

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E034 OF 2024

JOSEPH KITHEKA ALIAS JOSEPH M. KITHEKA KIILU.....
.....APPELLANT

-VERSUS-

LUCIA W. WANJOHI (Suing as the Administrator of
the estate of the Geoffrey Mwangi Wanjohi-
Deceased).....RESPONDENT

***(Being an appeal from the judgment and decree in the Chief Magistrate’s Court at
Ruiru (Hon. Diana Orago SRM) dated 12th March 2024 in her civil suit number E254
of 2023)***

JUDGMENT

Geoffrey Mwangi Wanjohi (hereinafter referred to as ‘the deceased’) was on 12-08-2022 involved in an accident with the appellant’s motor vehicle registration number KBQ 063L (hereafter referred to as ‘the vehicle’) along Ruiru eastern by-pass road which led to his demise two days later. The respondent who was the deceased’s mother brought suit in the lower court claiming damages under the Law Reform Act and the Fatal Accidents Act.

Upon full trial, the lower court found the appellant 100 per cent liable for the accident and awarded damages as follows;

- | | | |
|--------------------------------|------|--------------|
| a. Pain and suffering | Kshs | 70,000.00 |
| b. Loss of expectation of life | Kshs | 100,000.00 |
| c. Loss of dependency | Kshs | 1,400,000.00 |

8. Consequently, the decision of the learned trial Magistrate caused a miscarriage of justice.

The appeal was disposed of by way of written submissions with the appellant filing his dated 2-06-2025 and the respondent filing submissions dated 8-09-2025. I have gone through the submissions, the proceedings and judgment in the trial court and discern therefrom that the appellant's contentions are on liability and awards for pain and suffering and loss of dependency. Despite the appellant pleading in his memorandum of appeal that the trial court did not analyse his evidence and submissions, he has not pointed out to this court which portions or areas of his evidence or submissions were not analysed. There is a difference between analysing of evidence and reaching an erroneous conclusion. Having read the judgment of the trial court, it is my view that the Honourable Magistrate sufficiently analysed the evidence of the parties. Whether the decision was correct or erroneous is another thing all together.

This is a first appeal. As it has been held in many judicial authorities, an appellate court has an obligation to dispose the appeal before it as if it were conducting a re-hearing where it should analyse, consider and evaluate the evidence produced in the trial court afresh and come to its own independent conclusion. However, the appellate court must in doing so keep in mind that, it did not take the evidence of the witnesses and had no opportunity to observe the demeanour of the witnesses and give due allowance for that. One of the authorities is ***Mark Oiruri Mose v Republic (2013) KECA 67 (KLR)*** where the Court of Appeal held that;

'It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it,

evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.'

The respondent's case.

In the trial court, the respondent called two witnesses other than herself. The first witness was one Everlyn Muthengi a police officer stationed at Ruiru police station. She produced a police abstract for the accident in question. She told the court that she was not the investigating officer and could not tell who was to blame for the accident but according to the occurrence book, the deceased who was pushing a handcart was hit from behind by the motor vehicle.

The respondent was the second witness. She stated that the deceased who was her son was a casual worker who earned his living by fetching and selling water using a handcart. She added that she came to know of the deceased's death through his wife who she interestingly said she did not know and another man. She added that the deceased used to buy household goods for her and give her Kshs 5,000.00 per month. The respondent testified further that the deceased was 46 years and healthy before the accident. She produced a total of 13 exhibits and added that she spent Kshs 65,000.00 as special damages but she only had receipts for Kshs 36,000.00. She admitted in cross-examination that she had no evidence to prove that the deceased used to earn Kshs 15,000.00 per month.

PW3 was one James Muchiri Njungu who told the court that he lived in Ruiru as a casual labourer and that he witnessed the accident. He added that the deceased was his friend and blamed the driver of the vehicle as he was driving at a high speed.

He stated that he saw the vehicle hit the deceased from behind. The witness stated further that the driver of the vehicle was overtaking when the accident occurred and denied that the deceased moved into the vehicle's lane.

After the accident, the deceased was taken to Ruiru Sub-County hospital by good Samaritans where he was treated and allowed to go home. The witness added that he went to visit the deceased on 14-08-2022 and found him in a bad condition whereupon he called people who assisted in taking him to Thika Level 5 hospital where he was pronounced dead on arrival. He added that he went back to Ruiru and called the driver of the vehicle and they together went to the police station.

