

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CIVIL APPEAL NO. E002 OF 2024**

**BOKEYE ZACHARY MACHOME .....**

**APPELLANT**

**VERSUS**

**SALOME ANYANGO ODHIAMBO &  
ZULFA ACHIENG**

[Suing as the legal representatives of the estate of  
**STEPHEN CALEB AKEYO - Deceased] .....**

**RESPONDENT**

**JUDGMENT**

1. This is an appeal from the Judgment and decree of Hon. S. N. Mutava (RM) delivered on 06.12.2023 in Rongo CMCC No. E021 of 2022. The appellant was the defendant in the lower court.
2. The appeal was withdrawn, and only the cross appeal remained. The cross-appeal concerned the use of a 25-year multiplier rather than a 30-year multiplier. The next one was the question of the use of Ksh 7,240/= that came into force on 1.05.2018, instead of a sum of Ksh 13,527.88, as the deceased was a businessman.

## Pleadings

3. The Respondent filed suit vide a plaint dated 16.02.2022, claiming damages for an accident that occurred on 01.10.2021 when the deceased was a lawful passenger in motor vehicle Registration No. KCQ 545 L Toyota Hiace Matatu along Rongo- Awendo road at Geti area when the said vehicle was negligently managed and rammed into a stationary vehicle.
4. The suit was brought by a mother and the widow of a deceased, who was aged 25 years. He pleaded to have been earning Ksh. 60,000/= selling second-hand clothes. It was said that the deceased's life was considerably reduced.
5. The Appellant filed a defence on 03.08.2022, denying that the Respondent was a passenger. They set forth particulars of negligence on part of the deceased passenger. They pleaded in the alternative that, the accident occurred without negligence on their part.

## Proceedings and Evidence

6. Salome Anyango Odhiambo, testified that the deceased was his son. She produced 10 exhibits. The deceased was 25 years old. She stated that the deceased was earning Ksh. 60,000/=. The deceased left behind a wife and a mother. The ages were not given in the evidence. She stated that the deceased was the breadwinner and his children no longer go to school. There was no evidence that the deceased had any children.

## Submissions

7. The Appellant filed submissions dated 12.1.2026. They were in support of the appeal, which has since been withdrawn. There were no submissions in terms of the cross-appeal.
8. The Respondent submitted that there was no evidence that the deceased lived a sickly life. Nonetheless, it cannot be denied that in life there are preponderables and vicissitudes that can shorten one's life besides an accident. It was submitted that even if the court took into account the vicissitudes and vagaries of life, a multiplier of 25 years was too low in this case. The Respondents propose that the court adopts a multiplier of 30 years after deducting the 5 years that could be caused by the vagaries of life. Reliance was placed on the case of **Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe, deceased) v Reuben Muriuki Kahuha, City Hopper Ltd, Michael A. Craig & Rueben Kamande Mburu [2015] KEHC 4269 (KLR).**
9. They submitted that the court adopted the minimum wage for general laborers as per the regulation of Wages General Amendment Order 2018, and since the minimum wage salary for a person working in Nairobi as per the same Regulation is Kshs. 13,527.88/=, the honorable magistrate ought to have

adopted a multiplicand of Kshs. 13,527.88/= since the deceased was working as a businessman in Nairobi. They thus claimed for loss of dependency as follows:

$$\text{Ksh.13,527.88/=} \times 12 \times 30 \times \frac{2}{3} = \text{Ksh. 3,246,691.20/=}$$

### Impugned Judgment

10. The court noted that the respondent submitted that the deceased was 25 years and a multiplier of 25 years would suffice. The deceased was reported to earn a sum of Ksh 60,000/=. The court found that there was no evidence on the business that the deceased was involved in.
11. The court noted that the appellant had submitted that the loss of dependency was to use a multiplier of 6,890/-, a dependency ratio of 1/3, and a multiplier of 15 years. The court relied on several binding decisions of this court and used the minimum wage. In particular, the court relied on the case of **Jacob Ayiga Maruja & another v Simeon Obayo [2005] KECA 202 (KLR)**, where the court of appeal [Omolo, Tunoi & Githinji, JJ.A] 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 of proving 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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.

### Analysis

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.
13. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus classicus* case of **Selle and another Vs Associated Motor Board Company and Others [1968]EA 123**, where the Judges in their usual gusto, held as follows;-

.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of

a witness is inconsistent with the evidence generally.

14. The court has neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of **Peters vs Sunday Post Limited [1958] EA 424**, the court therein rendered itself as follows:-

It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...

15. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In **Anne Wambui Ndiritu -vs- 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.

16. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in **William Kabogo Gitau -vs- George Thuo & 2 Others [2010] 1 KLE 526** stated that:

**In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.**

17. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in **Re H and Others (Minors) [1996] AC 563, 586** held that;

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the

allegation is established on the balance of probability.....

18. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In **Palace Investment Ltd - vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, the Judges of appeal held that:

Denning J, in Miller -vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.

19. It must be remembered that an award of general damages that was within range must be respected and not disturbed, as

stated in the case of **Southern Engineering Company Ltd v Mutia** [1985] KECA 49 (KLR), where the court of appeal stated as follows:

.. the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question. This is shown by a passage from an English case in the House of Lords to which reference has often been made in this Court, but which I think illustrates Mr. Gautama's point that it is the quality and calibre of the judgment in question which is its most important factor, and that the reference to other and possibly to outside decisions is, in a sense, incidental to that. The passage is from Lord Morris' speech in *H West & Son v Shephard*, [1964] AC 326 at page 353, and reads as follows:-

The difficult task of awarding money compensation in a case of this kind is essential a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of

an award merely because it does not correspond with the figure of his own assessment.

20. The death certificate indicated the deceased's occupation as a businessman. The deceased died in Migori County at a place called Geti, which is outside the municipalities. The same is classified as all other areas in the Regulation of Wages (General) (Amendment) Order, 2018. The deceased died 1.10.2021. The court was therefore correct in applying the Regulation of Wages (General) (Amendment) Order, 2018. The next question is whether the court used the correct column.

21. The Respondent contended that the lower court erred in adopting the minimum wage of Ksh. 7,240.95/=. In the case of **Beatrice Murage vs Consumer Transport Ltd & Another (2014) eKLR**, the court held: -

Ordinarily, if one does not prove what the deceased earned, the court would base the earnings on the minimum wage. However, in this case, the minimum wage cannot apply because the deceased was beyond employment age and there is totally no evidence that he earned anything for a living.

22. It was contended that the deceased lived in Nairobi. However, there was no evidence of this. The deceased's residence was given as West Sakwa in the death certificate. The chief's letter also indicated that the deceased was a

resident of the Kamresi Sub-location of the West Sakwa location. There was no evidence tendered to show that the deceased was a businessman in Nairobi. In the circumstances, the court was correct in applying the minimum wage. Indeed, the court correctly acted on its discretion and awarded the said amount. There was no error in that respect. The Court of Appeal held in the case of **Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, that:

In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

23. The next question was whether the use of a multiplier of 25 years was proper. There are two aspects to consider when arriving at a multiplier. The first one is the remainder of the useful life of the deceased. The second aspect is the remaining period of dependency. The deceased did not have children. The ages of both the mother and the widow are not given. The mother cannot be counted when ascertaining dependency for

a married man. It is the wife and children who are dependants. There were no children indicated in the record. The court exercised its discretion and concluded that a period of 25 was sufficient. I am now being asked to increase the same to 30. This is basically replacing one discretion with another. In the case of **Mbogo and Another vs. Shah [1968] EA 93**, the Court stated:

...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

24. The vicissitudes of life meant that the deceased could have died earlier. However, he could have worked until his ripe old age. Ringera J in **Beatrice Wangui Thairu -vs- Hon. Ezekiel Barngetuny & Another - Nairobi HCCC. No.1638 of 1988 (unreported)**, held at page 248 that:

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply

the multiplicand by a reasonable figure representing so dependants and the chances of life of the deceased and dependants many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

25. Therefore, a multiplier of 25 years was within the discretion of the court to award. The mother will have lost the dependency to the wife and children. They will have also aged. The dependency ratio is a matter of fact. As was held by Odunga J (as he then was) in *J W N v Kassam Hauliers Limited* [2020] eKLR, the dependency ratio is a question of fact to be determined from the evidence on record and the circumstances of each case.

26. The net effect is that the cross appeal is dismissed. The next issue is who is to bear costs. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall

have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

27. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited** [2018] KECA 158 (KLR) had this to say:

**It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

28. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

18. It emerges that the award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

29. Costs must thus follow the event. The event is the dismissal of the cross appeal, and the Respondent is entitled to costs. A sum of Kshs. 65,000/= shall suffice. Having awarded costs for

both the appeal and the cross-appeal, the net result is that each party will bear their costs in respect of the appeal and the cross-appeal.

Determination

30. In the upshot, I make the following orders:

- a) The cross appeal lacks merit and is accordingly dismissed
- b) The appeal was withdrawn with costs of Ksh 65,000/=.
- c) The cross appeal is dismissed with costs of Ksh 65,000/=.

The net effect is that the appeal is withdrawn and the cross-appeal is dismissed, with no order as to costs.

- d) 30 days stay of execution.
- e) The file is closed.

**DELIVERED, DATED and SIGNED** at **NYERI** on this **11<sup>th</sup>** day of **March, 2026**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

No appearance for parties

Court Assistant - Michael

ORIGINAL