

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CIVIL APPEAL NO. E026 OF 2024

KENYA POWER AND LIGHTING COMPANY.....APPELLANT

-VERSUS-

DORICA KANINI MBURA

(suing as the Legal Representative of the Estate of

ROBERT MUGAMBO SIMON (dcd).....RESPONDENT

(Appeal arising from the decision of Hon. J.W. Gichimu, CM in Runyenjes MCCC No. E065 of 2023 delivered on 19th March 2024)

JUDGMENT

The Memorandum of Appeal

1. The appellant filed a memorandum of appeal dated 27th March 2024 seeking orders that:

- i. That this Appeal be allowed and the decision and Judgment of the Learned Principal Magistrate with regard to liability and Loss of Dependency in Runyenjes CMCC NO. E065 of 2023 delivered on 19th March, 2024 be set aside;
- ii. That this Honorable Court be pleased to re-evaluate the evidence on record and make its own finding and Judgment with regard to Liability and Loss of Dependency; and
- iii. That the Appellant be awarded the costs of the Appeal herein.

2. This appeal is premised on the grounds that:

- 1) The Learned Magistrate, while ignoring the evidence and facts as presented during trial and the Defendant's Submissions misdirected himself against the weight of evidence and failed to consider the role played by the deceased in causing the accident by holding that the Appellant was 100% to blame for the accident.
- 2) The Learned Magistrate, while ignoring the evidence and facts as presented during trial and the Defendant's Submissions misdirected himself against the weight of evidence and awarded the Respondent Loss

of Dependency award of Kshs.1,500,000/= which is exorbitant and manifestly high in the circumstances.

The pleadings in the lower Court

3. The respondent filed a plaint dated 19th May 2023 seeking judgment against the appellant for general damages under the Law Reform and Fatal Accidents Act, special damages of Kshs.68,000/= and costs of the suit with interest.
4. It was her case that on or about 17th June 2022, the deceased was riding his motorcycle registration number KMEB 154X along Kwanjara - Ishiara road within Nthagaya area when the appellant's driver, servant and or employee of motor vehicle registration number KBU 028T drove, managed, and or controlled the same so negligently, carelessly and or recklessly that he caused or permitted the same to lose control, veer off the road and violently hitting the deceased's motorcycle and thereby occasioning him fatal injuries.
5. She blamed the appellant for the accident which has left her a widow with 3 children. She stated that the deceased was a 42-year-old man in good health. Following the death of the deceased, the family incurred funeral expenses and legal fees to institute proceedings in his estate.
6. On its part, the appellant filed a statement of defence denying the allegations made in the plaint. It stated that the deceased failed to take the necessary precaution to ensure his own safety while riding the motor cycle. That he was not wearing reflective clothes and was riding in a precarious manner.

Summary of the Evidence at trial

7. PW1 was the respondent who testified that the deceased is her husband. On the day of the accident, she received a phone call from a stranger informing her that the deceased had been involved in an accident. She rushed to the scene and found that the deceased had been taken to the hospital, where he had been pronounced dead on arrival. She joined the rest of the family in making burial arrangements for the deceased. She incurred expenses during burial preparations and she also spent Kshs.30,000/= in legal fees.
8. She stated that the deceased was working as a mason earning Kshs.1,000/= daily. That the police officer who visited the scene and investigated blamed the appellant for the accident. In cross-examination, she stated that she did not witness the

- accident. That her children are aged 23, 17 and 8 years. That the deceased used to pay school fees for his children from his masonry earnings of Kshs.1,000/- daily.
9. PW2 was PC John Orengo who stated that the accident was reported at Runyenjes Police Station and a police officer visited the scene. He stated that the driver of the appellant's motor vehicle was to blame for the accident. That the driver was not consistent on his lane and he was driving in a zigzag manner.
 10. Further, that the driver was supposed to be prosecuted for a traffic offence. On cross-examination, he stated that he was in court on behalf of the investigating officer. He did not visit the scene but he said that there was an eye-witness who could testify on how the accident occurred. He said that the matter was still pending under investigation. He did not submit a sketch plan of the scene to Court.
 11. PW3 was John Kivuti Njeru who stated that he witnessed the accident. He was riding his motor cycle behind the appellant's vehicle which was being driven at high speed and in a zig zag manner. The driver was swerving from the right to the left and back and he saw the deceased's motor cycle oncoming. The vehicle knocked down the deceased's motor cycle which was being ridden on its right lane. On cross-examination, he stated that the police arrived at the scene about 20 minutes after the accident and he told them what he had witnessed. That the road is clearly marked and the point of impact was on the deceased's lane. He said that he saw the accident as he was about 3-5 meters behind the appellant's vehicle which, as a result, was damaged on the driver's side.
 12. DW1 was Gibson Mechangi who was the driver of the appellant's motor vehicle. He stated that the deceased was riding his motor cycle at high speed when the collision occurred. That he tried to avoid the deceased and even stopped the vehicle but the deceased came to his side of the road and caused the accident. He said that he was not charged with a traffic offence. On cross-examination, he stated that he saw how the deceased was riding his motor cycle from afar and he was speeding. He slowed down but the deceased hit his vehicle on the front bumper. He denied that he was driving the motor vehicle in a zigzag manner and stated that he had stopped the motor vehicle at the side of the road. He did not have a sketch plan of the scene to submit to the Court.

Findings of the Trial Court

13. The trial court found the appellant wholly liable for the accident. The respondents were awarded Kshs.50,000/= as general damages for pain and suffering, Kshs.100,000/= for loss of expectation of life as agreed by both parties, Kshs.1,500,000/= as a global sum for loss of dependency and special damages of Kshs.68,000/=.

