



Muchiri v Ambane & another (Suing as the Administrators of the Estate of Kennedy Ambane Kidake) (Civil Appeal E250 of 2024) [2025] KEHC 6870 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E250 OF 2024
FN MUCHEMI, J
MAY 15, 2025**

BETWEEN

KENNEDY MUKUHA MUCHIRI APPELLANT

AND

**MATAYO KIDAKE AMBANE & WYCLIFFE MALWA KIDAKE (SUING
AS THE ADMINISTRATORS OF THE ESTATE OF KENNEDY AMBANE
KIDAKE) RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. O. Wanyaga
(PM) delivered on 28th August 2024 in Thika CMCC No. E140 of 2023)*

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Principal Magistrate in CMCC No. E140 of 2023 arising from a motor vehicle accident whereby the trial court found the appellant 100% liable in favour of the respondents. The respondent was awarded general damages for pain and suffering at Kshs. 50,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 1,300,000/- and special damages of Kshs. 145,740/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 5 grounds summarized as follows:-
 - a. The learned trial magistrate erred in law and in fact in finding the appellant fully liable for the accident notwithstanding the evidence on record to the contrary.
 - b. The learned trial magistrate erred in law and in fact in awarding loss of dependency at Kshs. 1,300,000/- which was manifestly excessive thereby failing to consider the appellant's submissions and judicial authorities thus arriving at an erroneous figure.



- c. The learned trial magistrate erred in law and in fact in awarding special damages that was not strictly proven.
3. Parties disposed of the appeal by way of written submissions.

The Appellant's Submissions

4. The appellant submits that the findings of the police officer that was solely and exclusively relied upon was unsafe and unfounded in that PW1's evidence was hearsay evidence and thus ought to be disregarded.
5. The appellant argues that the trial court speculated on the issue of who was to blame for the accident as no evidence was produced in court of the nature and manner of investigations that was conducted. The police only blamed him for causing the accident. The appellant submits that there was an eye witness by the respondents, PW3 and one by the appellant, DW1 however their testimonies were discarded.
6. The appellant further argues that PW1, the police officer who testified, was not the investigating officer and thus he did not know how the accident occurred making his testimony hearsay evidence. During his testimony, he relied upon and produced a police abstract which did not indicate that the driver was to blame or that the deceased was off the road. PW1 further alleged that he referred to the occurrence book record which he never produced. The appellant argues that although PW1 alleged that the deceased was off the road, she did not see the deceased off the road neither did she see the motor vehicle off the road. She did not have the sketch plan or the investigation file and the occurrence book that she allegedly referred to was never produced in court. The appellant submits that PW1's evidence was not only hearsay evidence that should have been excluded from consideration but it was wildly unreliable and was without a basis to exclusively reach a finding of full culpability. To support his contentions, the appellant refers to the cases of Benjamin Mwenda Muketha (Suing as the legal representative of Mercy Nkirote) v Abdikadir Sheik & 2 Others [2018] KEHC 3137 (KLR); Easy Coach Limited & Another v Gideon Otieno Oulu & Another [2021] KEHC 6402 (KLR) and Kennedy Nyangoya v Bash Hauliers [2016] KEHC 2616 (KLR) and submits that the evidence of PW1 was not helpful to the respondent's case.
7. The appellant submits that the police abstract did not even indicate that the driver was to blame for the occurrence of the accident. The appellant further submits that the police officer only produced the police abstract and tendered oral evidence of the contents of the documents before court which is not admissible pursuant to Section 22 and 62 of the *Evidence Act*.
8. The appellant submits that the respondents' witness alleged that he witnessed the accident however his testimony was riddled with inconsistencies as he testified that he was a watchman at a nearby supermarket but he did not give the name of the supermarket nor did he produce any evidence to show that he was employed. Further, the eye witness testified that the defendant driver drove off from a petrol station but failed to mention the name of the petrol station up until cross examination. Neither did the respondents call any petrol station attendant to corroborate his testimony. Furthermore, the time the witness indicated the accident happened at 3.00am is inconsistent with the time the deceased was taken to Thika Level 5 Hospital as the receipt dated 31/10/2021 indicates the time as 1.44am. Additionally, the witness knew the deceased and his brother Wycliffe yet he failed to identify him at the time of the occurrence of the accident. The deceased stayed in the hospital for a period of 3 months after the accident.
9. The appellant submits that the eye witness was never listed as a witness in the police abstract yet he indicated that he wrote a witness statement at Makongeni Police Station. The appellant relies on the



