



REPUBLIC OF KENYA



Ondigo v Ochieng (Suing as the legal representative of the Estate of Wilson Ochieng Ongayi - Dcd) (Civil Appeal E095 of 2025) [2026] KEHC 1356 (KLR) (12 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1356 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E095 OF 2025
A MABEYA, J
FEBRUARY 12, 2026**

BETWEEN

KENNEDY MORGAN ONDIGO APPELLANT

AND

**DAVID AGUKO OCHIENG (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF WILSON OCHIENG ONGAYI - DCD) RESPONDENT**

(Being an appeal from the judgment and decree of Hon. K. Cheruiyot SPM delivered on the 9/4/2025 in Kisumu CMCC No. E133 of 2021, David Aguko Ochieng (Suing as the legal representative of the estate of Wilson Ochieng Ongayi (DCD) v KENNEDY MORGAN ONDIGO)

JUDGMENT

1. The respondent filed the primary suit before the trial court vide a plaint dated 13/03/2021. He sought general and special damages as well as costs of the suit for fatal injuries sustained following a road traffic accident that occurred on or about the 18/7/2019.
2. The appellant entered appearance and filed a statement of defence dated 30/4/2021 in which he denied the respondent's claim and pleaded contributory negligence on the part of the respondent.
3. The matter proceeded to trial and by a judgment delivered on 10/4/2025, the trial court decreed: -
 - a. Liability 100% against the appellant.
 - b. Pain & suffering Kshs. 50,000/-.
 - c. Loss of Expectation of life Kshs. 100,000/-.
 - d. Loss of dependency Kshs. 1,000,000/-.
 - e. Special Damages Kshs. 440,000/-.



- f. Total Kshs. 1,590,000/- plus costs & interests.
4. Being dissatisfied with the said judgment/decreed, the appellant lodged this appeal vide the Memorandum of Appeal dated 22/4/2025 and raised five (5) grounds of appeal as follows: -
- a. That the learned trial magistrate erred in law and fact in holding the appellant 100% liable in negligence.
 - b. That the learned trial magistrate erred in law and fact by failing to dismiss the respondent's suit in view of the evidence adduced.
 - c. That the learned trial magistrate erred in law and fact in failing to consider the submissions by the appellant on both issues of liability and quantum.
 - d. That the learned trial magistrate erred in law and fact by awarding the respondent excessive damages under the *Fatal Accidents Act*.
 - e. That the learned trial magistrate erred in law and fact by awarding the respondent special damages of Kshs. 440,000/- without receipts in support of the same.
5. The appeal was disposed of by written submissions. The appellant submitted that there was no evidence to support the conclusion reached by the trial court. That the evidence on record justified a finding of substantial contributory negligence and not 100% liability against him.
6. On quantum, it was submitted that the same was manifestly excessive and ought to be disturbed. He relied on his submissions before the trial court.
7. On his part, the respondent submitted that the appellant was wholly liable for the accident as was evident in the testimony of Pw2, the eyewitness to the accident and expert witness of the police officer who testified on his behalf.
8. On quantum, the respondent submitted that the award for pain & suffering, loss of expectation of life and loss of dependency awarded by the trial court were appropriate. That the approach by the trial court in using the global approach in awarding loss of dependency was appropriate in the circumstances.
9. That the special damages awarded were pleaded and proven and thus ought to be upheld. Finally, that costs follow the event and in this case being the successful party he was awarded the costs of the suit as pleaded.
10. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions but always having in mind that it did not have the benefit of seeing the witnesses testify. See *Selles & Anor v Associated Motor Boat Co Ltd & Others* [1968] EA 123.
11. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held that: -
- “This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect.”



12. Before the trial court, the respondent testified as Pw1. He adopted his statement dated 13/3/2021 as his evidence in chief and testified that the deceased was his father. In cross-examination, he told the court that the deceased was 84 years old at the time of his death, had 5 children who were married and working and who supported him. That the deceased had 2 widows.
13. Pw2 Kevin Odhiambo Oyieyo adopted his statement dated 15/3/2022 as his evidence in chief and further stated that the deceased was knocked down while off the road. In cross-examination, Pw2 clarified that the accident occurred on the morning of 18/7/2019 at around 8am when it was not raining. That the deceased was knocked down off the road and was not at the inner lane when he was knocked down. That the deceased bled from the head. He denied the suggestion that the accident occurred in the middle of the road.
14. Pw3 No. 86557 PC Joshua Otieno produced an abstract filled on 26/8/2019 as PExh5. He testified that PC Kamaru who visited the scene made a report that the area was a built up area where the maximum speed ought to have been 50km/hr. That the deceased was knocked down while in the middle of the road and that the right side of the windscreen was smashed meaning the vehicle was speeding.
15. In cross-examination, he told the court that the deceased was elderly and ought to have been assisted whereas the driver of the vehicle that knocked him down ought to have been on the lookout.
16. On his part, the appellant testified as Dw1 in support of his case. He adopted his statement dated 5/7/2019 as his evidence in chief and told the court that he was a qualified driver.
17. In cross-examination, he stated that his license failed to capture that he was licensed to drive on the date of the accident. That the deceased was crossing from the left to right side on a dual carriage road. That he was on the other lane while there was a tuk tuk on the other.
18. Dw2 No. 62810 Corporal Dickson Indiego produced an OB extract No. 33/18/7/19 as DExh3 over the suit accident following a report by the appellant. That the police established that a vehicle, tuk tuk and the pedestrian were involved in an accident. That the pedestrian was crossing the road from left to right and was hit on the middle of the road by a vehicle.
19. In cross-examination, he stated that the respondent was driving the vehicle that hit the deceased. That he blamed no one for the accident and further that he was aware of the Highway Code that drivers ought to be more careful where there are elderly or young people on the road.
20. It is on this evidence that the trial court rendered its decision. From the foregoing, the grounds of appeal may be summarized into one, viz, 'That the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on liability and quantum and consequently came to a wrong conclusion on the same'.
21. On liability, the appellant was held 100% liable for causing the accident. In *Stapley v Gypsum Mines Limited* (2) (1953) A.C 663 at P. 681 reiterated in the case of *Ndatho v Chebet* (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment) Lord Reid reasoned that: -

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it ... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as



having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally.”

22. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that: -

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

23. Accordingly, it was the respondent’s duty to tender evidence that the appellant was liable for causing the accident that led to the fatal injuries on the deceased.

24. The respondent advanced the case that the deceased was knocked down while he was off the road. This averment was supported by the testimony of Pw2 who alleged to have witnessed the accident. However, this version of events was debunked by the respondent’s own witness, Pw3 who testified that the deceased was knocked down while in the middle of the road. This was also the testimony of Dw2 who also produced the OB extract of the incident as reported by the appellant.

25. However, it was the undisputed testimony of Pw3 that the right side of the windscreen was smashed meaning the vehicle was speeding in a built-up area where the appellant ought to have been driving at 50km/hr.

26. From the foregoing evidence, it is clear that both parties contributed to the accident. The appellant ought to have been driving at a reasonable speed given that he was driving through a built-up area and the fact that he was in control of a vehicle that is likely to cause deadly harm in a collision with an individual thus the appellant had a higher duty of care to other road users. Similarly, the deceased ought to have been more careful when crossing the road given it was a dual carriage way.

27. Consequently, I hereby set aside the trial court’s apportionment of liability and apportion it in the ratio 80:20 in favour of the respondent as against the appellant. I rely on the persuasive decision in *Musyoki v Kirubai* [2025] KEHC 12890 (KLR) where the court dealt with a pedestrian knocked down on the Nairobi-Mombasa road in a built-up area (Canaan area). The High Court upheld a 90:10 liability apportionment in favor of the pedestrian, noting the driver’s failure to maintain a proper lookout and the fact that the driver fled the scene, which implied culpability.

28. The appellant impugned the trial court’s award on quantum on the grounds that the same was excessive and further that the trial court failed to take into consideration his submissions.

29. The law on the circumstances under which the court will interfere with an award of quantum by the trial court is settled that the appellate court will only interfere with the award of damages if; in exercising its discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another Vs Shah* (1968) EA and *Mkube v Nyamuro* 1983 KLR 403.



30. Further, in *Kemfro Africa Ltd -Vs- A.M. Lubia and Another* (1988) KAR 722, the Court of Appeal held thus: -

“The Principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. The same position was taken in *Denshire Muteti Wambui V. KPLC* (2013) eKLR.”

31. In the present case, the deceased was 84 years old at the time of his passing. He had 2 widows and from the testimony of the respondent, his children supported him. There was similarly no evidence that the deceased used to earn any wages.

32. The trial court awarded the respondent Kshs. 50,000/- and Kshs. 100,000/- for pain & suffering and loss of expectation of life under the *Law Reform Act* respectively.

33. Damages under the *Law Reform Act* include compensation for pain and suffering and loss of expectation of life. 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 the court 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. I have considered the Post Mortem Report which indicates that the deceased died on the spot as a result of the fatal injuries that he sustained in the accident in question. I therefore find that the trial court’s award of Kshs. 50,000/- and Kshs. 100,000/- for pain & suffering and loss of expectation of life respectively to be fair and in line with the set legal principles. I find no reason to interfere with the said award.

35. As regards the award of loss of dependency, the trial court whilst using the global approach, awarded the respondent Kshs. 1,000,000/- which the appellant has impugned as being excessive.

36. Though the appellant urged the court to rely on his submissions before the trial court in regard to the award of loss of dependency, this court could not trace the said submissions on record.

37. On his part the respondent had submitted before the trial court that an award of Kshs. 1,500,000/- would have been sufficient.

38. On my part, I wish to sample the following decisions;

- a. In *Kimaiyo vs Nyakweba* (Suing as the legal representative of the Estate of the deceased Seline Kerubo Nyakweba) [2022] KEHC 15488 (KLR) Aburili J upheld an award of Kshs. 700,000/- that had been awarded by the trial court in 2018 to the dependants of an 80 year old deceased person.



- b. In Haroon Yuasa Limited & another v Mbeneka & another (Suing as the legal representatives of the Estate of Benard Nzau Muia - Deceased) [2023] KEHC 21265 Muigai J upheld and an award of Kshs. 1,200,000/- granted by the trial court in the year 2019 where the deceased was aged 69 years old.
 - c. In Awale Transporters Ltd Mombasa v Wakhungu & another (Suing as Legal Representatives of the Estate of Alfred Sabwami Namasambu - Deceased) [2024] KEHC 2680 (KLR), involving a 61- year-old retired teacher, a global sum of Kshs 800,000/- was granted in favour of the dependants.
39. In the premises and considering the trend in the authorities alluded to above, the global awards for loss of dependency regarding elderly deceased individuals between 60 - 80 years' courts have awarded sums in the range of Kshs. 700,000 – Kshs. 1,200,000.
40. In the circumstances, I find no basis on which to disturb the discretion of the Lower Court in awarding Kshs. 1,000,000 for loss of dependency.
41. In view of the foregoing, the appeal is found to be partially successful in as far as the apportionment of liability at 80:20%. The lower court's award on liability is set aside and replaced with an award of liability at 80:20% in favour of the respondent as against the appellant. Parties to bear own costs of the appeal.

It is so decreed.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF FEBRUARY, 2026.

A. MABEYA, FCI Arb

JUDGE

