Ngaywa v Ochanda (Suing as the Legal Representative of the Estate of John Hillary Otieno - Deceased) (Civil Appeal E035 of 2024) [2025] KEHC 15329 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15329 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E035 OF 2024

DK KEMEI, J

OCTOBER 31, 2025

BETWEEN

KENEDY DAVID NGAYWA ..... APPELLANT

AND

JOSEPH OTIENO OCHANDA ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN HILLARY OTIENO - DECEASED

(An appeal from the judgment and decree of Hon. E. Tsimonjero(SRM) delivered on 24th July 2024 in Ukwala PMCC No. E042 of 2021)

JUDGMENT

1. Vide a plaint dated 6th July 2021, the Respondent sued the Appellant for both special and general damages arising from fatal injuries occasioned to the deceased herein who was a pedestrian then lawfully walking on the verge along Busia Kisumu road on 15th September 2020 when he was hit by the Appellant's motor vehicle registration No. KCW 552P wherein he succumbed from the said injuries. The learned trial magistrate, Hon. Tsimonjero (SRM) later on the 24th July 2024 entered judgment in favor of the Respondent to wit: liability- 100%, pain and suffering- Ksh 50,000/=, loss of expectation of life- Ksh 100,000/=, loss of dependency- Ksh 1,000, 000/= and special damages of Ksh 223,770/= all totaling to Ksh 1, 373, 770/=. Further, the Respondent was awarded costs and interest on the total award at court rates from the date of the judgment till payment in full. This precipitated the present appeal.

2. Aggrieved by the said decision, the Appellant filed his Memorandum of Appeal dated 20th August 2024 wherein he raised the following grounds of appeal:

    i. That the trial magistrate erred in law and fact by apportioning 100% liability to the Appellant in favor of the Respondent.

ii. That the trial magistrate erred in law and fact in awarding loss of dependency of Ksh 1,000 000/=, an award which was excessive in the circumstances.

iii. That the trial magistrate erred in law and fact in awarding special damages of Ksh 223,770/= yet the same was not fully proven by the Respondent.

iv. That the trial magistrate erred in law and fact in failing to pay regard to the authorities in the defendant's submissions that were guiding as regards the amount of quantum that is appropriate and applicable in similar cases as the case that he was deciding.

v. That the trial magistrate's exercise of discretion in assessment of quantum was injudicious.

vi. That the trial magistrate erred in law and fact in failing to consider the Appellant's submissions on quantum by completely disregarding the submissions and authorities of the Appellant and as a result arrived at an unjustified decision on quantum.

The Appellant therefore prayed that the appeal be allowed, this court do re-assess the evidence on record on liability and quantum and arrive at its own decision. That the Appellant be awarded costs of the appeal.

3. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000.(Okubasi, Githinji & Waki JJA).

4. No. 83157 Pc Michael Kasafiri (PW1) testified on behalf of Pc Barnabas Too. He stated that he is from Ugunja police station traffic base performing traffic duties. He testified on OB No. 15/15/09/2020 relating to a fatal injury traffic accident involving a driver by the name Kenneth David Omondi Nyangweso who was then driving a motor vehicle registration number KCW 552P make Toyota Probox. That the driver was driving from Busia to Kisumu direction when he hit a juvenile one John Hillary. That the accident was investigated and an abstract issued to the family of the minor. He produced the police abstract as P exhibit 1.

In cross examination, he stated that the minor was 9-year-old and that the driver was charged and convicted with an offence of causing death by dangerous driving.

5. Joseph Otieno Ochanda (PW2) adopted his witness statement dated 6/7/2020 as his evidence in chief. He testified that John Hillary Otieno was his child who died on 16/09/2020 following a road traffic accident which he witnessed as he was about 50 metres away. That the child died later at Siaya Referral Hospital while being placed under life support machines. That the child did not die immediately. He produced the documents in his list of documents dated 6/7/2021 as exhibits. He stated further that the deceased was a grade one pupil at Got Nanga Primary school and that he had hoped that he would grow to help him later in life but died prematurely.

