REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. E022 OF 2019

VERSUS

GEORGE NG'ANGA MUIRURI & VERONICA WATHIRA MWANGI (Suing as the personal representatives of the estate of the late

PETER MUCHERU MWANGI)…….
….APPELLANTS

VERSUS

COUNTY GOVERNMENT OF NAKURU (PUBLIC SERVICE BOARD)……1ST RESPONDENT

ALEX KIPKURUI SOI……2ND RESPONDENT

(*Being an appeal from the Judgment and Decree delivered on 22nd January 2024 by Hon. W. K. Kitur (RM) in Nakuru CMCC No. 443 of 2016)*

JUDGMENT

1. The appellants were the plaintiffs in the lower court while the respondents were the defendants. Vide the plaint dated 27th June 2022 they sued the respondents claiming damages under the Fatal Accident Act, damages under the Law Reform Act, special damages and costs of the suit plus interest from the date of the Judgment or from that of filing the suit.

2. The facts of the case were that on 25th March 2015 or thereabout the deceased was lawfully walking along but completely off Nakuru-Eldoret road at DT Dobie area when the 2nd defendant so negligently drove motor vehicle registration number KBY 857 C belonging to the 1st respondent, as a result of which he was knocked down and subsequently died.
3. After a full hearing the court in its Judgment delivered on 22nd January, 2019, dismissed the appellants' suit with costs to the respondents.
4. Being aggrieved with the judgment the appellants lodged the appeal dated 1st February, 2019 on the following grounds:
    i. ***That the learned trial magistrate erred in law and in fact by finding that the plaintiffs had not proved their case on a balance of probability hence dismissing the same.***
    ii. ***That the learned magistrate erred in law and in fact in failing to consider the evidence and submissions of the plaintiff by failing to make any finding on the evidence of the plaintiff witness.***
    iii. ***That the learned trial magistrate erred in law and in fact in dismissing the plaintiffs' case yet the evidence was clear on the occurrence of the accident.***
    iv. ***That the learned magistrate erred in law and in fact in failing to properly analyse, comment and/or make a finding on the evidence by the***

plaintiff's witnesses and submissions before him and therefore misdirected himself in arriving at the wrong conclusion.

v. That the learned trial magistrate erred in failing to assess damages awardable to the appellants had they succeeded.

5. The appellants urged the court allow the appeal and the respondents be found 100% liable. Further, that they be awarded damages for loss of the deceased plus costs of the appeal.
6. The Appeal was canvassed through written submissions.

Appellants' submissions

7. These were filed by Gekonga & Company Advocates and are dated 26th May 2025. Counsel gave a brief background of the case and submitted on grounds of appeal.
8. Regarding grounds 1,2,3 and 4 which are on liability, counsel submitted that the evidence of the appellants' witnesses was corroborated and consistent to the effect that the accident was solely caused by negligence on the part of the 2nd respondent who was over speeding and failed to do anything to avoid the accident. Thus, the appellants had proved their case on a balance of probabilities and had the trial magistrate not disregarded their evidence and submissions, he would have reached that decision. He urged the court find the defendants 100% liable for the accident.
9. On the last ground which is on quantum, counsel submitted that the deceased died on the spot after the accident. Thus, an award of Kshs. 100,000/= would be

reasonable for pain and suffering. He placed reliance on the decision in **Gilbert Nyangau Oyugi v Charles Ondego Onduso & Another 2019 eKLR** where the plaintiff who died on the spot after the accident was awarded Kshs. 50,000/= for pain and suffering.

10. Counsel submitted that PW1's testimony indicated that the deceased was 57 years at the time of his death as per the death certificate that was produced as P. Exhibit 4. Thus, an award Kshs. 200, 000/= would be reasonable for loss of expectation of life. He relied on the decision in **Violet Jeptum Rahedi V. Albert Kubai Mbogori [2013] eKLR** in which Kshs. 150,000/= was awarded for loss of expectation of life where the deceased was 44 years old.
11. Counsel further submitted that PW1 testified that the deceased was paid in cash kshs. 18,000/= since he used to hawk groceries, thermos flasks and hotpots. He submitted that a multiplicand of kshs.18,000/=, a multiplier of 13 as the number of years he was expected to work given that the deceased was not a civil servant and a dependency ratio of 1/3 should be applied in this case. Therefore, an award of kshs. 936,000/= would be reasonable. The court's attention was drawn to the decision in **Jacob Ayiga Maruja & Another v Simeon Obayo, Civil Appeal No. 167 OF 2002**, where it was held as follows:

"we do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way to

prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.

12. In conclusion, he urged the court to allow the appeal as prayed, the judgment by the lower court be set aside and they be awarded general damages plus special damages amounting to kshs. 108, 675/= both totalling to kshs. 1,344, 675/= plus costs.

