Kaguro & 2 others v Irungu & another (Suing as the Legal Representatives of the Estate of Joseph Njogia Muiruri (Deceased) (Civil Appeal E248 of 2024) [2025] KEHC 10738 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E248 OF 2024

FN MUCHEMI, J

JULY 17, 2025

BETWEEN

JOHN GITONGA KAGURO ..... 1ST APPELLANT

SOLOMON DAVID KARAU ..... 2ND APPELLANT

GANATRA PLANT & EQUIPMENT LIMITED ..... 3RD APPELLANT

AND

VERONICA WAIRIMU IRUNGU ..... 1ST RESPONDENT

PETER MWANGI WANGECI ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH NJOGIA MUIRURI (DECEASED

(Being an Appeal from the Judgment and Decree of Hon. D. N. Musyoka (CM) delivered on 28th July 2024 in Gatundu CMCC No. E215 of 2022)

JUDGMENT

Brief facts.

1. This appeal arises from the judgment of Gatundu Chief Magistrate in CMCC No. E215 of 2022 in a claim that arose from a motor vehicle accident whereby the court found the appellants fully liable. The court awarded the respondents general damages for pain and suffering Kshs. 50,000/-, loss of expectation of life at Ksh.100,000/-loss of dependency Kshs. 1,320,000/- and special damages of Kshs. 96,950/-

2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 7 grounds of appeal summarized as follows:-

a. The learned trial magistrate erred in law and in fact in finding the appellants fully liable

b. The learned trial magistrate erred in law and in fact by awarding damages to the respondents under the *Fatal Accidents Act* without proving dependency.

3. Parties put in written submissions.

The Appellant's Submissions.

4. The appellant submits that the respondents called three witnesses. with PW1. Corporal Linet Makuti testified that the driver of motor vehicle registration number KCR 0X3F turned to join a feeder road and failed to give way to the motorcycle registration number KMEP 4X2C thereby causing the accident. However during cross examination, PW1 stated that although she had recommended that the driver be charged, no charges had been preferred against him three years down the line. Further, PW1 admitted that she could not determine the speed of the motorcycle. The appellant agues that failure to charge the driver is a clear indication that no credible evidence was available to place blame on him. Additionally, PW1 was not an eye witness and thus she was not in a position to testify with certainty as to who was responsible for the accident.

5. PW2 Charles Mutegi Mwai testified that he was driving behind motor cycle registration number KMED 4X2C when lorry registration number KCR 0X3F allegedly being driven at a high speed turned suddenly thereby causing the accident. During cross examination, PW2 confirmed that the road was dusty and stated that he was about 30 metres behind the motor cycle which was riding at a speed of about 60km/hr. The appellants argue that given the dusty conditions and the distance between the two motorcycles, PW2 was not in a position to clearly observe how the accident occurred.

6. The appellants further submit that it is practically impossible for a lorry to make a sudden turn at a high speed. Further, PW2 testified that the motorcycle rider was moving at approximately 60km/hr on a rough road and that the motor cycle collided with the centre of the lorry which indicates that the lorry had substantially completed its turn by the time the accident occurred. Had the motor cycle rider been travelling at a lower speed, he would have had sufficient time to react and avoid colliding with the lorry after it had already turned. Furthermore, from the fatal injuries resulting from the accident, it is evident that the motorcycle was speeding on the dusty road.

7. Relying on the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Charles Nganga Mwaura (Suing as the legal representatives of the Estate of Ann Muthoni (Deceased)* [2016] KEHC 1362 (KLR), the appellants argue that the plaintiff must prove his case on a balance of probability whether the evidence was challenged or not. Thus, the trial magistrate erred by finding them fully liable without first ascertaining whether such a finding was supported by evidence. The appellants argue that in the absence of conclusive evidence determining who was to blame, liability should have been apportioned equally between the parties.

8. The appellants refer to Section 4(1) of the *Fatal Accidents Act* and the case of *Chania Shuttle Bus v Rebecca Mbogho (Suing as the legal representative of the Estate of Joseph Mwanyikia Mbogho)* [2021] eKLR and submit that the respondents did not prove dependency as they were the aunt and uncle of the deceased. As such, the two were not dependants under Section 4(1) of the *Fatal Accidents Act*. To support their contentions, the appellants refer to the cases of *Kenya Power and Lighting Company Limited v Monica Otiang Oluoch suing as administrator of Estate Ibrahim Obura Oluoch (Deceased)* 2016 eKLR and *John Mungai Kariuki & Another v Kaibei Kangai Ndethiu & 2 Others* (2020) eKLR.