On cross-examination, he stated inter alia; that the child died before he could obtain a birth certificate; that the child was aged nine years old; that the child was bright in class and was also helping out at home such as running errands; that he spent money during the funeral and that the villagers contributed.

6. Caroline Adhiambo Omondi (PW3) a business woman at Got Nanga testified to have witnessed a vehicle which was travelling from Busia towards Kisumu knock down a child on 16/9/2020. She adopted her witness statement dated 6/7/2021 as her evidence in chief.

   On cross examination, she stated inter alia; that on that day she was selling vegetables and that the accident occurred at around 5.45 PM and that she was close by; that the child was injured on the chest and head; that there were two children, the deceased and another who was not knocked; That she carried the child to the hospital and later reported to the police.

7. Richard Odhiambo Omondi (PW4) a businessman testified that he runs a shop at Got Nanga shopping Centre. He stated that he knows the Respondent herein as he had sold him goods when he (Respondent) was bereaved. That on 24/9/2020 he sold him goods totaling to Ksh 21 770/= and that he produced the receipt for the goods as exhibit 9(b).

   On cross examination, he stated that his shop is called Odhiambo shop and that the receipt bore the customer's name and that the goods were paid in cash. That he did not come with the receipts record book or the ETR register.

8. Stephen Otieno Obala (PW5) testified that he offers catering services as Coco-Beach outside Catering. That he offered catering services to Joseph Otieno Ochanda on 21/9/2020 at the funeral of his son and that was paid Ksh 50,000/= as per the receipt issued as exhibit 9(c). On cross-examination, he stated inter alia; that he has a certificate of ownership of the business; that he did not come with the receipt book; that he did not pay tax from the funeral proceedings.

9. That marked the close of the Respondent's case.

10. The matter was then fixed for defense hearing but that the Appellant failed to appear for the hearing on two consecutive dates. The court likewise noted that despite the counsel for the Appellant claiming indisposition of the Appellant, the court noted the issue of the indisposition, it was not able to understand why there was no virtual appearance by the concerned party. Further, the court noted that the defense witness statement had likewise bot been filed. The court thus directed that the defense case proceeds after the call over failing which the defense case would stand closed. The defense counsel thus went ahead and closed the defense case.

11. The appeal was canvassed by way of written submissions. Both parties have complied.

12. The Appellant submitted that the trial magistrate erred in holding the Appellant 100% liable for the accident. He further submitted that the award for the general damages was excessive. On loss of dependency, he suggested an award of ksh 800, 000/=. On special damages, he opined that only ksh 93, 000/= was proved. The Appellant thus prayed that the appeal be allowed with costs.

13. The Respondent on his part submitted that firstly, the advocates who filed the submissions for the Appellant are not properly on record. The appeal was filed by Kimondo Gachoka & Co. Advocates. They later entered into a consent with the firm of M/S Kairu McCourt Advocates to come on record in their place but they never filed a notice of change of advocates pursuant to Order 9 Rule 9 of the Civil Procedure Rules. As it is now, the submissions on record are neither filed by Kimondo Gachoka nor Kairu McCourt, but by a total stranger named KRK Advocates LLP which firm has never filed a notice of change of advocates nor notice of appointment. Based on the foregoing, the Respondent submitted that the appeal ought to be dismissed.

14. On liability, the Respondent submitted that the trial magistrate was spot on. The Respondent submitted that PW3 adopted statement found at page 10 of the record of appeal stated that she was walking along Busia-Kisumu road on the left hand side facing Kisumu general direction. That deceased

minor was also walking on the same side of the road but walking towards Busia general direction. PW3 stated that motor vehicle registration number KCW 552P driven from Busia general direction towards Kisumu and had just passed her, tried to overtake a lorry but encountered a matatu. That the driver swerved back to his left lane but because he was on high speed, he lost control of the vehicle and hit the deceased who was off the road. The Respondent submitted that contrary to what the Appellant stated in his submissions, the deceased never tried to cross the road.