- case of Andrew Ochieng & Another (Suing as the legal representatives of the Estate of George Otieno Ochieng (Deceased) v Rongai Workshop & Transport & Another [2020] KEHC 5403 (KLR) and submits that it is difficult to appreciate the truthfulness or correctness of his version.
10. The appellant further submits that he gave consistent evidence during hearing and he was not adjudged by the trial court as unreliable or untrustworthy. His evidence was not discredited or shaken in cross examination and thus it is not clear why the court totally disregarded it. Furthermore, the appellant submits that he noted the accident occurred at 12.30am as consistent with the time stamp on the receipt from Thika Level 5 Hospital the appellant argues that his evidence was corroborated by treatment note from Thika Level 5 Hospital that indicated that the deceased was drunk on admission. The appellant submits that the deceased was not in a good state of mind to make a proper assessment of the road before he made a dangerous attempt that cost his life. Additionally, the appellant submits that the place the deceased attempted to cross was not a designated crossing point.
 11. The appellant submits that the deceased owed a duty of care to confirm that the road was clear before crossing he was therefore the author of his own misfortune.
 12. The appellant refers to the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & Another [2015] KECA 616 (KLR) and submits that although the respondents alleged negligence against the appellant, no evidence was adduced to prove the same. The appellant submits that the respondents failed to establish their case based on the threshold of standard of proof and that the deceased was fully to blame for the injuries sustained for having exposed himself to injury that he knew or ought to have known about.
 13. The appellant argues that the award on loss of dependency was excessive in the circumstances as it did not commensurate the stature of the deceased. The appellant submits that loss of dependency is a question of fact and the criteria to be used in determining such an award for a deceased who left behind dependants is the number of dependants, the age of the dependants and the level of dependency. Thus the question of dependency is a question of fact that needs to be proved by way of evidence. To support his contentions, the appellant relies on the cases of Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti) [2022] KEHC 1330 (KLR) and Domitila Wangui Karugu & Another v Dagu Hidris Haide [2020] KEHC 9201 (KLR) and submits that the respondents in the instant case did not provide evidence that the adult child, parents or brother were dependent on the deceased. It would appear that only the widow and 2 children were dependent on the deceased. Thus an award of damages of Kshs. 800,000/- would be adequate compensation.
 14. The appellant submits that three receipts dated 26/01/2022, 26/01/2022 and 25/01/2022 do not have a name of the service provider, recipient of the service and they look similar in nature on their format yet it is indicated to have a description of different items. The appellant submits that the validity of the receipts is put into question where one is indicated as vehicle hire while the other two provide for black polythene bag and clothing items. The appellant further submits that the respondents did not produce receipts for the police abstract, certificate of death, motor vehicle search and mortuary fees. The appellant refers to the case of Aberdare Maize Milling Ltd v Julius Kiambati M'mbura [2020] KEHC 370 (KLR) and submits that the sum of Kshs. 50,000/- as legal fees ought to have been addressed under costs.

