Ngigi v Achoka & another (Suing as Legal Representatives of the Estate of Pamela Jane Akinyi Achoka) (Civil Appeal 35 of 2020) [2025] KEHC 11870 (KLR) (Civ) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11870 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 35 OF 2020

DKN MAGARE, J

JULY 28, 2025

BETWEEN

PAULINE NGIGI ..... APPELLANT

AND

ROSEMARY NABWIRE ACHOKA & CAROLINE ANYANGO ACHOKA (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF PAMELA JANE AKINYI ACHOKA) ..... RESPONDENT

(An appeal from the Judgment and decree of Hon. D.O. Mbeja (SRM) dated 13.12.2019 arising from Milimani CMCC No. 3452 of 2018)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. D.O. Mbeja (SRM) dated 13.12.2019 arising from Milimani CMCC No. 3452 of 2018.

2. The Memorandum of Appeal dated 23.1.2020 is against the award of liability and general damages. The Appellant posited that the lower court made an award of general damages under pain and suffering, loss of expectation of life and loss of dependency that was inordinately high. The appeal also challenged the finding on liability of 100%.

3. The Plaint dated 25.2.2018 claimed damages for an accident that occurred on 26.4.2016 when the deceased was walking along Mombasa Road and when the Appellant, her driver or agent negligently and dangerously drove motor vehicle Registration No. KBZ 746U causing it to violently hit the deceased hence the accident.

4. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded special damages as well as general damages under the *Law Reform Act* and *Fatal Accidents Act*.

5. The Appellant entered appearance and filed defence dated 6.11.2018 denying the particulars of negligence and injuries pleaded in the plaint.

6. The lower court heard the parties and proceeded to render the impugned judgment in which the court allowed liability of 100% against the Appellant and awarded Ksh. 50,000/= for pain and suffering, Ksh. 2,884,180/= for loss of dependency, and Ksh. 100,000/= for loss of expectation of life. The special damages were awarded at Ksh. 13,180/=.

7. Aggrieved by the finding of the lower court, the Appellant lodged the appeal herein.

Evidence

8. During the hearing, PW1 was No. 55834 PC Stephen Cheboi. He produced the police abstract. It was his case that the accident occurred on 26.4.2016 at 2 pm. He was not the investigating officer. On cross examination he stated that the matter was reported and was pending under investigations.

9. PW2 was Joseph Karanja. It was his case that he witnessed the accident. He blamed the accident motor vehicle. The driver of the motor vehicle left the road and knocked the deceased. He testified that the deceased was on the pedestrian path. The motor vehicle was overspeeding. It opted to go through the pedestrian path to pass other motor vehicle on the road. He testified that he was also injured in the accident and recorded a statement with the police.

10. PW3 was Rosemary Nabwire Achoka. The deceased was her third child. She died at 32 years. She was a security officer at Riley's Services earning Ksh. 25,000/= per month. She had one child 10 years old and was not married with good health. She produced her evidence in the bundle of documents filed in court dated 25.2.2018.

11. DW1 was David Ngata Gacogu. He relied on his witness statement dated 25.2.2019. He was the driver of the accident motor vehicle. According to him, a motorcycle appeared and he did not have space as there was a trailer. He tried to avoid the motorcycle and left the road. Later he was told he had a case. He did not knock anyone.

12. On cross examination, it was his case that he was charged in Makadara with causing death by dangerous driving. He gave evidence. He was not over speeding. He knocked someone down. One side of the road was blocked.

Submissions

13. The Appellant submitted that the Respondent failed to prove the case on liability on a balance of probabilities. They cited Section 107 of the *Evidence Act*. It was in this regard submitted that the court erred in allowing 100% liability when the Appellant pleaded and proved contributory negligence.

14. On quantum, it was submitted that age and income of the deceased were not proved. That the award on loss of dependency and loss of expectation of life were excessive. They submitted further that a minimum wage of Ksh. 6,896/= would have sufficed. On loss of dependency, it was also submitted that a multiplier of 15 years would be appropriate.

15. It was also submitted that there was double compensation as the award under *Law Reform Act* was granted without regard to the award under the *Fatal Accidents Act*. The Appellant relied on Hellen Waruguru Waweru v Kiaire Shoe Stores Limited (2015) eKLR.

16. On the part of the Respondent, it was submitted that the Respondent proved liability of 100% against the Appellant. Further, that there was loss of expectation of life. The deceased was 32 years old with income from which she supported her mother and her child.

Analysis

17. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

18. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

19. The court must bear in mind that it did not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."

20. The Appellant urged the court to find that the lower court erred in finding the Appellant 100% liable. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

21. It follows that the initial burden of proof lies on the respondents, but the same may shift to the Appellant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held 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."

22. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

23. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

24. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 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."

25. The Appellant's driver herein was driving motor vehicle registration No. KBZ 746U along Mombasa Road from Mlolongo direction. The evidence of the eye witness, PW2, was credible and unshaken. He was vivid that DW1 was driving the motor vehicle at a high speed and failed to control the accident motor vehicle. The motor vehicle then veered off the road and overran the pedestrian foot path. DW1 in his testimony disputed overspeeding. However, he testified that there was a motorcycle and a trailer and the road was squeezed as a result of which he went out of the road. This was a clear admission that he lost control of the motor vehicle.