1st and 2nd Respondents' submissions

13. These were filed by Momanyi & Associates and are dated 16th October 2025. Counsel submitted that the appellants had the duty to prove their case against the respondents on a balance of probabilities. That from the evidence on record there is no certainty that the 2nd respondent and by extension the 1st respondent are liable and that they caused the death of the deceased. Further, that the evidence tendered by PW1, PW2 and PW3 was sketchy and inadequate to establish liability. Additionally, that the appellants attempted to sneak in evidence in form of submissions which was inadmissible. Thus, the trial court relied only on the evidence given under oath and subjected to cross-examination.
14. The court's attention was drawn to the Court of Appeal decision in **Mariam Maghena Ali v Jackson M Nyambu**

T/A Sisera Store Civil Appeal No.5 of 1990 (Unreported) and **Idi Ayub Sahbani v City Council of Nairobi (1982-88) IKAR 681 at page 684** where it was held as follows;

"special damages in addition to being pleaded must be strictly proved as was stated by Lord Goddard C.J in Bonhan Carter v Shyde Park Hotel Limited [1948] 64 TLR 177 thus: plaintiffs' must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and so to speak, throw them at the head of the Court saying this is what I have lost 1 ask you to give me these damages. They have to prove it"

See also **Abdul v Mokua Civil Appeal No. E077 of 2023 [2025] KEHC 4105 (KLR) (1 APRIL 2025)** and **Kabue v Kurui & Another Civil Appeal E006 of 2023.**

Analysis and determination

15. I have considered the record of appeal, grounds of appeal as well as the submissions and the authorities relied on by the parties. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. In **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR**, the court stated as follows-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the

conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

16. The law is clear that this court as an appellate court will only interfere with the decision of the lower court, if the said decision is founded on wrong principles. That was the holding of the Court of Appeal in **Mkube v Nyamuro [1983] LLR at 403,** where Kneller JA & Hancox Ag JA held as follows;

    "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

17. The appellants through their counsel argued that they had proved their case on a balance of probabilities and had the trial magistrate not disregarded their evidence and submissions, he would not have dismissed their suit. The respondents' counsel contends that it was the appellants' duty to prove their case against the respondents on a balance of probability. According to him the evidence tendered by PW1, PW2 and PW3 was sketchy and inadequate to establish liability on the part of the respondents.

18. The trial magistrate in his judgment noted that the appellants had the duty to prove their case against the respondents on a balance of probabilities and from the evidence they tendered there was no certainty that the respondent were liable for the death of the deceased. He

further noted that the appellants had purported to sneak evidence in form of submissions and the said evidence was inadmissible as the court could only rely on evidence adduced in court.

19. This court has considered the evidence adduced before the trial court and it is not in dispute that the 1st respondent is the owner of motor vehicle registration number KBY 857C which was involved in the accident. Further, it is not disputed that the deceased was also involved in an accident and the police abstract attests to the same. During trial the appellants called three witnesses and PW1 did not tell the court much about how the accident occurred. He testified that he was told that the accident was at Total area near D.T Dobie. He stated that when he visited the hospital he confirmed that the deceased had been involved in the accident and that the vehicle that caused the accident was KBY 857C. In cross-examination, he stated that he was informed about the accident by PW2.
20. PW2 testified that the accident occurred at around 10pm and he saw motor vehicle KBY 857C and not KCC 560Y hit the deceased from behind, and he fell down and died instantly. He stated that the deceased was on the side of the road and not crossing the road.
21. PW3 No. 49807 CPL Jackson Nkonge testified that the accident occurred at D.T Dobie area along Nakuru-Eldoret highway on 25th April 2015 involving motor vehicles numbers KBY 857C Toyota Hilux and KCC 560Y, Toyota pick-up. He stated that the deceased died and the

accident was reported at around 22.05hrs under OB number 20 but it was not clear who reported. He further stated that the driver of KBY 857C was charged in court with the traffic offence of causing death by dangerous driving. He produced the police abstract as exhibit Pexh 3.

22. On-cross examination, he stated that he was not aware of the fate of motor vehicle registration number KCC 560Y and whether the driver of KBY 857C was ever charged in court.

23. The 2nd respondent testified as DW1 and gave sworn testimony. He stated that on 25th May 2025 while driving motor vehicle registration No. KBY 857C along Nakuru-Eldoret highway he saw a person in front of the motor vehicle, it was raining and he applied emergency brakes. As a result, the motor vehicle KCC 560Y hit his motor vehicle on the side. He stated that there was no zebra crossing and he never hit the deceased but he was in the middle of the road when the accident occurred. He further stated that the deceased was hit by the vehicle (KCC 560Y) behind his motor vehicle and that he was never charged with any traffic offence.

24. On cross examination, he stated that his signature was on the police file witness statement. He further stated that both motor vehicles were speeding and he tried to brake to avoid hitting the deceased. However, the motor vehicle KCC 580Y which was in the inner lane changed lanes and hit his motor vehicle on the side forcing it into the inner lane. He further stated that the deceased's body was found under motor vehicle KCC 560Y. He confirmed that

the said motor vehicle was not mentioned in the defence statement which was filed on 25th May 2016 and that he was able to see clearly even though it was at night.

