
 - c. General damages for loss of expectation of life Kshs 100,000/=.
 - d. Loss of dependency 15,000/=x12 months x 15 years x ²/₃= Kshs 1,800,000/=.
 - e. Special damages at Kshs 60,000/=.
 - f. Interest at court rates from the date of judgment.



2. The case before the trial court originated from a road traffic accident that occurred on 04.06.2019 at approximately 4:30 a.m. along the Northern Bypass near the Marurui area. The deceased, Gachau Gibson Mathenge, was driving motor vehicle registration no. KCR 107Q when a collision occurred with a Mitsubishi Fuso Lorry registration no. KCD 833E driven by the 1st Appellant, Solomon Kinyanjui Ndichu, who was heading in the opposite direction. The Respondent, Esther Njeri Kariuki, sued as the administrator of the deceased's estate, claiming the accident was caused by the 1st Appellant's negligence in encroaching into the deceased's rightful lane. At trial, the Respondent relied on testimony from the police officer and herself, while the Appellants relied solely on the 1st Appellant's account. The trial court found the Appellants 100% liable and awarded general and special damages to the Respondent.
3. The Appellants have now appealed against the decision of the trial court on liability and quantum on the following grounds summarized as:
 - a. That the trial magistrate erred in apportioning liability at 100% against them.
 - b. That the Respondent did not produce any eyewitness evidence.
 - c. That the evidence of the 1st Appellant was uncontroverted.
 - d. That the award of damages was excessive and not supported by the pleadings or evidence.
4. The Appellants seek that the judgment of the trial magistrate be dismissed with costs or in the alternative, liability be varied, the general damages be varied and for costs of the appeal.
5. The following issues arise for determination:
 - a. Whether the trial court erred in apportioning liability at 100% against the Appellants.
 - b. Whether the trial court erred in not finding that the absence of an eye witness was fatal to the Respondent's case.
 - c. Whether the quantum of damages was excessive or erroneous.
 - d. Who is to bear the costs herein.

Appellants' submissions

6. In their written submissions, the Appellants contend that the trial magistrate erred in apportioning 100% liability to them without sufficient and credible evidence. They argue that the only eyewitness to the accident was the 1st Appellant, whose version of events, stating that the deceased encroached onto his lane, was not rebutted by any other eyewitness testimony. The Appellants criticize the reliance placed on the testimony of the investigating officer, noting that no charges were filed following the accident and that an inquest was instead recommended. They further argue that the police sketch relied upon by the officer were never produced to prove that the 1st Appellant was at fault.
7. On the issue of quantum, the Appellants submit that the damages were never pleaded and should not have been allowed.

Respondent's submissions

8. In her submissions, the Respondent defended the trial court's finding of full liability against the Appellants by relying on the objective and impartial testimony of the police officer, PC Mutuma. The officer confirmed through a police sketch plan that the point of impact was within the deceased's



correct lane, indicating that the 1st Appellant had veered off his lane, thereby causing the accident. The Respondent argued that the absence of an eyewitness did not weaken her case, especially in a fatal accident scenario, and that relying on police findings and her testimony as the legal representative of the deceased was reasonable under the circumstances. She emphasized that the 1st Appellant's contradictory testimony lacked credibility.

9. Regarding quantum, the Respondent maintained that the award of Kshs. 1,925,000/= in general damages and Kshs. 60,000.00 in special damages was fair and justifiable. She contended that the damages were based on established principles under the *Law Reform Act* and *Fatal Accidents Act*, both of which were clearly pleaded. The award for loss of dependency, pain and suffering, and loss of expectation of life followed the correct formula involving the deceased's estimated monthly income, dependency ratio, and reasonable multiplier. The Respondent dismissed the Appellants' assertion that the awards were excessive, noting that the trial court had, in fact, taken a conservative approach. She urged the appellate court to uphold the lower court's decision in full.

