Kitenye & another (Suing as the Administrators/Personal Representatives of the Estate of Gidion Muthama) v Two Ways Communication Limited & another (Civil Appeal E042 of 2023) [2025] KEHC 9668 (KLR) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9668 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E042 OF 2023

TM MATHEKA, J

JUNE 13, 2025

BETWEEN

EUNICE MUMO KITENYE ..... 1ST APPELLANT

SHADRACK MBUTA ..... 2ND APPELLANT

SUING AS THE ADMINISTRATORS/PERSONAL REPRESENTATIVES OF THE ESTATE OF GIDION MUTHAMA

AND

TWO WAYS COMMUNICATION LIMITED ..... 1ST RESPONDENT

THOMAS MUTISYA WAEMA ..... 2ND RESPONDENT

(Appeal from the Judgment of Hon. F. Makoyo (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.82 of 2022, delivered on 27th April 2023)

JUDGMENT

1. The Appellants Eunice Mumo Kitenye & Shadrack Mbuta (Suing as the administrators/personal representatives of the estate of) Gidion Muthama filed a suit in the lower Court seeking general damages under the *Law Reform Act* (LRA) and the *Fatal Accidents Act* (FAA) on behalf of the Estate of Gidion Muthama pursuant to a fatal road accident, involving motor vehicle KBV 406Y and Motor Cycle KMFE 392V on 22/08/2020 (material day) along the Salama-Nunguni Road at Enzai area.

2. The Appellants case was that the deceased was a pillion passenger on the motor cycle when the motor vehicle KBV 406Y was carelessly and negligently driven lost control and hit the motor cycle KMFE 392V which was also carelessly and negligently driven thereby causing an accident which occasioned fatal injuries to the deceased. They also sought special damages, costs of the suit and interest.

3. The 1st Respondent two ways communication ltd filed its statement of defence, denied all the allegations in the plaint and called for strict proof. It averred that if the accident occurred as alleged, then it was wholly or substantially contributed to by the negligence of the deceased and the cyclist.

4. The Appellants replied to the defence where they joined issues with the 1st Respondent and reiterated the contents of their plaint.

5. The 2nd Respondent Thomas Mutisya Waema did not enter appearance or file a defence within the stipulated time thus an interlocutory judgment was entered against him on 04/07/2022.

6. After the preliminaries, the matter proceeded to trial and judgment was eventually delivered in favor of the Respondents. The trial court found that the Appellants had not established their case to the required standard and dismissed it with costs.

The Appeal

7. Aggrieved by the decision, the Appellants filed this appeal on the following grounds;

    a. The learned magistrate erred in law and in fact in finding that the Appellants had failed to prove their case on a balance of probabilities.

    b. The learned magistrate erred in law and in fact in dismissing the Appellants' claim with costs while the overwhelming evidence on record was to the effect that both Respondents were liable for the accident.

    c. The learned magistrate erred in law and in fact in failing to consider and analyze the evidence on record hence dismissing the Appellants' claim with costs.

    d. The learned magistrate erred in law and fact by ignoring/failing to consider and or apply the doctrine of res ipsa loquitor as pleaded and proved and as per the Appellants' submissions.

    e. The learned magistrate erred in law and fact in failing to consider the Appellants' submissions and legal authorities on liability thereby arriving at an erroneous decision.

    f. The learned magistrate erred in law and fact in adopting a global sum approach when there was sufficient evidence on record warranting the adoption of the multiplier approach.

    g. The learned magistrate erred in law and fact in failing to make any proper findings on quantum in accordance with the facts pleaded, the submissions and the evidence on record.

    h. The learned magistrate erred in law and fact in failing to make a proper finding on quantum hence awarding a global sum of Kshs 800,000/= on loss of dependency which amount is inordinately low in the circumstances.

8. The appeal was canvassed through written submissions.

The Appellants' Submissions

9. The Appellants identified the following issues for;

    a. Whether the learned magistrate erred in law and fact in dismissing the Plaintiff's case.

    b. Whether the Honourable court erred in failing to adopt the doctrine of res ipsa loquitor.

    c. Whether the learned magistrate erred in law and fact in adopting a global sum approach when there was sufficient evidence on record warranting the adoption of the multiplier approach.

