Karangu (Suing as the Legal Representative of the Estate of the Late Samwel Riro Karangu) v Toyopet Motors Limited & another (Civil Appeal E108 of 2023) [2025] KEHC 18210 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18210 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E108 OF 2023

PJO OTIENO, J

DECEMBER 5, 2025

BETWEEN

PATRICIAH WANJIKU KARANGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SAMWEL RIRO KARANGU) ..... APPELLANT

AND

TOYOPET MOTORS LIMITED ..... 1ST RESPONDENT

ABDUL QAYYOOM NORANI ..... 2ND RESPONDENT

JUDGMENT

Background

1. This is an Appeal by the Appellant, P W K (Suing as the Legal Representative of the Estate of her late brother S R K) against the Judgment and Decree of the Honourable J. Ndengeri, Principal Magistrate in Naivasha CMCC No. 363 of 2018 delivered on the 21st day of November 2023.

2. The suit was a claim for damages in negligence arising from a fatal road traffic accident that occurred on 7th January, 2018 resulting in the death of the Deceased, S R K. The particulars of the claim were that on or about the 7/01/2018 while the deceased was lawfully walking along Nairobi-Naivasha Road, at Kayole area or thereabout, the Defendant by themselves, servants, agents and/employees so negligently drove, controlled and/or managed motor vehicle registration number KCN XX7D as a result of which the deceased was knocked down and sustained fatal injuries.

3. The Respondent filed a Statement of Defence denying liability generally, denying ownership of KCN XX7D, and denying the occurrence of the accident as pleaded. The Defence asserted that if the accident ever occurred, it was solely or substantially caused by the deceased's own negligence of failing to heed to safety instructions.

4. The matter proceeded to full trial where the Appellant presented evidence from three witnesses. The summary of the evidence was that the motor vehicle registration number KCN XX7D, driven by the 2nd Respondent, knocked the deceased. A key witness for the Appellant (PW3) testified that the deceased was walking off the road when the speeding motor vehicle, while overtaking, veered off the road and hit him.

5. The respondent also gave evidence from one witness, the driver of the suit motor vehicle and the2nd Respondent. He was recorded as (DW1). He adopted his witness statement, asserting that the deceased crossed the road carelessly from right to left, he swerved to avoid him, and the deceased then came back to the road and was hit.

6. In the said judgment dated 21st November 2023, the trial court held that the evidence was conflicting and insufficient to place blame solely on one party. It was held that neither the driver anticipated the pedestrian, nor did the pedestrian anticipate the overtaking vehicle. She thus apportioned liability equally, at 50:50 between the Deceased and the Respondents.

7. The court then adopted a global approach and awarded general damages under three heads; a sum of Kshs. 500,000/= for lost dependency, Kshs 10,000 for pains and suffering and Kshs 100,000 for loss of expectation of life. Special damages was awarded in the sum of Kshs. 104,050/=. The final net award, after being subjected to the 50% contribution was calculated at Kshs. 357,025.00.

8. The Appellant was dissatisfied with the judgment, lodged this appeal, challenging the Trial Court's decision on both assessment of quantum and liability.

9. The two grounds of appeal, as set out in the Memorandum of Appeal dated 22nd November 2023, very concisely attack the judgment that;

    a. The Learned Trial Magistrate erred in law and fact in awarding Loss of Dependency which was too low in the circumstances.

    b. The Learned Trial Magistrate erred in law and fact in apportioning liability in the ratio of 50:50 between the Appellant and the Respondent yet there was overwhelming evidence to hold the Respondents 100% liable.

10. The Appellant seeks an order allowing the appeal, setting aside the apportionment of liability and substituting therefor a finding that the Respondents is 100% liable for the accident, and then re-assessing and enhancing the award made for loss of dependency.

11. The appeal has been argued by way of written submission filed on behalf of both parties.

Summary of the Appellant's Submissions

12. On liability, the Appellant submitted that the trial court failed to analyse the evidence exhaustively, particularly the uncontradicted testimony of the eye witness (PW3). PW3 affirmed that the deceased was either walking off the road or was on the side of the road when hit by the Respondent's vehicle, which was speeding and attempting to overtake. The Appellant contended that the 2nd Respondent's testimony that the deceased successfully crossed the road and then tried to cross again from the left side was illogical and fabricated to avoid liability.

