

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL APPEAL NO E135 OF 2023**

REUBEN CHESUMEI-----APPELLANT

VERSUS

ESITA BUWKU (suing as the legal representative of the Estate of SIMON  
INDIMULI NANDWA-----  
RESPONDENT

*(Being an appeal from the judgment /decree of the Honourable MARCELLA ONYANGO (SRM) delivered on 10/08/2023 in MUMIAS CMCC No. 66 of 2021)*

**JUDGMENT**

**Background**

1. The Respondent who was the plaintiff at the lower court filed a claim as the legal representative of Simon Indimuli Nandwa claiming that on or about the 8<sup>th</sup> December,2020 the deceased was a pedestrian walking along the Mumias-Kakamega road at Makunga Area when the defendant who was the registered owner of the motor vehicle KCV 165C Toyota Hiace driving at an excessive speed caused the motor vehicle to lose control veered off the road knocking the deceased occasioning him fatal injuries.
2. The deceased was 64 years old and a farmer at the time of his death, earning an average of Kshs. 10,000/= per month and died living behind a widow and 8 children.
3. The defendant/appellant denied the claim, putting the plaintiff to strict proof.

4. The plaintiff/ respondent called three witnesses while the defence had two witnesses. The trial magistrate, upon analysing the evidence, found the defendant 100% liable on the issue of quantum. The trial court awarded as follows: pain and suffering, Kshs. 50,000/= Loss of expectation of life, Kshs. 100,000/=, loss of dependency. 500,000/= and special damages Kshs. 20,000/= awarding the plaintiff a total amount of Kshs. 670,000/=
5. The appellant, being dissatisfied with the judgment on liability and quantum awarded by Honourable Marcella Onyango (SRM), appealed against both liability and quantum based on the following grounds;
  - a) *THAT the Learned Trial Magistrate erred in fact and in law in failing to dismiss the suit and by apportioning 100% liability to the Appellant (Defendant) without considering the circumstances of the case.*
  - b) *THAT the Learned Trial Magistrate erred in law and in fact in finding in favour of the Respondent (Plaintiff) against the Appellant (defendant) when there was no credible evidence or proof of negligence on the part of the Appellant.*
  - c) *THAT the Learned Trial Magistrate erred in fact and in law in failing to consider the Appellant's submissions and authorities of the Appellant and as a result arrived at an unjustified decision on both liability and quantum.*
  - d) *THAT the Learned Trial Magistrate erred in law and fact in awarding under loss of dependency when the Respondent*

*failed to produce a letter from the chief or a marriage certificate to support the said award.*

### **BRIEF OF THE EVIDENCE**

6. Pw1, Esita Buwuru Indimuli, the deceased wife, relied on her written statement and produced the following documents in support of her case: grants of letters of administration PEX 1, certificate of death PEX 2, post-mortem report MFIPEX3, police abstract MFIPEX4, demand letter dated 27/1/2020- PEX5; receipt for Kshs 20,000/= for succession - PEX6(a); and receipt for Kshs—10,000/= for post-mortem.
7. During cross-examination, she testified that she was the deceased's wife and they had 8 children, the first born in 1990. She testified that 5 of her children —the firstborn, Rose, William, Edwin, Janet, and Mary Beatrice — are all married, while Brian was in the university and she lived alone at home.
8. She testified that she is a farmer and her children take care of her since her husband, who was 64 years , was also a farmer earning Kshs. 10,000/= from selling the vegetables they cultivated has passed away.
9. PW2 was Ebrahim Bulima Okanga. he testified that he recorded his statement on 16/6/2021 and relied on it as his evidence in chief.
10. During cross-examination, he testified that he witnessed the accident, which was along the Mumias-Kakamega road at 8.45 pm. He testified that the deceased was his neighbour and on the material day, he was walking behind the deceased when the motor

vehicle, which was coming from Mumias on the right side of the road knocked the deceased. He fell on the side of the road, he was injured on the chest and head.

