



Njagi v Githua & Mugwika (Sued as the Legal Representatives of the Estate of Doreen Kinya Ithinyai) & another (Civil Appeal E062 & E063 of 2023 (Consolidated)) [2025] KEHC 16033 (KLR) (5 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E062 & E063 OF 2023 (CONSOLIDATED)
RM MWONGO, J
NOVEMBER 5, 2025**

BETWEEN

ROBERT KARIUKI NJAGI APPELLANT

AND

GENESIO NTHIGA GITHUA & GEOFFREY MITHINYAI MUGWIKI (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF DOREEN KINYA ITHINYAI) 1ST RESPONDENT

GENESIO NTHIGA GITHUA 2ND RESPONDENT

(Appeal from the Judgments of Hon. S.K. Ngii in Siakago CMCC Nos. E054 of 2021 and E007 of 2021 delivered on 19th October 2023)

JUDGMENT

The Appeal

1. In this consolidated appeal, the appellants filed two memoranda of appeal dated 03rd November 2023. In Embu HCCA E062 of 2023, the appellant seeks the following orders:
 - a. This Appeal be allowed with costs;
 - b. The Judgement delivered by Honourable Magistrate S.K. Ngii in Siakago in Civil Case No. E054 of 2021 delivered on 19th October, 2023 be set aside and the award made therein, be re-assessed; and
 - c. That the costs of this Appeal and that of the trial court be awarded to the Appellant.
2. That appeal is premised on the following grounds:



1. The learned trial magistrate erred in law and in fact in failing to appreciate the principle available for consideration in awarding apportionment of liability which led to an erroneous assessment of damages resulting in an award of damages so inordinately high as to represent an entirely erroneous estimate of the compensation to which the Respondent was entitled;
 2. The learned trial magistrate erred in law and in fact by computing an award for loss of dependency which was manifestly too high and excessive;
 3. The learned trial magistrate erred in law and in applying wrong principles while assessing general damages under the Law Reform and *Fatal Accidents Act* and the decision being exorbitantly high and excessive in the circumstances;
 4. The learned trial magistrate erred in law in failing to apply the provisions of the law in choosing the income of the deceased in failing to apply the minimum wage since there was no proof of the deceased earnings; and
 5. The learned trail magistrate erred in law and in fact by failing to evaluate the entire evidence on record and make a finding that Respondent was to blame for the accident as was brought out by the Appellant witness and thereby arrived on wrong findings on issues before the court.
3. In Embu HCCA E063 of 2023, the appellant seeks the following orders:
- a. This Appeal be allowed with costs;
 - b. The findings on liability be quashed and the Judgement delivered by Honourable Magistrate in Siakago in Civil Case No. E007 of 2021 delivered on 19th October, 2023 be set aside; and
 - c. The costs of this Appeal and that of the trial court be awarded to the Appellant.
4. The grounds of this appeal are that:
1. The learned magistrate erred in law and in fact in finding the Appellant liable and apportioning liability at 100% without any evidence to support his findings;
 2. The learned magistrate erred in law and in fact in failing to consider the evidence of the Appellant that it was the deceased who was to blame for the accident hence suffered fatal injuries;
 3. The learned magistrate erred in law and in fact in failing to consider the standard of proof in civil law which is on a balance of probabilities which lies with the party who alleges. The law on burden of proof under Sections 107, 108 and 109 of the *Evidence Act* Cap.80 Laws of Kenya places the burden of proof as to any particular fact on the person who wishes the court to believe in its existence, unless it is provided by the law that the proof shall be on a particular person. The court instead of dismissing the suit as the Plaintiff had failed to discharge the burden of proof, he proceeds to apportion liability at 100%;
 4. The Learned Magistrate erred in fact and in law by failing to follow rules of civil procedure law in apportioning liability; and
 5. The Judgment is against the weight of evidence.