25. After analysing all the evidence above, this court notes that PW2 witnessed the accident and from his testimony the deceased was knocked down by motor vehicle KBY 857C being driven by the 2nd respondent. Further, the police abstract attests to the occurrence of the accident and the motor vehicles involved being KBY 857C and KCC 560Y and the deceased. It also, indicates that the 2nd respondent who was the driver of motor vehicle KBY 857C was charged for causing death due to dangerous driving.

26. In his testimony, DW1 admitted that he was speeding, it was at night and it was raining when he saw the deceased in front of his motor vehicle and he tried to apply the brakes to avoid hitting him. I note that no police investigation report was produced to show whether either the deceased who was a pedestrian at the time of the accident or the motor vehicle KBJ 857C was wholly to blame. The 2nd respondent blamed the driver of KCC 560Y. In addition, their statement of defence does not mention motor vehicle KCC 560Y as being part of the accident.

27. PW2 an eye witness and the police abstract narrate on how the accident occurred and both blame the 2nd respondent for the accident. It is obvious that the general rule is that the initial burden of proof lay on the appellants but the same may shift to the respondents depending on the circumstances of the case. In my opinion, it was therefore incumbent upon the respondents to prove this

fact by marshalling the necessary evidence to support their case.

28. 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 (sic) 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 on that person who would fail if no evidence at all were given on either side."

29. It is clear from both the police and the 2nd respondent that the accident involved the two mentioned vehicles and the deceased. None of them blames the deceased for the accident. In his evidence the 2nd respondent blamed the driver to motor vehicle registration number KCC 560Y for causing the accident. It is a big surprise that the respondent though represented by counsel did not find it necessary to enjoin the said driver or the owner of the said vehicle in these proceedings. This would have enabled the court to determine who between the two drivers was to blame for the accident or whether both contributed to the

accident. In view of the foregoing I find the 2nd respondent to have been 100% to blame for the accident. The trial Magistrate erred in finding otherwise.

30. Moving to the issue of quantum, in the case of **Borthy-Gest** stated in **West (H) & Son Ltd v Shepherd [1964] A.C. 326 pg. 345** the court stated thus:

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

31. The appellant prayed for an award for pain and suffering amounting to kshs.100,000/=. According to the post-mortem report the deceased died on the spot. In **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR**, the Court stated as follows as regards damages awardable under these two heads;

"As regards damages awarded under the Law Reform Act, the principle is that 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….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 awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

32. In view of the above, I award kshs. 30,000/= for pain and suffering since the deceased died on the spot.
33. On loss of expectation of life, the court in the case of **Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR** 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 pain and suffering the awards range from Kshs.10,000/- with higher damages being awarded if the pain and suffering was prolonged before death."
34. Upon considering the two cited authorities above I award the sum of kshs. 100,000/= for loss of expectation of life.

35. Regarding the award of loss of dependency, it is not disputed that the deceased was 57 years old at the time of his untimely death (EXB 4). PW1 in his testimony informed the court that the deceased was a hawker and earned kshs.18,000/= monthly. However, he confirmed that he had no documents confirming the same.
36. In **Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR**, when dealing with a similar issue the court stated that:

"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."

37. Further, in the case of **Moses Mairua Muchiri vs Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR,** it was held as follows; -

"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

38. Guided by the principles advanced in the above cited cases, this court is inclined to apply the global sum approach rather than the multiplicand or multiplier method in determining the amount to be awarded for loss of dependency. I therefore issue a global award in the sum of kshs. 700,000/= for loss of dependency.

39. On special damages which is also a point of law, it is trite law that the same ought to be specifically pleaded and proved. In **Mbaka Nguru & Another -v- James George Rakwar [Civil Appeal No. 133 of 1998 (UR)**. the Court cited with approval ***Lord Goddard, C.J.*** in **Bonham Carter -v- Park [1948] 647 T.L.R. 177** and continued:

"It will suffice to say that plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to. In the

absence of any pleading as to damages claimed under this head, we are constrained to disallow the whole of that award and we set it aside wholly."

40. The appellants under paragraph 8 of the plaint indicated particulars for special damages amounting to kshs. 108, 675/=. However, from the receipts produced as evidence only kshs. 58,550/= was proved, and that's what they will get.
41. Lastly, on the issue of the appellants' submissions not having been considered, I opine that the said allegation does not hold water. In the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR** it was held as follows:

    "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."
42. The upshot is that the appeal herein succeeds and the Judgment of the lower court is set aside in its entirety, and substituted by a Judgment of this court in the following terms:

(a) The respondents are found liable at 100%

(b) General damages:

(i) Pain and suffering – Ksh 30,000/=

(ii) Loss of expectation of life – Ksh 100,000/=

(iii) Loss of dependency - Ksh 700,000/=

(iv) Special damages – Ksh 58,550/=

43. The appellants shall have costs both in the lower court and in the high court.

44. Orders accordingly.

Dated and signed this 20th January, 2026 by:

H. I. ONG'UDI
JUDGE

Delivered this 17th February 2026 in open court at Nakuru by:

J. M. NANG'EA
JUDGE