9. The appellants further submit that the respondents did not prove how and to what extent they depended on the deceased for their economic and social wellbeing. PW3, Peter Mwangi Wangechi

testified that he was 43 years old and a businessman and that the deceased was working in a hardware and used to pay his rent. Despite alleging that the deceased used to pay his rent, PW3 did not produce any evidence including rent payment receipts or Mpesa statements to support the same. Further, the respondents asserted in their written statements that they were in their respective houses when they were informed about the occurrence of the accident which confirms that they were not living with the deceased and thus not dependent on him as alleged.

10. The appellants argue that although the 2nd respondent who claimed to be the deceased's aunt recorded a witness statement, she did not testify before the court to prove her dependency. Relying on the case of *Chania Shuttle v Mary Mumbi* [2017] eKLR, the appellants argue that it is *trite law* that dependency is a matter of fact and must be proved.

11. The appellants refer to the cases of *Mercy Muriuki & another v Samuel Mwangi Nduati & Another (Suing as the legal administrator of the Estate of the late Robert Mwangi)* [2019] eKLR and *Peter & Another v VOO & Another (Suing as the legal representative of the Estate of CJAJ)* (Civil Appeal E043 of 2021) [2023] KEHC and submits that the deceased died on the spot and thus the sum of Kshs. 50,000/ for pain and suffering is excessive and ought to be reduced to Kshs. 20,000/-.

12. Relying on the case of *Mutinda (Deceased) v Maraga t/a Mwamasaburi Hydrotech Services & Another* (Civil Appeal E216 of 2022) [2023] KEHC 18009 (KLR), the appellants argue that the magistrate ought to have adopted the minimum wage as the multiplicand as the respondents did not prove that the deceased used to earn a monthly salary of Kshs. 26,000/-. Further, the appellants submit that the trial magistrate gravely misdirected herself in applying a multiplicand of Kshs. 15,201/- which figure is derived from the Regulation of Wages (General) (Amendment) Order 2022 as the minimum wage for general labourers in the cities of Nairobi, Mombasa, Kisumu and Nakuru whereas the deceased lived and worked in Juja. Thus the correct multiplicand ought to be Kshs. 14,025/-.

13. The appellants submit that the deceased was 38 years old at the time of his death but no evidence was presented to confirm that he was in good health. Thus the trial court ought to have adopted a multiplier of 20 years taking into account the deceased's work, the vicissitudes and uncertainties of life. To support their contentions, the appellants rely on the cases of *Mutinda (Deceased) v Maraga t/a Mwamasaburi Hydrotech Services & Another* [2023] KEHC 18009 (KLR), *Festus Akolo & Another v Dickson Taabu Ogutu* [2016] eKLR and *Jackline Ndulu Musyoka & 2 Others (Suing as legal representatives of the estate of Andrew Musyoka Mutua v Delmonte Kenya Ltd* [2018] KEHC 2629 (KLR). The appellants thus submit that the loss of dependency ought to be calculated as follows:- Kshs. 14,025.40 x 12 x 20 x 1/3 = Kshs. 1,122,032/-.

14. The appellants rely on the case of *Kenya Power & lighting Company Ltd v James Muli Kyalo & Another* [2020] eKLR and submit that the trial court ought to allow for special damages that have been pleaded and proved by way of receipt.

The Respondents' Submissions.

15. The respondents submit that they called two witnesses being a police officer and an eye witness who gave evidence to support their case. On the other hand, the appellants did not produce any documents and neither did they call any witnesses to rebut the respondent's evidence. The eye witness Charles Mutahi Mwai testified that the defendants' motor vehicle suddenly and without warning joined a feeder road without indicating to exit and the deceased's motorcycle was consequently hit. The police officer who was the investigating officer further corroborated their evidence and testified that the motorcycle had the right of way and the 1st defendant ought to have waited for the motorcycle to pass

before exiting the road. Further, the investigating officer recommended a charge of causing death by dangerous driving and told the court that she had forwarded the file to ODPP for further action.

16. The respondents argue that although the 1st defendant had never been charged with a traffic offence, that did not mean that he had been vindicated of civil liability. The respondents further submit that the appellants ought to have brought an expert to show that a lorry being driven at high speed could not make a sudden turn. Further, the respondents submit that the appellants did not avail any evidence to show that the deceased was speeding at the time of the accident or that the eye witness had poor eyesight and could not be able to see the occurrence of the accident at his distance.

17. Relying on the case of *Nyeri Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another* [2014] eKLR, the respondents submit that they have proved on a balance of probability that the 1st appellant was to blame for the accident and in the absence of any contrary evidence, the respondents urge the court to find that the 1st appellant who was the driver of motor vehicle registration number KCR 0X3F is liable for his acts of negligence that led to the accident. Further, the 2nd and 3rd appellants being the beneficial and registered owners are vicariously liable for the acts and omissions of the 1st appellant.