11. He testified that the accident happened at night. He used the light from his phone at the scene. He testified that the vehicle that knocked him slowed down but then he drove off. He went to the police station and reported and later called his family members.
12. On re-examination, he stated that he saw the deceased being knocked down from afar .
13. The deceased was walking on the pedestrian walk but not crossing the road when he was knocked over.
14. PW3 was Pc Martin Wambalo, of Mumias police station, the traffic department. He produced the police abstract dated 22/1/2021 as MFIPE x 4, showing that a fatal accident had occurred on 8/12/2020 at Ikoli area along Mumias-Kakamega road involving motor vehicle KCV 165C and the deceased(simon indimuli Nandwa) between 8-10 pm. The vehicle owner was Reuben Chesonei.
15. At cross-examination, he testified that he was not the investigating officer, Moses Ewoyi; was but he was transferred to Busia. He said OB No. 47/8/12/2020, did not indicate the circumstances of the accident. The matter was still under investigation .
16. The post-mortem report marked MFIPEX 3 was produced by consent .

17. DW1 was Ramadhan Mudondo Juma, the driver produced a copy of his ID marked Dexh 1, and a copy of the driving license marked Dexh 2 and relied on his statement as evidence in chief. He testified that the accident occurred on 8/12/2020 at about 10 pm at night. He stated that he was from Mumias headed to Kakamega and on reaching a corner someone came from the left side, crossing over to the right side of the road, he was hit by the motor vehicle.
18. He made a report at the police station and later took the motor vehicle for inspection. He produced a copy of the inspection as DEx-3.
19. On cross-examination, he testified that the accident happened at Shianda as he passed the river along the Ikoli area. He stated that he was on the left side and the person was crossing to the right side. He swerved to the right side and drove off afterwards, for he feared for his life.
20. He testified that all the passengers alighted, and one person was able to identify the deceased, who had died on the spot. He reported the accident at Kakamega police station and not Makunga, where the accident had happened.
21. He claimed that he was driving at 75 Km/h and the impact was great, and only his side mirror was damaged.
22. On re-examination, he testified that he tried to swerve to the right and reported the incident to Kakamega, then later came over to Mumias. He stated that the motor vehicle did not have to be on a high speed to kill and that the vehicle had a speed governor.

23. Dw1 was Pc Moses Ewoi, who testified that on 8/12/2020, a fatal accident occurred along Ikoli along the Mumias Kakamega road at 8 p.m. involving the motor vehicle registration KCV 165C Toyota Hiace. He testified that the deceased was walking along the right side as you face Kakamega, and the motor vehicle was headed in the same direction. He claimed that the pedestrian was likely drunk. He produced the police abstract as DEX3 ISSUED ON 22/1/2021.
24. During cross-examination, he stated that he received news of the accident and rushed to the scene and found the deceased at the scene who was left on the side of the road. He testified according to the inspection report, the bonnet and the driving mirror were damaged, as were the front lights. He testified that the motor vehicle was damaged on the right side, and the deceased was knocked when he was coming from the right side.
25. On re-examination, he testified that the motor vehicle was on the left side facing Kakamega, and the deceased was on the left side facing Kakamega and he noticed that the vehicle was damaged on the front side, that is, on the bonnet light and driving mirror.
26. The defence closed its case.
27. The trial court, upon analysing the witness evidence and the exhibits produced, found that the driver of the defendant was 100% liable for the accident and awarded the plaintiff both general and special damages amounting to Kshs. 670,000/= plus costs of the suit, which has now prompted the appeal by the appellant.
28. The appeal was canvassed by way of written submissions.

Appellant's submission.

