

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
[MILIMANI LAW COURTS]
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E009 OF 2025

-between-

DAVID CHEGE THUO..... 1st
APPELLANT
SIMON CHEGE KARIUKI.....2nd
APPELLANT

-versus-

MTANANYAO NZABAKAMIRA & KAGANI MUGUNGA
(Suing as administrator of the Estate of the late
NYAKAMISHA NYAMORO (Deceased).....
RESPONDENT

[Being an appeal from the judgment of Hon. C. K. Cheptoo (Principal Magistrate) delivered on 6th December 2024 in Nairobi CMCC No. E11608 of 2021]

JUDGMENT

1. On 19th September 2021, *Nyakamisha Nyamoro*, was a pedestrian along Kangundo Road when she was fatally hit by motor vehicle registration number KCM 104J then driven by one *Simon Chege Kariuki*, the 2nd Appellant herein. The motor vehicle was registered in the name of *David Chege Thuo*, the 1st Appellant herein.
2. As a result of that accident, *vide* a Plaint dated 17th September 2021, *Mtanyanao Nzabakamira* and *Kagani Mugunga*, the Respondents herein, being the legal representatives of the Estate of *Nyakamisha Nyamoro* [hereinafter referred to as **‘the deceased’**], sued the Appellants in *Nairobi [Milimani] Chief Magistrates Civil Suit No. E11608 of 2021* [hereinafter referred as **‘the suit’**] for general damages and special damages together with costs and interest.

3. In their joint Statement of Defence dated 8th December 2021, the Appellants denied causing the accident and instead blamed the deceased for being negligent and therefore causing the accident. The suit was eventually heard by way of oral evidence. The Respondent called two witnesses, namely *Mtanyanao Nzabakamira* and *Corporal Becky Osebe*. The Appellants did not call any witnesses. At the close of parties' respective cases, the trial Court delivered judgment on 6th December 2024 in favour of the Respondent in the following manner: -

a.	<i>Liability</i>	-	100%	against the Appellants;
b.	<i>Pain and Suffering</i>	-		<i>Kshs.36,000/=;</i>
c.	<i>Loss of expectation of life</i>	-		<i>Kshs.100,000/=;</i>
d.	<i>Loss of Dependency</i>	-		<i>Kshs.3,270,000/=;</i>
e.	<i>Special Damages</i>	-		<i>Kshs.13,850/;</i>
	<i>Total</i>	-		
				<u><i>Kshs.3,419,850/=</i></u>

- f. *Costs of the Suit; and*
- g. *Interest on general damages from the date of judgement, interest on special damages from the date of filing the suit until payment in full.*

4. Dissatisfied with the decision, the Appellants filed the instant appeal *vide* the Memorandum of Appeal dated 6th January 2025 and preferred the following grounds: -

1. *The Learned Magistrate erred in law and fact and thereby arriving at an erroneous decision on the issue of liability as against the appellants.*
2. *The Learned Magistrate erred in law and fact by basing his decision on irrelevant facts and failing to base his decision on the evidence on record and thereby arriving at an erroneous decision on the issue of liability.*
3. *That the trial Magistrate erred in law and fact as she did by basing her decision on irrelevant matters and failing to*

base her decision on the facts and evidence on record thereby arriving at an excessive award on the issue of damages.

4. *That the trial Magistrate erred in law and fact as he did, on the assessment of general damages under the Law Reforms Act for pain and suffering, Loss of Expectancy and Loss of Expectation of life.*
5. *That the trial Magistrate erred in law and fact by basing her decision on irrelevant matters and failing to base her decision on the facts and evidence on record.*
6. *That the trial Magistrate erred in failing to follow and uphold legal parameters and binding precedents on assessment of general damages under the Law Reforms Act and liability in similar circumstances.*

5. It was upon these grounds that the Appellants sought the appeal, which was both on liability and quantum, to be allowed and the trial Court's decision be set aside/quashed. The appeal was canvassed by way of written submissions whereof the Appellants filed their submissions dated 26th May 2025 and the Respondent's submissions were dated 14th May, 2025. The gist of these submissions and the decisions referred therein will be ingrained in the latter part of this judgment.