18. The respondents rely on the case of Esther Nduta Mwangi & Another v Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 20027 and submit that their evidence remains uncontroverted.

19. The respondents rely on Section 2(2) of the *Fatal Accidents Act* and the case of *Mutete & Another v Bosire & Another (Suing as the personal representatives and legal administrators of the Estate of Evans Nyan'au Maturu (Deceased)* (Civil Appeal E036 of 2023) [2024] KEHC 5155 (KLR) (25 April 2024) and submit that the deceased lost his parents when he was very young and was brought up by the 2nd respondent, who is his aunt and at the time of the deceased's death, the deceased was still living with her. The 1st respondent further submits that he told the court that the deceased would assist him to pay his rent and support his aunt at home.

20. The respondents refer to the case of *Kenya Breweries Ltd v Saro* (1981) KLR 408 and submit that it has been held before that in an African setting it is expected that an adult child will assist his aging or aged parents. The 2nd respondent is 57 years old and the 1st respondent who has authority to plead on her behalf indicated that the 2nd respondent depended on the deceased for financial aid. The respondents further argue that the appellants did not cross examine them on the issue of how they received financial contribution from the deceased.

21. The respondents argue that the deceased died on the date of the accident and an award of Kshs. 100,000/- ought to be awarded. On the award of loss of expectation of life, the respondents rely on the case of *Moses Akumba & Another v Hellen Karisa Thoya* [2017] eKLR and submit that an award of Kshs. 200,000/- would be sufficient.

22. The respondents refer to the cases of Civil Appeal 173 of 2019 *Joseph Gatone Karanja v Michael Ouma Okutoyi & 2 Others* [2022] eKLR and Marsabit HC Civil Appeal No. 9 of 2017 *Guyo Jillo & Another v Lilian Kanyua* [2019] eKLR and submit that a multiplier of 22 years is fair taking into account the deceased's age. The respondents further submit that the court ought to adopt a multiplicand of Kshs. 15,201/- being the minimum wage and dependency ratio of 2/3. Thus loss of dependency ought to work out as follows:- Kshs. 15,201 x 12 x 22 x 2/3 = Kshs. 2,688,752/-.

Issues for determination.

23. The main issues for determination are:-

a. Whether the finding on liability was against the weight of evidence adduced.

b. Whether the award under the *Law Reform Act* was manifestly excessive.

c. Whether the award on loss of dependency was properly made under the Fatal Accident Act and whether it was manifestly excessive.

The Law.

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

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

25. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court of Appeal stated that:-

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

26. The foregoing case demonstrate that the appropriate standard of review to be established can be stated in three complementary principles:-

a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

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

27. The appellant seeks to have the court substitute the trial court's findings of full liability against him with 50% liability between the parties. The appellant asserts that the accident was substantially caused by the deceased who was riding his motorcycle at an excessive speed.

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

> It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

29. The respondents called two witnesses at the hearing of this case. PW1, the investigating officer testified that an accident occurred along Mulindi area involving motor vehicle registration number KCR 0X3F Mahindra lorry and motorcycle registration number KMEP 4X2P. The witness further testified that the driver of motor vehicle registration number KCR 0X3F turned right to join a feeder road failing to give way to the motor cycle rider causing the rider to ram into the motor vehicle. The witness attributed blame to the driver of the motor vehicle as he failed to give way to the motorcycle rider who had right of way. PW1 further testified that she recommended that the driver of the lorry be charged for causing death and injury to the rider and his pillion passenger. On cross examination, the witness stated that the motorcycle rider did not contribute to the accident as he had the right of way.

30. PW2, Charles Mwai, an eye witness testified that he was driving in the same direction as the motor cycle when the lorry which was in the opposite direction and which was being driven carelessly and at a high speed suddenly and without indicating joined a feeder road and hit the said motorcycle. The witness testified that he blamed the driver of the lorry for failing to give way to the motor cycle rider, over speeding and lack of due care to other road users. On cross examination, the witness testified that the deceased was riding his motorcycle at a speed of 60km/hr and that he rammed into the center of the lorry.

31. It is evident that the appellants did not call any witnesses to controvert the evidence of the respondents. The appellants could only give evidence to controvert that of the respondents for the court to find in their favour. PW2 gave a sound account of how the accident occurred and his testimony was corroborated by the evidence of the investigation officer who visited the scene. Thus it is my considered view that the respondents proved their case on a balance of probabilities. In the circumstances, it is my view that the appellants did adduce any evidence to rebut that of the respondents. As such, the respondent' case remained unchallenged. There is no legal or factual basis of apportioning liability between the parties as proposed by the appellants. The magistrate, in my considered view did not err in finding the appellant fully liable.

