



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CIVIL APPEAL NO. E027 OF 2022**

**MICHAEL WANYEI KARANI.....APPELLANT**

**VERSUS**

**GRACE WARINGA GATUCU & CONSOLATA WANJIRU KAMAU (As the legal  
Representatives of Francis Gatucu Kimitho-Deceased).....  
RESPONDENTS**

**(Being an Appeal from the Judgment of Honorable G.W Kirugumi (P.M) delivered on the  
16/3/2022 at Kerugoya CMCC No. 8 of 2019)**

**JUDGMENT**

- [1] By a Plaintiff dated 20/12/2018, the Respondents sued the Appellant seeking general damages under the Law Reform Act and the Fatal Accidents Act, special damages of Ksh. 102,975 and costs of the suit plus interest. The Respondents pleaded that on or about 18/2/2018, the Appellant, his servant or agent drove motor vehicle registration No. KCG 606 G so carelessly and/or negligently along Sagana - Makutano road that he knocked down Francis Gatucu Kimitho, the deceased herein, and caused his death. At the time of his death, the deceased was 35 years old, in good health and an employee of Therema Gardens and Holiday Camp earning Ksh. 20,000 per month, and by his death, his dependants and his estate suffered loss and damage.
- [2] The Appellant denied the claim vide his statement of defence dated 23/9/2020 and prayed for the Respondents' suit to be dismissed with costs.
- [3] Upon full hearing, the trial court apportioned liability at 50% against the Appellant, and awarded Ksh. 100,000 for pain and suffering, Ksh.100,000 for loss of expectation of life, Ksh. 1,379,230 for loss of dependency, Ksh.7,000 for witness expenses and special damages of Ksh. 36,350 together with costs and interest.

### **The appeal**

[4] On appeal, the Appellant vide his memorandum of appeal dated 8/4/2022 set out 7 grounds as follows:

1. *The learned trial magistrate erred in law and fact in finding the Appellant 50% liable for the accident despite the absence of evidence to support such a finding.*
2. *The Learned trial Magistrate erred in law and fact in failing to consider adequately, or at all, the totality of the evidence that was tendered on quantum, and in so doing she arrived at an erroneous finding on quantum.*
3. *The learned Magistrate erred in law and fact by failing to consider or even remotely adopt and appreciate the written submissions and authorities of the Appellant on quantum and as such gave an award that was excessive and inordinately high.*
4. *The learned Magistrate erred in law and fact in awarding of general damages for pain and suffering of Kshs. 100,000 an award that was excessive and inordinately high.*
5. *The learned Magistrate erred in law and fact in adopting a multiplier of 25 years which was excessive and did not take into consideration vagaries and vicissitudes of life.*
6. *The learned trial magistrate erred in law and fact in the manner that he assessed general damages and in awarding damages that were excessive in the circumstances.*
7. *The learned trial magistrate erred in law and fact in failing to consider the Appellant's submission on liability and quantum and in so doing she arrived at an erroneous decision.*

### **Duty of the Court**

[5] This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123**).

### **Oral Evidence**

- [6] **PW1 Grace Waringa Gatuchu**, and one of the Respondents herein adopted her statement dated 20/12/2018 as her evidence in chief and produced the list of documents dated 20/12/2018 as exhibits. She testified that, *“I am from Murang’a. I am a farmer. Francis Gatuchu is my husband. We married under Kikuyu customary rites and practice.”*
- [7] On cross examination, she stated that, *“The accident was on 18.2.2018. I don’t know the vehicle involved. It was in the evening. It occurred at about 7 pm. I did not witness it. I did not visit the scene. I can’t tell how it occurred. Elius Waweru informed me about it. He called me. I don’t have a document to demonstrate he was studying. I have produced a death certificate. It was completed in my presence. I gave the details. In the death certificate I said the deceased was a farmer. He was earning 15,000/= per month. An employee’s letter. He was employed by Nancy Kanyotu. I have not supplied a bank statement. We were living in our own homestead. We were not paying rent. The children were attending public primary school. I don’t recall how much. He would give me cash 8500/= per month. I don’t have proof. I don’t recall how much we spent at the funeral. People did not contribute for the funeral. I am a farmer. I get income.”*
- [8] In re-examination, she stated that, *“My children are still in school. One is in secondary. He is called. They were students at Thangathi Primary. The deceased was paying fees. He was paying activity fees. The children are still in school. I am now taking care of their needs together with their grandmother. He was a farmer. I said so in the death certificate. He was also doing other jobs. He was employed by Nancy Kanyotu. He was working at Therema Gardens. It was a hotel. They also had a shamba. He was employed to cultivate in that land. We were not having any documents for monies he gave me to spend.”*
- [9] **PW2 Consolata Wanjiru Kamau**, the other Respondent adopted her statement dated 20/2/2018 as her evidence in chief. She testified that, *“I know the deceased. He was my son. Grace Waringa is his wife.”*
- [10] On cross examination, she stated that, *“I can’t recall when they got married but they had stayed for a long time. It was through Kikuyu customs. They lived together then dowry was paid later. I have recorded when dowry was paid. I don’t know the registration number or the vehicle involved in the accident. I can’t recall how it occurred. Waweru called us. He didn’t have a phone. He borrowed one to call us. He was working at Therema Gardens. He was cultivating at the shamba and at times at the hotel.”*