10. On whether the trial court erred in dismissing the case, it was submitted that a police officer from Salama Police station was called as PW3 and he took the court through the OB wherein the rider had been blamed for the accident and also testified that there was a traffic case pending against the rider. That, according to PW3, notices to sue were issued against both the driver of the motor vehicle and the rider.

11. It was submitted that the driver (DW1) and the police officer who was called as DW2 blamed the rider for causing the accident. It was contended that even if the statements of the vehicle occupants were taken, they would be of no use as DW1 was categorical that they (occupants) did not witness the accident.

12. It was submitted that there was material contradiction in the evidence of the witnesses who testified on liability. That PW3 and DW2 who were police officers from Salama police station gave contradictory evidence on who was to blame. It was submitted that when DW1 was cross-examined, he stated that he veered off the road to avoid the accident and as such, his evidence as contained in the witness statement, to the effect the accident happened on the road, cannot be true. That DW2's evidence to the effect that the accident happened at the end of the road cannot be true as the end of the road and off the road do not mean the same thing. Reliance was placed on Susan Wangui Gakuha -vs- Stephen Mwangi Gakuha [2016] eKLR where the court held that;

> " ...To me such inconsistencies are sufficient to the extent of creating
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> doubts in the mind of the court because they cast serious doubts as to the credibility of the protestor. The court cannot shut its eyes to such serious contradictions and inconsistencies emanating from the same person...Considering the above inconsistencies and having observed his demeanor in court, I also find this witness to be totally unreliable and his evidence is of little evidential value. ..... Turning to the facts of this case, as mentioned earlier I have noted key inconsistencies in the evidence of the protestor and I need not repeat the same here. The evidence of the protestor suffered not just from inconsistencies but contradictions hence it is unreliable...."

13. Reliance was also placed on Maawiya Ali Abdala T/A South-Coast Paint & Hardware -vs-Bongo Mwamwero Ngome [2022] eKLR where the court held:

> " To address the issue who between the parties is more likely to be stating the truth, it should that the respondent's testimony which is inconsistent with his pleadings must be disregarded Such gaps and inconsistencies in pleadings and testimony render the respondent's case not established on a balance of probability or at all. The Court upholds the appellant's submission that John Onteri Momanyi –Versus- Motor Boutique Limited [2018] eKLR applies for the holding that the claimant's contradictory evidence and case cannot be trusted and the respondent's coherent and clear evidence and case in such circumstances prevails."

14. Consequently, it was submitted that DW1 and 2 are not reliable witnesses and their evidence should be disregarded. That the only reliable witness on the issue of liability was PW3 who testified that the traffic case was still pending before court and did not know who to blame. This court was urged to apportion liability between the two parties in the ratio of 50:50. Reliance was placed on Ndatho -vs-

Kireu *(Suing as the legal representative of the estate of Mark Murimi Marigu) (Civil Appeal 7 of 2020)* [2022] KEHC 3133 (KLR) (16 March 2022) (Judgment) where the court stated: -

> " The law is trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally.....I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party. In this case the finding by the investigating officer was that he did not know who to blame since there were no independent witnesses to the accidents. He further stated that he could not blame the appellant for the accident. It is my finding that apportionment of liability by the trial magistrate was not supported by the evidence. The collision was between the vehicle driven by the appellant and the motor cycle. They both bear the blame for the collision. They should both be held to blame for the collision. The apportionment of liability by the trial magistrate cannot be upheld. In the circumstances, I find that the learned trial magistrate erred in his finding on liability. I set aside the finding and hold that the appellant and the respondent were equally to blame for the collision."

15. It was submitted that the pillion passenger was not in any way to blame for the accident as there was nothing, he could do to avoid it. Reliance was placed on Vivian Anyango Onyango & Anor -vs- Charity Wanjiku [2017] eKLR where the court held that: -

> " A passenger in my opinion, that I hold dearly, cannot be held liable or even contribute to an accident unless it is demonstrably shown that the said passenger contributed to the occurrence of the accident. It is my very strong view, and supported in numerous court decisions, that a passenger cannot be held liable when a vehicle he is travelling in is involved in an accident."

