**Waihenya v Kariuki (Suing as the Legal Representative of the Estate of the Late Nicholus Wachira Kariuki (Deceased)) (Civil Appeal E075 of 2023) [2024] KEHC 14237 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14237 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL E075 OF 2023**

**DKN MAGARE, J**

**NOVEMBER 14, 2024**

**BETWEEN**

**PAUL MUNYI WAIHENYA ..... APPELLANT**

**AND**

**JOYCE NDUTA KARIUKI ..... RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE NICHOLUS WACHIRA KARIUKI (DECEASED)**

***(Appeal from the judgment and decree of the Honourable Principal Magistrate, Hon. F. Muguongo given on 25/10/2023 in Nyeri CMCC E043 of 2022.)***

## JUDGMENT

1. This is an appeal from the judgment and decree of the Honourable Principal Magistrate, Hon. F. Muguongo given on 25/10/2023 in Nyeri CMCC E043 of 2022. The Respondent was the plaintiff in the lower court in a suit she filed claiming damages under the *Law Reform Act* and *Fatal Accidents Act*.
2. The matter was heard and determined on 25/10/2023 where the court made the following awards in favour of the Respondent against the Appellant herein:
    a. Liability 100%
    b. Loss of dependency - 7,200,000/=
    c. Pain and suffering - 100,000/=
    d. Loss of expectation of life - 100,000/=
    e. Special damages - 100,000/=

f. Costs and interest

3. It is in respect of 100% liability, general damages for loss of dependency of Ksh 7,200,000/= and damages for pain and suffering Kshs. 100,000/= that this appeal relates. There appears to be no appeal in respect of special damages and loss of expectation of life. The Appellant filed grounds of appeal in respect thereof as follows:

   a. That the learned trial magistrate erred in law and fact in holding the Appellant 100% liable for the accident when there was no sufficient evidence to that effect.

   b. The learned magistrate erred in law in awarding general damages for pain and suffering at Kes. 100,000/= which amount is manifestly excessive as the deceased died at the scene of the accident.

   c. That the learned magistrate erred in law in awarding general damages for loss of dependency at Kes. 7,500,000/= which amount is manifestly excessive.

   d. That the learned magistrate erred in law and fact by adopting multiplicand of Kes. 60,000/= as the deceased's monthly income which amount was not sufficiently proved so as to form a basis for reliance by the court.

   e. That the learned magistrate erred in law and fact by adopting multiplier of 15 years whereas the deceased was aged 52 years and thereby arrived at an award that is inordinately excessive.

   f. That the learned magistrate erred in law and in fact in failing to consider the written submissions of the Appellant on record and the authorities annexed therein in support of the Appellant's case while arriving at the award in damages.

   g. That the judgment of the learned trial magistrate is against the law and weight of the evidence on record and against the doctrine of stare decisis.

**Pleadings**

4. The Respondent pleaded that the deceased was lawfully driving motor vehicle registration number KAN 554S along Nyeri -Karatina road on 4/3/2021, when the Appellant drivnig motor vehicle registration number KDA 028U, caused it to violently collide with the deceased's vehicle and as a result the deceased lost life, which caused the estate loss and damages.

5. The deceased is said to have left 4 dependants, that is 3 sons and a sister. In the plaint, their ages are not given. However, for the 3 sons the particulars are in the chief's letter, being 23, 19 and 18 years. The deceased died on 4/3/2021 at Gatitu due to multiple injuries, head, spine, chest and limbs secondary to a road traffic accident.

6. The Respondent claimed damages under *Law Reform Act* and *Fatal Accidents Act*, funeral expenses of 191,605/= and general damages for pain and suffering and loss of amenities.

7. It was pleaded that the deceased used to earn an average of 100,000/= per month and supported his family for the prospects of a bright future. The Appellant was said to be the sole cause.

8. The Appellant filed defence on 14/3/2022 and denied everything that could be denied including the ownership of the deceased's motor vehicle registration number KAN 554S. In what they called to be in the alternative and strictly without prejudice, they stated that if the accident occurred, which was again denied, then the deceased was to blame. 6 particulars of negligence were set out. The Appellant relied on the doctrine of res ipsa loquitor, Highway Code and The *Traffic Act*.