[11] **PW3 Elius Wanjohi Wachira** adopted his statement dated 20/12/2018 as his evidence in chief. He testified that, *“I come from Thanju. I am a farmer. The deceased is known to me.”*

[12] On cross examination, he stated that, *“I come from Thanju. I am 32 years old. My Id is 25186538. I am a farmer. On 18/12/2018 at kwa VI area. I had come from home. I had left home at 2 pm. It is about 6 kilometers from our home. Kwa VI area is 6 kilometers from home. I arrived at kwa Vi at 3 pm. I was alone. I stayed for two hours. I took some alcohol at Kwa Vi. We were with Francis Katuchu at Kwa Vi. He took some alcohol. We left kwa Vi at 6.30 pm. We had walked for 30 minutes before the accident occurred. We were facing Makutano. We were on the left side. The road has a shoulder. We were walking on the tarmac road shoulder. There were vehicles from Sagana and Makutano. The vehicle had their head a lights on. We were walking side by side. It was KCG 606 G. The vehicle is the one that caused the accident. I got aware of it when the accident occurred. In my statement I didn't write that Registration number. I came to learn of it later. The vehicle came from Sagana. We were walking towards Makutano. I was walking. The vehicle came from behind. I saw how it happened. I saw the vehicle when it hit him. I was not hit. The vehicle hit him using its left side. I was not injured or hit. The vehicle veered off the road completely. I saw it, when it hit him. I did not see it before. I just saw it when it hit him. I didn't hear it approach as there were many vehicles on the road. I saw its wheel. It was outside the road. He fell in front of the vehicle after it him. It was outside the tarmac. At the side of the road. The vehicle stopped ahead of him. He was hit, the vehicle kept moving. He was thrown down. The vehicle went back to the tarmac and stopped. The vehicle stopped on the road finally. The deceased was not crossing the road. We never crossed the road to go to kwa vi. I had crossed the road. You had to cross the road to go home but we had not crossed. We were not crossing the road. The body of the deceased was on the road. The vehicle was on the road. I didn't record a statement with the police. I called his wife. I borrowed a phone from a friend. We searched for his wife's number. Police came to the scene. They looked at the scene. I did not fall down. I was fast shocked.”*

[13] In re-examination, he stated that, *“We were walking side by side the deceased was on the side near the road. I was not near the road. I was not near him when he was hit. I suddenly just heard the sound of the vehicle as the accident occurred. We were not crossing the road.”*

[14] **PW4 Corporal Evaline Muthengi** from Sagana police station, testified on behalf of the Base Commander and produced the summons. The OB extract and police abstract as

exhibits. She testified that, *“I was paid 7000 to attend. The accident occurred on 18.2.2018. It occurred along Sagana-Makutano road Riandira area. It involved motor vehicle Registration number KCG 606 G. Toyota Matatu care of Kukena Sacco. The driver was Alex Njuguna Wanjiku. There was a pedestrian Francis Gatucu Kimithu male adult aged 35 years. It was a fatal accident. The pedestrian succumbed to his injuries. The owner of the vehicle was Michael Karani. The investigating officer was PC Charles Mathenge. He is on leave. I have the occurrence book here. The reference OB 7 OF 18.2.2018. The accident occurred 2000 hrs 8 pm. It was at Riandira area. The driver was heading from Sagana direction to Makutano - Nairobi direction. At Riandira area he knocked down the pedestrian who was crossing the road from the right side to the left side as you face Makutano - Nairobi direction. He died on the spot. The vehicle was damaged at the right side headlamp windscreen was smashed at the driver’s side right side. The body was removed to Murang’a mortuary. Post mortem was done in presence of relatives. The vehicle was inspected at Sagana police station where it was towed. The result are not in the OB. The pedestrian crossed from right to left. The matatu was at the left side.”*

