



Alice (Suing as the Next of Kin and Personal Representative of the Estate of Alice Ruguru Njue) v M'Arimi & another (As Legal Representatives of the Estate of Moses Kirimi Mati). (Civil Appeal E045 of 2024) [2025] KEHC 11166 (KLR) (23 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E045 OF 2024
RM MWONGO, J
JULY 23, 2025**

BETWEEN

DAVID OGIVI ALICE (SUING AS THE NEXT OF KIN AND PERSONAL REPRESENTATIVE OF THE ESTATE OF ALICE RUGURU NJUE) APPELLANT

AND

GERVASIUS MATI M'ARIMI & GEOFFREY MUCHENI MATI (AS LEGAL REPRESENTATIVES OF THE ESTATE OF MOSES KIRIMI MATI). RESPONDENT

(Appeal arising from the decision of Hon. Dorcas Endoo, RM in Embu CMCC No. E044 of 2020 delivered on 26th April 2024)

JUDGMENT

The Appeal

1. The appellants filed a memorandum of appeal dated 15th May 2024 seeking orders that:
 - a. This appeal be allowed and the Learned Magistrate's decision be set aside, quashed and be substituted by this Honourable court's orders and/or reassessment of damages;
 - b. This Honourable court do adjudicate and determine this matter and enter a just judgment in light of the evidence on record; and
 - c. That Respondents do pay costs of this appeal.
2. This appeal is premised on the grounds that:



1. The Learned Trial Magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar fatal injuries and awarded general damages for loss of dependency which was inordinately low;
2. The Learned Trial Magistrate erred in law and in fact by failing to pay regard to decisions relied upon in the Plaintiff's submissions that were guiding in the amount of general damages that is appropriate and applicable in similar fatal injuries;
3. The Learned Trial Magistrate erred in law and in fact by failing to award special damages that had been specifically pleaded and proven by the Appellant herein;
4. The Learned Trial Magistrate erred in law and in fact by failing to award costs of the suit to the Appellant herein;
5. The Learned Trial Magistrate erred in law and in fact by failing to consider and take into account and appreciate the fact that costs follow the event and are awarded to a successful party in a suit;
6. The Learned Trial Magistrate erred in law and fact in finding that the Appellant was not entitled to costs on the grounds that the annexed demand notice and statutory notices does not indicate whether they were received whereas the Respondent herein entered appearance after receiving the demand notices and statutory notices as well;
7. The Learned Trial Magistrate erred in law and fact by failing to consider the facts, documentary evidence, written submissions and the binding authorities made on behalf of the appellant in arriving at her decision of giving an award on general damages of Kshs.720,000/= that was inordinately low vis a vis a claim for a fatal accident; and
8. The Learned Trial Magistrate's judgment consequently occasioned a miscarriage of justice.

The Cross-Appeal

3. The respondents/cross-appellants filed a cross-appeal dated 16th October 2024 seeking the following orders:
 - a. The Learned Senior Resident Magistrate's judgment on liability be set aside and the Honourable court do enter judgment on liability at 100% against the respondent and accordingly dismiss the respondent's suit in the lower court with costs to the appellants;
 - b. In the alternative to prayer (a) above, the Honourable court do apportion liability between the appellants and respondent and consequently, reduce the decretal amount awarded to the respondent by the lower court; and
 - c. The appeal be allowed with costs to the appellants.
4. The cross-appeal is premised on grounds that:
 1. The Learned Resident Magistrate erred in law and in fact in entering judgment on liability at 100% against the appellants whereas the deceased was hit by the subject motor vehicle while crossing;
 2. The Learned Resident Magistrate in law and in fact in entering judgment on liability at 100% against the appellants whereas the material accident was wholly or substantially caused by the negligence of the deceased who was crossing the road when it was not safe to do so;



3. The Learned Resident Magistrate in law and in fact for failing to properly analyze evidence of the appellant's witness as a result of which she erroneously held that the appellants were wholly liable for causation of the material accident; and
4. The judgment was against the weight of evidence.

