Otieno (Suing on behalf of the Estate and beneficiaries of Sylvester Otieno Masinde - Deceased) v Kengas Logistics Ltd (Civil Appeal E057 of 2024) [2026] KEHC 3927 (KLR) (24 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3927 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E057 OF 2024

DK KEMEI, J

MARCH 24, 2026

BETWEEN

ESTHER BWABI OTIENO (SUING ON BEHALF OF THE ESTATE AND BENEFICIARIES OF SYLVESTER OTIENO MASINDE - DECEASED) .... APPELLANT

AND

KENGAS LOGISTICS LTD .... RESPONDENT

(Being an appeal arising from the judgment delivered on 24/10/2024 by Hon. T. K. Nambisia (RM) in Ukwala PMCC No. E082/2021)

JUDGMENT

1. The appeal arises from the judgment of Hon. T. K. Nambisia dated 24/10/2024 in Ukwala PMCC No. E082/2021 wherein she held the parties jointly liable in the ratio of 50%: 50 % as well as awarding the Respondent Kshs50,000/= (pain and suffering), Kshs2,000,000/= (loss of dependency), Kshs 150,000/= (special damages), costs of the suit at 50 % and interest at court rates from the date of filing suit.

2. The Appellant was aggrieved by the aforesaid decision and filed a memorandum of appeal dated 20/11/2024 wherein she raised the following grounds of appeal.

   i. That the learned trial magistrate erred in law and fact by apportioning liability at 50% against the deceased when the clear evidence on record indicated that he was not at fault for accident.

   ii. That the learned trial magistrate erred in law and fact by failing to find that the Respondent's agent was the sole cause of the accident.

iii. That the learned trial magistrate erred in law and fact by misdirecting herself in declaring that the deceased had contributed to the accident when there was no basis in the evidence or otherwise for apportioning liability at 50% against the deceased who was a pillion passenger.

iv. That the award of Kshs 2,200, 000/= was inordinately low and wholly erroneous estimate of the damages.

v. That the decision of the learned trial magistrate was grossly at variance to the evidence on record.

vi. That the learned trial magistrate totally misdirected herself by failing to consider and appreciate the evidence on record tendered on behalf of the Appellant.

The Appellant therefore prays that the appeal be allowed and the judgment of the trial court be set aside and that the costs of both the lower court suit and in this appeal be awarded to the Appellant.

3. Being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh exhaustive scrutiny so as to arrive at its own findings and independent conclusion on whether or not to uphold the decision of the trial court. In carrying out this task, the court must bear in mind that it neither saw nor heard the witnesses as they testified and therefore to give due allowance for that. (See Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123; Peters v. Sunday Post Ltd (1958) EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000. (Okubasi, Githinji & Waki JJA).

4. The Appellant had filed her plaint dated 3rd December 2021 wherein she pleaded on how the accident took place, particulars of negligence on the part of Respondent or its agent, particulars of the Dependants as well as claim for both general and special damages plus costs of the suit. The Respondent later filed a statement of defence dated 9/3/2023 wherein it denied the Appellant's claim and further pleaded negligence on the part of the deceased as well as denying the claim on both general and special damages. The Respondent finally pleaded the doctrine of ''inevitable accident."

5. The suit commenced for hearing on 19/3/2024. It was as follows:

6. Esther Bwari Otieno (PW1) adopted her statement filed on 7/6/2023 as her evidence in chief. The Appellant also produced a list of documents dated 14/3/2024 which comprised of Exhibit 1-11 as exhibits but the same was later allowed for production except Exhibit No.2. Her witness statement was inter alia; that the deceased herein was her husband with whom they got married in 2006 and were blessed with five children; that the deceased worked as an insurance agent earning a minimum of Kshs 50,000/= per month and he was responsible for the welfare of the family members; that she is a house wife and that it was the deceased who was responsible in meeting all the expenses such as payment of school fees and maintenance; that the deceased on the material date (17/12/2019) was travelling on a motor cycle as a pillion passenger but was knocked along Kisumu-Busia High way from behind by the Respondent's motor vehicle registration KBP 379K Mercedez Bench Actross and Trailer No. ZD5767 and that he died on the spot; that good Samaritans rushed him to Ambira Sub County Hospital where he was confirmed dead on arrival; that an autopsy was conducted on the body and the cause of death established to be hemorrhagic shock due to severe abdominal aorta as a result of a road traffic accident; that as a result of the deceased death, she was forced to incur several costs which she seeks reimbursement therefore; that the family and the dependents have suffered loss and damage and now seek for compensation; that she reported the matter at Ugunja Police station where an abstract was