29. In his submission dated 26<sup>th</sup> March 2025, the appellant raised four grounds of appeal and gave a brief background of the case. He had five issues for determination.
30. On the first issue of whether the trial court erred in finding that the defendant was 100% liable for the accident. He submitted that PW1 never saw or witnessed the accident while PW2 who allegedly saw the accident happen, confirmed that it occurred around 8.45 pm and that it was rainy night.
31. He questioned the evidence of PW2 who said the deceased was walking 100 meters away from him, how he was able to witness the incident using his " *mulika mwizi*" torch, and yet there was a hindrance to visibility.
32. He questioned the credibility of PW2 for he not able to capture the registration plate of the vehicle .
33. He further questioned the evidence of Pw3, who was not the investigating officer he just produced the police abstract report he never produced the occurrence book he further said that the matter was still under investigation.
34. He maintained that he was in the process of negotiating a corner when the deceased suddenly crossed from the left to the right when he tried to swerve but hit the deceased. He was not charged for causing the accident. The deceased was drunk and upon investigations, it was confirmed that the damage was on the right-side.

35. He submitted that the plaintiff failed to prove her case on a balance of probability as required by sections 107 and 112 of the Evidence Act. No negligence was proved on the part of the driver. He referred the court to the case of **Securicor Security Service Kenya vs. MFK & another (2016) Eklr.** No evidence was produced to rebut his evidence on what happened on the road. The deceased was wholly to blame for the accident .

36. On the issue of whether the trial magistrate erred in disregarding the testimony of DW1 and Dw2 and relying wholly on the evidence by the plaintiff,hefaulted the trial magistrate who opined that just because the accident occurred between the motor vehicle and the pedestrian, the driver was to blame automatically and pray that the argument and finding be set aside as there was no evidence to proof the appellant's negligence to the required standards as Pw3 only produced the police abstract without the police file, occurrence book or any other document to prove appellant's negligence.

37. On the claim of awarding damages,he faulted the trial magistrate's finding that Pw1 was the deceased wife in the absence of a marriage certificate or a chief's letter to prove the alleged marriage and that the deceased had 6 children. He referred the court to the case of **Rahab Wanjiru Nderitu vs. Daniel Muteti** where the court failed to award under the fatal Accident Act as the plaintiff did not produce any chief letter or birth certificate. He urged the court to dismiss the claim under the Law Reform Act and Fatal

Accident Act for failure to prove the claim under the required standard.

38. He faulted the trial magistrate for finding that the deceased used to earn Kshs. 10,000 from his farming yet there was no proof .

39.

### **RESPONDENT'S SUBMISSION**

40. In her submission dated 21<sup>st</sup> May 2025, the respondent upon analysing the trial court evidence and the allegations made by the appellant avered that she had proved that the deceased was on the left side of the road facing Kakamega and was hit while on the side and by no means contribute to the accident Dw1 and Dw2 gave contradicting evidence by claiming that the deceased was crossing from left to right.

41. That from the impact caused on the deceased it showed the vehicle was being driven at a high speed.

42. On the issue of dependency, she submitted that the plaintiff swore under oath that she was the deceased wife which was confirmed by PW2 and pleaded to the court to take judicial notice that before the letters of administration was granted to the petitioner, a chief letter was mandatory on the proof of income. The trial court resorted to a lump sum award as opposed to the multiplier formula.

43. She prayed that the appeal be dismissed with costs to her (the respondent.)

### **Analysis and determination**

44. I have considered the record of appeal, rival submissions by both parties, and the authorities cited, and find the following issues for determination;

*a) Whether the learned trial magistrate erred in holding the appellant 100% liable for the accident;*

*b) Whether the trial court properly assessed damages, especially with the absence of documentation; and*

*c) Whether the appeal has merit*

45. The duty of the first appellate court is well settled. as a first appellate court, this court is tasked with the solemn duty to re-evaluate the evidence adduced before the trial court, both oral and documentary, and to arrive at its own independent conclusions on the facts and the law, mindful always of the principles laid down in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the Court of Appeal for East Africa emphasized that an appellate court must not lightly disturb findings of fact unless they are shown to be based on no evidence at all or to be so perverse as to defy logic.

46. For the record, I note that Pw1, who was the deceased wife was not an eye witness but her evidence was based on hearsay and the court majorly focused on the evidence of PW2, who was the sole eyewitness to the accident.