Case Background

5. The appellant/respondent filed a plaint dated 13th October 2020 seeking judgment against the respondents/cross-appellants for general damages under the *Fatal Accidents Act* and *Law Reform Act*, special damages of Kshs.201,200/= and interest. It was the appellant's case that on 15th July 2020, the late Alice Ruguru Njue was walking along Embu-Nairobi Road when the respondents/cross-appellants' vehicle registration number KCV 765X hit her. She died while undergoing treatment at Embu Level 5 Hospital.
6. The respondents/cross-appellants filed a statement of defense in which they denied the averments made in the plaint and attributed negligence on the deceased pedestrian, the late Alice Ruguru Njue. The appellant filed a reply to defense, reaffirming the assertions made in the plaint.

Summary of the Evidence in the Trial Court

7. PW1, the appellant, stated that the deceased was 81 years old at the time of the accident. She had gone out to run some errands when she was hit by the respondent's motor vehicle. He was informed of the accident by PW2, his cousin, who worked in the vicinity of the scene. The deceased sustained injuries and was taken to Embu Level 5 Hospital where she died while undergoing treatment.
8. The accident was reported at the police station and they investigated it. PW1 produced documentary evidence in support of his case and added that the deceased earned Kshs.30,000/= monthly from hawking coffee and her family depended on her for sustenance. In cross-examination he stated that the deceased had 4 children although there were no birth certificates; he stated he did not have proof of the deceased's earnings.
9. PW2, Nevat Mbogo Kariuki, stated that he was at work when he heard that a car had hit someone along the road. He took a photograph of the vehicle and then when to the scene. He found that it was his grandmother who had been hit by the vehicle. He stated that the deceased had just finished crossing the road when the respondent's motor vehicle hit her.
10. PW3 was CPL Abudo Galgalo of Embu Traffic Base. He produced the police abstract of the accident and confirmed that the deceased was a pedestrian safely crossing the road at the time of the incident.
11. Upon close of the plaintiff's case, the court was informed that the defendant was deceased. He was substituted by the 2 personal representatives named.
12. DW1 was Arthur Nkari Morris who stated that he was driving motor vehicle registration number KCV 765X at the time of the accident. He saw the deceased crossing the road but according to him, she did not check both sides before crossing. He tried to swerve to stop the car but he did not realize that he had hit the deceased who had fallen near the kerb. He took the deceased to hospital where she died while undergoing treatment. He said that the deceased crossed the road when it was not safe to do so. In cross-examination, he stated that he was moving at a reasonable speed of 40KM/H and he did not hear any impact.



13. The trial court found the deceased defendant, respondent 100% liable for the accident. Liability was assessed at Kshs.70,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life, and Kshs.550,000/= for loss of dependency using the multiplier method and costs.

Parties' Submissions

14. This appeal was canvassed by way of written submissions.
15. In his submissions, the appellant relying on the case of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, urged the court to reconsider the evidence adduced on the finding of liability. He submitted that the burden of proof lies on the alleging party and he relied on the cases of Treadsetters Tyres Ltd v. John Wekesa Wepukhulu [2010] eKLR and Ormrod v Crosville Motor Services Ltd (1953) 1 WLR 1120. He stated that the amount for damages for pain and suffering should have been assessed at Kshs.500,000/= and relied on the cases of Joseph Kivati Wambua v SMM & another (Suing as the Legal Representatives of the Estate of EMM-Deceased) [2021] KEHC 9632 (KLR) and Sanya Hassan & Anor v Somar Properties Ltd NRB HCCC 1517 of 2002.
16. Further, relying on the cases of Rose v Ford (1935) 53 Ll L Rep 1, Benham v. Gambling [1941] 1 All ER and Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR), the appellant submitted that the damages for loss of expectation of life should be increased to Kshs.200,000/=. On the assessment of damages for loss of dependency, he submitted that the trial court ought to have applied a multiplier of 10 years. He relied on the case of Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased) [2018] KEHC 7123 (KLR) where Makau J. held that there is no retirement age for a watchman. He also relied on the case of Leonard O. Ekisa & another v Major K. Birgen [2005] KEHC 2214 (KLR). It was his submission that the special damages were well enumerated in the plaint and so they should have been awarded as pleaded. He also prayed for costs of the suit.
17. The respondents/cross-appellants submitted that the trial court's assessment of damages should not be disturbed unless it is based on wrong principles of law as was stated in the case of Butt v Khan [1978] KECA 24 (KLR). On the issue of the trial court's finding on liability, which is the subject of their cross-appeal, they stated that the same was erroneous. They argued that the accident occurred while the deceased was crossing the road, thus she should be held partly liable for the accident. They relied on the case of Makube v Nyamuro [1983] eKLR.