6. This being a first appeal, the role of this Court was discussed in ***Selle and Another vs Associated Motor Boat Company Ltd & Others*** [1968] 1EA 123, as follows: -

'...this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.'

7. Additionally, the above role was discussed in ***Mwanasokoni vs Kenya Bus Service Ltd*** (1982-88)1KAR 78 and ***Kiruga vs Kiruga and Another*** effective that an appellate Court will not

ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles In reaching the findings. [See also ***Gitobu Imanyara & 2 Others vs Attorney General*** [2016] eKLR and ***Sugut v Jemutai & 3 Others*** (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment)].

8. Based on the above guidance and having perused the record, parties' submissions and the decisions referred thereto, the two issues that arise for this Court's determination are whether the trial Court erred on the issue of liability and the assessment of damages respectively. To that end, this Court will re-look at the said aspects, starting with the issue of liability.

Liability:

9. Whereas, on one hand, the Appellants vehemently protested the manner in which the trial Court found them wholly liable for the accident, the Respondent, on the other hand, was adamant that the said decision was sound in law and ought not to be disturbed.
10. On their part, the Appellants protested that none of the two witnesses called upon by the Respondent witnessed the accident. They also faulted PW2 for failing to avail any evidence that the Appellants were culpable. The Appellants also contended that the Police Abstract produced in evidence was not sufficient evidence to hold the Appellants liable. To that end, they relied on *Peter Kanithi Kimunya Vs Aden Guyo Haro* (2014) eKLR to buttress the point that a Police Abstract was not proof of occurrence of an accident. In the end, they argued that the trial Court erred in finding them 100% liable for the injuries whereas there was no evidence to that end.
11. The Respondent emphasized that the Appellants were liable for the accident. They reiterated that the Police Abstract corroborated the Respondent's case and its contents were unchallenged. They were emphatic that they had met the

minimum threshold of proving their case on a balance of probabilities and as such, the trial Court's finding on liability was proper.

12. It is not in dispute that an accident involving the Appellants and the deceased occurred. The evidence of PW1 and PW2 affirms as much. This Court has reviewed the evidence by the two witnesses and finds that it was not impugned in principle. Be that as it may, whereas it is settled in law that a Claimant must prove its case regardless of whether the Respondent adduces any evidence, the Respondent adduced evidence that shifted the evidential burden of proof to the Appellants. The testimony of PW1 was aptly corroborated by PW2. To that end, as the evidential burden of proof shifted to the Appellants, they bore the burden of proving otherwise. Since the Appellants failed to adduce any contrary evidence or to successfully challenge the evidence already *in situ*, then they failed to prove what they alleged in their pleadings. In such circumstances, it will be remiss to find the Respondent at fault or at all.

13. In ***Autar Singh Bahra And Another vs. Raju Govindji*** HCCC No. 548 of 1998 (UR) *Mbaluto J*, [as he then was], held thus: -

.... Although the Defendant has denied liability in an Amended Defence and Counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counterclaim must fail.

14. This was further restated in ***Interchemie E.A Limited vs Nakuru Veterinary Centre Limited*** [2001] KEHC 618 (KLR) and in ***Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*** [2009] KEHC 4030 (KLR), where the Courts held that where no witness is called on behalf of a Defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted, reliable and wholly admissible. Further, in

Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, the Court held that: -

... When a man drives a motor vehicle along the road, he is bound to anticipate that there may be things and people or animals in the way and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it. The driver should take reasonable steps to avoid hitting or colliding with the object.

15. In **Mary Njeri Murigi vs. Peter Macharia and Another** [2016] eKLR, the Court held that: -

... a person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control.

16. Therefore, the Appellants having failed to impugn the Respondent's evidence cannot stand on the way of the claim. The Appellants' Statements of Defence remained as mere statements as they were unsubstantiated. The claim was thus proved on a balance of probabilities. This Court cannot, hence, fault the trial Court in finding the Appellants wholly liable for the accident.

