



Njoroge (Legal representative and administrator of the Estate of Joseph Natii Lodeket Ekale - Deceased) v Cartland (Civil Appeal 71 of 2019) [2026] KEHC 2636 (KLR) (20 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 71 OF 2019
PJO OTIENO, J
FEBRUARY 20, 2026**

BETWEEN

MARY NYAMBURA NJOROGE (LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF JOSEPH NATII LODEKET EKALE - DECEASED) APPELLANT

AND

ROBERT JOHN CARTLAND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J. Karanja (SPM) in Naivasha CMCC No. 455 of 2017 delivered on 7th November, 2019)

JUDGMENT

Background of the Appeal

1. By a Plaint dated 13th July 2017, the Appellant instituted suit against the Respondent seeking general damages and special damages in the sum of Kshs 61,750 under both the Law Reform Act as well as the Fatal Accidents Act together with costs of the suit and interest thereon.
2. The Appellant's case was that on or about 3rd November 2016, the deceased was riding motorcycle registration number KMDN 437K along Moi North Lake Road at the Great Rift Lodge junction when the Respondent so negligently and/or recklessly drove motor vehicle registration number KAX 538S, a Toyota Caldina, that he caused a collision with the motor cycle , thereby fatally injuring the deceased.
3. The claim was resisted on the basis of the Statement of Defence dated 5th September 2017, by which the Respondent admitted the occurrence of the accident on or about 3rd November 2016 but attributed the accident to the negligence of the deceased, alleging that the deceased encroached onto the lawful



path of motor vehicle registration number KAX 538S and was riding at an excessive speed, among other particulars of negligence.

4. In a judgment delivered on 7th November 2019, the learned trial magistrate apportioned liability in the ratio of 70:30 in favour of the Appellant. The Appellant was awarded total damages of Kshs. 2,489,350/-, broken down as; Kshs. 30,000/- for pain and suffering; Kshs. 100,000/- for loss of expectation of life; Kshs. 2,308,800/- for loss of dependency; and Kshs. 50,550/- as special damages. Upon deducting the 30% contributory negligence, the net award payable to the Appellant amounted to Kshs. 1,742,545/-. The Appellant was also awarded costs of the suit and interest at court rates.
5. The decision aggrieved the Appellant who lodged the present appeal vide a Memorandum of Appeal dated 6th December 2019, seeking to have the judgment and decree of the learned trial magistrate set aside and an appropriate judgment entered in its place.
6. The appeal is premised on the grounds that:
 - a. The learned magistrate erred in law and fact and rendered a judgment that held the deceased 30% liable in respect of the contributory negligence for the accident in question and yet the evidence on record clearly demonstrates that the respondent was to be held 100% liable for the accident herein.
 - b. The learned magistrate erred in law and fact and rendered a judgment that held the deceased 30% liable in respect of the contributory negligence for the accident in question and failed to appreciate the fact that the plaintiff's (appellant's) evidence was corroborated in favor of the deceased whereas the defendant's (respondent's) evidence against the deceased was not corroborated.
 - c. The learned magistrate erred in law and fact and awarded the deceased an award for damages which award is inordinately low.
 - d. The learned magistrate erred in law and fact by applying wrong principles in calculating the loss of dependency.
 - e. The learned magistrate erred in law and fact by using basic salary instead of the net and/or gross salary in calculating the loss of dependency.
 - f. The learned magistrate erred in law and fact by using 25years as the lost years and yet the deceased was aged 30 years and he would have worked and earned a living for the next 30 years until the attainment of the statutory requirement age of 60years of which lost years would have been 30 and not 25.
 - g. The learned magistrate erred in law and fact by ignoring the appellant's submissions and the authorities supplied thereto and as such refusing to be guided and/or bound by the said authorities in the spirit of the doctrine of stare decisis.
 - h. The learned magistrate erred in law and fact by misapprehending the evidence on record and applying the wrong principles of law and rendered a decision that is incompetent and not supported by evidence and law.
7. It is apparent that the appeal challenges both apportionment of liability as well as the assessment of damages together with the thresholds leading thereto. The appeal was directed and has been canvassed by way of written submissions. The court has read the submissions and will give due regard and consideration to the same. Just a brief summary suffices for this decision.