In cross-examination, the witness described the colour of the vehicle and insisted that the driver was speeding and overtaking. He stated that he worked at a timber yard which was just along the road and he could see the vehicle. He added that, there are rumble strips and bumps at the point of the accident but there was no zebra crossing.

The appellant's case

The appellant told the court that he was the owner of the vehicle and that he was the driver at the time of the accident. He stated that he was driving slowly at about 50 kilometers per hour. The appellant added that the deceased suddenly joined his lane from his right-hand side as he was trying to cross the road. He consequently hit the tyre of the handcart. He stated further that he braked, swerved and hooted but it was too late. After the accident, he stopped and took the deceased to hospital where he was treated and discharged.

In cross examination, the witness stated that he hit the tyre of the handcart and insisted that the deceased entered the road without looking and that he hooted and braked when he saw the deceased. He also stated that the point of impact was on the number plate and his car was damaged at the front. He alleged that he showed the police skid marks.

The appellant's other witness Mrs. Dorothy Mueni who was the appellant's wife told the court that she was on board the vehicle at the co-driver's seat when the accident occurred. She added that the vehicle was being driven safely and at 50 kilometers per hour. She added that the deceased encroached onto the lane of the vehicle from the right side causing the driver to apply emergency brakes but because of the proximity, the handcart hit the vehicle on its wheel causing the handcart pusher to be thrust to the side where he fell. The driver stopped and police came later and took details of the accident. She stated that the deceased was to blame for operating a non-motorised vehicle without due regard to the presence of other road users and breaching the highway and traffic rules.

In cross-examination, the witness stated that the back tyre of the vehicle hit the handcart and insisted that the deceased entered the road without checking. She denied that there were bumps at the place of the accident.

Analysis and determination

There is no dispute that the accident occurred on the date pleaded involving the deceased and the vehicle. There is also no dispute that the demise of the deceased was occasioned by the accident. The dispute between the parties is who was to blame for the accident and the quantum of damages.

The appellant has maintained that the deceased joined the road without looking out and that he tried to avoid the accident by braking, hooting and swerving in vain. He also claims to have been driving at 50 or 60 kilometers per hour. On the other hand, the respondent insists that the deceased was pushing the handcart and was hit from behind by the speeding vehicle.

The parties have given different versions of events and how the accident occurred. It is true as submitted by the appellant that where the court is faced with a situation where it is not able to tell who was to blame for an accident, the appropriate thing to do is to apportion liability equally. It was so held in ***Ndatho v Chebet (2022) KEHC 346 (KLR)***, that;

‘The law is trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally.’

In making a decision on liability, the court must look at the totality of the evidence from both sides and make a conclusion based on the strength of the evidence. Strength of evidence of the parties is determined from the flow of the events as described by the witnesses including consistency of the testimonies and authenticity of any documentary evidence. The court must also look at the circumstances of the case and probabilities of the truth of one set of facts given by one party as measured against the other.

In this case, the appellant admitted that he hit the tyre of the handcart and his motor vehicle was damaged on the front side specifically at the number plate. It is common knowledge that number plates are usually placed in the middle of the front of the vehicle. The admission that the vehicle was damaged at the front is

consistent with the PW1 and PW3's accounts that the handcart was hit from behind. The same version was recorded in the occurrence book which must have been entered after either scene visit or evaluation of evidence given to the police. DW2 alleged in cross-examination that the back tyre of the vehicle hit the handcart. This evidence is inconsistent with the damage to the vehicle and contradicted what the appellant told the court. I therefore do not find the evidence of DW2 truthful and it must be disregarded.

The appellant alleges to have been driving at 60 kilometers per hour. In my view, a prudent driver at that speed would come to a stop within a few meters if he applied brakes. If indeed the appellant applied brakes and swerved as he alleges, I do not think that the impact of the collision would have been that strong as to cause death. Either the appellant was driving at a high speed or he did not apply the brakes as he alleged. I have no reason to doubt the testimony of PW3 that there were rumple strips and bumps at the point of the accident.