**Evidence**

9. The Respondent's witnesses started testifying on 8/3/2023. PW1, 77170 CPL Justus Muturi testified that he was attached to Nyeri Patrol Base, performing traffic duties and was standing in for CPL Arthur Kathurima who was happily on paternity leave. He testified that on 4/3/2021, at 2100 hours an accident occurred at Gatitu at Nyeri-Karatina road, involving motor vehicle registration number KAN 554S and motor vehicle registration number KDA 028U.

10. He stated that motor vehicle registration number KDA 028U was driven by the Appellant heading to Nyeri general direction while motor vehicle registration Number KAN 554S was driven by the deceased herein Nicholus Wachira (deceased) heading to Karatina. He further stated that motor vehicle registration number KAN 554S was on its rightful lane when it was hit by motor vehicle registration number KDA 028 U. Both occupants of motor vehicle registration number KAN 554S, that is, the deceased herein as the driver and Wilson Murithi Kimani as a passenger died, while being rushed to hospital.

11. He continued that preliminary investigations blamed motor vehicle registration number KDA 028 U. His evidence was that the driver of motor vehicle registration number KDA 028 U, who was the Appellant, was charged and convicted for causing death of deceased and Wilson Murithi Kimani by dangerous driving.

12. PW1 gave evidence that according to the sketch map, the point of impact was 1.2 m from the middle lane from Nyeri to Karatina general direction. Both vehicles made a sudden violent stop after the accident. KAN 554S was thrown 13.5 m away on the left side facing Karatina. On the other hand, motor vehicle registration number KDA 028 U was thrown 26 m on the left side facing Karatina. The vehicle spanned and faced the direction it was coming from. The witness produced the police abstract and sketch map.

13. On cross examination PW1 stated that the Appellant was the accused in the traffic case. It was stated that the Appellant was overtaking in a continuous yellow line. The witness stated that the weather condition was dry at the time of accident at 2100 hours.

14. The Respondent testified as PW2 and adopted her statement which mirrors the plaint. She produced exhibits 1-3, 5-9. The others had been produced by PW1. She stated that the deceased had 2 companies and was doing well and as a result he was expanding to Nyeri. The deceased reportedly supported PW1 who was allegedly a sister and a 'single mother'- this is a common day phrase for a responsible mother with an absentee landlord as a father of her child.

15. PW2 continued that the deceased stayed at Mirema paying rent of Ksh 25,000/= and had 3 adult sons. On cross examination she stated that she did not have a bank statement to show finances.

16. The Appellant testified as DW1 and stated that the point of impact was in the middle of the road. He admitted being convicted of his own plea of guilty. He stated that he is remorseful for the two lives lost. He stated in his witness statement that there was an oncoming vehicle that blurred his vision; he suddenly collided with the oncoming vehicle. He stated he was driving at 50 K/h.

**Submissions**

17. The Appellant filed submissions dated 13/8/2024. Three issues were submitted as follows:

    a. Liability

    b. Earnings

c. Multiplier

18. It was submitted that the deceased ought to have shouldered a percentage of the liability. Therefore, that the conviction in a traffic case was not conclusive proof of civil liability. Reliance wad placed inter alia on the case of Joseph C. Mumo vs Attorney General & Another (2008) eKLR. Based on this case, it was submitted that the standard of proof in civil and criminal cases were different.

19. The Appellant also submitted that there was no proof of earning on the part of the deceased even though it was not in dispute that the deceased was earning income from business. No records of earning were produced in court. The Appellant relied on Maina Stephen Mathu & 2 Others v David Kanja Macharia & Another (2019) eKLR and submitted that Kshs. 30,000/= would have been sufficient for earnings.

20. On the multiplier, the Appellant submitted that the deceased was 52 years old and the multiplier of 15 years was on the higher side. It was contended that a multiplier of 8 years would be appropriate. The Appellant relied on the cases of Omar Shariff & 2 others –vs- Edwin Mathias Nyonga & Another (20200 eKLR.