13. While citing the decision in Onyancha (Suing as the Personal representative... of Beatrice Kerubo Nyakundi...) v Makini KEHC 9826 (KLR), the Appellant argued that the liability of a driver who is in control of a lethal weapon should not be equated to that of a pedestrian unless the pedestrian committed an overtly reckless act, such as jumping into the road. The Appellant proposed that if

contributory negligence was to be found, it should be in the ratio of 80% against the Respondents and 20% against the Deceased.

14. On quantum, the Appellant submitted that the award of Kshs. 500,000/- for loss of dependency was inordinately low, warranting appellate intervention under the standard established in Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR 727.

15. Regarding earnings, the Appellant argues for adoption of the pleaded figure of Kshs. 30,000/= per month for the deceased businessman, relying on Jacob Ayiga Maruja & Another v Simeon Obayo, Civil Appeal No. 167 of 2002, which recognizes that documentary proof is not the sole means to prove earnings in informal sectors.

16. Alternatively, the Appellant proposed adopting the 2018 statutory minimum wage of Kshs. 13,572.90/- for a general worker, applying a multiplier of 30 to 36 years and a dependency ratio of 2/3, arguing that this calculation would yield an award far higher than the global sum granted. The Appellant further pointed out that the global sum of Kshs. 500,000/- was contradictory to settled precedent for similar cases involving deceased adults without formal proof of income, where awards often exceeded Kshs. 1,200,000/-.

Summary of the Respondent's Submissions

17. The Respondents urged the Court to dismiss the appeal and uphold the trial court's findings. On liability, the Respondents argued that the 50:50 apportionment was correct because the evidence was insufficient and conflicting, making it unsafe to place the blame entirely on one party. They relied on the decisions in Farah vs Lento Agencies (2006) 1 KLR 124,125, and David Kimilu Mutinda Masinde Wamela Samuel (2021) eKLR which supports equal apportionment where fault is undiscernible. They contended that the apportionment was not manifestly erroneous and did not contain an error in principle. For that proposition they cited the decision in Khambi and Another vs. Mahithi and Another (1968) EA 70.

18. On quantum, the Respondents defended the global sum award of Kshs. 500,000/- as reasonable and justified. They maintained that the deceased was a casual worker and that the Trial Court rightly adopted the global approach because applying the multiplicand approach would involve undue speculation regarding monthly income and expected length of dependency.

19. The Respondents raised a statutory challenge to the entire claim under the *Fatal Accidents Act*. They submitted that the Appellant, being the deceased's sister, does not fall under the statutory class of beneficiaries listed in Section 4(1) of the FAA of wife, husband, parent, and child. Furthermore, they argued that the dependency of the deceased's three alleged children was never conclusively proven, as their birth certificates were not produced, and a chief's letter was insufficient proof of dependency. The decision in Arimi & another v Muasya, Civil Appeal E413 of 2023, was cited to buttress the point.

Issues, Analysis and Determination

20. Upon due perusal of the Record of Appeal and the submissions made by both parties, the Court frames the issues for determination to be:

    a. Whether the Learned Trial Magistrate erred in principle and facts in apportioning liability at 50:50 between the deceased and the Respondents?

    b. Whether the Learned Trial Magistrate erred in her approach in assessing damages for lost dependency?

21. Being a first appellate court, the mandate is to re-examine the evidence and submissions presented at the trial court to reach an independent conclusion, while acknowledging that this Court did not have the opportunity to observe the demeanour of the witnesses. In Gitobu Imyanyara & 2 Others -vs- Attorney General [2016] eKLR, the Court of Appeal stated as follows in line with the foregoing; -

> " An appeal to this court is by way of a 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."