Parties' Submissions on the appeal

14. This appeal was canvassed by way of written submissions.

15. In its submissions, the appellant stated that the deceased was partly to blame for the accident and that the findings of the trial court on liability were faulty. It relied on the case of **Sacred Heart of Jesus Academy & another v FKK (Suing Through Father and Next Friend JK) [2024] KEHC 14818 (KLR)** and urged the court to find liability at a ratio of 65%:35% against the appellant. The appellant challenged the award of loss of dependency by the trial court.

16. It argued that there was no basis for applying the multiplier method since the deceased's earnings and dependency were not proved. It relied on the cases of **Gammel v Wilson [1981] 1 All ER 578** and **Okiro & another v Manani & another (Suing as the Personal Representatives and Legal Representatives of the Estate of Alloys Manani Gitaga – Deceased) [2025] KEHC 8717 (KLR)** where the court abandoned application of the multiplier method and awarded a global sum of Kshs.800,000/=. On this basis, he prayed that the court should apply a global award of Kshs.800,000/= in place of the assessment by the trial court.

17. The respondent submitted that the question of liability was conceded and that the only issue for determination is quantum. She relied on the cases of **Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased) [2021] KEHC 4971 (KLR)**, **Abok James Odera v John Patrick Machira t/a Machira & Co. Advocates [1999] KECA 198 (KLR)**, **Nkube V Nyamuro [1983] KLR** as cited in the case of **Nyambura v Njuguna & another (Civil Appeal E025 of 2022) [2024] KEHC 4185 (KLR)** and **Butt v Khan [1978] KECA 24 (KLR)**. She urged that whilst the court should re-examine the evidence it should be hesitant to overturn the findings of the trial court.

18. Finally, the respondent argued that on the trial court was correct in finding the appellant wholly liable for the accident. That the evidence adduced proves this on a balance of probabilities. She applauded the trial court for applying the multiplier method in computing loss of dependency since it was evident that the deceased was a mason earning Kshs.1,000/= daily. She relied on the case of **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988.**

Issues for determination

19. From the foregoing the issues for determination are:

- 1) Whether the trial court's finding on liability should be set aside; and
- 2) Whether the award of loss of dependency should be set aside.

Analysis and Determination

20. As a first appellate court, it is the duty of this court to reexamine the evidence adduced at trial. This was stated in the case of **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, where it was held:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

21. On the issue of liability, the respondent called PW2 and PW3 who testified that the accident occurred due to the appellant's driver's negligence. PW3, an eye witness, testified that he saw the appellant's motor vehicle being driven in a zigzag manner on the road and it eventually veered onto the deceased's lane. The accident occurred head-on, and on the deceased's rightful lane where the appellant's driver swerved to. PW2 stated that the appellant's driver, DW1, was to blame for the accident. DW1 confirmed that the police arrived at the scene after about 20 minutes. Whilst he denied driving carelessly, liability is a matter of fact which is proved through evidence.

22. 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.”

23. The evidential burden is further established under sections 109 and 112 of the Evidence Act. In the case of **Evans Otieno Nyakwana v Cleophas Bwana Ongaro [2015] KEHC 8440 (KLR)** the Court discussed the evidential burden and 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, [who has] 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 standard of proof in civil cases such as this one is on a balance of probabilities. In the case of **Miller v Minister of Pensions (1947) 2 All ER 372** 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.”

25. From the evidence adduced, it is clear that, on a balance of probabilities, the appellant's driver, DW1 was 100% to blame for the accident.

26. The trial court awarded a global sum of Kshs.1,500,000/= as general damages for loss of dependency. According to the trial court's judgment, the court stated that it would have considered applying the multiplier method with a multiplier of 18 years

and a multiplicand of Kshs.20,000/= against a dependency ratio of $\frac{2}{3}$. This would have resulted in an award of Kshs.2,800,000/= under that head.

27. The trial Magistrate noted that the appellant had suggested that the court applies a global sum of Kshs.500,000/= under that head. He also noted that the deceased's earnings were not proved. As such, he was more persuaded to apply the global sum approach and he was guided by the decision in the case of **Samuel Nyaga Ukavi v Jamlick Nyaga Namu, Embu Civil Appeal No. 27 of 2022**.

28. In the case of **Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased) [2020] KEHC 5897 (KLR)**, the court was inclined to apply a global sum where there was no proof of earnings. It held:

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

29. In the instant case, the earnings of the deceased were not proved. That is the reason why the trial court abandoned the multiplier method and applied a global sum approach. The deceased was 42 years old at the time of the accident. He was survived by a wife and 3 children who are argued to have been dependent on him. These facts were not contested by the appellant.

30. In **Karuku v Mwai & another (Suing as Personal Representatives and Administrators of John Muriuki Muceke - Deceased) [2023] KEHC 24803 (KLR)**, the court upheld a global sum of Kshs.1,200,000/= where the deceased was 52 years old. In **Hashi Hauliers & another v Joel Songok & another [2021] KEHC 6338 (KLR)**, the court made a global award of Kshs.1,000,000/= where the deceased was 38 years old. Based on these estimates and the exigencies of economic inflation, the trial court's assessment of

general damages for loss of dependency should be allowed to stand. The court applied the relevant principles of law properly. See the case of **Butt v Khan (supra)**.

31. All in all, the trial Court's decision was reasonable and there is nothing that persuades me to reach a different conclusion or interfere with the trial court's judgment.

32. Accordingly, I hereby dismiss the appeal with costs. The findings of the trial court on liability and assessment of general damages for loss of dependency are hereby upheld.

33. Orders accordingly.

Delivered electronically, dated and signed at Embu High Court this 3RD DAY OF DECEMBER, 2025, pursuant to notices issued on 24th and 26th November 2025, as to electronic delivery.

**R. MWONGO
JUDGE**