21. On the part of the Respondents, it was submitted that the Respondents had proved their case on liability on a balance of probabilities and the lower court was correct in its finding. The Respondent proved liability 100% against the Appellant.

22. The Respondent also submitted on quantum that the lower court correctly assessed damages for pain and suffering, loss of dependency, loss of expectation of life and special damages. It was submitted that the deceased died on his way to hospital. On loss of dependency, it was submitted that the deceased had 3 children he was taking care of. Reliance was placed on the case of Kenya Power & Lighting Co. –vs- Leonard Ochieng Mukenya (2018) eKLR to submit that the multiplier adopted by the lower court was proper.

**Analysis**

23. 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 demeanor of the witnesses and hearing their evidence first hand.

24. The first appellate Court will not interfere with the exercise of judicial discretion by the subordinate court unless it is satisfied that its decision is clearly wrong, or that the said court misdirected itself in some material particulars as held in the case of Mbogo and Another vs. Shah [1968] EA 93, where the Court posited that:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

25. The duty of the first Appellate Court was in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the court in their usual gusto, held as follows:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

26. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of Peters vs Sunday Post Limited [1985] EA 424, 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..."

27. The court cannot interfere with discretion unless the lower court, in assessing the damages, or exercising discretion, took into account an irrelevant fact or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high as to amount to an erroneous estimate of damages. The Court of Appeal pronounced itself succinctly on these principles in case of Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR, where the court of Appeal [Kneller, Nyarangi JJA & Chesoni AG JA] where it posited as follows: -

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilanga v Manyoka, [1961] EA 705, 709, 713 (CA-T); Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.

28. The principles to be considered by this court when deciding on the issues raised on this appeal was laid down in the case of Ali –vs- Nyambu t/a Sisera stores [1990] KLR 534 at page 538 quoted with approval the principles laid down by the Privy Council in Nance –vs- British Columbia Electric Railways Co. Ltd. [1951]AC 601 at page 613 where it held that:

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of the law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of

this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages (Flint –vs- Lovell [1935] 1KB 354) approved by the House of Lords in Davis –vs- Powell Duffryn Associated Collievers Ltd. [1941]AC 601."

29. The former East African court of Appeal stated as doth in the locus classicus case of Butt v Khan [1978] eKLR, KAR where Law JA stated that:

> "an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low. This, with respect, is what I think happened in this case. The learned judge attached undue importance to the likelihood of epilepsy developing in the future. To what extent this view influenced him in awarding the amount he in fact awarded is a difficult question to answer."

30. I now turn to each of the grounds of appeal raised. However, I shall dismiss ground (f) since it relates to submissions. Submissions are not evidence upon which anyone can found grounds of appeal. Mwera J succinctly posited as follows when postulating on what is the role of submissions. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim, in the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993:

> "Indeed, and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

31. Submissions are not, strictly speaking, part of the case, the absence of which may not do prejudice to a party. Their presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, where the court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

32. The Court of Appeal was more succinct, in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

33. The last ground postulated that the decision was against the law and weight of the evidence on record and against the doctrine of stare decisis. The ground is too general and as such is subsumed in the other grounds. The same offends Order 42 Rule 1 of the Civil Procedure Rules, which provides as doth:

> " Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

34. This leaves 5 grounds. Out of the 5, grounds 3, 4 and 5 raise the same issue - that is, loss of dependency in all its facets. Ground 2 deals with general damages for pain and suffering while ground 1 deals with liability.

35. The court shall address all the 5 grounds seriatim under 3 themes, that is:

    a. general damages for pain and suffering

    b. general damages for loss of dependency

    c. liability

**General damages for pain and suffering**

36. The main question to be addressed under this head is whether the deceased died on the spot or died on the way to hospital. The death certificate indicates that the deceased died at the scene of accident and on the same day. Prosecution evidence produced by the respondent in support of their case during the traffic case, shows the deceased died on the spot as shown at page 18 of the record. He therefore could not have suffered much excruciating pain as to attract the highest possible award under this head. Though general damages for pain and suffering ordinarily range between 10,000/=and 100,000/=, the court has some latitude based on the individual case. In this case, the court awarded the maximum given for a person who suffered much excruciating pain.