16. The Appellants also submitted that it was not fatal for them to sue the owner of the motor vehicle instead of the driver. They placed reliance on Johnstone Mutuku Kilango -vs- Elijah Wambua [2016] eKLR where the court held that: -

> " 8. It is apparent from the foregoing provisions of law that the appellant did not err when he opted to sue the owner of the motor vehicle instead of suing the owner and the driver jointly. It is therefore the finding of this court that failure of the appellant to join the respondent's driver to this suit is not fatal to the appellant's case. The court of appeal when considering a similar issue in the case of Mwonia vs Kakuzi Limited (1982 – 88) 1 KR 525 had the following to say: -
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> "From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in the damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings, and of the claim. Vicarious liability of the employer is not pegged on the employee's liability but to his negligence."

17. As to whether the court erred by not relying on the doctrine of res ipsa loquitor, it was submitted that reliance on the doctrine was pleaded at paragraph 5 of the plaint and that it came out very clearly that the collusion was due to the collision between the motor vehicle and motor cycle. That the defendants did not offer any believable explanation of how the accident happened hence the court should have

adopted the doctrine. Reliance was placed on Paul Kamau Mbugua & Anor -vs- payless Car Hire & Tours Limited & Anor [2020] eKLR where court held: -

> " 30. The said doctrine was aptly discussed in the authority of Susan Kanini Mwangangi & another Patrick Mbithi Kavita (2019) eKLR with reference to the East African Court of Appeal's decision in Embu Public Road Services Ltd, 0 Rimi [1968) EA 22 where the following was enunciated:"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."
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> 31. From my understanding of the above, a mere pleading of the doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence."

18. As to whether the trial court erred by adopting the global sum approach instead of the multiplier approach, it was submitted that PW1's testimony that the deceased was earning Kshs 500/= per day was not controverted. That, even though PW1 did not produce any documents to prove the earnings, courts have previously held that production of documents is not the only way to prove that the deceased was earning a living.

19. Reliance was placed on David Kimathi Kaburu -vs- Gerald Mwobobia Murungi (suing as legal representative of the estate of tames Mwenda Mwobobia(deceased) (2014) eKLR where the court held;

> " The court is alive of the fact that in Kenyan Society, most of the individual earnings need not be proved by production of documents such as banking statements or payment vouchers or pay slips. Further to the above with the modern technology in whichever payment are to be effected through use of mobile phones or where payments can be made by cash without requirements of payments by cheques or execution of documents to confirm payments it is not necessary to produce documentary proof. The court of appeal in the case of Jacob Ayiga Maruta - vs Simeon Obavo (2005) eKLR the Court of Appeal stated: -
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> " in our view, there was more than sufficient material on record from what the learned Judge was entitled to and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about Ksh. 4,000/- per month. 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 earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep

no records and 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"

20. Reliance was also placed on Samson Mwaura Mburu & Anor -vs- Reginant N. Okoth & Anor [2019] eKLR where court held:

> " ...Pw-1the widow testified; the deceased used to earn Kshs. 1,000/= per day on days when the work was fine, He used to bring Kshs. 3,000/= or Kshs. 4,000/= or Kshs. 5,000/ per week. receive Kshs. 20,000/- per month from the deceased. We use to share the money with my co-wife. The earning of the deceased in a fatal accident case which is the multiplicand has to be pleaded or at least. ascertained from the pleading and must be proved. Proof of earning can be by way of earning records, where available, or all evidence by employer evidence of earning in the occupation or industry of a person of his skills. While production of records in desirable it is not the only means by which earning can be proved. In this appeal the earning of the deceased was pleaded, evidence led by both the widow and Pw3 on the average earnings per day. This evidence was not controverted or challenged by the appellant. In my view the trial court had no reason to disregard the earning and resort to the Minimum Wages Regulations as submitted by the appellant"

21. It was submitted that the deceased was 21 years old and that his beneficiaries were listed in the Chiefs letter which stated categorically that the deceased was the sole bread winner for his mother. It was contended that the multiplier and multiplicand were proved on a balance of probability hence there was absolutely no reason of using the global approach. Reliance was placed on CWW (Suing as personal representative of the estate of PWK -vs- Mark Kahenya & Anor [2020] eKLR where the court held that;

> " 21. I am constrained not to use the global approach as a carte blanche to escape from reasoned analysis of the evidence. From the evidence on record, it is possible on a balance of probabilities to elicit the inconvenience, the loss that the appellant suffered as a result of the death of the deceased and it would occasion injustice if this court were to use the global approach in awarding damages in the instant case. This being my finding, I shall use the multiplier approach to assess damages and proceed to analyze the award for loss of dependency."