The Plaints

5. Vide plaint dated 28th June 2021 in Siakago MCCC E054 of 2021, the 1st respondents sought judgment against the appellant for special damages and reasonable funeral expenses, general damages according



to the *Fatal Accidents Act* and *Law Reform Act*, costs of the suit and interest. They claimed that on 20th February 2020, the deceased was a pillion passenger on motor cycle registration number KMCX 614A ridden by the 2nd respondent when at Munathiri area along Embu-Kiritiri road, the appellant's driver, agent, assignee or employee drove motor vehicle registration number KCM 657J so negligently that it knocked down the motor cycle causing an accident. As a result, the deceased suffered injuries and she died on 08th March 2020 as a result of the injuries sustained.

6. In Siakago MCCC E007 of 2021, the 2nd respondent filed a plaint dated 16th February 2021 through which he sought judgment against the appellant for special damages as pleaded in the plaint, general damages, costs of the suit and interest. He stated that that on 20th February 2020, he was riding motor cycle registration number KMCX 614A when at Munathiri area along Embu-Kiritiri road, the appellant's driver, agent, assignee or employee drove motor vehicle registration number KCM 657J negligently and it knocked down the motor cycle causing him bodily injuries.
7. In both cases, the appellant was named as the owner of the motor vehicle registration number KCM 657J which was, at the time of the accident, being driven by his driver, employee, assignee or agent. Therefore, the respondents sought that the appellant be held vicariously liable for the accident.

Statements of Defense

8. In both Siakago MCCC E054 of 2021 and Siakago MCCC E007 of 2021, the appellant filed a statement of defense denying the averments made in the plaints. He attributed contributory negligence to the 2nd respondent as the rider of the named motor cycle. He denied being vicariously liable for the accident.

Summary of the Evidence

9. The case in Siakago MCCC E007 of 2021 was treated as the lead file in the series, and viva voce evidence was taken in it.
10. PW1 was the 2nd respondent who stated that he was riding motor cycle registration number KMCX 614A while carrying the deceased as a pillion passenger. On reaching Munathiri area, motor vehicle registration number KCM 657J overtook the motor vehicle that was behind him and when it returned to its lane, it knocked his motor cycle from behind. Following the accident, the deceased suffered fatal injuries while he suffered bodily injuries as follows:
 - i. Massive laceration right hand dorsal surface
 - ii. Laceration right ankle area lateral aspect
 - iii. Contusion right hip joint
11. He stated that he was treated at Kiritiri Hospital and a medical examination report was issued to him, which he produced as evidence. He said that he paid the doctor Kshs.5,000/= for the report and Kshs.6,000/= for court attendance. He conducted a motor vehicle search that cost him Kshs.550/=. He blamed the driver of motor vehicle registration number KCM 657J for the accident since he and the deceased were wearing helmets and reflector jackets at the time of the accident. He produced receipts, medical treatment records and reports, the police abstract and motor vehicle search records as evidence
12. Further, PW1 testified that the deceased who was his wife, sustained injuries on the hand and leg and she was also taken to Kiritiri Hospital where she died 2 weeks later while receiving treatment. He stated that the deceased was survived by himself and 3 children and that she worked as an accounts



- clerk at Mariari Girls Secondary School where she earned about Kshs.30,000/= monthly. He produced documentary evidence in support of the case of the deceased.
13. In cross-examination, she stated that the accident occurred when the driver of the motor vehicle was overtaking another vehicle that was driving behind his motor cycle. That at the time of the accident, both he and the deceased were wearing reflector jackets and helmets. That the deceased was in good health before the accident and that she was earning Kshs.30,000/= from her job. He had an employment letter to prove her employment.
 14. PW2 was Cpl. Maurice Mwakachola of Kiritiri Police Station who testified that the 2nd respondent reported the accident at the police station and the circumstances relating to it. He was a survivor while his wife suffered fatal injuries. He was issued with a police abstract. In cross-examination, he stated that he was not the investigating officer of the accident neither did he have the sketch maps. He said that nobody was charged with a traffic offence following the accident.
 15. DW1 was Cpl Dennis Ouko of Kiritiri Police Station who produced a police abstract for the accident which is authored by Cpl Kinyambu. He blamed the 2nd respondent for the accident.