37. The evidence generally on record is that the deceased died on the spot. He was not taken to any hospital, except to be pronounced dead. An amount of Ksh.50,000/= will suffice in the circumstances. The court failed to have regard that the police were on the scene about 30 minutes later and the deceased was already dead. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, the deceased had died immediately after the accident and the trial court awarded

Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

> "(5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

38. Consequently, I set aside the award of Ksh 100,000/= and substitute with a sum of 50,000/=.

**Liability**

39. The Appellant raised the first ground that the court erred in holding the Appellant 100% liable for the accident. It must be remembered that the burden of proving the case was on the Respondent. This court appreciates that the philosophy behind the preponderance of probabilities as a standard of proof in civil claims derives from the understanding that in percentage terms, a party, be it claiming or responding, who is able to establish their 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. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 stated as follows:

> "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 than 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."

40. In the case of Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR, the Court of Appeal [Karanja, Okwengu & G. B. M. Kariuki, JJ.A] 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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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."

41. 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 as stated in the case of Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR, where the court stated as doth:

> " 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."

42. This means that the burden of proof is not on the plaintiff alone. The plaintiff bears the burden of proof in proving negligence and damages. However, he only needs to set up a prima facie case on respect of these matters. The question always is not whether there is proof beyond reasonable doubt; it is the question of believability. The issues related to liability and the duty to prove the case is on the party that asserts. The duty is on whosesoever asserts. On the other hand, there is no duty to prove a negative or an admitted fact. Sections 107, 108 and 109 of the *Evidence Act* provides as doth; -

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
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> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
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> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

43. The burden of proof falls upon the person alleging it to establish each element of the tort as held in the case of Treadsetters Tyres Ltd V John Wekesa Wepukhulu [2010] eKLR, where, Ibrahim J, as he was then allowed an appeal, on negligence and quoted with approval a passage quoted in Charlesworth & Percy on Negligence, 9th edition at P. 387 on the question of proof, and burden thereof where it is stated:

> " In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

44. The appellant pleaded guilty to the offence. I do not see any evidence that the deceased was negligent. There must be cogent evidence tendered to prove either negligence or contributory negligence. The

court dealt with the issue of contributory negligence in the case of *Cadama Builders Limited v Mutamba ((Suing as the administrators of the Estate of Philip Musei Ndolo) (Deceased)) (Civil Appeal E093 of 2021*) [2022] KEHC 11029 (KLR) (27 July 2022) (Judgment), Kasango J and stated as follows: -

> " No evidence at all was adduced which proved negligence on the part of the appellant. I venture to state that just as much as the trial court found the appellant's pleadings, not supported by oral evidence, remained mere allegations, similarly the respondent's pleadings remained mere allegations so long as the evidence that was adduced did not prove those pleadings. The Court of Appeal expressed itself in those terms in the case of Charterhouse Bank Limited (under statutory management) vs Frank Kamau (2016) eKLR, as follows:-
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> > "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in KARUGI & ANOTHER V. KABIYA & 3 OTHERS (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis."

45. Section 47 of the *Evidence Act* covers the evidence that was tendered by the parties. It provides as follows: -

> A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

46. The plea of guilty entered in the traffic case was conclusive proof of the Appellant's negligence. I find it disingenuous for the Appellant to posit that the conviction did not denote guilty. The cases referred to were in relation to an acquittal. Given high standards in criminal cases and the presumption of innocence, a person can be acquitted since the case was not proved on a standard of beyond reasonable doubt but at the same time, a party can prove negligence of the same person on a balance of probability. The converse is not true. A conviction is conclusive proof of negligence. The legal burden of proof in

criminal matters was addressed in the most oft quoted English decision of Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

47. This means a conviction per se is enough to prove negligence. However, it does not rule out contributory negligence. The case of Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR was quoted. A wrong passage was however quoted. The nearest approximation was to the effect that:-

> Now, it was correct for the learned judge to refer to Mr. Chemwolo's conviction because section 47A of the *Evidence Act* (cap 80) declares that where a final judgment of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr. Chemwolo's conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter, because it may also be that Mr. Kubende was guilty of carelessness, and if were to be so, then the position would be as explained in Queen's Cleaners and Dyers Ltd. v EA Community and others (supra); and despite Mr. Chemwolo's conviction, the issue of contributory negligence may still be alive if the facts warrant it. In the present case there was a triable issue in contributory negligence which would affect the quantum of damages.