Analysis And Determination

10. This appeal being solely against the decision on damages, I am guided by the decision of the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR 5 where the court held 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”
11. As a first appellate court, I am bound by the principle in *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 to re-evaluate and re-analyze the evidence afresh while bearing in mind that I did not have the opportunity to see or hear the witnesses testify.
12. On liability, the Respondent, testified as the second plaintiff witness (PW2) in her capacity as the administrator of the estate of the late Gachau Gibson Mathenge. She adopted her witness statement and confirmed that she had been issued with letters of administration ad litem to institute the suit. She testified that on the material night of 04.06.2019, the deceased—her husband—was returning home from a towing-related assignment when the fatal accident occurred. She stated that the deceased was healthy, 40 years old, and was a businessman involved in vehicle towing and granite trade. As a result of the accident, the deceased died, leading to a significant loss to the estate and dependents, including herself and their child, A.G.M.
13. PW1, the police officer, PC Mutuma George, from Kasarani Police Station, who testified based on the police file. He stated that motor vehicle KCD 833E driven by the 1st Appellant was from town heading to Githurai direction and motor vehicle KCR 107Q driven by the Deceased collided and the Deceased died on the spot. The witness was stood down to familiarize himself with the police file.
14. When recalled, he stated that the point of impact was on the right side of the road facing toward Kahawa West, which was the deceased's rightful lane. According to his review of the police file, the 1st Appellant encroached into the deceased's lane, causing the head-on collision. He confirmed that no one had been charged following the accident, and an inquest had been recommended. Although the officer did not produce a sketch map, he confirmed the accident details and produced the police abstract.
15. On cross-examination, he stated that the investigating officer blamed the deceased for the accident.



16. The 1st Appellant, testified as the sole witness for the defence. He confirmed that he was the driver of Motor Vehicle KCD 833E, a Mitsubishi Fuso lorry, involved in the accident on 04.06.2019 along the Northern Bypass. He acknowledged that the accident occurred and resulted in the death of the deceased.
17. In his testimony, the 1st Appellant denied responsibility for the accident and instead alleged that the deceased was at fault, claiming that the deceased had encroached onto his (the 1st Appellant's) lane, thereby causing the collision. He asserted that the accident occurred on his rightful side of the road. That the Deceased was overtaking on his lane.
18. As held in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991], there is no liability without fault. Mere occurrence of an accident does not impute negligence unless supported by cogent evidence. Further, in *Bwire v Wayo & Sailoki* [2022] KEHC 7 (KLR), Mativo J. stated that when the plaintiff fails to discharge the burden of proof, the defendant is under no obligation to rebut that which is not established.
19. However, the law is that the burden of proof rests on the plaintiff. Section 107 and 108 of the [Evidence Act](#), Cap. 80 Laws of Kenya, provides that he who alleges must prove.
20. From the evidence adduced at the trial court, PW2, the Respondent, was not present at the scene when the accident occurred. PW1, the police officer, was not the initial investigating officer and blamed the 1st Appellant for the accident. However, he didn't produce the sketch map of the accident scene. The police abstract issued on 02.06.2022 indicated the case was pending under investigation. PW1 stated that the matter was referred for public inquest. This could mean the police could not find who was to blame for the accident. As the witness testified, he referred to sketch maps in the police file both fair sketch and rough sketch but didn't produce the same before the court. In his re-examination, he stated that the investigating officer had blamed the deceased for the accident. This is in contradiction with his testimony that the point of impact was on the deceased's rightful lane.
21. The trial magistrate in her finding stated that:

“My analysis of the evidence tendered is that the 1st Defendant's evidence is contradictory. It is not true, as stated by the 1st Defendant that the deceased was driving on the Northern Bypass from Ruaka direction. It was the 1st Defendant who stated that he was driving from Naivasha that morning, that was driving on the Bypass from Ruaka direction. The 1st Defendant was on the deceased's lane when the head on collision with KCR 107Q occurred. I find that the 1st Defendant is to blame for the accident and that the 2nd Defendant is vicariously liable.”
22. At page 16 of the proceedings paragraph 2 the 1st Appellant testified that:

“KCR was on the lane from Ruaka. It was on my lane.”
23. It appears that the trial magistrate interpreted the above quoted excerpt to mean that KCR was being driven from Ruaka yet the 1st Appellant clarified that it was on his lane. In fact, the 1st Appellant testified in his exam-in-chief and cross-examination that the Deceased was driving from Kahawa West direction heading towards Ruaka direction. This was also supported by the evidence of PW1. The trial magistrate erred in her analysis that the 1st Appellant's evidence was contradictory.
24. The 1st Appellant, though an interested party, gave the only direct account of the events, claiming the deceased was overtaking in his lane. In the absence of concrete forensic or diagrammatic evidence, the



versions of both the Appellants and the Respondent remain in direct conflict. Having alluded to the presence of sketch maps in the police file, it was prudent that the same were produced in court to assist it make a finding.

