



Nderi & another (Suing as Legal Representatives of the Estate of Sebera Karimi Nderi) v Njiru & another (Civil Appeal E071 of 2023) [2025] KEHC 7821 (KLR) (4 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E071 OF 2023
RM MWONGO, J
JUNE 4, 2025**

BETWEEN

MOSES NJERI NDERI 1ST APPELLANT

MATTHEW NJAGI NDERI 2ND APPELLANT

**SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF SEBERA KARIMI
NDERI**

AND

AGABIU NDWIGA NJIRU 1ST RESPONDENT

CHIBA TIM LIMITED 2ND RESPONDENT

*(Appeal arising from the decision of Hon. H.N. Nyakweba, SPM
in Embu CMCC No.78 of 2019 delivered on 29th November 2022)*

JUDGMENT

The Appeal.

1. The appellants filed a memorandum of appeal dated 10th November 2023 seeking orders that:
 - a. The appeal be allowed;
 - b. The judgment/decree of the trial court be reviewed and/or set aside;
 - c. The respondents bear the costs of the appeal; and
 - d. Any other orders as the court shall deem fit.
2. The appeal is premised on the grounds that:
 1. The trial Magistrate erred in law and fact by dismissing the appellant's suit entirely with costs;



2. The trial Magistrate erred in law and fact by holding that the case against the 1st defendant is a bad misjoinder, expunging his name from the record and dismissing the case against him with costs;
3. The trial Magistrate erred in law and fact by holding that the case was not proven on a balance of probabilities;
4. The trial Magistrate erred in law and fact by holding that the deceased had no dependants and stated that on loss of dependency he wouldn't have awarded any amount; and
5. The trial Magistrate erred in law and fact when he held that the plaintiffs did not prove their case against the 2nd defendant on a balance of probabilities.

The Pleadings in the trial Court.

3. Through a plaint dated 06th May 2019, the appellants sought judgment against the respondents for general damages, special damages of Kshs.61,745/= and costs with interest. It was their averment that on 18th July 2018, the deceased was a passenger in motor vehicle registration number KCN 479W, whilst proceeding along Embu-Manyatta Road the said motor vehicle was so negligently, recklessly and/or carelessly driven at a high speed that while overtaking, the 1st respondent or his authorized driver caused the motor vehicle to lose control and collide with motor vehicle registration number KCA 278R. This resulted in a road traffic accident that caused the death of the deceased. The appellants have since suffered loss and pain.
4. In the plaint, the appellants gave particulars of the negligence which they attributed to the respondents. The 1st respondent was the driver of the motor vehicle at the time of the accident while the 2nd defendant was its registered owner.
5. The respondents filed a statement of defense in which they denied the averments made in the plaint, and attributed negligence to the driver of motor vehicle registration number KCA 278R.

Summary of the Evidence.

6. PW1 was Moses Njeru Nderi, one of the appellants. He testified that the deceased is his mother, who was 60 years old to the time of the accident. That before the accident, the deceased was a farmer earning Kshs.15,000/= per month, which money she used to care for her children. In cross-examination, he stated that he is 48 years old while his brother, the other appellant is 41 years old and they both work as casual labourers. That the deceased supported them through her income.
7. PW2 was Elias Muthomi Njiru who witnessed the accident. He stated that he saw motor vehicle registration number KCN 479W overtaking a vehicle in front of it but it collided head on with another motor vehicle registration number KCA 278R. He added that the scene of the accident was along the tarmac road at a corner and the weather was fine. He helped in rescuing the occupants of the motor vehicle registration number KCN 479W who had all died on the spot except one who was rushed to hospital. He blamed the driver of motor vehicle registration number KCN 479W for the accident.
8. PW3 was PC Noor Adan of Embu Traffic Base who produced the police abstract following a report of the incident at the police station. He stated that the police abstract did not indicate who was to blame for the accident.
9. Upon close of the plaintiff's case, the defendants did not tender any evidence and they closed their case.



The Trial Court's Judgment.