22. Even with the framed issues in mind, there is the preliminary issue raised by the Respondent on whether the Appellant demonstrated statutory compliance by proving the legal capacity of the beneficiaries (the minor children) and their dependency on the deceased under the *Fatal Accidents Act*. The Respondent against the claim for loss of dependency was made on two fronts; the Appellant's standing/capacity and the proof of the minors' dependency.

23. Regarding the Appellant's capacity, the record confirms that Appellant and the deceased's sister instituted the suit in her capacity as the administrator of the deceased's estate. The fact that she is the deceased's sister has not been contested. The court takes the view that although the sister is not a beneficiary under Section 4(1) of the *Fatal Accidents Act*, she possesses the requisite locus standi to prosecute the claim on behalf of the listed statutory beneficiaries by dint of the Letters of Administration issued to her by the court. She equally possesses the standing to maintain a claim on behalf of the estate under the *law reform Act*. That the court was entitled to do even on the face of the very inelegant pleadings filed.

24. On the second objection concerning the lack of birth certificates for the minor children to conclusively prove dependency, this Court notes that the children, aged 6, 7, and 8 years old at the time of filing suit, were and are still minors who are legally presumed to be dependent on their father under the *Fatal Accidents Act*. While the Respondents now challenge the dependency of the children on the basis of absence of birth certificates, that was never raised at all in the cross examination. It is a matter that never arose at trial and need not arise here for the first time. The court finds that the fact of the minor children being born of the deceased was expressly pleaded but was never expressly traversed by the defence. Even at cross-examination the issue was never raised. It was thus strictly not an issue for determination. Accordingly, the Court finds that the dependency of the minor children was sufficiently established for the purpose of maintaining the claim under the *Fatal Accidents Act* and that no error has been established against the judgment to warrant interference.

25. On the merits, the appellant seeks to disturb the 50:50 apportionment, arguing that the driver bore the greater negligence. Interference with a trial court's finding on liability is only justified where there is a clear error in principle or where the apportionment is manifestly erroneous as being contrary to the evidence led. From the records, the court notes that the trial court dismissed the 2nd Respondent's (DW1's) narrative that the deceased crossed the road successfully and then immediately crossed back as being illogical. The court concurs with the trial court and observes that the speed of a pedestrian is never comparable to that of a motor vehicle on a paved road driven at a speed that militated against abrupt stop to avoid collision. It is thus illogical that the collision could have occurred as narrated by the defence witness. With such conclusion, the remaining evidence on the occurrence is as narrated by PW3, an eyewitness. That evidence pointed to the driver, who was speeding while overtaking, veered off its lane before hitting a pedestrian who was either off the road or just at the verge.

26. In the court's mind, the primary fault rested with the driver who failed to control the vehicle, despite claiming visibility was clear and seeing the pedestrian. The jurisprudence this genre of claims emphasizes the principle of comparative negligence, recognizing the higher duty of care placed upon the driver of a motor vehicle. As held in Onyancha v Makini (2022) KEHC 9826 (KLR), a driver is in charge of what is often deemed a lethal weapon, and the liability borne by a driver cannot be equated with that of a pedestrian unless the pedestrian's actions were exceptionally reckless.

27. From the evidence of both PW3 and DW1, the driver failed to exercise the sufficient lookout, foresight and control required of a reasonable driver commanding a lethal instrument. Even by granting the possibility of pedestrian carelessness of failing to keep a proper lookout, the same could not amount to the gross recklessness necessary to justify 50% fault when contrasted with a driver who was overtaking and failed to maintain control of the vehicle.

28. The trial court in apportioning liability at 50:50 alluded to the driver having observed the road kerb then commented that the driver did not anticipate a pedestrian crossing the road. All that was not in evidence and thus amount to consideration of irrelevant matter which then invites interference on appeal. Having found the defence evidence illogical, it was thus expected that the otherwise cogent evidence of PW3 takes sway for purposes of credibility. The court finds the apportionment to have been erroneous and sets it aside. It finds that the respondent was more if not wholly to blame. However, because there is no mathematical certainty with which to measure the blame, the court apportions liability at 80:20 in favour of the appellant.