25. Where both parties provide conflicting versions of events and there is no independent corroboration or clear documentary evidence, courts often apportion liability equally, particularly in fatal accident claims. This was the principle adopted in similar cases such as *Khambi & Another v Mahithi and Another* [1968] EA 70 where the court held:

“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.”

26. The police officer in his testimony gave contradictory evidence that the accident occurred on the deceased’s rightful lane, despite this the matter was referred to public inquest. In his re-examination, he stated that the investigating officer blamed the deceased for the accident.

27. The Court of Appeal in *Michael Hubert Kloss & Another -v- David Seroney & 5 others* (2009) eKLR held:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley -v- Gypsum Mines Ltd (2)* (1953) A.C. 663 at Page 681 as follows: - To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connection. In a Court of Law, this question must be decided as a properly instructed and reasonable jury would decide it.....”The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally”.

28. In *Kibimba Company Ltd -V- Umar Salim*, Supreme Court civil appeal No.7 of 1988 (1988) the court said

“Where there is little to choose between the evidence of two parties, the blame is equally divided between them i.e. 50% liability on each side from the observations made by the Honourable judge in this case, and the evidence and testimony provided in the hearing of the suit, we hold a humble view that the learned magistrate, lawfully and rightly exercised his judicial powers, in applying the proper legal principles, and coming up with the equal apportionment of liability.

In *Hussein Omar Farah -V- Lento Agencies – CA at Nairobi Civil appeal no. 34 of 2005*, the justices of the Court of Appeal stated as follows; -

The trial court as we have said, had two conflicting versions on how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the



fault of the opposite party, we would think that liability for the accident would be equally on both the drivers. We therefore hold each driver equally to blame.”

29. In *Isaac Onyango Okumu -V- James Ayere & another* (2019) eKLR (Musyoka, J.) stated as follows:-

“It is an established principle of law that where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable.”

30. In this case, the court is faced with the dilemma of who is to blame for this accident and to what extent. The question that begs an answer is why weren't the sketch maps produced before the trial magistrate? It is a practice that, since these documents are in the police file, which is in the custody of the police, it was incumbent upon the police officer to produce these documents. PW1 referred to these documents when he was testifying, as it would have supported the evidence that the 1st Appellant was to blame. Therefore, without these documents, the court is denied an opportunity to have a wholesome view of the occurrence of the accident. This Court faced with two conflicting evidence on who is to blame, I hereby apportion liability at 50:50.

31. On quantum, some of the principles that courts will take into account when assessing quantum are-

- a. That assessment of damages is a matter of exercise of discretion and it depends on the facts and circumstances of each case.
- b. Money as an award cannot review a physical frame that has been battered and shattered or a lost life. The award is only meant to give a party reasonable compensation.
- c. It is desirable that so far as possible, comparable injuries should be compensated by comparable awards.

32. The Appellants submitted that the Respondent did not plead for general or special damages. A look at the plaint dated 02.06.2022 at paragraph 8, the Respondent gave the particulars of the special damages and particulars pursuant to the *Fatal Accidents Act* and the *Law Reform Act* which was summarized in the prayers as special damages Kshs 30,000/= and general damages. I find that the Respondent pleaded for both special damages and general damages under the *Fatal Accidents Act* and the *Law Reform Act*.

33. For general damages on pain and suffering the trial court awarded Kshs 25,000/=. The deceased according to PW1 died on the spot. I find the award was reasonable and uphold the same.

34. For general damages on loss of expectation of life the trial court awarded KShs 100,000/=. In *Benedeta Wanjiku Kimani vs Changwon Cheboi & Another* [2013] eKLR the court held;

“In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case, the conventional figure for loss of expectation of life is Shs 100,000/= and I award the said.”