In my view, the totality of the above leads to a conclusion that the appellant was driving at a high speed and hit the handcart from behind. Where a vehicle hits another vehicle, object or a person from behind, its driver has a higher duty to explain the circumstances and factors that led him not to see the vehicle, object or person in due time in order to avoid the accident. My conclusion on this point is that, the lower court was justified in returning a verdict of 100 per cent liability against the appellant.

On pain and suffering, the appellant has claimed that the award is too high considering that the deceased died two days after the accident. According to the appellant, the court should have considered an award in the region of Kshs

20,000.00. Damages for pain and suffering are at the discretion of the trial court and the appellate court should not disturb the same unless it is sufficiently demonstrated that the award by the trial court was arrived at through application of wrong principles or that they were so high or too low as compared to other decided cases as to amount to an erroneous estimate.

In awarding damages for pain and suffering in fatal claims, the court considers the nature of the injuries and the period the deceased suffered which is between the date of the accident and the time of demise. I have considered that the deceased died two days after the accident. The injuries indicated in the postmortem report are shown to have been multiple. Although the report is hardly legible, the injuries seem to have been in all areas of the body except the spinal cord and column. It actually looks strange to me, although I am not a medical doctor, that the deceased was discharged from Ruiru Sub-County hospital with these nature of injuries. In my view, the deceased must have suffered great pain and suffering for the two days he lied in bed at home before PW3 visited him and made arrangements to take him to Thika level 5 hospital. In the circumstances, I do not find the amount awarded by the trial court under this head to be so high to justify interference by this court. I have considered the decision of Honourable Justice Mumbua T. Matheka in *Mwangi (Suing as the administrator of the Estate of Peter Maina Mwangi (Deceased)) v Arim (2022) KEHC 3295 (KLR)* where she awarded a sum of Kshs 100,000.00 in respect of the deceased who had died a day after the accident.

On loss of dependency, the court adopted the global approach which in my opinion was best suited for this case. There was no proof of income of the deceased and the court did not have parameters on which it could to apply the multiplier approach. The appellant has argued that the court should have applied the minimum wage

and adopted the multiplier approach instead of the global approach. The trial court had the discretion to choose which approach to adopt of course with no scientific factors of consideration.

In applying a global approach, a court should be guided by factors like the extent of dependency of the claimants, the age of the deceased, the expected period of the dependency, the lifestyle of the deceased and the status of the living dependants. The list of the factors of consideration is not exhaustive. In this case, the deceased had no demonstrable level of income and had no children or wife. He was aged 46 and his only supposed dependant was his mother whose age was not disclosed. There was no proof of the level of dependency other than the unproved allegations that the deceased would give the respondent Kshs 5,000.00 per month and buy her some household items.

The pleadings do not show how old the respondent was which would guide the court on the expected period of the dependency. Taking all these factors into consideration, I hold the view that the sum of Kshs 1,400,000.00 awarded under this head was not justifiable. I am minded to reduce the same to Kshs 800,000.00. I am persuaded by the authority of *Kabora & another (Suing as the legal representative of the Estate of Esther Gathigia Mwangi (Deceased) v Mwangi (2023) KEHC 24919 (KLR)* in which Honourable Justice A.K. Ndungu awarded a sum of Kshs 1,000,000.00 in respect of the deceased who died at 43 years leaving behind a son aged 17 years.

In the final analysis, I dismiss the appeal against liability and award on pain and suffering and set aside the award on loss of dependency which I substitute for Kshs 800,000.00. In the circumstances of this case, I will not make any orders on costs.

The final orders of this court are;

1. Judgment and decree of the trial court dated 12-03-2024 is adjusted as follows;

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|------------------------------------|------|------------|
| a. Pain and suffering | Kshs | 70,000.00 |
| b. Loss of expectation of life | Kshs | 100,000.00 |
| c. Loss of dependency | Kshs | 800,000.00 |
| d. Special damages | Kshs | 36,950.00 |
| e. Costs of the suit and interest. | | |

2. There shall be no orders as to costs in this appeal.

Dated, signed and delivered at Nairobi this **16th** day of **January** 2026.

B.M. MUSYOKI
JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Messo holding brief for Miss Nyaata for the appellant and in absence of the respondent.