Ngari v Kariithi & another (Suing as the Administrators of the Estate of the Late Jacob Ngando Mwaria) (Civil Appeal 4 of 2019) [2025] KEHC 7915 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7915 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 4 OF 2019

JK NG'ARNG'AR, J

JUNE 5, 2025

BETWEEN

FRANCIS MURIITHI NGARI ..... APPELLANT

AND

DORCAS WANGITHI KARIITHI & JAMES NDAMBIRI MWARI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JACOB NGANDO MWARIA) ..... RESPONDENT

(Being an appeal from the judgment and decree of the Senior Resident Magistrate's Court at Gichugu (Hon. G.K. Odhiambo, RM.) delivered on 16th January 2019 in SRMCC NO. 9 OF 2018)

JUDGMENT

1. By plaint dated 29th January 2018, the respondents sued the appellant under the *Law Reform Act* and the *Fatal Accidents Act*. It was averred that on 11th November 2016, the deceased one Jacob Ngondo Mwaria was a lawful passenger aboard motor vehicle registration number KWH xxx; insured and/or beneficially owned by the appellant. At Kirigo area along Kimunye-Kutus road, the appellant's driver drove the vehicle so negligently that it lost control, veered off the road and rolled several times as a result of which the deceased sustained fatal injuries.

2. The respondents disclosed that the deceased died leaving his wife, brother and two minor daughters. At the time of his death, the deceased was 43 years old earning Kshs. 40,000.00 monthly from farming and business. They added that he was designated for a better life that was cut short suddenly by the appellant. For those reasons, they sought general damages, special damages of Kshs. 147,000.00 costs and interest.

3. In its judgment dated 16th January 2019, the trial court found that the appellant was 100% vicariously liable. The respondents were awarded Kshs. 30,000.00 for pain and suffering, Kshs. 100,000.00 for

loss of expectation of life, Kshs. 1,920,000.00 for loss of dependency and special damages of Kshs. 137,500.00 totaling Kshs. 2,187,500.00. The respondents were also awarded costs of the suit and interest.

4. The appellant is aggrieved by those findings. He filed his memorandum of appeal dated 6th February 2019 that raised seven grounds disputing the findings of the learned magistrate. In summary, the appellant faulted the learned magistrate's findings on liability contending that the evidence was too insufficient to arrive at that conclusion. He faulted the trial court for improperly shifting the burden of proof to him pitting out that the driver ought to have been sued. On quantum, he lamented that not only was the total sum not supported by any law, but that the Kshs. 20,000.00 was not justifiable. For those reasons, he urged this court to allow his appeal, set aside the impugned judgment and in its stead, dismiss the respondents' suit with costs.

5. During the hearing of the appeal on 10th April 2025, parties elected to rely on their written submissions. The appellant's written submissions dated 23rd August 2xxx submitted that since the respondents failed to furnish the maker of the police abstract as a witness, the appellant was prejudiced as he was unable to challenge its authenticity. As a consequence, liability was not proved on a balance of probabilities.

6. On quantum, the appellant submitted that since the deceased died on the spot, the estate ought to have been awarded Kshs. 10,000.00. On loss of dependency, the appellant submitted that the trial court ought to have applied the Regulation of Wages (General) Amendment Order 2018 to adopt a multiplicand of Kshs. 7,240.95. He calculated that the respondents ought to have been awarded Kshs. 579,276 calculated as follows: 7,240.95 × 2/3 × 12 × 10 under that head.

7. The respondents opposed the appeal. They relied on their written submissions dated 20th September 2xxx to submit that the production of the police abstract was produced by consent without calling its maker as could be discerned from the record. In fact, the respondents' witness was cross examined on it. On quantum, the respondents submitted that the appellant failed to demonstrate how the trial court misapplied the law or misapprehended the principles such that it arrived at a wrong finding. They lauded the findings of the trial court and prayed that the appeal be dismissed with costs.

8. I have considered the parties diametrically opposed written submissions, examined the memorandum of appeal and record of appeal and analyzed the law. The duty of this court as a first appellate court was set out by the Court of Appeal in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR that held as follows:

> "An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

9. According to the facts set out in the record of appeal, the respondents called two witnesses to the stand. PW1 Dorcas Wangithi, the deceased's surviving wife testified on 21st November 2018 in the presence of the appellant's counsel. The record also shows that the documents relied on by the respondent were produced without any objection. In the circumstances, estoppel prevents the appellant from complaining that the makers of the documents were not called to testify. If he so desired to cross examine these witnesses, nothing would have been easier than to make that application before the trial court. I find that the appeal on this issue lacks merit and is dismissed.