Determinations of the Trial Court

16. In Siakago MCCC E007 of 2021, the trial court found the appellant 100% vicariously liable for the accident and awarded special damages of Kshs.5,550/= and general damages of Kshs.145,000/= to the 2nd respondent.
17. In Siakago MCCC E054 of 2021, the trial court relied on the evidence adduced and the finding on liability in Siakago MCCC E007 of 2021. It assessed General damages for pain and suffering at Kshs.100,000/=, loss of expectation of life at Kshs.150,000/=, loss of dependency at kshs.3,500,000/= as a global award and special damages of Kshs.20,000/=.

Parties' Submissions on the appeal

18. The appellant, in his submissions, challenged the findings of the trial court in Siakago MCCC E007 of 2021 on quantum. He argued that the award of general damages for pain and suffering should be reduced to Kshs.10,000/= in reliance on the case of Sukari Industries Limited v Clyde Machimbo Juma [2016] KEHC 8728 (KLR).
19. For loss of expectation of life, he argued that an award of Kshs.100,000/= would have been sufficient and he relied on the cases of Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased) [2020] KEHC 2146 (KLR) and Loice Wanjiku Kagunda v Julius Gachau Mwangi C A No. 142 of 2003 (UR). It was his argument that the trial Magistrate erred in applying the multiplier method to arrive at an award of Kshs.3,500,000/= for loss of dependency yet the deceased was 31 years old and without proof of earnings. He relied on the cases of Moses Muthuri v Mercy Nkirote (suing as the legal representative of the Estate of Luka Kirimi (Deceased) [2021] KEHC 7345 (KLR) and Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another [2020] KEHC 573 (KLR).
20. He stated that a global sum of Kshs.1,000,000/= would suffice under that head. He relied on the cases of Dorah Hellen Akinyi Aloo & another (Suing as the Legal Representatives of the Estate of Jack Opiyo Gitau-Deceased) v Simon Gakahu Murimi & 2 others [2020] KEHC 1919 (KLR), Gilbert Kimatare Nairi & another (suing as personal representatives of the Estate of Lemayian Richard Kimatare (Deceased) v Civiscope Limited [2021] KEHC 5828 (KLR) and John Macharia Mwangi v Josephat Muriungi Muguongo & another (Suing as the legal representatives of the estate of Christine



Nkirote Muriungi (Deceased) [2020] KEHC 5673 (KLR). The appellant also prayed for costs of the appeals.

21. The respondents submitted that the appellate court should not reconsider the trial court's findings on liability. That the findings of quantum are reasonable and they should not be displaced either. They relied on the cases of *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2)* [1985] KECA 137 (KLR) and *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] KECA 202 (KLR).

Issue for Determination

22. The key issue for determination is whether or not the trial court's findings on liability and quantum should be reviewed.

Analysis and Determination

23. While sitting as an appellate court, it is expected that this court shall re-evaluate all the evidence on record and make a finding while keeping in mind the finding of the trial court. In the case of *Coghlan v. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows:

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

24. Liability is a matter of fact; hence, this court must re-look the circumstances under which the accident in question occurred. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. Section 107 (1) of the *Evidence Act* provides that:

“ Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

25. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of *Evans Nyakwana v. Cleophas Bwana Ongaro* (2015) eKLR the evidential burden was discussed and the court stated that:

“ As a general proposition 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.”