Appellant's Submissions

8. The Appellant identifies four issues for determination by this Court. The first issue is whether it was proper for the trial court to apportion liability at 30% against the deceased. On this issue, the Appellant contends that having found that the Respondent ought to have ensured that there was no oncoming traffic before turning and that he owed a greater duty of care, the learned trial magistrate ought to have held the Respondent 100% liable for the accident.
9. The Appellant further argues that the apportionment of liability against the deceased was erroneous for the reasons that: a) PW2, an eye witness, testified that the Respondent was over speeding and failed to slow down as he turned to enter the gate of the Great Rift Lodge. The witness further testified that upon impact, the deceased was thrown approximately 50 meters away; b) The testimony of PW2 was corroborated by one Ruben Martim; and c) The police abstract indicated that the Respondent was to blame for the accident and that he was charged with causing death by dangerous driving vide Naivasha CMC Traffic Case No. 29 of 2016 but the respondent had not been put on his defence. On the basis of the evidence recorded and the foregoing submissions, the Appellant urges this Court to find the Respondent 100% liable for the accident.
10. The second issue is whether the trial court properly adopted Kshs. 11,544/- as the net pay in assessing loss of dependency. The Appellant submits that the deceased's gross salary was Kshs. 19,996/-, his net pay after statutory deductions was Kshs. 17,894/-, and his net pay after voluntary deductions was Kshs. 11,544/-. She faults the trial magistrate for relying on the net pay after voluntary deductions in calculating loss of dependency.
11. In support of her position, she relies on Evaline Chepkirui (suing as the Legal Representative of the Estate of the late Kiprotich Cheruiyot) v Stella Asuga & another [2021] eKLR, where the court held that statutory and other deductions whose beneficial owner is the deceased and/or his estate should not be discounted when assessing dependency. She also cites Leonard O. Ekisa & another v Major K. Birgen [2005] eKLR, where the court held that voluntary deductions are ordinarily for the benefit of the dependents, and James Gakinya Karienyee & another (suing as the Legal Representatives of the Estate of David Kelvin Gakinya (deceased)) v Perminus Kariuki Githinji [2015] eKLR, where the court held that in assessing loss of dependency, only statutory taxes ought to be deducted from the gross income.
12. It is therefore the Appellant's position that the trial court ought not to have adopted the deceased's net pay after voluntary deductions in assessing loss of dependency.
13. The third issue is whether it was proper for the trial court to adopt a multiplier of 25 years for lost years instead of 30 years, considering that the deceased was 30 years old at the time of his death. The Appellant submits that the multiplier of 25 years was inordinately low. She relies on Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR and Miriam Muthoni Kagira & another (suing as the Administrators of the Estate of the late John Kagira Gitau) v Kenya Forest Service & another [2018] eKLR, where the courts observed that a deceased person would ordinarily have worked up to the age of 60 years.
14. She therefore urges this Court, given that the deceased died at the age of 30 years, to adopt a multiplier of 30 years in assessing loss of dependency.
15. The fourth and final issue is the appropriate award in the circumstances. The Appellant proposes a total award of Kshs. 4,608,230/-, less Kshs. 1,742,545/- already paid by the Respondent. The proposed award is itemized as follows:



- I. Kshs. 4,207,680/- for loss of dependency;
 - II. Kshs. 100,000/- for pain and suffering;
 - III. Kshs. 150,000/- for funeral expenses; and
 - IV. Kshs. 50,550/- for special damages.
16. The Appellant contends that by virtue of Section 6 of the *Fatal Accidents Act*, she is entitled to funeral expenses and proposes an award of Kshs. 150,000/-, relying on Premier Dairy Limited v Amarjit Singh Sagoo & another [2013] eKLR, where the Court of Appeal awarded a similar sum.
17. With respect to damages for pain and suffering, the Appellant proposes an award of Kshs. 100,000/-, on the basis that the deceased did not die instantly but succumbed while undergoing treatment.