10. PW1's evidence was that she obtained a grant of letters of administration together with her brother-in-law PW2 in order to file suit. Though she was not an eye witness, she blamed the suit vehicle for

occasioning fatal injuries on her deceased husband. She recalled that during his lifetime, the deceased was earning Kshs. 20,000.00 from farming and generated Kshs. 20,000.00 from sand and ballast business. She however had no documents to support these assertions. She decried that as a result of the premature death of her husband; she suffered loss of love and affection. The deceased left their two daughters fatherless namely Ruth Wanjiku Ngondo aged 10 years and Emily Wanjiru Ngondo, a five-year-old girl. Their birth certificates were adduced in evidence.

11. PW1 was issued with police abstract dated 9th June 2017 confirming that an accident occurred on that day involving the suit motor vehicle. The appellant was named as its owner while the deceased was recorded as having passed on as a result of the accident. Testifying as to the expenses, she testified that she paid Kshs. 80,000.00 in legal fees. She also paid Kshs. 550.00 in obtaining a motor vehicle search of the suit vehicle. She also relied on a bundle of receipts towards the funeral costs totaling Kshs. 57,000.00.

12. PW2 James Ndambiri Mwaria, the deceased's brother and co-administrator, happened to be at the scene of the accident. His evidence was that he was a motor cycle rider aboard motor cycle registration number KMDV xxx on that fateful day along Kimunye Kutus road. PW2 was coming from Kabare herding to Kirigo. On the opposite direction was an oncoming lorry registration number KWH xxx. It was 11:00 p.m. and there was a full moonlight. The lorry's headlights were on. He was approximately 100 – 200 meters away from it. He therefore maintained that his sight was not disrupted.

13. His evidence was that the lorry lost control, hit a culvert, veered off the road, spined and overturned. PW2 alighted immediately from his motorcycle to rescue the on boarders. That is when he found his deceased bother on the passenger seat with the lorry lying on top of him. Also present were the driver and another passenger. He discovered that the deceased was the appellant's employee who died on the spot. Police officers arrived at the scene shortly thereafter and took away the deceased's body where he lay in Kibugi funeral home.

14. PW2 testified that his brother earned Kshs. 40,00.00 monthly stating that since he was also in the sand and ballast business, indeed a low income would garner Kshs. 20,00.00 approximately. He confirmed that the deceased died leaving a wife and two children. He blamed the driver of the suit vehicle for driving the vehicle at an excessive speed and failing to slow down, brake, swerve and or in any way manage the vehicle to avoid the accident resulting in his brother's premature death.

15. DW1, the appellant testified that indeed the suit vehicle was registered in his name at the time of the accident. He received a call from his friend Fundi that his vehicle was involved in an accident on the night of 11th November 2016 at around 10:00 p.m. He affirmed that the vehicle was driven by his authorized driver. On arrival at the scene about thirty minutes later, he established that the deceased had already passed on; a person well known to him. He then called his brother and informed him about what had transpired.

16. It is not gainsaid that an accident occurred on the night of 11th November 2016 involving motor vehicle registration number KWH xxx involving the deceased one Jacob Ngondo Mwaria at Kirigo area along Kimunye-Kutus road. It is also not denied that the deceased was an authorized passenger aboard the vehicle on that night. The defendant in his testimony at trial confirmed that he was the driver of the motor vehicle. In this appeal, he was unhappy with the trial court's reliance of the police abstract apportioning liability on him. It is trite law that a police abstract only establishes that an accident occurred. In order to establish liability thus, the evidence of an eye witness becomes crucial and kernel.

17. PW2 was the only eye witness who was extensively cross examined by the appellant. His evidence was that he was riding his motor cycle KMDV xxx in the opposite direction of the lorry. It was 11:00 p.m. and there was a full moonlight. The lorry's headlights were on. He was approximately 100 – 200 meters

away from it. Suddenly, the lorry lost control, hit a culvert, veered off the road, spined and overturned. PW2 blamed the driver of the lorry for driving the vehicle at an excessive speed and failing to slow down, brake, swerve and or in any way manage the vehicle to avoid the accident.

18. It is important to point out that from the evidence of PW2, this was a self-involving accident. The driver did not testify. I therefore do not see how the deceased would have caused the accident or given mitigating circumstances to prevent the accident from taking place. It may have been the reason why the driver never testified. The eye witness confirmed that the driver was driving at an excessive speed and without any infirmity or inability, caused the accident. He owed a duty of care and in the process, breached that duty leading to the accident. A life was lost regrettably.

19. The appellant purported to assert that the respondents ought to have sued the driver. However, firstly, the appellant was at liberty to join the driver as a third party. That did not take place. Secondly, the appellant was in any event, vicariously liable for the actions of his driver. As a matter of fact, he confirmed that the driver was authorized to drive the vehicle at that material time of the accident resulting in vicarious liability.