issued and that she later conducted a search of motor vehicle records and established the Respondent as the owner of the suit vehicle.

On cross examination, she stated inter alia; that she has not filed any proof of employment by the deceased; that she has not availed any proof showing the sums of Ksh 50,000/= was pad to the deceased; that she was not present during the accident; that they used Kshs 303, 000/= in funeral expenses but that she has not attached the receipts; that the deceased took care of her and the children.

7. Rose Anyango Obiero (PW2) adopted her statement filed on 15/3/2024 as her evidence in chief. On cross examination she stated inter alia that she did not witness the accident; that the drive of the lorry briefed her on how the accident happened when she met him at the police station; that she verified the injuries on the body of the deceased when she went to view it in the mortuary.

8. Parties later entered into a consent in terms inter alia; that the police abstract be produced as exhibit 1; that the Appellants case be marked as closed; that the Respondent's documents as per their list of documents dated 11/7/2023 be produced as per the list; that the Respondent's case be marked as closed; that parties to take directions for submissions.

9. The trial court later deliberated on the matter and arrived at the impugned judgment.

10. The appeal was canvassed by way of written submissions. Both parties complied.

11. The Appellant's submissions are dated 6th December 2025.

12. Learned counsel for the Appellant pointed out that it is not disputed that there was an accident on 17th December 2019 at Ulwan area along the Kisumu-Busia Road involving Sylvester Otieno Masinde, the deceased pillion passenger and motor vehicle registration number KBP 379K Mercedes Benz Actros. That when the Plaintiff filed the primary suit, she placed full blame on the part of the Defendant/Respondent and or their agent for causing the subject accident. That at paragraph 4 of the Plaint which can be traced to page 5 of the record of appeal, the Plaintiff particularized negligence on the part of the Defendant/Respondent as follows: -

    a. Driving at a speed that was far too excessive or permitting its vehicle to be driven at a speed that was far too excessive.

    b. Driving without due care and attention or permitting its vehicle to be driven without due care and attention.

    c. Failing to keep any proper look-out for other road users or permitting its agent to drive without any proper look-out for other road users.

    d. Failing to keep and or maintain any effective control of motor vehicle registration number KBP 379K Mercedes Benz Actros.

    e. Driving contrary to the Highway Code and the *Traffic Act* or permitting its agent to drive contrary to the Highway Code and the *Traffic Act*.

    f. Driving without due care and attention to other road users having regard to all circumstances.

13. It was further pleaded that "The Plaintiffs shall in so far as may be applicable rely upon the doctrine of Res Ipsa Loquitor and on the provisions of the Highway Code and the *Traffic Act*." The Respondent equally filed a statement of defense and under paragraph 7 of the statement of defence, they pleaded that the accident was caused by the sole or contributory negligence of the deceased. They particularized the negligence on the part of the deceased as follows.

a. Exposing himself to risks which he knew or ought to have known.

b. Failing to wear a helmet or a reflective jacket while on the motorcycle.

c. Boarding a motor-cycle that was unroadworthy.

d. Failing to inform the rider of the motorcycle to be careful on the road and observe traffic rules.

e. Failing to board a motorcycle that is registered under a Sacco.

f. Boarding a motorcycle where the rider has no valid licence to ride a motorcycle.

The case proceeded to full hearing. The Plaintiffs case was made up of the testimonies of two witnesses while the defence did not call any witness but however, the consent entered into by the parties enabled the Respondent's documents to be produced for the trial court's determination.