10. The trial court found that the evidence adduced on liability was unreliable, therefore, it was rejected. The trial magistrate proceeded to state how it would have awarded damages in the event that the case was proved against the 2nd respondent. It would award Kshs.10,000/= as general damages for pain and suffering and Kshs.100,000/= for loss of expectation of life.
11. The Magistrate stated that he did not understand how 2 adult sons of the deceased who were married and who have families of their own were dependant on their 60-year-old mother. Therefore, an award for loss of dependency would not be given. He found that only Kshs.40,000/= would have been awarded as special damages since it was the only amount that was strictly proved. All in all, the trial court found that the appellants had not proved their case on a balance of probabilities.

Parties' Submissions on the appeal.

12. The court directed parties to file their written submissions but only the appellants complied.
13. It was the appellants' submission that the evidence adduced proves that the respondents are to blame for the accident. They relied on the cases of William Kabogo Gitau v George Thuo & 2 Others [2010] KEHC 4124 (KLR), Mary Njeri Murigi v Peter Macharia & another [2016] KEHC 3535 (KLR) and Wilter Chemutai Torongi (Suing as personal representative of estate of Wesly Kiplangat (Deceased) v W.E. Tilley Muthaiga Limited & Attorney General [2017] KEHC 7484 (KLR). They argued that there was sufficient evidence to show that the respondents were responsible for the accident.
14. In support of their argument that the trial court erred in failing to award damages for loss of dependency since the appellants were adults, the appellant's relied on the cases of Peter Wainaina & another v Lucia Ndulu Muindi & another [2021] KEHC 1986 (KLR) and Sokoro Plywood Limited & another v Njenga Wainaina [2007] KEHC 1095 (KLR).

Issues for determination.

15. From the foregoing, the issues for determination are the following;
 - a. Whether trial court erred in failing to find on liability; and
 - b. Whether the appellants should have been awarded damages.

Analysis and Determination.

16. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of Williamson Diamonds Ltd and another v Brown [1970] EA 1, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
17. Liability is a matter of fact; hence, this court must review the evidence on the circumstances under which the accident in question occurred. Matters of fact are determined from evidence and the burden



of proof lies on the party alleging the facts to prove them. Section 107 (1) of the Evidence Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

18. The evidential burden is further established under sections 109 and 112 of the Evidence Act. In the case of *Evans Nyakwana v. Cleophas Bwana Ongaro* (2015) eKLR the evidential burden was discussed and the court stated that:

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

19. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v. Minister of Pensions* (1947) 2 All ER 372 (supra) discussing the burden of proof the court had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

20. PW2 testified that he witnessed the accident since he was travelling on the same road in a different vehicle when the accident happened. He said that he even helped rescue people from the respondents' motor vehicle. He saw the Respondents' vehicle trying to overtake when it collided head on with another motor vehicle, causing the accident. The respondents did not tender any evidence to specifically controvert this clear evidence of PW2.
21. In as much as PW3 did not have a sketch map of the accident scene, the eye-witness account proves on a balance of probabilities that the accident was caused through the fault of the respondents' vehicle. The respondents did not also provide any proof that the motor vehicle registration number KCN 479W did not belong to the 2nd respondent or that the driver of motor vehicle registration number KCA 278R was to blame for the accident as was alleged in the statement of defense. It means that the respondents are to be held 100% liable for the accident.
22. On the issue of quantum, the trial court gave a breakdown of what it would have awarded as damages under the various heads but declined to make such awards. PW1 testified that the deceased was 60 years old at the time and she was earning Kshs.15,000/= from her farming activities. He stated that she used this money to support her 2 sons who are adults aged 48 and 41 years old. The trial Magistrate stated that he could not understand how PW1's aged mother was supporting her grown-up sons.



23. The court is no alien to the fact that family set-ups are different and each has its own unique arrangements, which may even appear to be appalling. The statement on dependency by PW1, indeed, appalled the trial Magistrate. However, it is nothing unusual, especially considering the fact that the said evidence was not substantially challenged. The 48-year-old witness said his 60-year-old mother provided for him and his 41-year-old brother. In the same way, it should not be surprising when parents become dependant on their young children. In the case of Leonard O. Ekisa & another v Major K. Birgen [2005] KEHC 2214 (KLR) it was held:

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.”