Issues for determination

18. From the foregoing, the issues for determination are the following;
 1. Whether the deceased should be held partly liable for the accident;
 2. Whether the damages awarded should be reassessed for being inordinately low; and
 3. Who should be awarded costs?



Analysis and Determination

19. As a first appellate court, it is the duty of this court to reexamine the evidence adduced at trial. 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.”

20. Liability is a matter of fact; hence, this court must re-evaluate the circumstances under which the accident in question occurred. Matters of fact are determined from evidence. The burden of proof lies on the party alleging truth of any the facts to prove them as provided by Section 107 (1) of the *Evidence Act* where it is stated:

“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.”

21. 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 proposition 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.”

22. It is trite that 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 the Court, discussing the burden of proof, 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.”

23. None of the plaintiff’s witnesses witnessed the accident. PW1 said that he was informed on the circumstances under which the accident occurred since he was not at the scene. PW2 was not at the scene but working nearby, but he, too did not witness the accident. He arrived at the scene after the accident. PW3 was not the officer who investigated the accident and she stated that she did not witness the accident.

24. DW1 was the driver of the deceased defendant’s motor vehicle. He stated that he saw the deceased crossing the road when it was not safe to do so. He was an eye witness. He said he swerved and ended



up in the opposite lane with the deceased lying by the kerb. He did not say that he applied emergency brakes. He said that he did not hear any impact on his vehicle. The evidence by DW1 is the only eye witness evidence of the circumstances under which the accident occurred.

25. DW1 said he saw the deceased cross the road, he noted that she did so when it was not safe to do so. These are observations he made. So he swerved, and saw the deceased lying by the kerb. It is still inexplicable that he did not use his brakes. After all, he said he was driving at only 40 kph. He must have been fairly inattentive and unreactive. It is the responsibility of a driver to maintain care and attention and to drive safely. It then follows that on a balance of probabilities, the accident occurred as a result of the negligence of both the driver and the deceased. In my view, the deceased bears some responsibility and she should be held 10% liable for the accident as it appears that she minimally contributed.

26. The Court of Appeal in *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] KECA 146 (KLR) stated thus:

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley v Gypsum Mines Ltd (2)* (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”

27. Ultimately, therefore, the cross-appeal succeeds on contributory negligence.

28. On the issue of quantum, the trial court failed to award special damages because in as much as the amounts were pleaded, they were not strictly proved as required in law. 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.”

29. Clearly the law is that it is not enough to plead even with the greatest particularity. The matters pleaded must be specifically proved. Thus, on the issue of special damages, the trial court cannot be criticized: It did not err since the amounts pleaded were not strictly proved.

30. An award of Kshs.100,000/= was given as general damages for loss of expectation of life. This amount is regarded as conventional.



31. In the case of *Mercy Muriuki & Another v. 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.”

32. The trial court also awarded Kshs.70,000/= for pain and suffering. It is considered that PW1 testified that the deceased was involved in the accident at about 7pm and she died at around 11pm the same night. She suffered for about 4 hours before she died. This award is reasonable based on the amount of time during which she suffered. As for damages for loss of expectation of life; It was held in the English Court in the case of *Benham v Gambling*, (1941) AC 157 (supra) as follows:

“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.”