[15] On cross examination, she stated that, *“I was summoned. I was paid 7000. No amount is written in the summons. I was told the base Commander was paid. I don’t have proof. I am giving evidence in support of the plaintiff’s case. The officer visited the scene then completed the OB entry. A brother of the deceased was present as the OB was completed. The deceased was crossing the road. He crossed the yellow line at the centre when the accident occurred. He was on the left side. He was on the lane of the matatu. The right side of the vehicle was damaged. The right front side was damaged. The point of impact was on the lane of the matatu. The vehicle did not veer off the road to knock the pedestrian. I have worked for 3 years as a traffic officer. I am aware of traffic laws. The driver is to blame. He would have seen somebody crossing. You check left, right then cross. If he did that he would have seen the vehicle. If the road is not clear you don't cross. He crossed when there was a vehicle on the road.”*

[16] In re-examination, she stated that, *“It occurred immediately after the yellow line. He did not swerve to avoid the accident. I blame him. He could have tried to swerve if he was careful enough to see him. He could have seen him in good time.”*

[17] **DW1 Patrick Ngatia Kariuki** adopted his statement dated 25/3/2021 as his evidence in chief. He testified that, *“I am a businessman. On 18.2.2018 I was a passenger in motor*

*vehicle Registration No. KCG 606 G I sat next to the driver. A person was crossing the road. He was knocked down at Kwa-vi area. He was knocked down by the right side of the vehicle the driver's side. It occurred on the lane as you face Nairobi. The driver tried to brake. He did so. It stopped when the person was hit. The vehicle never veered off the road. The person crossing was to blame. There were people on the left side of the road. The driver could not swerve there. He could have knocked them down."*

[18] On cross examination, he stated that, *"I come from Karaini. I am a business man at Karaini. I sell meat. I was on board the vehicle. I was going to Nairobi, Michael Wanyei Karani the defendant is not related to me. The police called me to record a statement at Sagana police station. Also with the Advocate. He applied emergency brakes. I have said he could not swerve to the left. He never swerved as there were people on the side of the road. I did talk about these people in my statement. He took sufficient steps to avoid the accident. I am not lying. I saw what happened. I actually witnessed. I can't recall whether or not he hooted. We just saw someone cross the road. He was doing about 50 km/hr. We were headed to Nairobi. He came from the right side the opposite side. It was on the other from our lane. The road is straight. You can see less than a kilometer. There are other vehicle. You can't see far. There were vehicles from Nairobi. When it passed the vehicles from Nairobi, he just crossed. He was hit by our vehicle. He had crossed the lane of the oncoming vehicle then suddenly came to our lane. He was very near. When the vehicle from Nairobi passed he came to our lane about 2 metres. I saw the vehicle hit him. He was crossing the vehicle was moving he was hit. He was 1 metre from the middle yellow line. He was not driving very close to the middle of the road. He could not swerve to the left. He could have caused another accident. I am an experienced driver. 50 km/hr. is low speed. The driver is able to avoid any accident even if you are doing 50km/hr. and someone jumps on the road. You can have a fatal accident. He was not on high speed of over 100 km/hr. he was not on the left side. The vehicle was hit on the driver's side. The vehicle never veered off the road."*

[19] In re-examination, he stated that, *"Our vehicle never came off the road. He was crossing the road. The vehicle was damaged on the driver's side. I did not anticipate any accident would occur. It just happened. I cannot accurately estimate the distance. There were people walking on the left side of the road on the side of the edge of the road outside the road. I witnessed even then. Our driver was on his lane and not near the yellow line. He was doing 50 km/hr. the deceased jumped into our side suddenly. There was a vehicle from the opposite*

*direction. When it passed he suddenly jumped into our side. I have given the estimate distance I did not measure.”*

[20] **DW2 Alex Njuguna Wanjiku** adopted his statement dated 25/3/2021 as his evidence in chief. He testified that, *“I am a driver. The deceased was crossing the road. He came to my lane. He was knocked down. The point of impact was on the left lane facing Makutano direction. The vehicle was damaged on the driver’s side. I applied brakes to avoid the accident. It was at night there were on coming vehicles on the right side. On the left there were pedestrians. I blame the deceased.”*