47. It is not contested that the accident did happen, it was Pw2 evidence that he was about 100 meters away from the deceased since he was walking behind him. He testified that the deceased

was walking off the main carriageway, on the pedestrian side of the Mumias-Kakamega road, when the appellant's motor vehicle, travelling at high speed, veered and hit him. His account was not materially shaken in cross-examination by the appellant's counsel.

48. The appellant's driver (DW1) admitted that he did hit the deceased but blamed him for allegedly crossing suddenly at a corner from left going to the right side of the road and in the process, he tried to swerve. He, however, conceded that he was driving at about 75 km/h, that visibility was poor, and that he swerved to the right but still hit the deceased. Notably, he drove off after the accident and reported the matter the next day at Kakamega police station instead of the nearby Makunga station.

49. The testimony of DW2, the police officer, did not offer an independent reconstruction of events but merely echoed speculative conclusions. He stated that the pedestrian was on the right side as you face Kakamega and the vehicle headed the same direction which contradicted DW1 evidence which stated that the deceased was on the left side. He further admitted that investigations were incomplete and that the police abstract did not attribute blame.

50. Upon reviewing both the parties' evidence, the trial magistrate concluded that the accident occurred off the road, and therefore, the driver failed to maintain proper control of the vehicle. This conclusion was supported by the physical damage to the right front

side of the vehicle, including the bonnet and the side mirror as was stated in the motor vehicle inspection report which is consistent with PW2's account.

51. The principle that a driver owes a duty of care not only to passengers but also to other road users, including pedestrians, is trite. A prudent driver must anticipate the presence of pedestrians and exercise reasonable care as was held in the case **of Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**, where the Court of Appeal held that a driver must drive at such speed and keep such a lookout as would enable him to avoid colliding with other road users.

52. *In* **Statpack Industries Ltd v James Mbithi Munyao [2005] eKLR**, the Court of Appeal reaffirmed that negligence is established where a person fails to take reasonable care in the circumstances to avoid acts likely to cause injury to others.

53. The driver herein admitted to seeing the deceased only when it was too late to avoid the collision. This confirms lack of proper lookout and control. As held in **Kenya Bus Services Ltd v Dina Kawira Humphrey [2003] eKLR**, failure to keep a proper lookout is evidence of negligence.

**54.** The appellant argued that the deceased may have been drunk or crossed suddenly as was stated by Dw2, the police officer. There was no submission of any toxicology report or corroborative

evidence was produced to substantiate intoxication. The claim was a mere assertion. As the Court of Appeal observed in **Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2 KAR 258**, *“there is as yet no liability without fault in Kenya, and a party must prove negligence on a balance of probabilities.”*

55. In **Dorcias Njeri & Another v Benson Mwangi [2014] eKLR**, the Court held that a driver who veers off the road and knocks a pedestrian bears full liability unless contributory negligence is proved by cogent evidence.

56. The appellant’s driver claim that he “suddenly swerved” to avoid hitting the deceased is not enough; there must be real, believable evidence, not just assertions. In **Letim v Nakuru General Transport Co. Ltd [1964] EA 484**, the court rejected a similar excuse where skid marks and the crash point clearly showed the defendant had crossed the center line. The court stated that if one driver crosses the line without explanation, negligence is obvious unless it is proved the other driver had time and chance to avoid the crash but failed to do so. Here, the appellant’s witness (DW1) did not bring the mechanic to testify in person, so DEXH 1 became hearsay and could not be used under Section 65 of the Evidence Act.

57. The learned trial magistrate correctly held that the appellant, through his driver, failed to discharge this burden. The totality of evidence demonstrated that the deceased was lawfully using the pedestrian path when he was fatally hit by Dw1. The contention that

he suddenly crossed the road as was stated by the appellant's driver was inconsistent with the physical evidence which was the motor vehicle inspection report and with DW1's own admission that he saw the deceased ahead and had time to swerve.