29. Flowing from the foregoing discussion, the court hereby sets aside the equal apportionment of liability by the trial court and substitutes therefor an apportionment of 80:20 against the 1st and 2nd Respondents jointly and severally.

30. On assessment of damages, the Appellant challenges the award of Kshs. 500,000/= for loss of dependency, arguing that it is inordinately low. The trite position of the law is that an appellate interference with the difficult and discretionary task of assessing damages is only permissible where the award is demonstrated to be so inordinately low as to represent an entirely erroneous estimate. In this matter, the reason put forth by the trial court while rejecting the multiplier/multiplicand formula and adopting the global sum approach was because the deceased was deemed a casual labourer, making the determination of monthly earnings speculative.

31. the court finds that not to be a plausible reason at all. While there is no magic in the multiplier approach and while the court is entitled to use the global sum approach, the end game is to award a compensatory sum not merely vindicative one. The reason is not plausible because even where a monthly income is not discernible, but the engagement is known as in this case, the straight forward way is to adopt the gazetted minimum wage as the multiplier. The court finds that it was more appropriate and just, looking at the age of the deceased of 32 year, the application of minimum wage would have given the appellant a sum obviously larger than the global sum. That is a conclusion drawn from the decisions cited to court by the appellant at trial.

32. The court takes the position that where precise proof of informal income is absent, courts must adopt a reasonable estimate, typically the gazetted minimum wage to prevent injustice.[1] The Appellant having failed to formally prove the claimed income of Kshs. 30,000/=, the trial court ought to have reverted to a baseline income. The applicable baseline herein is that for a general worker under the reigning Regulation of Wages (General) (Amendment) Order, 2017. The orders set the minimum wage for

[1] Sukaru Industries Limited v Lensa Awuor Nyagumba & Another eKLR.

the area at Kshs. 11,926.40/ per month. The court adopts that sum as the multiplier and opts for the multiplier formula.

33. The deceased was 32 years old at the time of death. The court is of the view that while the Appellant proposed up to 38 years, considering the informal nature of the employment and standard contingencies and vicissitudes of life, a multiplier of 20 years is deemed reasonable. The deceased was survived by three minor children, justifying the submission of a 2/3 dependency ratio. The calculation for Loss of Dependency under the *Fatal Accidents Act* is therefore Kshs. 11,926.4 x 20 x 12 x 2/3 amounting to Kshs. 1,908,224/=

34. The court is satisfied that the appeal is merited. It allows it on terms that the judgment on liability is set aside and, in its place, substituted one apportioning liability at 80:20% in favour of the Appellant.

35. The global sum approach on assessment of damages is equally set aside and the multiplier formula adopted with the use of minimum wage. the other heads of damages remain undisturbed and are upheld.

36. The award of damages thus works out thus:

    a. Pain and Suffering: Kshs. 10, 000/=

    b. Loss of Expectation: Kshs. 1,908,224/=

    c. Loss of Dependency: Kshs. 100,000/=

    d. Special Damages: Kshs. 104,050/=

    Gross award : Kshs. 2,122,274/=

    Less 20% contribution Kshs. 424,454.80=

    Net Damages due : Kshs. 1,697,819

37. General Damages shall attract interest at court rates from the date of the lower court Judgment until payment in full while interest on Special Damages shall accrue at the same rates from the date of filing suit until payment in full. The Respondent shall pay the costs of the suit in the lower court and the costs of this Appeal.

38. Because the sums under the *Law Reform Act* vest on the minors and in terms of the said Act the court directs that a sum of Kshs 1,200,000 shall be invested for the benefit of the minors in an interest earning account operated between the appellant and the deputy registrar pending the attainment of the age of majority by the minors.

39. The surplus thereof including interests and costs shall be paid to the appellant on behalf of the estate to help her meet any debts of the estate including legal fees and the immediate needs of the minors.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER, 2025.

PATRICK J O OTIENO

JUDGE

In the presence of;

Ms. Kiberenge for the Appellant.

Ms. Soi for the Respondent.

Ms. Hanna – Court Assistant.