Learned counsel for the Appellant took issue with the trial court's judgment on liability at paragraph 10 thereof namely "Having considered that neither the plaintiff nor the defendant tendered corroborative evidence on how the accident happened, I am unable to apportion blame to either of them. Accordingly, liability is apportioned equally between the plaintiff and defendant."

It was submitted that the above finding by the trial magistrate was erroneous and legally untenable and it should be set aside as there was no basis in law or fact for the trial magistrate to apportion liability at 50-50 as against the deceased for reasons inter alia; that the apportionment of liability at 50-50 by the trial magistrate was premised on a false assessment "It was however the defendant's evidence that the deceased jumped off the moving motorcycle, thereby catching the defendant's driver unawares and causing the driver to run him over"; that the said statement was not made by the Respondent who did not testify and that the trial magistrate abdicated her role and chose to place reliance on the investigation report thereby arriving at an erroneous finding; that it is trite law that parties are bound by their pleadings and it is equally paramount that material facts must be specifically pleaded beforehand so that they can be respondent to; that the particulars of negligence as pleaded against the Respondent have been quoted above as well as the particulars of contributory negligence as pleaded by the Respondent against the Appellant have been pleaded; that there is no where did the Respondent plead the fact that the pillion passenger had jumped off the motorcycle which was a very material and crucial fact and or element of the defence which ought to have been pleaded at the forefront and hence the trial magistrate was therefore wrong to place reliance on purported evidence that was not pleaded; that the evidence points to the fact that the deceased was a pillion passenger and had no control over either the motor vehicle or the motorcycle; that the Highway Code and the *Traffic Act* requires that a motor vehicle trailing another should maintain a safe distance to enable the driver react in the event of any unexpected action and that the said Code specifically required drivers to watch out for other road users and in particular for cyclists, motorcyclists and pedestrians; that the Respondent's driver was not keeping a safe distance and or lookout for other road users; that if the deceased had jumped off the moving motorcycle, then it was the Respondent's driver who caused him to do so; that the finding of liability at 50-50 against the deceased was untenable in the circumstances and should be set aside and the Respondent be held 100% liable for the accident.

14. As regards the award of general damages, it was submitted that the trial magistrate awarded the sum of Kshs 2,200,000/= as damages which was again slashed to 1,100,000/= upon apportionment of liability. That the trial magistrate placed reliance on the case of Ainu Hamshi Hauliers Ltd Vs Moses Sakwa [2021] eKLR. It was contended that the case can be distinguished from this one because the deceased in that case was survived by two children while the deceased herein was survived by five children and a widow and that he was also the sole bread winner.

15. It was finally submitted that the appeal has merit and should be allowed as prayed.

16. The Respondent submissions are dated 22/1/2026. Learned counsel raised the following issues for determination namely:

    a. Whether the learned magistrate erred in law and fact in the finding of liability at the ratio of 50:50

    b. Whether the learned magistrate erred in law and in fact in the award of the quantum of general and special damages

    c. Who should bear costs of this appeal?

17. As regards the first issue, it was submitted for the Respondent that at the trial court, the Respondents adduced sufficient evidence to establish the apportionment of liability at a ratio of 50:50. That liability is deduced from the circumstances of the accident and that this court is invited to come to the same findings and conclusion as per the trial court. It was submitted that as per the investigation report captured on pages 20-57 of the record of appeal, the accident was caused substantially by the Appellant jumping off the moving motorcycle and landing on the part that was in close proximity to Motor Vehicle KBP 379K, hence the accident. Reliance was placed in the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 29, where the court highlighted the determinants of negligence as follows: "The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."

    Also, in the case of Christine Kalama vs Jane Wanja Njeru & Another (2020) eKLR the court reiterated this principle and stated as follows: "How is the scope of negligence and duty of care determined?

    i. First that the respondents owed a duty of care to the appellant

    ii. Second, that the respondents breached that duty of care in the manner of their driving

    iii. That the breach caused the appellant to suffer personal injuries attracting recovering damages at Law

    iv. That the injury suffered by the appellant was as a result of the breach and negligence which was reasonably foreseeable.