58. I find no misdirection by the trial court in its evaluation of evidence. The finding of 100% liability against the appellant was supported by the record and by settled legal principles.

59. The second issue raised by the appellant was on awarding of damages especially awarding on loss of dependency where the appellant failed to provide a marriage certificate.

60. The appellant faulted the learned magistrate for finding that the respondent had proved dependency in the absence of a marriage certificate or chief's letter confirming the relationship between the deceased and the dependents.

61. It is trite law that dependency is a question of fact, to be proved by evidence direct or circumstantial and not necessarily by documentary proof. The Court of Appeal in **Albert Odawa v Gichimu Gichenji [2007] eKLR** held that:

***"The extent of dependency is a question of fact. Proof of marriage or parentage is not strictly dependent on production of a certificate or formal documentation; oral evidence, if credible, may suffice."***

62. Similarly, in **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR**, the Court of Appeal emphatically stated that the absence of documentary evidence, such as certificates or

payslips, does not negate a party's claim if the oral evidence is consistent, credible, and unchallenged. The court observed:

***“We do not subscribe to the view that only documentary evidence can prove income or dependency. If that were so, many Kenyans who operate in the informal sector would be locked out of justice.”***

63. In the present case, PW1 testified under oath that she was the widow of the deceased and had lived with him for many years. Her testimony was not challenged by the defence during cross-examination. She also testified that they had eight children, some of whom were adults and one was still in the university and a dependent. Further, the grant of letters of administration (PEX1) could not have been issued without a chief's letter, as is the usual procedural requirement under Rule 7(2)(e) of the Probate and Administration Rules.

64. The trial court correctly took judicial notice of this procedural safeguard and accepted that the relationship between the respondent and the deceased had been sufficiently proved. In **John Wamae & 2 Others v Jane Kituku Nziva & Another [2017] eKLR**, the court reaffirmed that once a grant of letters of administration has been issued, it is sufficient proof of legal capacity to sue as a personal representative, and by implication, recognition of dependency.

65. The learned magistrate therefore cannot be faulted for finding that the respondent was indeed a dependant within the meaning of

Section 4 of the Fatal Accidents Act. The decision accords with the approach taken in **Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwangi) v Kiarie Shoe Stores Ltd [2015] eKLR**, where the Court of Appeal held that dependency may be inferred from the circumstances and the conduct of the parties, even in the absence of formal documentation.

66. Consequently, the award for loss of dependency was justified. The trial court adopted a global sum of Kshs. 500,000/=, which was reasonable given that the deceased was a subsistence farmer aged 64 years.

67. . In **Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR**, the Court of Appeal approved a global award approach where income cannot be precisely proven. The figure herein was modest and within comparable precedents.

68. The awards for pain and suffering and loss of expectation of life were also reasonable and consistent with authorities such as **Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457**, and **Hyder Nthenya Musili & Another v China Wu Yi Ltd & Another [2017] eKLR**, where courts have awarded between Kshs. 30,000 and 100,000 for similar claims.

69. The special damages were specifically pleaded and proved by receipts.

70. I therefore find no basis for disturbing the trial court's findings on quantum.

71. Having re-evaluated the evidence on record, and guided by the authorities cited above, I find that the learned trial magistrate properly analyzed the facts and applied the correct legal principles. The finding that the appellant's driver was wholly negligent was supported by credible evidence. The award of damages was fair and consistent with precedent.
72. Accordingly, I find no merit in this appeal. It is hereby dismissed in its entirety.
73. The judgment and decree of the Honourable Marcella Onyango (SRM) in Mumias CMCC No. 66 of 2021 are hereby upheld.
74. The respondent shall have the costs of the appeal and those of the lower court.
75. Right of Appeal 30 days.
76. File closed.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA  
THIS 6<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**S.MBUNGI**

**JUDGE**

**In the presence of:-**

**CA:** Angong'a

Parties absent and their advocates though aware of the Judgment date.

The Court Assistant to publish the Judgment in the CTS forthwith.