Submissions by 1st Respondent

22. Relying on section 107 and 109 of the *Evidence Act*, it was submitted that parties are bound by their pleadings and that the particulars of negligence pleaded were not proved against the Respondent. Reliance was placed on CMC Aviation Ltd –vs- Cruis Air Ltd (1) (1978) KLR 103 where Madan J.A stated;

> " Pleadings contain the averments until they are proved or disapproved or there is admission of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence."

23. It was submitted that the Appellants did not avail an independent witness or the investigating officer while the Respondent submitted overwhelming evidence to rebut the allegations against its driver. Reliance was placed on the following cases;

a. V.O.W -vs- Private Safari EA Ltd 2010 eKLR where the learned Judge H.M Okwengu stated;

> " I have no reason to fault the trial Magistrate in that regard. I find that there was no evidence upon which a finding of negligence against the Appellant's driver could be arrived at. It was not for the respondent to prove that he was not negligent but for the Appellant to discharge that burden. Indeed, an accident can be caused by many factors for the above reasons. I find no merit in this appeal and do therefore dismiss it...."

b. HCCA No. 102 of 2005 – Sally Kibii & Anor -vs- Dr. Francis Ogoro where Justice Ibrahim (as he then was) held that;

> " In the Kenital case (above), I held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. The appellants simply did not adduce any evidence before the trial court on liability. They could have called eye witnesses and/or the investigating police officer. Proof of negligence was material in this case and the burden of proof was upon the appellants. She did not discharge the burden and the appellant's counsel submission before me that 'someone had to explain how the accident took place is telling. That 'someone' is the appellants who alleges negligence on the part of the defendant."

c. David Kasyoka Ndivo & Anor (Suing as the Legal Representative of the Estate of Willy Mutua Muli (Deceased) -vs- Buzeki Enterprises Ltd & another [2020] eKLR where C. Kariuki J stated;

> " From the evidence before court, there is no evidence to prove that DW1 was speeding at the time of the accident. There was no eye witness to the accident and the only evidence as to how it happened is the evidence of DW1 the driver of respondents' motor vehicle. The particulars of negligence pleaded by the appellants are not proved. Suit is dismissed. Each party to bear its own costs"

d. Nairobi HCCA No.152 of 2003, Statpack Industries Ltd -vs- James Mbithi where the court stated;

> " It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce in evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessary as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."

24. The Respondent submitted that the evidence of DW1 was not controverted and he squarely blamed the rider for the accident and his evidence was not shaken on cross-examination. That, from the evidence of DW2, there was no doubt that the rider was charged in court and was to blame for the accident. Reliance was placed on the Halsbury's Laws of England, 4th Edition pg. 662 paragraph 476 where it is stated;

> " The burden of proof in an action for damages for negligence rests primary on the plaintiff, who, to maintain the action must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This invites the proof of some duty owed by the

defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established."

25. Further reliance was placed on Clerks & Lindsell on Torts 20th Edition at pg. 55 where it is stated;

> "The burden of proving causation rests with the claimant in almost all instances. The claimant must adduce evidence that is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains."

26. In conclusion, it was submitted that the trial magistrate did not err in law and fact in dismissing the suit.

Duty of Court

27. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123)

28. Having considered the grounds of appeal, the rival submissions and entire record, the following issues arise for determination:

    a. Whether the trial court erred by dismissing the Appellant's suit.

    b. What is the quantum of damages, if any?

Whether the trial court erred by dismissing the Appellant's suit.

Evidence on Liability

29. The Appellant pleaded that the 1st Respondent was the owner of motor vehicle KBV 406Y while the 2nd Respondent was the owner and rider of motor cycle KMFE 392V.

30. PW3 was PC Henry Gatiti of Salama Traffic Base and he referred to an abstract dated 27/04/2021 under OB No. 15/22/08/20 concerning Gideon Muthama. He testified that the accident occurred on 22/08/2020 at 11am at Enzai area along Salama-Nunguni Road involving motor vehicle KBV 706Y Toyota Hilux driven by Francis Karanja and motor cycle KMFE 392V skygo ridden by Thomas Mutisya Waema.