15. It was the Respondent's submissions that the deceased was aged 9 years, thus a child of tender years who did not have the requisite road sense. He placed reliance on the case of Machakos HCCA No. 17 of 2019 Patrick Muli vs EM (a minor) where the court held that in accidents involving children of tender years, the law places strict liability on drivers and shifts burden of proof on the drivers to show that the child was of such age as to be responsible for his own safety. It is noted that the Appellant has taken great exception at the trial court's apportionment of liability at 100% and thus has urged this court to interfere with it and have the deceased be blamed or at least be held to have contributed to the accident. In the case of Rahima Tayab & Others Vs Anna Mary Kinanu Kisumu Civil Appeal No. 29 of 1982[1983] KLR 114 the Court of Appeal held as follows:

> ''The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, in so far as a young person is concerned, only upon clear proof that at the time of the doing of the act or making omission he had the capacity to know that he ought not to do the act or make the omission... The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy."

Again in the 349 of Bashir Ahmed Butt Vs Uwais Ahmed Khan [1981] 1 KLR a similar finding was made by the court. It is noted that the Appellant's driver at the time was driving at high speed and overtaking other vehicles only to be forced by an oncoming vehicle to return to his lane but did not manage to control his car and which veered off the road and hit the young minor. Further, the driver was expected to have a proper look out and was expected to have seen the deceased before crashing him. There is no evidence that the Appellant's drive made an evasive action to avoid hitting the deceased. I am satisfied that the Appellant driver was wholly to blame for the accident. The law when it comes to accidents involving children of tender years appears to me to place strict liability on the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precaution for his/her own safety. Indeed, the Appellant was given the opportunity to present his evidence but he did not do so and therefore the evidence of the Respondent remained unchallenged. Hence, the finding on liability by the learned trial magistrate was quite sound and must be upheld.

16. Regarding loss of dependency, it was the Respondent's submission that the award of Ksh 1000 000/= was appropriate based on recent similar decisions. He relied on several decisions including Bungoma HCCA No. E032 OF 2021 West Kenya Company Limited vs PWM where this court upheld an award of ksh 1, 100 000/= made in favor of a 9-year-old child.

17. On the head of special damages, it was submitted that the Respondent pleaded ksh 224 120/=. That the Appellant conceded the sum of ksh 50,000/= for catering services, ksh 8780 for mortuary fees and

ksh 35, 000/= for legal fees. What was in issue was thus the balance of ksh 129,990/=. The Respondent submitted that the law provides for an award of funeral expenses that are reasonable. He urged the court to have the Kenyan context in mind under this head and hold that the same was reasonable.

18. In conclusion, the Respondent submitted that the appeal should be dismissed with costs to the Respondent.

19. I have considered the record of appeal, rival submissions and all the relevant authorities relied on by the parties. I find the issue for determination is whether the Respondent's case was proved on a balance of probabilities.

20. I need to first dispose the Respondent's complaint that the Appellant's new advocates are not properly on record. Indeed, the firm of Kimondo Gachoka & Co Advocates had been on record for the Appellant in the lower court before the matter was taken over by the firm of Kairu Mcourt Advocates. Under the provisions of Order 9 Rule 9 of the Civil Procedure Rules, it is mandatory for an incoming advocate to ensure that they seek leave of court or secure a consent from the outgoing advocate for a party in a matter wherein judgement had been entered. Indeed, the Respondent's counsel herein has confirmed that the new firm of advocates for the Appellant have since obtained a consent from the former advocates to act for the Appellant herein. That being the position, I find that the Appellant's new advocates are properly on record and hence the Respondent's objection lacks basis and must be rejected.

21. By and large, the Appellant's contention is on both liability and quantum of damages.

22. Delving on the issue of liability, PW3's adopted statement found at page 10 of the record of appeal indicated that she was walking along Busia-Kisumu road on the left-hand side facing Kisumu general direction. The deceased minor was also walking on the same side of the road but walking towards Busia general direction. PW3 stated that motor vehicle registration number KCW 552P driven from Busia general direction towards Kisumu and had just passed her, tried to overtake a lorry but encountered a matatu. That the driver swerved back to his left but because he was on high speed, he lost control of the vehicle and hit the deceased who was off the road.