26. PW1 was the rider of the motor cycle upon which the deceased was a pillion passenger. In his testimony, he stated that the appellants motor vehicle overtook another vehicle which was behind him and when it was time to return to its lane, the driver of the appellant’s vehicle knocked the motor cycle from behind, causing the accident. PW2 produced a police abstract that had been issued to the 2nd respondent and he stated that the appellant’s driver was liable. DW1 produced a police abstract and simply indicated that the 2nd respondent was to blame for the accident.
27. This was all the evidence available to the trial court. A decision was expected to be made on it as to whether or not the appellant was vicariously liable. The evidence was subjected to the standard of proof which is on a balance of probabilities. In order to attain this standard, a party simply needs to persuade the court that it is more likely that his side of the story is the more plausible narration of what transpired. In the case of *Miller v. Minister of Pensions (1947) 2 All ER 372*, while discussing the burden of proof the court had this to say:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
28. From the available evidence, it is most probable that the appellant’s driver caused the accident. This driver was not made a party to the suits but the owner was, and he did not deny such ownership, it is thus clear that vicarious liability should have been apportioned to the appellant at 100%, in the absence of the driver and it was. The appellant, in addition, did not deny that the driver was driving his motor vehicle on his instructions.
29. The appellant challenged the awarded quantum in both Siakago MCCC E054 of 2021 and Siakago MCCC E007 of 2021. In Siakago MCCC E007 of 2021, the court considered the medical report authored by Dr. Njiru which was produced as evidence. It detailed injuries suffered by the 2nd respondent as stated in the plaint. The 2nd respondent prayed for an award of Kshs.200,000/= as general damages.
30. The trial court was guided by the cases of *Livingstone v Rawyards Coal Co (1880) 5 App. Cas. 25*, *Nancy Aseko v Board of Governors Masai Girls High School [2011] eKLR* among others and found that an award of Kshs.145,000/= was reasonable. Special damages of Kshs.5,550/= were found and also awarded. This was based on a receipt of Kshs.5,000/= charged by Dr. Njiru and Kshs.550/= for the motor vehicle search. These findings are fair and need not be disturbed.
31. In Siakago MCCC E054 of 2021, the 2nd respondent testified that the deceased was his wife and their 3 children and himself survived her as her husband. He produced birth certificates as proof. That she was working as an accounts clerk at Mariara Secondary school earning Kshs.30,000/= per month. No proof of these earnings was produced, neither did her purported employer testify as to the deceased’s employment. Through the documentary evidence adduced in that case, it was clear that the deceased was 31 years old at the time of her death.



32. Even though the deceased's employment at the secondary school was not proved, it was not controverted that she was working as a clerk at the time of her death. On this basis, the trial court should have applied the multiplier method with the multiplicand being the minimum wage at the time. Her work can be classified under Schedule 7 of the Regulation of Wages (General) (Amendment) Order, 2018 which provides for minimum wages for "pattern designer (draughtsman) garment and dress cutter, single hand oven man, charge-hand baker, general clerk, telephone operator, receptionist, storekeeper." In Embu, this minimum wage is set at Kshs.16,295.95/= under the schedule.
33. As for the multiplicand, the deceased was in formal employment which means that she could have worked until the formal retirement age of 60 years. Therefore, a multiplicand of 29 years is fair and applicable in this case. The deceased also had a husband and 3 children which dependency calls for application of a $\frac{2}{3}$ ratio. The calculation for general damages for loss of dependency would therefore be Kshs.16,295.95/= $\times \frac{2}{3} \times 29 \times 12 =$ Kshs.945,165.10/=.
34. On the awards for loss of expectation of life and pain and suffering, in the case of Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed:
- "The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."
35. In this case, following the accident, the deceased was in hospital for 2 weeks undergoing treatment before she succumbed to the injuries sustained. She suffered more pain and suffering as a result of the accident, and so a maximum allowable award is reasonable in the circumstances. The award of the trial court for pain and suffering is reasonable. The award for loss of expectation of life is also reasonable given that the deceased as a young person aged 31 years old and she had the chance of living a long life were it not for the accident. In the case of Benham v Gambling, (1941) AC 157 the court held:
- "In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects."
36. As for special damages, they must be strictly pleaded and proved. The respondents produced one receipt of Kshs.20,000/= for money paid to the advocate. This is the only proved amount that could have been awarded by the trial court, and it was so awarded.

Disposition

37. Taking into consideration all the matters discussed, the appeal succeeds and I hereby order as follows:
1. The judgment in Siakago MCCC E007 of 2021 is hereby upheld;
 2. The judgment in Siakago MCCC E054 of 2021 is hereby upheld as to the findings of liability, general damages for loss of expectation of life, pain and suffering and special damages.



However, the trial court's finding on general damages for loss of dependency is hereby set aside and substituted with an award of Kshs.945,165.10/= (Kshs.16,295.95/= $\times \frac{3}{5} \times 29 \times 12$); and

3. Costs of the appeals are awarded to the appellant.

38. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 5TH DAY OF NOVEMBER, 2025.

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Njuguna for Appellant
2. No Representation for Khan Associates for Respondents
3. Francis Munyao - Court Assistant