The Respondents' Submissions

15. The respondents submit that PW1 confirmed that an accident occurred involving motor vehicle registration number KBM 045J and the deceased. PW1 testified that the said motor vehicle was heading



towards Thika town and at Makongeni Area it knocked down the deceased who was a pedestrian walking off the road. PW1 further testified that the occurrence book blamed the driver of motor vehicle registration number KBM 045J for the occurrence of the accident as the deceased was knocked down whilst off the road. On re-examination, PW1 confirmed that motor vehicle registration number KBM 045J was to blame for the accident. PW3, an eye witness, testified that the driver of motor vehicle registration number KBM 045J came from behind after leaving a petrol station and veered off the road ramming into the deceased who was ahead of him and walking away from the road from behind. The respondents submit that the evidence of PW3 and PW1 corroborated as to the circumstances leading to the accident.

16. The respondents submit that the appellant, DW1 testified that the accident occurred when the deceased was crossing the road and that the deceased was smelling of alcohol at the material time. He further testified that the accident wasn't off the road and the deceased ran across the road. On cross examination, the witness said that the deceased was knocked by the suit motor vehicle and that he applied emergency brakes and swerved to avoid knocking down the deceased. The appellant confirmed that the version of the circumstances of the accident were captured in the occurrence book by the police. The respondents argue that the allegation that the deceased was drunk could not succeed as the treatment sheets produced belonged to a third party. The respondents submit that the appellant interfered with the scene by ferrying the deceased in his vehicle to the police station and then to hospital. Thus, the appellant's version on the circumstances of the accident was not corroborated or supported by any other evidence.
17. The respondents argue that the sudden application of brakes of the suit motor vehicle was a clear indication that the said motor vehicle was being driven at a high speed hence its losing control and knocking down the deceased who was walking off the road. the respondents further argue that the suit motor vehicle having come from behind the deceased, it was incumbent upon the driver of the said vehicle to exercise extra caution so as not to veer off the road and knock down the deceased who was walking lawfully away from the road. The respondents argue that the deceased who was lawfully walking away from the road could not do anything as he was on his lawful path when the accident happened.
18. The respondents submit that the trial court exercised its discretion and applied the global approach making a proper and commensurate finding on loss of dependency. To support their contentions, the respondents rely on the cases of Mombasa HCCA No. 10 of 2020 AINU Shamshi Hauliers Limited v Moses Sakwa & Faith Awino Sakwa (Suing as the administrators of the Estate of the late Ben Sigoda Okach (Deceased) where the deceased was forty years and the trial court awarded a global sum of Kshs. 2 million for loss of dependency. Further in Koresa & Another (Suing in their own behalf and as administrators of the Estate of Abdul Mohammed Artan alias Abdul Mohammed Artan) v Stephen & Another Civil Appeal E090 of 2022 (2023) KEHC 24191 (KLR) the court upheld a global award of Kshs. 1,200,000/- where the deceased was 48 years of age and in Nyeri HCCA No. 22 of 2020 Moses Maina Waweru v Esther Wanjiru Githae (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti) the deceased was 9 years old and the court awarded a global sum of Kshs. 800,000/- for loss of dependency.
19. The respondents submit that the sum of Kshs. 145,740/- as special damages is adequate as the same was specifically pleaded and proved by way of receipts.

Issues for determination

20. The main issues for determination are:-



- a. Whether liability apportioned by the trial court was against the weight of the evidence adduced.
- b. Whether the award on loss of dependency is manifestly excessive.
- c. Whether the award on special damages was specifically pleaded and proven.

The Law

21. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another v Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

22. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated 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 allowance in this respect.
23. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-
 - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
 - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether liability apportioned by the trial court was against the weight of the evidence adduced.

24. The appellant seeks to have the court substitute the trial court’s findings of 100% liability against him with 100% liability upon the deceased. The appellant asserts that the accident was substantially caused by the deceased as he was drunk and therefore not in a proper frame of mind to make a proper assessment of the road before he made a dangerous attempt that cost him his life.