23. It is not in issue that an accident occurred involving motor vehicle reg. No. KCW 552 P and the deceased minor. It is likewise not in issue that the child was aged nine years old. The question therefore is whether a child of nine years being tender years has the requisite road sense. In the case of Machakos HCCA No. 17 of 2019 Patrick Muli vs EM (a minor) (Supra), the court was of the view that such a child did not have the requisite road sense and thus it behooved upon the driver to adduce evidence to prove that the child was indeed knowledgeable of the dangers of walking on the verge of the road. Indeed, all drivers are expected to observe the Highway Code of traffic one of which is to have a proper lookout and ensure that the road ahead is clear before they can overtake other vehicles. In the present circumstances, it is clear that the Appellant's driver was driving at high speed and that on being confronted by an oncoming matatu, he was forced to move to his left lane but could not control the vehicle which left the left lane of the road and hit the minor who was a pedestrian lawfully walking off the road. I find that the minor could not be blamed for the accident in any way since he had believed that vehicles would stick to the tarmac road. Had the Appellant's driver been on moderate speed, the accident would not have happened. I find the Appellant wholly responsible for the accident. The finding on liability at 100% against the Appellant by the learned trial magistrate was quite sound. Besides, it is noted that the Appellant failed to tender evidence in rebuttal and thus the Respondent's evidence was thus uncontroverted. It is noted that the Appellant has taken great exception at the trial court's apportionment of liability at 100% and thus has urged this court to interfere with it and have the deceased be blamed or at least be held to have contributed to the accident. In the case of Rahima

Tayab & Others Vs Anna Mary Kinanu Kisumu Civil Appeal No. 29 of 1982[1983] KLR 114 the Court of Appeal held as follows:

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Again, in the case of Bashir Ahmed Butt Vs Uwais Ahmed Khan [1981] 1 KLR 349 a similar finding was made by the court. It is noted that the Appellant's driver at the time was driving at high speed and overtaking other vehicles only to be forced by an oncoming vehicle to return to his lane but did not manage to control his car and which veered off the road and hit the young minor. Further, the driver was expected to have a proper look out and was expected to have seen the deceased before crashing him. There is no evidence that the Appellant's drive made an evasive action to avoid hitting the deceased. I am satisfied that the Appellant driver was wholly to blame for the accident. The law when it comes to accidents involving children of tender years appears to me to place strict liability on the drivers and shifts the burden onto the drivers to show that the child is of such an age as to be expected to take precaution for his/her own safety. Indeed, the Appellant was given the opportunity to present his evidence but he did not do so and therefore the evidence of the Respondent remained unchallenged. Hence, the finding on liability by the learned trial magistrate was quite sound and must be upheld.

24. As regards the quantum, it is noted that the Appellant has challenged the awards made by the trial magistrate. This being an appeal challenging the trial magistrate's decision on quantum of damages only, it is important to set out the principles that guide an appellate court in deciding whether or not to interfere with the damages awarded by the trial court. in the celebrated case of Kemfro Africa Limited t/a Meru Express Service (1976) & Another v Lubia & Another (No.2) [1985] eKLR, the Court of Appeal expressed itself 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 to be that; it must be satisfied that either that 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.."
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> In Mariga v Musila [1984] KLR 251 the same court also stated as follows:
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> > "The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

> The question is not what the appellate court would award but whether the lower court judge acted on the wrong principles...".

It is the law in Kenya that general damages must be compensatory. When one looks at the impugned judgement, it must be fair in the sense of what the claimant suffered. In my view whether at the trial court or appeal claimant should not aspire to a perfect compensation. They should take what has reasonably been found by the court as a fair compensation since the said award cannot by any chance replace a damaged part of a human body but that the same suffices as the tortfeasor's earnest response (sorry for the accident).