Respondent's Submissions

18. The Respondent contends that he has already settled the decretal sum as ordered by the trial court and that the Appellant forfeited her right of appeal upon accepting payment of the decretal amount. He argues that by electing to execute the judgment and subsequently accepting payment, the Appellant affirmed the judgment and thereby extinguished her right of appeal.
19. In support of this position, he relies on Dr. Sunny Samuel v Simon M. Mbwika & another [1998] KECA 224 (KLR), where the Court held:

“I have given most anxious consideration to this submission and the point raised. In my judgment, in the circumstances now obtaining, the applicant is precluded from attacking the judgment. He is no longer an aggrieved person.

Nor can he be allowed to approbate and reprobate the judgment at the same time. I am not persuaded that in the circumstances the applicant is entitled to proceed with his appeal.

In not too dissimilar circumstances, Mustafa J.A. (as he then was), delivering the first judgment of the Court of Appeal for East Africa in Industrial and Commercial Development Corporation v Kariuki Gatheca [1977] KLR 52, was inclined to the view that the applicant had in effect affirmed and approbated the judgment, and had enjoyed and continued to enjoy the full benefit of it and would be precluded from attacking it. Law V-P agreed in every respect with the judgment prepared by Mustafa J.A., and so did Musoke J.A.

In view of the above, it is not necessary for me to deal with the other points raised.”

20. The Respondent further relies on Premier Food Industries Limited v Public Health Prosecutor–Kisumu [2021] KEHC 6453 (KLR), where the Court stated:

“Having received payment on the strength of the Ruling dated 16th September 2020, the Applicant was now seeking leave to challenge the very same Ruling. In effect, the Applicant was seeking to challenge the validity of the decision from which it has been conferred with a benefit, whilst at the same time retaining the said benefit.

In the case of Evans v Bartlam (1937) 2 All E.R. 649, at page 652, Lord Russell of Killowen said:

“The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit.’



It is well settled that the court cannot approve an attitude in which a party approbates and reprobates. For that reason, too, the application before me fails.”

21. On the merits of the appeal, the Respondent maintains that he is in agreement with the judgment of the trial court. He contends that PW2, the alleged eye witness, was a witness of convenience, having admitted that he was a neighbour of the deceased. The Respondent further submits that the Appellant failed to call a police officer to formally produce the police abstract, sketch plans, and the investigation file detailing the cause of the accident.
22. The Respondent argues that his evidence was that the deceased was over speeding, had no headlights on, and was not wearing a helmet at the time of the accident. He submits that these assertions were supported by the post-mortem report, which indicated that the nature of the injuries sustained would likely not have occurred had the deceased complied with traffic regulations.
23. With respect to quantum, the Respondent supports the findings of the trial court and contends that an award for funeral expenses is not mandatory.
24. He concludes by submitting that an appellate court will not interfere with a judgment merely because it would have reached a different conclusion, but only where it is shown that the trial court misapprehended the evidence or applied wrong principles. In support of this proposition, he cites *Idris Abdi Abdullahi v Ahmed Bashane & 2 others* [2018] KECA 455 (KLR). The Respondent accordingly prays that the appeal be dismissed with costs.