31. He testified that the motor cycle was coming from Salama towards Nunguni and at a sharp corner, the rider left his lane and collided with the motor vehicle where the deceased died on the spot and the rider got serious head injuries. That, Cpl Githaiga was called by the Base Commander and informed about the accident. That, the driver was at the scene but the rider had been taken to the Hospital. That both the driver and rider were issued with the notice of intention to prosecute. He produced the abstract and notices to prosecute as P. Exh 2 (a), (b) & (c) respectively.

32. PW3 could not tell whether there was an independent witness as he did not have the police file in court, he said that the area has an 's' corner. That, it is bushy with a sharp corner and one cannot see any oncoming motor vehicle and the road is narrow. That from his experience, motorists tend to veer on to the lane of oncoming motor vehicles. The case of the rider was pending before court and had not been concluded and therefore they could not tell who was to blame. He said that he was paid Kshs 6,000/= and produced the petty cash voucher as P. Ex 12.

33. On cross-examination, he said that the letter dated 22/08/2020 from the staffing officer Traffic Base Salama stated that the motor cycle was to blame for the accident. That according to the abstract, the matter was pending before court and the officer who drew the sketch plan, one PC Koros, was deceased.

That from the OB, the motor cycle veered into the motor vehicle's lane and was well captured in the sketch maps. That the motor cycle was uninsured. That, a notice of intention to prosecute was issued to the two drivers subject to investigations.

34. DW1 was Francis Ndung'u Karanja and he testified that he was a driver with 2-way Communication Limited. He adopted his statement dated 18/08/2022 as his testimony in chief in which he stated that he was assigned motor vehicle KBV 406Y which he had been driving for two years prior to the accident. He recalled that on 22/08/2020, he went to the site with two technicians on duty. They left at 10am and drove towards the Salama town direction. There is a sharp corner on the road at Enzai area and he was driving steadily. He saw a motor cycle approaching from the opposite direction with one pillion passenger and it was moving fast.

35. The rider tried to negotiate the sharp bend but was unable to. The rider fell down with the motor bike which skidded towards the vehicle and hit the front right-side tyre. Unfortunately, the pillion passenger died on the spot and the rider was injured. The police officers from Salama Police Post went to the scene, requested for a statement and investigated the incident. They confirmed that the rider was to blame for the accident. DW1 said that he was not to blame for the accident as he was on his right lane when the cyclist lost control and skidded into the car. He produced his driving licence and photographs as D. Ex 1 and 2.

36. On cross-examination, he said that he was from Salama direction and was very familiar with the road. That there was a very sharp corner and motorists don't normally have their lawful lane on that corner. That he would normally slow down at the corner. That he tried his best to avoid the accident and even veered off the road. He said that if he had not moved, both the rider and passenger would have died. He said that he was on the side of the road where he was supposed to be. That, police arrived at the scene after 15 minutes and by that time, the rider had been taken to the hospital and the body was at the scene. He said that his passengers were asleep and did not witness the accident since it happened so fast. That he was the only one who recorded the statement since he had the motor vehicle. That, the police had seen who was to blame by the time they left the scene. He said that he was never issued with a notice of intention to prosecute.

37. DW2 was CPL Josephine Githaiga of Mukaa Traffic Department and she testified that she had a police abstract dated 24/04/2021 indicating that she was the investigating officer. She also had the OB, entire police file, sketch plan and a letter. According to the abstract, PC Koros who passed away was her co-investigating officer. She said that she was with him at the scene of the accident. That, they drew the sketch plan together and she produced it as D. Ex 1. She said that the letter dated 22/08/2022 from Salama Police station indicated that motor cycle KMFE 392V was to blame for the accident. She produced the letter as D. Ex 2.

38. Further, she testified that the rider, Thomas Mutisya Waema, was charged with three counts of causing death, driving without insurance and without driving licence vide Kilungu Tr 291/21. That the accused person/2nd Respondent Thomas Mutisya Waema absconded and cash bail was forfeited and warrants of arrest were still in force. That the rider was fully to blame for the accident.

39. On cross-examination, she said that Koros was not the lead I.O and that they visited the scene together but he drew the map himself. That they got to the scene after about 15 minutes and the pillion passenger was dead at the scene and the rider was still at the scene but was seriously injured and could not say a word. That they took statements of the rider and by standers as well as the occupants of the accident motor vehicle. That, the by standers refused to go to the station and make a statement. That the rider of the motor cycle lost control while negotiating a corner, left his lane and collided with KBV

406Y. That, the driver tried to avoid the rider but impact was on the front right-hand side of the vehicle at the head light. That the impact was at the end of the road.