Quantum:

17. As this Court has been called upon to interfere with the award on general damages, it is not lost that that assessment of damages is generally a difficult task. A Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See **Butler vs. Butler** (1982) KLR 277.)

18. The Court of Appeal in ***Kemfro Africa Ltd v A. M. Lubia & Another*** (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

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 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.

[Also see ***Arrow Car Limited -vs- Bimomo & 2 others*** (2004) 2 KLR 101 and ***Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd*** (2013) eKLR].

19. It is on the above guidance that this Court will consider whether to disturb the awards in place. On the limb of the award on the pain and suffering before death, the Appellants submitted that an award of Kshs.20,000/= for pain and suffering would be sufficient as the deceased died on the same day. They relied on the case of *Ednar Gesare Ogega vs Kebiba (suing as father and legal Representative of the Estate of Alice Bochere-Deceased)* [2015] eKLR to argue that the award of Kshs.36,000/= by the trial Court was excessive. It is trite law that the generally principle is that nominal damages will be awarded on this head for death occurring immediately after the accident whereas higher damages are awardable for death occurring long after the accident. (See ***Sukari Industries Limited vs. Clyde Machimbo Juma*** [2016] eKLR. Generally, from case law, the sums under this head range between Kshs.10,000/= to Kshs.100,000/=. As such, the award of Kshs. 36,000/= made by the trial Court falls within the region of reasonability. The appeal on this head, hence, fails.

20. On the award of loss of expectation of life, the Appellants protested that the award of Kshs. 100,000/= was excessive and that an award of Kshs.70,000/= would be sufficient. However, the Appellants did not demonstrate how excessive the award was and as such, this Court finds no reason to disturb it.
21. As the award of Kshs.13,850/= under special damages was not challenged, the same is hereby affirmed.
22. On the issue of loss of dependency, the Appellants emphasized that there was no proof of the deceased income or how the deceased supported her family and further that the age, capacity or status of the other two children of the deceased were not proven. Additionally, they submitted that a global award of Kshs. 800,000/= as general damages would be sufficient. In the end, they submitted that should the Court be persuaded to apply the multiplicand method, then the Court should apply Kshs.10,000/= being the minimum wage applicable as at the date of the deceased's death.
23. The trial Court, rightly so, opted for the global sum method as opposed to the multiplier approach in assessing damages under this limb after it found that no evidence had been tendered on the income of the deceased. It then approved of the sum of Kshs. 3,270,000/=. This Court will now look at some comparable decisions in ascertaining whether the award be disturbed.
24. The deceased was aged 46 years old at death and a single mother with three children. In ***Ainu Shamshi Hauliers Limited vs. Moses Sakwa & Another*** (suing as administrators of the Estate of Ben Siguda Okach (deceased) [2021] eKLR, the Court awarded a global sum of Kshs. 2,000,000/= where the deceased was 40 years old. In ***Ndeti and Another*** (suing on their own behalf and as administrators of the estate of Gerald Ndeti Mutua (Deceased) ***vs. Mwangangi & Another*** [2022] KEHC, the Court awarded a global sum of Kshs. 2,500,000/= for a deceased who died aged 48 years old. Further, the trial Court referred to several decisions in coming up with the award it made and the Courts

therein awarded Kshs. 2,000,000/= on average. This Court, therefore, finds that the award of Kshs. 3,270,000/= to be excessive and without sound basis. Respectfully, the said sum has to be reviewed downwards. To that end, this Court finds the sum of Kshs. 2,000,000/= as sufficiently reasonable and awards the same instead.

25. Having dealt with all the issues in this appeal, this Court hereby makes the following final orders: -

[a] The appeal on liability is dismissed. The liability against the Appellants at 100% is hereby affirmed.

[b] The appeal on quantum partially succeeds on the limb of the award on loss of dependency. Consequently, the sum of Kshs. 3,270,000/= is hereby reviewed to Kshs. 2,000,000/=. The rest of the awards of damages and other orders made by the trial Court are hereby affirmed.

[c] Parties do bear their own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 19th day of November, 2025.

**A. C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

Miss Gichuhi, Learned Counsel for the Appellant.

Mr. Kulecho, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.