26. On a balance of probability, the court finds no basis to interfere with the finding of the lower court that the Appellant was 100% liable for the accident. The Appellant did not sufficiently establish any liability on the part of the deceased. It was the duty of the Appellant to prove contributory negligence against the deceased. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

27. On the damages the lower court awarded Ksh. 50,000/= under damages for pain and suffering. For pain and suffering, in Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

28. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of her injuries in the period before her death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased died later on. In this case, the deceased passed away on the same day of the accident. There is no evidence that he was taken to any hospital prior to his death. I find no reason to disturb the award of Ksh. 50,000/= as it was not inordinately high.

29. On loss of expectation of life, considering that the deceased was 32 years old and her life was cut short at that age, I do find that a sum of Ksh. 100,000/= was not excessive. There was no evidence that the deceased was of ill health. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

> " 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 award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

30. There has to be a basis for interfering with damages under the *Fatal Accidents Act*, in terms of the dependency ratio, multiplicand and the multiplier. The deceased herein was 32 years and was not married. She had one child aged 10 years. There was no proof of income even though the Respondent's case was that the deceased was a security guard earning Ksh. 25,000/= per month. The lower court

adopted the minimum wage bill method and applied Regulation of Wages (General Amendment Order), 2017. The Appellant contended that the lower court erred in applying the wage of a watchman without proof that the deceased was under that category of employment.

31. However, the Respondent pleaded that the deceased was employed as a guard. She produced the job card for Riley's Services Limited and as such there was proof of employment. There was no contrary evidence from the Appellant.

32. In the circumstances, there was basis for applying the minimum wage regulations as the employment was proved but actual income was not proved. There was no error in respect thereof. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

33. The award of Ksh. 14,420.90/= was the minimum wage for a watchman and within the category that the deceased was in as a guard. I am unable to interfere with the discretion of the lower court. I am fortified by the reasoning of the court in the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the *Fatal Accidents Act*.

34. The deceased was 32 years. She had a 10-year-old child. She will have depended on her up to the age of 25-26. This will have been 16 years. The multiplier of 25 years was thus excessive. The mother was aged 54 at the time of demise of the deceased. In the circumstances, I set aside the award of 25 years and substitute the same with 16 years.

35. Looking at the circumstances of this case in which the deceased's income and amount and length of dependency were directly ascertainable, the lower court was correct in applying the minimum wage and therefore multiplicand approach as opposed to the global sum approach. As was held by Ringera J, (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993:

> The multiplier approach is just a method of assessing damages and not a principle of law or 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 ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

36. The deceased was not married but had one child. She was a sole bread winner for her child. The award of 2/3 is therefore correct. As was held by Odunga J (as he then was) in J W N v Kassam Hauliers Limited [2020] eKLR 17. Conventionally Courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ratio of 2/3. On the other had they have taken unmarried people to spend more on themselves more than their dependants more so parents hence have apportioned a dependency ratio of 1/3 which has over time been enhanced to 1/2. In this case it was submitted that as the deceased was married with 3 children he spent more on his family than self hence a dependency ratio of 2/3 would suffice.

37. The position is also fortified in the case of Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), Ringera J, as he then was, held at page 248 that:

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."

38. There was no appeal against the award on special damages. I will not disturb this finding. In the circumstances, the appeal is partly allowed on loss of dependency. This works out as follows:

> Ksh. 14,420.90 x 12 x 16 x 2/3 = by a small margin to Ksh. 1,845,872.20/=.

39. In the end the court enters judgment for the Respondent against the Appellant for:

i. Liability 100%

ii. Pain and suffering Ksh. 50,000/=

iii. Loss of expectation of life Ksh. 100,000/=

iv. Loss of dependency Ksh. 1,845,872.20/=

v. Special damages Ksh 13,180/=

Total Ksh. 2,009,055.20/=

vi. Costs to the respondent in the lower court.

40. The next issue is the question of costs, which are governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

41. Costs are discretionary. The court can at this point quantify them or leave for assessment. To reduce backlog, an award is more advisable given the backlog with the Deputy Registrars. The court of appeal in the case of Farah Awad Gullet V CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

42. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

43. In the circumstances the appeal is partly allowed. Given the mixed success, each party will bear their own costs in the appeal.

Determination

44. In the upshot, I make the following orders: -

a. The appeal against liability is dismissed.

b. Appeal on loss of dependency is partly allowed. The award works out as follows:

i. Liability 100%

ii. Pain and suffering Ksh. 50,000/=

iii. Loss of expectation of life Ksh. 100,000/=

iv. Loss of dependency Ksh. 1,845,872.20/=

v. Special damages Ksh 13,180/=

Total Ksh. 2,009,055.20/=

c. The respondent to have costs in the court below.

d. General damages to attract interest from the date of judgment in the court below while special damages to attract interest from the date of filing suit.

e. Each party will bear their own costs in the appeal.

f. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Gathoni Njogu for the Appellant

Kiima for the Respondent

Court Assistant – Michael