24. That being said, the appellants are entitled to a fair assessment of damages. First, according to PW2, all the passengers in the motor vehicle carrying the deceased, died at the scene. The police abstract also indicates that the deceased was one of the fatally injured passengers. An award for damages for pain and suffering should be kept at the minimum given that the deceased did not suffer before dying. The same applies to an award for loss of expectation of life. In the case of Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed:

“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 Ksh.100,000/- while for pain and suffering the awards range from Ksh.10,000/= to Ksh.100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

25. Therefore, under the general damages for pain and suffering, an award of Kshs.10,000/= is sufficient. As for damages for loss of expectation of life, the court held thus in the case of Benham v Gambling, (1941) AC 157:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

26. The evidence led was that the deceased was 60 years old at the time of the accident. It was testified that she was undertaking farming activities and supporting her 2 sons. In all likelihood, she could have lived longer and her life was cut off. An award of Kshs.100,000/= is sufficient for loss of expectation of life.

27. On the general damages for loss of dependency, it is already in uncontroverted evidence that the deceased supported her 2 children through her income as a farmer. Given the age of the deceased and the fact that the earnings are not clearly or substantively proved, the most appropriate mode to use for assessing these damages is the global sum. The deceased was 60 years old at the time of the accident.



28. It is important that the court assesses loss of dependency with reference to comparable awards, such as the following:
- a. In *MNM & another v Solomon Karanja Githinji* [2015] eKLR, Hatari J awarded a lump sum of Kshs 3,000,000/- for loss of dependency where the deceased died at 46 years while in good health and left behind a spouse and four children.
 - b. In *Amazon Energy Limited v Josephine Martha Musyoka & another* [2019] eKLR, Nyakundi J. reduced the trial court's global award of Kshs 2,500,000/- for loss of dependency to Kshs.1,200,000/- for the reason that the deceased was 56 years old and his only child was in college.
 - c. In *Shalom Transporters v Omare & another* (Suing as the legal representatives of the Estate of Martha Moraa); *Nyamo Investment & another* (Third party) [2023] KEHC 27267 (KLR), Gikonyo J. upheld a global sum of Kshs.800,000/= where the deceased was 60 years old at the time of death and who was survived by 3 school-going children.
 - d. In *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), Njagi J. reduced a global sum of Kshs.2,000,000/= to Kshs.800,000/= where the deceased was 68 years old and who left behind a wife and adult children.
29. Under this head, it is my view that a global sum of Kshs.800,000/= is sufficient for loss of dependency.
30. As regards special damages, the court is bound to award only those amounts that are specifically pleaded and strictly proved. In the case of *Maritim & Another v Anjere* (1990-1994) EA 312 at 316 it was held:
- “It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”
31. The appellants pleaded for Kshs.61,745/- in the plaint. The appellant testifying as PW1 referred to a receipt of Kshs.40,000/-. He had a bundle of other receipts, Kshs.550/- for obtaining a copy of the NTSA records, Kshs.6,400/- for hospital charges at Embu Level 5 Hospital. The Kshs.40,000/- was a receipt from Shem Kabongo Advocates for legal services towards obtaining the grant. The amount of Kshs.6,400/- was not pleaded in the plaint. Therefore, for special damages, only Kshs.40,000/- was specifically testified to and can be awarded.

Disposition.

32. In light of the foregoing, the appeal herein succeeds; and the Court makes the following orders:
- a. The judgment of the trial court is hereby set aside;
 - b. The respondents are held 100% liable for the accident;
 - c. The respondents shall pay the appellants general damages with interest from the date of this judgement until payment in full, as follows:
 - i. Pain and suffering- Kshs.10,000/=
 - ii. Loss of expectation of life- Kshs.100,000/=



- iii. Loss of dependency- a global sum of Kshs.800,000/=
 - d. The respondents shall pay the appellants special damages of Kshs.40,050/= with interest from the date of filing the plaint until payment in full;
 - e. The appellants are awarded costs of this appeal with interest; and
 - f. Interest on monetary awards shall be at court rates.
33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 4TH DAY OF JUNE, 2025.

R. MWONGO

JUDGE

DElivered in the presence of:

Adongo holding brief for Kebongo for Appellant

Kabita holding brief for Njuguna for Respondent

Francis Munyao - Court Assistant