[21] On cross examination, he stated that, *“I was doing 60 km/hr. it is slow speed. The vehicle should stop on the spot. It you apply emergency brakes. I applied emergency brakes. The vehicle stopped but it knocked down the deceased. He was crossing from my lane. It was at night. I saw him on my lane. I don’t know where he came from. It was at night. I stated he attempted to cross the road. He was crossing from the right to the left. I have noted so in my statement. He came to my care from the middle line. The statement is mine. I agree with the contents of the statement. I knew Patrick Ngatia. He was a passenger in my vehicle. He testified. I was about 2meters when I saw him crossing. I was driving a meter from the middle lane. The point of impact was near the center line. I can’t doubt the evidence of the passenger. My headlines were on. I could see six to seven meters. I did not see the deceased due to oncoming vehicles whose headlight were on. He was not knocked down by vehicles from the opposite lane. I did not hoot. Witness referred to his statement of defence. Paragraph 4e. He did not hoot. I did not warn the deceased. The road was spaced that way. I was a meter from the center line. There was no space on the left. My vehicle is about 2 meters. The road is six meters. My lane is three meters. It was an emergency. He just came on my lane abruptly. There were people on the left. On the right there were other vehicles. The people were off the road not on the road. I was not speeding. The vehicle has an 80km/hr speed governor. It was functional. Any impact can lead to death. It depends on landing. It depends how he landed when he was hit the car stopped. I did not run him over.”*

[22] In re-examination, he stated that, *“I was not speeding. I was doing 60 km/hr. I did not anticipate the accident. The deceased crossed the road suddenly. There were pedestrians on the left. On the right there were on coming vehicles. I could not swerve to the other side. It was very urgent. I didn’t know he was crossing. I stepped onto emergency brakes. If he was careful the accident could have not occurred. The defence is correct.”*

### Submissions

[23] The Appellant faults the Respondents for failing to prove negligence against him, and cites *Peter Kariuki Njenga v Gabriel P. Muchira & another [2017] KEHC 7929 (KLR), Patrick Mutie Kimau & Anor v Judy Wambui Ndurumo [1997] KECA 60 (KLR) and Michael Kariuki Muhu v Charles Wachira Kariuki & another (2015) eKLR.* He proposes an award of Ksh. 10,000 for pain and suffering as the deceased died on the spot, and cites *John Kimani Mwangi (suing as administrator of the estate of Charles Nyingi Mwangi) v Aspendos Dairy Limited (2021) eKLR.* He further proposes a multiplier of 15 years and cites *Jane Wangui Kamau and 2 Others v Alice Atandi & Another (2004) eKLR, Asha Mohamed Swaleh v Kennedy Bindi Muriungi & Another (2012) eKLR and Alex Koech & another v Mary N. Odhiambo (suing as the legal representative of the estate of Erick Juma Odhiambo, Deceased) (2018) eKLR.*

[24] The Respondents cite *Kimani (Suing as the Administratrix of the Estate of Amos Kanina Kimani - Deceased) v Mwangi (Civil Appeal 120 of 2021) [2024] KEHC 2434 (KLR) (7 March 2024) (Judgment) and Ephantus Mwangi v Duncan Mwangi Wambugu [1984] KECA 13 (KLR* on the duty of the first appellate court. They cite Kenya *Bus Services Ltd v Gladys Okwoma (1972) EACA 10,* where liability was apportioned at 50% for a totally drunk deceased pedestrian who crossed the road in a grossly negligent manner by staggering back and forth. They urge that the award of Ksh. 100,000 for pain and suffering and the adoption of a multiplier of 25 years were apt, and cite *Joseph Gatone Karanja v Michael Ouma Okutoyi & 2 others (2022) eKLR, Karimba (Suing as the legal representative of the Estate of Christopher Mutahi Mwangi Deceased) v Murigu & another (Civil Appeal 38 of 2022) [2023] KEHC 20680 (KLR) (21 July 2023) (Judgment), Mohamed Hirbo Shande & another v George Mwenda Mwiti (Legal Representative of the Estate of Miriam Makena) [2021] eKLR, Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga (2020) eKLR and China Henan International Co-operation Ltd v China Henan International Co-operation Ltd & another [2021] KEHC 2731 (KLR).*

### Analysis and determination

[25] From the grounds of appeal as framed, the issues for determination are whether the apportionment of liability was proper, whether the awards were excessive and whether the Appellant's submissions were considered.

### **Liability**

[26] The crucial witnesses in this case were the 3 eye witnesses, PW3, DW1 and DW2. Whereas PW3 restated that he was walking with the deceased when the accident motor vehicle veered off the road and fatally hit him, both DW1 and DW2 were categorical that the deceased was knocked down as he tried to cross the road. DW2 conceded that he did not hoot to warn the deceased, which testimony was corroborated by DW1.