25. The principles guiding the appellate court’s power to interfere with the trial court’s finding on liability are well settled. In *Khambi & Another v Mahithi & Another* [1968] EA 70 it was held that:-

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 circumstances, 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. According to PW1, the police officer, testified that an accident occurred on 31/10/2021 at 3.00 am along Thika Garissa road involving motor vehicle registration number KBM 045J and a pedestrian, the deceased. The witness testified that the motor vehicle was heading towards Thika town and along Makongeni it hit a pedestrian who was walking off the road. PW1 testified that according to the occurrence book, the driver of motor vehicle registration number KBM 045J was to blame for the accident as the pedestrian was knocked while off the road. On cross examination, the witness testified that he was not the investigating officer and neither did he visit the scene of the accident. He further testified that the police abstract did not indicate that the deceased was off the road or that the appellant was blamed for the accident.
27. PW3 an eye witness, adopted his witness statement and testified that on 31/10/2021 he was working as a watchman at a supermarket at Makongeni area near a petrol station when at around 3.00 am, motor vehicle registration number KBM 045J being driven from Garissa towards Thika entered the petrol station next to the supermarket he was guarding and went from the petrol station at a high speed suddenly losing control and hit the deceased who was walking away from the road. The eye witness testified that the deceased was walking on the left side of the road as one faces Thika direction from Garissa road. PW3 further testified that the driver of the suit motor vehicle came from behind veered off the road and rammed into the deceased who was ahead of him and away from the road. The witness testified that after knocking down the deceased, him, the driver of the said motor vehicle and other good Samaritans took the deceased to Thika Level 5 Hospital where he passed away while undergoing treatment.
28. On cross examination the witness said that the deceased was not crossing the road and he did not appear drunk to him. The witness further testified that he knew about the deceased's death after 3 months. He further stated that he knew the deceased's brother but at the time of the accident he did not know they were related.
29. The appellant testified that he was the driver of motor vehicle registration number KBM 045J and that he was travelling from Thika towards Landless when a truck passed on the opposite lane and immediately and without notice, the deceased darted onto the road from the right side to the left side. He said that he applied emergency brakes and swerved to the right to avoid hitting the deceased but due to the short distance and abrupt entry into the road, the accident occurred. The appellant further said that the deceased was visibly drunk and that he took him to hospital after the accident and that the deceased was unknown to them and for three months after the accident nobody identified the deceased.
30. On cross examination, the witness said that the accident occurred at around 12.00 am on the road and not off the road as alleged. The appellant further said that the accident occurred right after the petrol station, Mid Oil Petrol Station and that he did not enter the petrol station. The witness further testified that the deceased was crossing from right to left at an undesignated crossing point. The witness stated that he was driving at a speed of 50 km/hr. DW1 further stated that he and the police went to the scene and he gave them his version of how the accident occurred.
31. The clinical officer at Thika Level 5 Hospital DW2 testified that when the deceased was taken to hospital on 31/10/2021, he was drunk and registered as inpatient number 616673. On cross examination, the witness testified that he was not the one who attended to the patient but it was one Macharia, a colleague and that the deceased was unconscious when he was brought in. He further testified that the documents indicated that the inpatient number was 616673 and the patient's name appears as Luke Dennis but the inpatient waiver form did not contain the said name Dennis. The witness further testified that as per the documentation, there was no alcohol test done on the deceased and he could not tell why the doctor indicated that the deceased was drunk.



32. From the record and testimonies of the parties, it is not contested that an accident occurred on 31/10/2021 along Thika-Makongeni road between the deceased and motor vehicle registration number KBM 045J. The main contention is how the accident occurred. PW3 and DW1 both witnessed the accident. The appellant stated that he went back to the scene of the accident with the police and gave his version of how the accident occurred but the police still blamed him for the accident. The treatment notes according to the appellant indicated that the inpatient number was 616673 and the patient's name was not matching and that the waiver form did not contain the name Dennis. This is contradictory as all the witnesses testified that the deceased was not identified for months when he was attended to at the hospital. Thus it is interesting how the hospital knew the name of the deceased and the same recorded in the documents before he was identified. Thus, the court is persuaded by the version of how the accident occurred as told by PW3. Furthermore, if the appellant was driving at a speed of 50 km/hr as he alleged, he would have seen the deceased before he hit him. The fatal injuries sustained by the deceased support the fact that the appellant was driving at an excessive speed. It is clear from the evidence that the appellant did not exercise due diligence and drive more carefully to avoid the accident. It is my considered view that the appellant has not provided any material to support apportionment of liability to the deceased. As such, it is my view that the respondents discharged the burden of proof and proved on a balance of probabilities that the appellant was fully liable.