40. She said that there was a sharp corner where many accidents would happen if one is not careful. That, the rider was coming down a hill and into a corner. That, immediately they arrived at the scene, they established that the rider was to blame for the accident. That the driver of the vehicle was not to blame but they issue a notice to prosecute to everyone involved in an accident whether they are wrong or not. That the rider was issued with the notice when he went to record his statement after 3 months in hospital. That, he had gone for an abstract to follow up on compensation. The traffic case was yet to be concluded. That, they concluded investigations and charged the rider.

Analysis & Determination

41. It is not in dispute that an accident occurred on 22/08/2022 between motor vehicle KBV 706Y and motor cycle KMFE 392. PW3 and DW2 were police officers from Salama police station and the evidence shows that DW2 was an investigating officer (I.O) together with his colleague PC Koros who is now deceased. According to PW3, the motor cycle was from Salama going towards Nunguni and it was the one which veered onto the lane of the vehicle. He acknowledged that there was a sketch map illustrating how the accident had occurred and described the scene of the accident as bushy, with a sharp corner and narrow road.

42. On the other hand, DW2 said that she visited the scene of the accident with the late PC Koros shortly after it occurred and that she was involved in preparation of the sketch map. She said that it was the rider who lost control while negotiating a corner, left his lane and collided with the vehicle. That the rider was coming down a hill and into the corner.

43. The Appellants contended that DW1 contradicted himself for testifying that he veered off the road yet his witness statement was that the accident happened on the road. I have looked at the said witness statement and there is nowhere where it is indicated that the accident happened on the road however, even if the statement had an express indication to that effect, it is obvious that there is a difference between a point of impact and the place where an accident motor vehicle finally rests after coming to a halt. In this case, the sketch map shows that the point of impact was near the edge of the road but the vehicle rested off the road.

44. The Appellants also contended that DW2's evidence was contradictory for saying that the accident happened at the end of the road whereas DW1 said that he veered off the road. They argued that 'off the road' and 'end of the road' do not mean the same thing. Similarly, there is no contradiction here as DW2 was talking of where the accident happened whereas DW1 was talking about what happened after the impact.

45. From the totality of the evidence, the argument by the Appellants does not hold any water as the evidence from the three witnesses is corroborative. Even if this court was to agree with the Appellants and rely on the evidence of PW3 only, that evidence is clear that it was the rider who got into the lane of the vehicle after inability to negotiate the corner.

46. The evidence shows that it was the rider who was going downhill hence the probability is higher that he was the one who was unable to negotiate the sharp corner hence colliding with the vehicle which was on its lane on the opposite direction. This is demonstrated by the fact that the impact on the vehicle was on the front right hand side a per the evidence of DW1 and DW2. The evidence is that the vehicle was going up a hill and would therefore have no difficulties in negotiating a corner as it is expected that a vehicle going uphill is usually on low speed. Additionally, the rider was duty bound to approach the accident scene with utmost care as the evidence shows that visibility was poor due to the bushes,

there was a sharp corner and the road was narrow. It is also trite that motorists should slow down when approaching a corner and especially when going downhill.

47. Consequently, the evidence adduced is sufficient to show that the rider was negligent and was solely to blame for the accident. DW1 testified that he did his best to avoid the accident and his testimony is actually corroborated by the sketch map showing that the point of impact was near the end of the road on the proper lane of the vehicle. There is no evidence to show that DW1 was negligent in any way.

48. The trial magistrate found that; "There is no evidence showing any negligence on the defendants' part and I do not hesitate in finding the plaintiffs have failed to establish their case on a balance of probabilities and thus this claim must fail." In my view, the finding was erroneous to the extent that it exonerated the rider from any blame. The rider was the one carrying the deceased as a pillion passenger and he therefore owed a duty of care to the passenger. The rider breached that duty by riding negligently and causing an accident which led to the death of his passenger. It is therefore my considered view that the rider was 100% to blame for the accident.

What is the quantum of damages, if any?

49. The trial magistrate opined that if the Appellants had succeeded in their claim, he would have awarded damages as follows; Kshs 100,000 for loss of expectation of life, a global award of Kshs 800,000 for loss of dependency, Kshs 50,000 for pain and suffering and Kshs 60,250 for special damages.