48. With respect I agree. There was however, no evidence of contributory negligence. It was only remorse. The traffic evidence shows that the defendant was rushing a patient to hospital and did not have the presence of mind.

49. The case of Hussein Omar Farah v Lento Agencies [2006] eKLR quoted by the appellant is with all respect not on all fours with this case. The court in that case stated as doth:

> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of BARCLAY – STEWARD LIMITED & ANOTHER VS. WAIYAKI [1982-88] 1 KAR 1118, this Court said:-
>
> > "The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."

The Court said further:-

> "The collision is a fact. It is, however, not reasonably possible to decide on the evidence of Waiyaki & Gitau who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."

In Baker V Market Harborough Industrial Co-Operative Society LtD [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:-

> "Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them..."

50. The case of Hussein Omar Farah [supra] deals with situations where there is competing evidence. The record shows that the Appellant solely caused the accident. I thus dismiss the appeal on liability as it is untenable.

**Loss of dependency**

51. The Appellant raised the issue that the court erred in law in awarding manifestly excessive general damages for loss of dependency at Ksh. 7,500,000/=. They also blamed the court for adopting multiplicand of Kshs. 60,000/= as the deceased's monthly income and adopting multiplier of 15 years whereas the deceased was aged 52 years. They relied on an in personum case of Maina Stephen Mathu & 2 others v David Kanja Macharia & Esther Wangui Mwai (Suing as the administrators of the estate of James Gachoka Macharia (Deceased) [2019] eKLR. The case decided by Rachel Ngetich J in 2019 turned on its own facts. This turned on the facts of that case and cannot be copiable. The court stated as follows:

> Whereas, I agree that the income cannot be arrived at without some degree of speculation, the fact that the awarded sum will be paid in lump sum has to be taken into consideration; the attendant costs associated with the running of the business will now not be incurred. The uncertainties associated with business may affect the projected income. It is also important to put into consideration that the business may continue running under management of family members. Putting all the above into consideration, I find that the figure of Kshs.45,000/= per month was on the higher side. My view is that a sum of Kshs.30,000/= would be reasonable in the circumstances.

52. There was nascent evidence that there was a business earning some income. The income cannot be ascertained. I have been invited to use a sum of 60,000/= allegedly admitted in submissions. As stated above submissions are not evidence. The court must decide on basis of cogent and succinct evidence. On the second part the court erred was disregarding the question of dependency.

53. Dependency is not a factor for the deceased alone. The age of dependents is crucial. There was no wife. In that case, the children were the only dependents. I dismiss the postulation that the sister is a dependant for purpose of the *Fatal Accidents Act*. Section 4 of the said Act provides as follows:

> (1) 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; and in every such action the court may award such damages as it may think

proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

(2) In assessing damages, under the provisions of subsection (1), the court shall not take into account-

(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;

(b) any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph.

54. A sister is any other dependant who must prove dependency. In this case, it was not proved. Dependency is a question of fact. The other dependents failed to testify on their own dependency. In James Mukolo Elisha & another v Thomas Martin Kibisu [2014] eKLR, the Court of Appeal [G.B.M. Kariuki, Musinga & J. Mohammed, JJ.A] posited as hereunder:

> The next issue for consideration is whether the learned judge erred in making an award under the *Fatal Accidents Act*. The first challenge by the appellants is loss of dependency of the deceased's children on the income of the deceased. In GERALD MBALE MWEA V KARIKO KIHARA & ANOTHER, [1997] eKLR (supra) it was correctly stated that:
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> > "The issue of dependency is always a question of fact to be proved by he who asserts it."