Issues, Analysis and Determination

25. As a preliminary issue, this Court must first address the Respondent’s contention that the Appellant lost her right of appeal upon accepting settlement of the decretal sum. The determination of this question is dispositive of whether the appeal is properly before this Court.
26. The Respondent cites *Dr. Sunny Samuel v Simon M. Mbwika & another* [1998] KECA 224 (KLR) and *Premier Food Industries Limited v Public Health Prosecutor–Kisumu* [2021] KEHC 6453 (KLR), wherein the courts held that a party who has accepted a benefit under a judgment cannot subsequently impugn that same judgment. The principle articulated is that one cannot approbate and reprobate on the same decision.
27. Conversely, other decisions have affirmed that payment or acceptance of the decretal amount does not extinguish a party’s statutory right of appeal where that party remains aggrieved. See *Machakos District Co-Operative Union Limited v Philip Nzuki Kiilu* [1997] eKLR; *Bash Hauliers Limited v Peter Mulwa Ngulu* [2020] eKLR; and *Ismael Lonkishu Kobei v David Kariuki Gichangi & another* [2017] eKLR.
28. In the latter authorities, the courts held that equitable doctrines such as he who comes to equity must come with clean hands or the principle against approbation and reprobation cannot override a litigant’s statutory right of appeal.
29. This Court aligns itself with the latter position. The payment or acceptance of a decretal sum does not, in itself, extinguish a party’s right of appeal. Indeed, the general rule is that a judgment is enforceable unless stayed, and an appeal does not operate as an automatic stay of execution. See *Bash Hauliers Limited v Peter Mulwa Ngulu* (supra). Accordingly, the objection lacks merit, and the appeal is properly before this Court.
30. Having carefully considered the record of appeal, the Memorandum of Appeal, and the rival submissions of counsel, the issues that arise for determination are:



- a. Whose negligence occasioned the accident?
- b. What heads and quantum of damages, if any, is appropriate in the circumstances?

Who Bears Liability for the Accident?

31. The Appellant contends that the Respondent ought to have been found 100% liable for the accident. She relies on the testimony of PW2, who stated that the Respondent was driving at a high speed at the material time. She further submits that the said evidence was corroborated and that the police abstract blamed the Respondent.
32. The record, however, shows that the alleged corroborating witness was not called to testify. The police abstract, though produced as an exhibit without objection, is not conclusive proof of liability. It merely showed that the accident did occur with additional evidence that even though the respondent was charged with a traffic offence the matter was still active and he was yet to be put on his defence. The court appreciates the law to be that even a conviction with a traffic offence is not a bar to apportionment of liability
33. Other than PW2 and DW1, there was no independent eyewitness to the occurrence of the accident. DW1 testified that he was travelling from Naivasha along North Lake Road and that upon approaching the entrance to Green Park and Great Rift Valley Lodge, he slowed down and indicated before turning right. As correctly observed by the learned trial magistrate, the Respondent owed a greater duty of care when executing the turn.
34. However, both PW2 and DW1 testified that the deceased was thrown about 50 meters from the point of impact. The force of the impact reasonably suggests that the deceased was riding at considerable speed. In the circumstances, and upon re-evaluating the evidence, this Court finds no basis to disturb the trial court's apportionment of liability at 70:30 in favour of the Appellant.

What Quantum of Damages Is Appropriate?

35. It is trite that assessment of damages is a matter within the discretion of the trial court. An appellate court will interfere only where it is demonstrated that the trial court acted on wrong principles, misapprehended the evidence, or made an award so inordinately high or low as to represent an erroneous estimate. See *Butt v Khan* [1981] KLR 349 and *Kemfro Africa Ltd t/a Meru Express Services & Another v A.M. Lubia & Another* [1982–88] 1 KAR 727.
36. The court appreciates the appellant to challenge the assessment of quantum of damages under three heads: loss of dependency, pain and suffering, and funeral expenses.

On Loss of Dependency

37. The deceased was aged 30 years at the time of his death and was employed as a watchman. The trial court adopted a multiplier of 25 years, citing the uncertainties of life, the life expectancy in Kenya, and the risks inherent in the deceased's occupation.
38. In *Bob Morgan Security Ltd v Caroline Kamene Matilu & another* [2018] eKLR, the court observed that the occupation of a watchman exposes one to heightened risks and adjusted the multiplier from 25 years to 15 years. Conversely, in *Paul Otuoma v Rosemary Atieno Onyango & another* (Siaya Civil Appeal No. 6 of 2016), a multiplier of 20 years was adopted for a deceased watchman aged 38 years.