[27] PW3 acknowledged on cross examination that both he and the deceased were intoxicated at the time of the accident when he stated that, ***"I took some alcohol at Kwa Vi. We were with Francis Katuchu at Kwa Vi. He took some alcohol."*** PW3 contradicted himself when he stated that, ***"I was not near him when he was hit"*** notwithstanding his earlier contention that he was walking side by side with the deceased before the accident.

[28] In ***Hussein Omar Farah v Lento Agencies*** [2006] KECA 388 (KLR), the Court of Appeal said that:

*"In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame...The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."*

[29] Upon a wholesome evaluation of the conflicting testimonies of the 3 eye witnesses, the court draws the inference that both the pedestrian and DW2, were equally to blame, and the trial court's apportionment of liability at 50% was well-founded.

### **Excessive damages**

[30] This court has previously considered the principles for appellate interference with an award of damages by a trial court in **Crown Bus Services Ltd & 2 others v BM (Minor suing through his mother & Next Friend) SMA** [2020] eKLR as follows:

*“The well-known principles for interference of an award of damages by a trial court are laid down by the Privy Council in Nance v. British Columbia Electric Railway Co. Ltd. (1951) A.C. 601, 613 and applied in East Africa by Sir K. O’Connor (with whom Sir Alastair Forbes, V.-P. and Newbold, J.A. agreed) in Henry H. Ilanga v. M. Manyoka [1961] EA 705, 713 as follows: “The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or a jury, the appellate court is justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as taking in some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (Flint v Lovell, [1935] 1 K.B.), approved by the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601.”*

[31] The evidence on record is that the deceased died instantaneously, and while this court is mindful that the deceased must have experienced some degree of pain, however momentary, it is of the considered view that the award of Ksh.100,000 was excessive and erroneous. The said award is therefore set aside and substituted with an award of Ksh.30,000.

[32] The trial court cannot be faulted for awarding the conventional amount of Ksh.100,000 for loss of expectation of life.

[33] The special damages of Ksh.36,350 awarded by the trial court were specifically pleaded and strictly proved. The Respondents produced the receipt for copy of records of Ksh.550 and bundle of receipts for funeral expenses totaling to Ksh.35,800.

[34] The deceased herein was 35 years old, enjoying a happy and healthy life. Whilst the deceased is said to have worked at Therema Gardens and Holiday Camp, earning a monthly salary of Ksh.20,000, the letter from the alleged employer was never produced as an exhibit,

and the trial court properly resulted to the minimum wage for a gardener of Ksh.6,896.15 as the multiplicand. The record is clear that the deceased was survived by his mother, his wife and 2 minor children, and the application of a dependency ratio of  $\frac{2}{3}$  was reasonable.

[35] The bone of contention is the adoption of a multiplier of 25 years, which, according to the Appellant, was unjustified.

[36] The court takes cognizance of the cases cited by the Appellant, where multipliers of 13 and 15 years were applied for deceased persons aged 37 and 35 years. It is not lost to this court that the said decisions were made in 2004, 2012 and 2018 respectively. The court equally notes the cases cited by the Respondents where multipliers of 16 and 15 years were applied for deceased persons who were 44, 47 and 50 years old. Those decisions are more recent, having been made in 2021 and 2021.

[37] There is no doubt that the deceased could have continued gainful employment beyond the mandatory retirement age of 60 years, given that he was engaged in the private sector and full of life, and thus the multiplier of 25 years was proper.

### **Consideration of the Appellant's submissions**

[38] As observed by the Court (*Patrick J.O Otieno J*) in **Charles Mutuma M'kanake v Diocese of Meru Trustees Registered** [2021] eKLR:

*“This court takes the view and position that such a ground is not sustainable on a first appeal and cannot be a basis to overturn a decision of the trial court unless it finds support in the ultimate decision.”*

On first appeal, the Court considers the facts of the case against the law afresh.

### **ORDERS**

[39] Accordingly, for the reasons set out above, the court finds the Appellant's appeal partially succeeds and is allowed in the following terms:

1. The award of Ksh.100,000 for pain and suffering is set aside and substituted with an award of Ksh.30,000.
2. The other awards remain unchanged.
3. There shall be no order as to costs.

*Order accordingly.*

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

Mr. Mwangi Maina for Appellant.

Mr. Ndonga for Mr. Mbutia for the Respondent.