

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 192 OF 2024

ABEL ANGWACHO.....
APPELLANT

-VERSUS-

JUMA ONWONG'A ONDIMU..... 1ST
RESPONDENT

(Suing as the legal representative of the estate of the late
GEORGE ONDIMU ONWONG'A

ISAAC KIPKEMBOI TOWETT..... 2ND
RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. P.M Mutai Principal Magistrate dated 22.11.2023 arising from Kisii CMCC No. 419 of 2019.
2. The Memorandum of Appeal of Appeal dated 5.11.2024 is against the award of liability and general damages. The Appellant posited that the lower court made an award of general damages under pain and suffering, loss of expectation of life and loss of dependency that was inordinately high. The appeal also challenged the finding on liability of 100%.

3. The Plaintiff dated 9.4.2019 claimed damages for an accident that occurred on 22.8.2017 when the deceased was a pillion passenger on motorcycle reg. no. KMCE 669U along Kisii-Kilgoris Road and the Appellant, his driver or agent negligently and dangerously drove Motor vehicle Registration No. KCG 154F causing it to violently collide with the motorcycle as a result of which the deceased suffered fatal injuries.
4. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded Special Damages as well as General Damages under the Law Reform Act and Fatal Accidents Act.
5. The Appellant entered appearance and filed Defence dated 3.9.2019 denying the particulars of negligence and injuries pleaded in the Plaintiff.
6. The lower court heard the parties and proceeded to render the impugned judgement in which the Court adopted the agreed liability of 100% against the Appellant and awarded Ksh. 30,000/- for pain and suffering, Ksh. 1,300,000 for loss of dependency, Ksh. 100,000/- for loss of expectation of life.
7. Aggrieved by the finding of the lower court, the Appellant lodged the appeal herein.

Evidence

8. During the hearing, PW1 was Juma Omwonga Ondimu. The Deceased was his son. He was born in 1998 and was not married. He was involved in a motor accident when he was a pillion passenger. PW1 came after 30 minutes. He rushed the deceased to Hema Hospital where the deceased was referred to Moi Teaching and Referral Hospital. He died while undergoing treatment. He was in second year at the University. He testified that he used money in the funeral which he could not even account. He produced his bundle of documents.
9. PW2 was Geoffrey Nyangaresi. He based on his witness statement dated 9.4.2019. He was a bodaboda rider. The accident motorcycle herein was his motorcycle. He did not have driving license and insurance. It was his case that the motorvehicle hit him and it was over speeding while overtaking another motorvehicle and hit them in head on collision.
10. PW3 was Handson Jomo Onyanchwa. He recorded statement as eye witness. In testifying, it was his case that he came and found the motorvehicle and motorcycle after the accident.
11. PW4 was No. 82220 PC Silas Kimutai, base commander of Kisii police station. He produced the police abstract and conformed the occurrence of the accident.

12. It was his case that the investigating officer was PC Catherine who had since retired. He did not know the details of the accident.
13. The Appellant closed the defence case without calling witnesses.

Submissions

14. The Appellant filed submissions dated 3.9.2025 and submitted that no negligence was proved against the Appellant. It was submitted that there could be no liability without fault and reliance place on as Ogwari vs. Hersi [2023] KEHC 20111 (KLR).
15. It was submitted that the witnesses could not tell how the accident occurred and the case of the Respondent was as such never proved. Reliance was further placed on Bwire v Wayo & Sailoki (2022) eKLR.
16. On quantum, it was submitted that if liability was to be found Ksh. 1,300,000/= as lumpsum would be adequate compensation.

17. The Respondent submitted that the lower court's finding on liability and quantum was proper.

Analysis

18. 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 demeanour of the witnesses and hearing their evidence first hand.

19. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the 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...”

20. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence,

evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

21. Bearing in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet this court must reconsider the evidence, evaluate it itself and draw its own conclusions.

22. The Appellant urged the court to find that the lower court erred in finding the Appellant 100% liable. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In **Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

23. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In **Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

“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.”

24. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

“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.”

25. The balance of probabilities is also about what is likely to have happened than the other. In **Lord Nicholls** of

Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

26. Furthermore, the standard of proof in civil cases **must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities.** In Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal 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 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 loose because the requisite standard will not have been attained.”