20. In *Ormrod v Crosville Motor Services Ltd* [1954] 2 All ER 753, it was held:

> " The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

21. Our Court of Appeal in *Khayigila v Gigi & Co Ltd & another* [1987] KECA 53 (KLR) held as follows on the issue of vicarious liability, opined thus:

> " For the vehicle owner to be responsible for the negligence of the agent, that agent must have been detailed to do a task beneficial to or on behalf of the owner. The recent decision of this court in Nakuru Automobile House Ltd v Nasiruddin Ziaudin Civil Appeal No 63 of 1986 based its decision on *Morgan v Launchbury and Others* [1972] 2 All ER 606 and held that the owner of the car was not vicariously liable for the negligence of the driver of the car who had borrowed it to enjoy the rally. The driver was not at the time of the accident driving the vehicle as a servant or an agent of the owner. In the present appeal, the second respondent was not driving the vehicle as a servant or agent of the first respondent. The second respondent was not driving for the benefit of the first respondent nor did he have a task to do for and on behalf of the first respondent. He was driving the car for his own benefit and interest. I would also dismiss this appeal."

22. As stated earlier, the driver of the appellant was authorized to operate the vehicle when the unfortunate accident occurred. My inescapable conclusion from that evidence is that the trial magistrate properly arrived at the finding that the appellant's driver was 100% responsible or the accident. The appellant was thus 100% vicariously liable for the negligent acts of his driver. In view of the foregoing, the appeal on liability fails and is resultantly dismissed.

23. On quantum, it is a firmly established principle of law that this court will not interfere with the award of damages merely because it would have awarded differently. In *Butt v Khan* [1981] KLR 349, the court held:

> "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."

24. In awarding damages under the *Law Reform Act*, the trial court awarded Kshs. 30,000.00 for pain and suffering and Kshs. 100,000.00 for loss of expectation of life. Were the awards proper? On pain and suffering, Majanja, J. (as he then was) profoundly pronounced himself as follows in the case of *Sukari Industries Limited v Clyde Machimbo Juma* Homa Bay [2016] eKLR:

> "On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

25. In this case, the respondents were awarded Kshs. 30,000.00 on account of the fact that the deceased died immediately and must have endured some pain. I do not think that is an unreasonable assessment and find that the sum proper taking into account the fact that the trial court was guided by recent jurisprudence in its assessment. On loss of expectation of life, the court awarded Kshs. 100,000.00 which is the conventional sum where the deceased died on the spot. I will therefore not disturb that finding.

26. Taking into account the damages awarded under the *Law Reform Act*, I now consider whether the damages for loss of dependency under the *Fatal Accidents Act* were properly assessed. In this case, the trial court relied on the testimonies of PW1 and PW2 to establish that the deceased earnings were Kshs. 20,000.00 from sand and ballast business. In its view, that evidence was not challenged and therefore adopted as unopposed.

27. It is instructive to however note that PW2 also testified that the deceased was the appellant's employee. That was also not controverted. If indeed PW2 was candid with the truth, what was the court to believe? Was the appellant t an employee or a businessman since he gave those testimonies regarding the deceased's occupation? I think not. The fact that the evidence was not disputed was not tantamount to its veracity. In my view, the respondents failed to prove that the appellant was either a farmer, businessman and if in employment, his rank and job description in employment. Without those ascertainers, we cannot rely on the conflicting evidence that was on record to establish that he was a businessman or farmer. No documentary evidence was adduced in this regard. For those reasons, I find that the global sums approach is preferred to the multiplier approach.

28. The court in *Albert Odawa v Gichumu Githenji* [2007] eKLR, quoting the words of Ringera, J. (as he then was) in the case of *Mwanzia v Ngalali Mutua Kenya Bus Ltd* held:

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

29. The deceased was 43 years of age. He died leaving a wife and two daughters aged 10 years and 5 years old. Certainly, they would have depended on him until they attained their post-secondary education. The deceased was a man of good health as was established and would have lived to work up to his retirement age.

30. In, *Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased)* [2021] KEHC 4971 (KLR) the deceased was 29 years old and was survived by his wife and young children aged six and four years old. The estate was awarded Kshs. 2,000,000.00. In *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] KEHC 9074 (KLR) the deceased was a 41-year-old driver. The estate was awarded the sum of Kshs. 2,129,184.00 for loss of dependency.

31. Taking the above sums into account, and the factors laid out in this case, I find that an award of 1,700,000.00 is sufficient in general damages for loss of dependency. In view of the foregoing, I find that the appeal partially succeeds to the extent that the award on loss of dependency is set aside and substituted with an award of Kshs. 1,700,000.00. since the appeal partially succeeds, each party shall bear its own costs of the appeal.

It is so ordered.

30 days stay of execution granted

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF JUNE 2025 IN THE PRESENCE OF;

.....

J. NG'ARNG'AR

JUDGE

No appearance for the Appellants

Muthoni for the Respondents

Siele /Mark (Court Assistants)