35. I am further persuaded by the case of Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased) v Reuben Muriuki Kahuha, City Hopper Ltd, Michael A. Craig & Rueben Kamande Mburu [2015] eKLR where Ougo J awarded a sum of Kshs 100,000/= for loss of expectation of life.
36. In E M K & another vs E O O [2018] eKLR the Court held as follows;
- “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. In the present appeal PW2 testified that the deceased died after a period of hospitalization of about two months. I therefore award Kshs 150,000/= as damages for pain and suffering and Kshs 100,000/= as damages for loss of expectation of life.”
37. The trial court award was thus guided by comparable awards and the award of Kshs 100,000/= is upheld.
38. For general damages on loss of dependency the trial court awarded Kshs 1,800,000/=. Under the *Fatal Accidents Act*, it is necessary to determine the deceased’s income, the dependency ratio of his/her dependants and the multiplier to be used.
39. In the case of Jastine Nzula Musyoka & Ano. -vs-china Wu Yi Limited & Ano. Machakos HCCC 52 OF 2014 wherein Nyamweya J. relied on the case of Beatrice Wangui Thairu-vs-hon. Ezekiel Barngetuny & Ano., Nairobi HCCC No. 1638 Of 1988 wherein Ringera J. explained the manner of assessment of damages for loss of dependency as follows:
- “The principle 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 purchase. 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 dependents 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.”
40. Firstly, on the multiplicand, the Respondent testified that the Deceased ran a towing and granite business. There was no proof of his earnings. In the case of Kenya Catholic Seminary Commission & another v Musa Omumia Rakama(suing as Administrator and Legal Representative of the Estate of the Everline Onyango Ogada [2018] eKLR wherein Njagi J. stated at par 29-31:
29. The respondent testified that the deceased was a tailor and a businesswoman and that she was earning shs. 15000/- a month. The respondent did not produce any documents to prove the deceased’s earnings. The Court of Appeal in Job Ayiga Maruja & another Vs Simeon Obayo (2005) eKLR held that:-
- “ We do not subscribe to the view that the only way to prove the profession of a person must be by the 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 illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. “

30. If however, the deceased herein was a tailor it was easy to produce documents such as a business licence to prove the kind of work she was engaged in. I therefore find no evidence that the deceased was a tailor. The court cannot award damages for a tailor’s job without evidence to prove so. In the absence of this, the alternative for purposes of computing the deceased’s earnings is to treat her as a general labourer.
31. The trial magistrate resulted to the use of the government’s minimum wage to estimate the earnings of the deceased. Judgment in the case was delivered in October 2017. If the deceased had been alive by then, the wages provided in The Regulation of Wages (General Amendment) Order of 2017 that came into operation on 1st May 2017 would have been applicable to her. The minimum wage for a general labourer in that order is Kshs. 6896/=. I will apply that figure as the multiplicand. “
41. The trial court adopted the statutory minimum wage at Kshs 15,000/= as there was no proof of income of the deceased. This I find is in line as no income of the deceased was proved. The deceased died at the age of 40 years as shown in the death certificate issued 31.12.2019 and the multiplier of 15 years used by the trial court was also reasonable and took into consideration the vicissitudes and vagaries of life. The deceased had dependents his wife, the Respondent, and a child A.G born 04.02.2018. Therefore, the multiplicand of $^{2/3}$ used by the trial court was correct.
42. I uphold the award on loss of dependency calculated as $15,000/= \times 15 \times 12 \times 23 = 1,800,000/=$.
43. On the Special damages award, a party must produce receipts in order to meet the requirement of specifically proving special damages. The Respondent pleaded Kshs 30,000/=. The grant ad litem costs of Kshs 30,000/= was proved by production of a receipt. The court went further and awarded an additional Kshs 30,000/= for the funeral expenses.
44. The Court of Appeal in the case of Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR, the court held:
- “We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as “funeral expenses and other expenses” were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.”
45. Also, the Court of Appeal in the case Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR, held:
- “We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issues of record keeping when the primary concern to a bereaved family



is that a close relative has died and the body needs to be interred according to the custom of the particular community involved...”

46. The Court of Appeal in the Premier Diary case supra further held:

“...The learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages...”

47. In the present case, the Respondent pleaded funeral expenses and did not adduced any receipts in support. I am guided by the Court of Appeal decisions cited above that the sum of kshs 30,000/= awarded by the trial magistrate was fair and I hereby uphold the award on special damages as awarded by the trial court.

48. The upshot of the above is that:

- i. The appeal partly succeeds
- ii. Liability 50:50
- iii. General damages for pain and suffering Kshs 25,000/=
- iv. General damages for loss of expectation of life Kshs 100,000/=
- v. General damages for loss of dependency Kshs 1,800,000/=
- vi. Special damages at Kshs 60,000/=

49. The Appellants will have $\frac{1}{2}$ the costs of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 1ST DAY OF APRIL 2025

LINUS P. KASSAN

JUDGE

In the presence of:

Mugambi for the Applicant

Gikonyo for Respondent

Carol - Court Assistant