50. The Appellants argued that it was erroneous for the trial magistrate to use the global award approach as there was enough evidence to use the multiplier approach.

51. The deceased's mother, PW1, adopted her statement as her evidence in chief wherein she stated that the deceased was 21 years old at the time of death and that he was a casual labourer at Makutano Hardware earning Kshs 500/= per day. That, he was not married and had no children. That, the deceased had siblings under his care and he would pay for their school fees and other needs like food, clothing and school related requirements. In her evidence in court, PW1 said that the deceased was a welder at Makutano. That, he was a casual labourer. She did not avail proof of the deceased's employment. The trial magistrate resorted to the global award approach in the absence of proof of earnings.

52. The general rule is that assessment of damages is an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In Butt –vs Khan (1977)1KAR it was held that;

> " An appellate Court will not disturb an award for damages unless it is 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.

53. With regard to the use of the global award approach by the trial court, I find relevance in Michael Ukwala -vs- Floice Ochieka Amwayi; Kakamega HCCA 63 of 2022 (2024) KEHC 618 (KLR) where the court stated;

> " On the award of general damages under the head loss of dependency, there are two schools of thought on how to calculate damages in respect thereto. One school advocates for tabulation using the multiplier, the multiplicand and the dependency ratio while the other school advocates for a global award. Both are indeed at the choice of the trial court for it is known that there is no magic in the multiplier approach. The aim of the court is to do justice by

awarding a sum that compensates the victim rather than enrich her and merely punishing the tortfeasor."

54. Similarly in Moses Mairua Muchiri -vs- Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the court held that:

> "It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case 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."

55. In this case, PW1's witness statement was that the deceased was a casual laborer but her evidence in court was that he was a welder. In my view, that distinction is significant because the minimum wage schedules that are published by the Government from time to time show that there is a distinction between skilled and unskilled laborers. In my view a casual laborer would fall in the category of unskilled employee while a welder would be a skilled employee and both categories have different remunerations. Consequently, the trial magistrate was well within his discretion in using the global award approach as it was not possible to ascertain the multiplicand accurately.

56. As to whether the award made is adequate compensation, it is trite that dependency is a question of fact. It was pleaded that the deceased was survived by his mother and three sisters but according to section 4 of the *Fatal Accidents Act*, all actions brought under the Act are for the benefit of a wife, husband, parents and child of the person whose death was caused. In this case therefore, the only dependant recognized by law is the deceased's mother.

57. I have looked at awards given in other cases in order to gauge whether the award was adequate compensation. In the case of Mumbi Ngumbi Kasamu (Suing as the legal Representative of the Estate of Boniface Mulinge Mbithe) -vs- Mutua Mulaa & another [2019] eKLR, the appellate court made an award of 876,376.00 after making a finding that the deceased's grandmother was equivalent to his parent. The court (Odunga J) stated that;

> "20. The deceased was according to the plaintiff's statement aged 25 years old. He was doing casual work of painting. Although it was claimed that he was earning Kshs 1,000.00 per day, there was no evidence to that effect. According to the Regulation of Wages (General) (Amendment) Order, 2015 the appellant would fall under the category of general workers whose minimum wage would be Kshs. 10,954.70. This also is in tandem with the finding of the Court in Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR that where income is not proved, the income of an unskilled worker ought to apply. Since the Respondent was the deceased's grandmother, and she would not have been expected to depend on the deceased wholly and for a very long time, I would apply a dependency ratio of 1/3rd with multiplicand of 20 years.
>
> 21. Accordingly, the loss of dependency would be: 10,954.70 x 20 x 1/3 x 12 = 876,376.00"

58. In Ouru Superstores Limited -vs- Mary Buyaki & another (suing as the Legal Representatives of Omambia Nehemia Ogutu (Deceased)) [2022] eKLR, the appellate court reduced an award of

2,800,000/= for loss of dependency to Kshs 640,808/= for a 19-year-old deceased who was unmarried, without children and was a casual labourer.

59. It is my view that the assessment of the trial court was within the acceptable range of similar cases. In the circumstances I find that the appeal is not merited. The judgment of the trial court is upheld.

60. The appeal is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED VIA EMAIL (CTS IS DOWN) THIS 13TH DAY OF JUNE 2025

MUMBUA T MATHEKA

JUDGE

CA Chrispol

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