The respondent had stated that it was his deceased wife who all along took care of the farm, but did not adduce any evidence to show that after her demise, the farm yields had fallen. In any event, all the documents produced in court indicate that payments for the farm produce were made to the respondent. The trial judge was therefore justified in finding that neither the income of the deceased, nor the dependency of the family members, was proved to the required standard. The respondent did not adduce any documentary evidence to show that any of the persons listed under paragraph 6 of the Plaint were actually dependants of the deceased.

55. Regarding dependency George Dulu J, in the case of Leonard O. Ekisa & another v Major K. Birgen [ 2005] eKLR, stated as follows:

> With regard to dependency, I have to rely on the case of Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), in which Ringera J. as he then was, held at page 248-
>
> > "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."

The learned Judge went further to state on the same page that -

> "I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Bor – vs- Onduu [1982- 1992] 2 K.A.R. 288"

56. The documents produced do no show support for the dependants, further they are all adults. Applying the multiplier is as such not a proper measure as it goes more into the realm of conjecture and surmise. The multiplier of 15 is equally too long for adult children aged 18-23. The best method is thus to have either nominal dependency, which in this case could be 5 years. However, there will be a hurdle on proof of income. Having business turnover or contracts is not evidence of income. And even where it were, each of the children should prove dependency. They did not. This is where a global award comes in.

57. Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another cited by the Court of Appeal for Eastern Africa in Radhakrishen M. Khemaney v. Mrs Lachaba Murlidhar (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows:

> " I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Prances Hayes and others against Chunibhai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:
>
> > "The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."

Upon an appeal against this judgment this court held ([1957] R.A. 748 (C.A.):

> "That the method of assessment of damages adopted by the learned chief justice was correct.""

58. Courts are not compelled to adopt multiplier method in cases where the exercise is a grope in the dark; speculation on the important aspects of lost years or dependency. This was well stated by Ringera J (as he then was) in the case of Kwanzia Vs Ngalali Mutua & another that:

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

59. In this case, noting that the deceased was a businessman of some sort, with some income and adult children, the youngest being 18 and who never bothered to testify on loss of dependency, I find both formulae suggested by the parties an exercise in conjecture, hyperbole, and guess work. A sum of Kshs. 1,920,000/= suggested is simply on the lower side while a sum of Kshs. 7,200,000/= is excessive in the circumstances.

60. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

61. Paraphrased to this case, the payment is not for the killing of the deceased as no amount of money can replace a human being. No amount of payment can ameliorate the permanent scar felt by the families. However, from the insuring public perspective, the awards are for moderation of pain suffered and compensate for loss of dependency.

62. In that contest, given the short period of dependency remaining, the businesses being available for the dependents, and paucity of evidence on the loss, a global sum will be proper. I therefore set aside the award of Kshs. 7,200,000/= and substitute thereto a sum of Ksh. 3,000,000/=.

63. On costs, costs follow the event. The results are mixed. The issue of costs is 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.

64. The court has discretion to award costs. In this case the court is guided by the Supreme Court , which 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.

65. In exercise of my discretion, which I must exercise judiciously and not capriciously or arbitrarily, I find that the circumstances call for the parties to bear their own costs.

**Determination**

66. Consequently, I make the following orders: -

a. Appeal on liability is dismissed for lack of merit.

b. Award of General damages for pain and suffering is set aside and substituted with a sum of Kshs. 50,000/=.

c. Award of General damages for loss of dependency is set aside and in lieu thereof, I substitute with a sum of Kshs. 3,000,000/=.

d. Special and funeral expenses remain at Kshs. 100,000/=.

e. General damages for loss of expectation of life remain at Ksh. 100,000/=.

Total Ksh. 3,250,000/=.

f. Special damages shall attract interest from the date of filing on 10/02/2022.

g. General damages to attract interest at court rates from the date of judgment in the lower court on 25/10/2023.

h. The Respondent shall have costs in the lower court.

i. 30 days stay of execution.

j. Each party to bear its costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF NOVEMBER, 2024.**
Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Ms. Ann Muya for the Appellant

Mr. Mahugu for the Respondent

Court Assistant – Jedidah