Whether the award of general damages was manifestly excessive.

33. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“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 different 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 leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

34. Similarly in *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 Others* [1986] KLR 457 that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

35. In the instant case, the appellant faults the court below for awarding an excessive amount which did not commensurate the stature of the deceased. The appellant argues that the respondents did not provide any evidence that the adult child, parents or brother were dependent on the deceased but it was in order



that the widow and 2 children were dependent on the deceased. The court below adopted a global award upon finding that the respondents did not provide proof of the deceased's earnings.

36. In *Frankline Kimathi Maariu & Another v Philip Akungu Mitu Mborothi* (Suing as administrator and personal representative of Antony Mwiti Gakungu (Deceased) [2020] eKLR where the court was dealing with a similar issue stated:-

“In the present case, there was no satisfactory proof of the monthly income. 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 but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.

37. In the same breadth, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the Estate of Mercy Nzula Maina (Deceased) [2016] eKLR held as follows:-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.

38. From the foregoing, it is evident that there are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income of the deceased, whereas the other school advocates for a global award.

39. I have perused the trial court's judgment and noted that the learned magistrate exercised his discretion. He relied on the case of *Koresa & Another* (Suing in their own behalf and as administrators of the Estate of Abdul Mohammed Artan alias Abdul Mohammed Artan) v *Stephen & Another* (Civil Appeal E090 of 2022) [2023] KEHC 24191 (KLR) (26 October 2023) (Judgement) decided to adopt the global award approach whereas he awarded a sum of Kshs. 1,300,000/-. The magistrate was guided by the fact that there was no cogent evidence to show the deceased's earnings. The court further noted that the deceased left a wife, three children parents and a brother who were all depending on him.

40. It is not in dispute that the deceased was in good health and was aged 48 years at the time of his death. He left behind a wife and three children who were aged 18, 15 and 11 years. The deceased also left behind his two elderly parents aged 92 and 75 years respectively. From the age of the deceased's children and that of his parents, the length of dependency would not be for a long period which the court considered. In the premises, it is my considered view that the sum of Kshs. 1,300,000/- awarded by the trial magistrate for loss of dependency was adequate in the circumstances and ought not to be interfered with by this court.



Whether the award on special damages was specifically pleaded and proven.

41. It is trite law that special damages must be both pleaded and proved, before they can be awarded by a court. This was stipulated in the Court of Appeal decision of Hahn V. Singh Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

“Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.

42. On perusal of the respondents’ plaint dated 24th March 2023, the appellant pleaded special damages of Kshs. 157,550/- and the court awarded Kshs. 145,740/- which was proved. The record shows that the appellant pleaded special damages and proved the sum of Kshs. 145,740/- which was awarded. This included funeral expenses of hiring a vehicle at Kshs. 70,000/-, coffin at Kshs. 9,000/-, funeral expenses at Kshs. 9,150/- and Kshs. 3,600/-, legal fees for letters of grant ad litem at Kshs. 50,000/- and bill from Thika Level 5 Hospital for Kshs. 3,990/-. As such, the award of special damages was based on the evidence of the respondent on record.

43. It is my considered view that the appeal lacks merit and it is hereby dismissed with costs to the respondents.

44. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 15TH DAY OF MAY 2025.

F. MUCHEMI

JUDGE