25. Guided by the above principles, I now proceed to determine whether the learned trial magistrate erred in the assessment of damages under the loss of dependency awarded to the Respondent in view of the evidence on record. I will start with the damages awarded under the *law Reform Act*. it is important to point out at this juncture that general damages under the *Law Reform Act* are awarded for the benefit of the deceased's estate in two categories only namely for pain and suffering and secondly for loss of expectation of life.

On the issue of loss of dependency, the trial court awarded the sum of Ksh 1, 000,000/=. Guided by this court's previous decision in Bungoma HCCA No. E032 OF 2021 West Kenya Company Limited vs PWM as relied upon by the Respondent, i do not find the award to be excessively high or low to warrant an interference over the same. The award of ksh 1000 000/= for loss of dependency by the trial court is hereby upheld.

26. As regards damages for pain and suffering, it is noted that the trial court awarded the sum of Kshs 50, 000/. It is noted that the deceased was rushed to hospital where he was put on life support machine but later succumbed to his injuries. It is thus clear that the deceased did not die on the spot and that he must have experienced extreme pain before he passed away. I find the aforesaid sum to be reasonable in the circumstances and thus the award must be upheld. Again, the award of loss of expectation of life in the sum of Kshs 100, 000/ is reasonable and is a conventional sum awarded by several courts across the country. I uphold the same.

27. As regards the award of special damages, it is trite that the same should be specifically pleaded and proved. The Respondent pleaded ksh 224, 120/= under this head. It is noted that the Appellant has no issue with ksh 50,000/= catering services, ksh 35,000/= legal fees and ksh 8780/= for mortuary fee. What is in contention is the balance of ksh 129,990/= being the expenses incurred during the funeral.

28. Section 6 of the *Fatal Accidents Act* allows the court to award funeral expenses where they are reasonable. It is noted that the Respondent has provided receipts for goods purchased including a receipt for ksh 35,800/= from the County Government for the purchase of a cow at the Siaya market. The Contention by the Appellant was that the receipts for the consumables from shops and supermarkets did not contain the name of the Respondent but that a list of items and the amounts paid for the same was availed. I am in agreement with the Respondent that in the Kenyan context of a funeral, relatives and friends usually lend a hand in carrying out the purchases on behalf of the family. It is thus impracticable to have all the receipts bear the name of one person such as the Respondent herein. It must be noted that funerals conducted by several communities in Kenya entails a lot of expenses as the mourners sort of celebrate the deceased and that it is a way of sendoff. On the issue of funeral expenses, I place reliance on the case of Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR where the Court of Appeal stated as follows:

> " .... The plaintiff did not avail any documentary evidence to show the sum of Kshs. 400,000/= was expended. Nevertheless, I think that this court is entitled to conclude that considerable

> amounts of money is usually used during the burial of a deceased person. Parties cannot be expected to disregard that issue which has assumed public knowledge and notoriety. I think to expect the relatives to keep the receipts of every expenditure incurred, is to underestimate the pain and loss of a loved one. Where a party cannot show the amount of expenses incurred the court would weigh the scales of justice in order to address the pertinent issues involved in the matter. From the evidence available, the deceased was a fairly rich businessman and I think the relatives used considerable amount of money to give him a good and decent send off. Such expenses needless to mention includes attending to the needs of mourners and other incidental expenses. I therefore award a sum of Kshs. 150,00/= as funeral expenses, as a prudent and reasonable amount to have been used as funeral expenditure ..."

29. In my view, the amount pleaded by the Respondent was reasonable in the circumstances and that i find the amount awarded by the trial court was backed by the receipts. The said award must be upheld.

30. In conclusion, I find that the trial court correctly addressed its mind on the issues and the law in this matter. The trial court's discretion was likewise exercised judiciously and does not warrant interference by this court.

31. In view of the foregoing observations, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs to the Respondent.

    Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 31ST DAY OF OCTOBER 2025.

D. KEMEI

JUDGE

In the presence of:

M/s Turgut for M/s Ongonga....for Appellant

Omondi.....for Respondent

Maureen.....Court Assistant