39. Considering these authorities and the circumstances of this case, and noting that the choice of a multiplier is a matter in the province of judicial discretion, the Court finds no reason to interfere with the choice of 25 years adopted by the trial court.
40. As regards the multiplicand, the pay slip for October 2016 reflects a gross salary of Kshs. 19,996/- and a net pay before voluntary deductions of Kshs. 17,408/-.
41. In *James Gakinya Karienyé & another v Perminus Kariuki Githinji* [2015] eKLR, the court held that only statutory deductions should be excluded in computing loss of dependency. This Court agrees with that position of the law and determines that in using net pay after voluntary deductions, the trial court erred. For the error, the choice of multiplicand is set aside, and in its place substituted a sum of Kshs. 17,408/-.
42. The loss of dependency is therefore calculated as follows:
$$\text{Kshs. } 17,408 \times 12 \times 25 \times 2/3 = \text{Kshs. } 3,481,600/-$$

On Pain and Suffering

43. The Appellant proposes Kshs. 100,000/-, while the trial court awarded Kshs. 30,000/-. The oral evidence and the police abstract and post-mortem report indicate that the accident and death occurred on the same date and at approximately the same time, suggesting that death was instantaneous.
44. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed that nominal damages are generally awarded for pain and suffering where death follows immediately after an accident. The court was guided further by *Chege & Another v Jeremy & Another* (Suing as Legal Representative of the Estate of Jeremy Rukaria Maua- Deceased) Civil Appeal E340 of 2023 [2025] KEHC 4055 (KLR), where it was held:

“It is natural that any person who suffers injury as a result of an accident will experience some form of pain. The pain may be brief and fleeting, but it is nonetheless compensable. Nominal damages are appropriate where death occurs immediately after the accident, with higher damages awarded if pain is prolonged. Comparable awards in the High Court over the last 20 years have ranged from Kshs. 10,000/- to Kshs. 100,000/-.”
45. In light of the evidence and comparable awards, this Court finds no justification for interfering with the award of Kshs. 30,000/- for pain and suffering, because that award too invoked judicial discretion.

On Funeral Expenses

46. Although funeral expenses were pleaded, no specific sum was particularized in the plaint. It is nevertheless undisputed that funeral expenses were incurred.
47. In *Jacob Ayiga Maruja & Another v Simeon Obayo* [2005] eKLR, the Court of Appeal recognized that reasonable funeral expenses may be awarded even in the absence of strict proof, provided that the amount claimed is reasonable in the circumstances.
48. In *Peter Ngari Njeru v Alchanger Njue Kithogo & Josphat Njue* (Suing as Legal Representatives of Eugenio Muchori Njue – Deceased) [2019] eKLR, as well as in *Jacob Ayiga Maruja & Another v Simeon Obayo* (supra), the courts awarded Kshs. 60,000/- as reasonable funeral expenses.



49. The Appellant proposes Kshs. 150,000/-. In the absence of strict proof and having regard to comparable awards, this Court finds that Kshs. 60,000/- constitutes a reasonable award for funeral expenses in the circumstances.
50. In the result, the appeal partially succeeds and the Court makes the following orders:
- a. Liability is upheld at the ratio of 70:30 in favour of the Appellant as against the Respondent.
 - b. The award for loss of dependency is set aside and substituted with an award of Kshs. 3,481,600/-.
 - c. An award of Kshs. 60,000/- is hereby made for funeral expenses.
51. Having succeeded, and the law being that costs follow the event, the Appellant shall have the costs of this appeal.
52. Because contribution in liability permeates the entire award, all heads of damages and costs shall be subjected to the apportioned contribution.
53. It is so ordered.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 20TH DAY OF FEBRUARY 2026.

PATRICK J O OTIENO

JUDGE