33. For damages for loss of dependency, PW1 testified that the deceased was 81 years old at the time of the accident; That she was survived by 4 adult children who depended on her for sustenance. He testified that the deceased was a hawker who sold coffee in shops and offices in town and that she used to earn Kshs.30,000/= monthly from this business. In fact, he said, she died while going about this business. On cross-examination, he stated that he did not have any proof of the deceased’s income. Nevertheless, the trial court applied the multiplier method using the alleged earnings of the deceased as the multiplicand even though they were not proved. A multiplier of 6 years was applied with a dependency ratio of $\frac{2}{3}$.

34. Looking at the circumstances herein, the deceased was 81 years old and she was allegedly earning an income of Kshs.300,000/- which couldn’t be proved. The available evidence is not even clear who her actual dependants are since there was no proof of her actual children, for instance through birth certificates. It is, therefore, difficult to firmly apply the multiplier method in a case like this one. That method ought to have been abandoned.

35. In my view, the trial court should have applied the global sum method. In *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, it was held as follows:

“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.”



36. It is important that the court reassesses loss of dependency with reference to comparable awards. The following are comparable:
1. In *Moses Maina Waweru vs Esther Wanjiru Githae* (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR the deceased died at the age of 68 years and left one dependant, the court made a global award of Kshs.800,000 for loss of dependency.
 2. In *Onsongo & another v Mutisya & another* (Both suing as the legal representatives of the Estate of Mutisya Mwalavu - Deceased) [2024] KEHC 9163 (KLR), the deceased was 81 years old at the time of the accident. The court noted that the deceased's earnings were not ascertained but the family claimed that she ran a business that gave her Kshs.30,000/= a month. The appellate court reduced the trial court's global award of Kshs.1,600,000/= to Kshs.1,200,000/= for loss of dependency. In that case, the actual dependants of the deceased were proved to the required standard.
37. Under this head, global sum of Kshs.550,000/= is sufficient for loss of dependency considering the circumstances of the case.
38. On the issue of costs, the trial court was silent. The appellant herein claims that he should have been awarded costs of the suit. Costs are awarded through the discretion of the court; which discretion must be applied judiciously. Section 27 of the *Civil Procedure Act* provides:
- “(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
- Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”
39. In the case of *Republic v. Rosemary Wairimu Munene, Ex-Parte Applicant Ihururu Dairy Farmers Co-operative Society Ltd* Judicial Review application no 6 of 2014 court held as follows: -
- “The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....It is well recognized that the principle that costs follow the event is not to be used to penalize the losing party; rather it is to be used to compensate the successful party for the trouble taken in prosecuting or defending the case.”
40. The appellant succeeded before the trial court. His appeal herein is premised on the quantum. As it is, the assessment of damages as made by the trial court has been upheld save for the method of assessing damages for loss of dependency. The cross-appeal has succeeded. Regarding costs at the trial court, it would have been fair for the appellant to be awarded those costs.

Disposition

41. Ultimately, and in light of the foregoing, the appeal partially succeeds whilst the cross-appeal succeeds.



42. Accordingly, it is hereby ordered as follows:

1. The judgment of the trial court is hereby set aside;
2. Liability is reassessed at 90%:10% against the respondent/cross-appellant;
3. Quantum is reassessed as follows:
 - i. Pain and suffering- Kshs.70,000/=
 - ii. Loss of expectation of life- Kshs.100,000/=
 - iii. Loss of dependency- a global sum of Kshs.550,000/=
4. The appellants are awarded costs of the trial court with interest;
5. Each party shall bear its own costs of the appeal and cross appeal.
6. Interest on monetary awards shall be at court rates from the date of the judgment until payment in full.

43. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 23RD DAY OF JULY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Kiranga holding brief for Guantai for Appellant
2. No Representation for Gitonga for Respondent
3. Francis Munyao - Court Assistant