27. The Appellant herein was the registered owner of motorvehicle registration number KCG 154F. Like the lower court, I discredit the evidence of PW3 who testified for the Respondent as eye witness. His evidence did not point to what he saw as causation for the accident. He arrived at the scene after the accident and his testimony was largely about what he perceived after arrival.

28. The Appellant’s case on liability was that the Respondent did not prove liability at all and the case against the Appellant ought to have been dismissed in its entirety. The case of the Respondent was that the Appellant was

negligent. The court found the Appellant and the 2nd Respondent jointly and severally liable at 100%.

29. The court notes that default judgement was entered against the 2nd Respondent on 6.9.2021 for failure to enter appearance upon service of the summons and pleadings.

30. The evidence of PW2 was not shaken. He narrated how the accident occurred. He was the one carrying the deceased on his motorcycle. According to him, the probox was overtaking another motorvehicle hence the head on collision. On a balance of probability, the court finds no basis to interfere with the finding of the lower court on liability. It was the duty of the Appellant to prove contributory negligence on the part of the deceased who was merely a pillion passenger. In the case of *Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431* the court held that; -

“In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence”.

31. The accident can therefore not be said to have occurred by magic. Or unidentified flying object. In a court room situation, we deal with empirical evidence on what is more probable than the other. The court can possibly get it wrong but if better still 50.01:49.99, there can be no better equal chance. This is the rule in *Embu Road Services V Riimi (1968) EA22* and *25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201*, *Menezes Stylianicers Ltd CA No.46 of 1962* in which the courts held inter alia; -

*“Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence”. See also *Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).**

32. Further, the Appellant did not call any evidence. The driver of the accident motor vehicle did not testify or give evidence. As such, the evidence of the Respondent was as

such uncontroverted. In the case of Janet Kaphiphe Ouma & Another -vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through Stanley Muriga -vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997 that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony.”

33. The Defence filed by the Appellant in the lower court on liability thus contains mere allegations that were not substantiated in evidence and I so find. However, even if there were no defence filed, the Respondent still retained the duty to prove his case on the balance of probabilities and in fact proved on a balance of probabilities that probox was to blame 100% for the accident. The Court of Appeal’s

position in Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

34. The appeal against liability is thus declined.

35. On the damages the lower court awarded of Ksh. 30,000/- under the head for pain and suffering, in *Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased)* paragraph 21 the Hon. Odunga J (as he then was) observed: -

“The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the

same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

36. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this case, the deceased passed away on the same day of the accident. however, I note he was transported from Kiss to Eldoret and died at the Moi Teaching and referral hospital.

He did not therefore die suddenly or on the spot. The amount that the court awarded of Ksh. 30,000/= was low but not inordinately low and also as the Respondent did not appeal, I uphold it.

37. On loss of expectation of life, I do not think Ksh. 100,000 was excessive award. There was no evidence that the Deceased was of ill health. In **Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR** it was observed that:

“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 Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

38. Under dependency ratio, to interfere with the finding of the lower court on loss of dependency, this court has to find basis. The deceased herein was 20 years and was not married. He had no child. He was in the University as a student. There no prove of income. In the circumstances, the global sum approach was the most appropriate

approach as applied by the lower court. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

39. As to whether the award of Ksh. 1,300,000/= as damages for loss of dependency was not inordinately high, I find no basis to interfere with the discretion of the lower court. The Appellant submitted that a lump sum of Ksh. 1,300,000/= would be adequate compensation. The court properly applied the global sum approach and awarded general damages for loss of dependency of Ksh. 1,300,000/= which I find adequate in the circumstances. I am fortified by the reasoning of the court in the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR as follows;

On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the Fatal Accidents Act.

55. I find no wrong principles that the lower court applied. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

“In effect, the court before it interferes with an award of damages, should be

satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

56. There was no appeal against the award on special damages. The Respondent pleaded Ksh. 459,865/= and the court awarded 442,642/= as the amount that was proved. In the absence of basis to question the receipts produced in evidence which I note the court's award arose from, I will not disturb this finding.

Determination

57. In the upshot, I make the following orders: -
- i. The Appeal is dismissed.
 - ii. The Respondent shall have costs of Ksh. 95,000/-.

DELIVERED, DATED and SIGNED at Nyeri Virtually on this **13th** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Ms Momany Aunga for the Respondent

No appearance for the Appellant

Court Assistant- Michael

ORIGINAL