Whether the award under the *Law Reform Act* was manifestly excessive.

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

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would award different figure if it had tried the case at first instance. The appellant court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

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

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of

> an appellate court when naturally and reasonably says to himself "what figure would I have made" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own."

34. In the instant case, the appellant faults the trial court for awarding excessive damages for pain and suffering thereby urging this appeal court to interfere with the award by reducing it.

35. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR the court stated:-

> As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death...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 Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/- to Kshs. 100,000/- with the higher damages being awarded if the pain and suffering was prolonged before death.

36. In the instant case, it is not disputed that the deceased died on the spot. Given that the sums awardable under this head range from Kshs. 10,000/- to Kshs. 100,000/- from past authorities, it is my considered the sum of Kshs. 50,000/- was reasonable compensation for pain and suffering as the deceased died at the scene of the accident. Similarly, the award of Kshs.100,000/- for loss of expectation of life was reasonable and comparable with similar cases.

Whether the award on loss of dependency is manifestly excessive.

37. The Court of Appeal in *Chunibhai J. Patel & Another v P. F. Hayes & Others* [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

> The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

38. The appellants argue that the respondents did not prove dependency as they are uncle and aunt of the deceased and are therefore not dependents within the meaning of Section 4 of the *Fatal Accidents Act*. Section 4(1) of the *Fatal Accidents Act* provides:-

> Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased;

39. Dependency is a matter of fact and should be proved through evidence. PW3, the respondent testified that the deceased used to live with his aunt, the 2nd respondent who took care of him since childhood. The witness further testified that the deceased used to assist him in paying rent as he was not working. Furthermore the respondents produced a limited grant of letters of administration ad litem for purposes of this suit. This means that the respondents were rightly appointed as administrators of the estate of the deceased.

40. The argument on dependency in the strict meaning of Section 4(1) of the *Fatal Accidents Act* was demystified by the courts as to also include persons beyond the nuclear family, so long as they can prove that they depended on the deceased immediately prior to his death. See *Karuku v Kariuki & Another (Suing as personal representatives and administrators of John Muriuki Muceke (Deceased)* (Civil Appeal E093 of 2022) [2023] KEHC 24803 (KLR) (3 November 2023). It is therefore my considered view that the respondents proved that they depended on the deceased prior to his death. As such, the two dependants were entitled to be compensated on loss of dependency.

41. The deceased was 38 years old at the time of his death. PW3 testified that the deceased worked in a hardware but stated that he had no documents to show how much the deceased was earning.

42. It is trite law that where there is no evidence of income, the court ought to resort to minimum wage as was stipulated in the case of *Petronila Muli v Richard Muindi Sayi & Catherine Mwende Mwindu* (2021) eKLR. The deceased died on 19th September 2021. Therefore the order applicable is the Regulation of Wages (General) (Amendment) Order 2018. The deceased was a resident of Juja as indicated in the death certificate. Column 2 refers to "all former municipalities and town councils" of the Regulation of Wages (General) (Amendment) Order 2018 is applicable. I have perused the record and noted that the deceased's occupation as per the death certificate was casual labourer. Thus, this court upon re-evaluation of the evidence tendered finds that the minimum wage applicable as gazetted in respect to the deceased was Kshs. 12,522.70/-.

43. On the issue of multiplier, the appellant argues that the multiplier of 22 years was on the higher side and argued that the trial magistrate failed to take into account life's uncanning and unpredictable circumstances that would lower the chances of survival of the deceased. Relying on the case of *Jackline Ndulu Musyoka & 2 Others (Suing as legal representatives of the Estate of Andrew Musyoka Mutua v Del monte Kenya Ltd* [2018] KEHC 2629 (KLR) the appellant urges the court to adopt a multiplier of 20 years. I have perused the court record and noted that the deceased was 38 years old at the time of death. The court adopted a multiplier of 22 years. It is therefore my considered view that the multiplier of 22 years was reasonable as the deceased would have worked up to the age of sixty (60) years. He was young and in good health at the time of his death only that his life was cut short by the accident. Furthermore, the proposal by the appellant for 20 years is a bit on the lower side.

44. Consequently, the loss of dependency ought to work out as follows:-

    Kshs.12,522.70/- x 12 x 22 x 1/3 = Kshs.1,101,997.60/=

45. In view of the foregoing, I find that the appeal partly successful and I hereby give an award of loss of dependency at Kshs.1,101,999.60/= The award of the court below of Kshs.1,320,000/- is hereby set aside.

46. Each party will meet their own costs in this appeal.

47. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 17TH DAY OF JULY 2025.

F. MUCHEMI

JUDGE