18. It was submitted that on page 9 of the investigation report captured on page 28 of the record of appeal, is a sketch of the scene, which confirms that the motor vehicle registration number KBP 397K/ ZD 5767 marked A thereon was trailing the motorcycle ferrying the deceased, which is marked B. That the position of the deceased after jumping from the motorcycle is marked B1. That the point of impact marked C thereon shows that the Appellant deceased fell in the path of the Respondent's vehicle registration number KBP 397K/ ZD 5767 and was consequently run over. Further, on page 14 of the investigation report, captured on page 33 of the record of appeal, it is shown that the "preliminary findings of police investigations revealed that the deceased was to blame for the accident as he jumped off a moving unknown third-party motorcycle in the midst of moving traffic and was consequently crashed by the insured's vehicle which was trailing the motorcycle".

19. It was further submitted that in order to successfully assert a claim of negligence, a party must establish all of the essential elements of the tort. This requires a comprehensive examination of each element to determine if they have been met. Reliance was placed in the case of Trendsetters Tyres Ltd v John Wekesa Wephukulu (2010) eKLR, where the court stated that; "In an action for negligence, as in

every action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence, it is for the plaintiff to adduce evidence of the facts on which he bases his claims for damages. The evidence called on his behalf must consist of such either proved or admitted and after it is concluded two questions arise,

(1). Whether on that evidence, negligence may be reasonably inferior and

(2). Whether assuming it may be reasonably inferred, negligence is in fact inferred, proof of liability is on a balance of probabilities as applied in civil claims and generally discerned from the evidence of the claimant as against the defendant. This is what the law stipulates in sections 107, 108 and 109 of the *Evidence Act*."

20. It was also submitted that the appellant's own actions or omissions contributed to the occurrence of the accident. Reliance was placed in the case of Wyne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, where the court held that "In this case, contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, on page 611, Lord Simon said:"......When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

21. The Respondent maintained that the occurrence of the accident was a result of the appellant failing to exercise due caution through carelessness by jumping off from the moving unknown third-party motorcycle, despite being aware of the risks. It is submitted that had the pillion passenger taken reasonable caution, the accident would not have occurred. The deceased ought to have exercised caution in ensuring his safety while aboard the unknown motorcycle on such a busy road, but did not. By jumping off a moving motorcycle in the middle of traffic, he contributed to the accident that led to his subsequent demise and hence, the Appellant was the author of his own misfortune. That the Respondent proved contributory negligence on the part of the deceased Appellant.

22. Further reliance was placed in the case of Khambi & Another v Mahithi & Another [1968] EA 70 where it was held that:-"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

23. It was also submitted that the driver of motor vehicle registration number KBP 397K/ ZD 5767 was neither reckless nor negligent and that his manner of driving was that expected of any reasonable and prudent driver. That the Respondent's driver could not slow down, swerve, or stop to avoid the accident as the deceased Appellant fell on the path and was in close proximity. Further, the Appellant never availed any investigation report as to the happenings of the accident and only depended on the testimony of PW1, who did not witness the accident as per the proceedings captured on page 102 of the record of appeal. The Appellant did not call any other independent witness to corroborate the evidence of PWI. This position was also ably captured by the trial court in Paragraphs 9 and 10 of the judgment at page 95 of the record of appeal. Reliance was placed in the case of Amani Kazungu Karema v Jackmash Auto Ltd & another (2021) eKLR the court stated that; "in my view, where any

person suffers damage as a result partly of his own fault and partly of the fault of the defendant the court can only apportion contributory negligence based on the pleadings and evidence."

24. It was submitted that in the absence of evidence to the contrary, this Honourable Court should not interfere with the learned Magistrate's findings on liability at the ratio of 50:50.

25. As regards the second issue, it is submitted for the Respondent that the principles that govern an appellate Court in considering whether to review an award of general damages were stated by the court in the case of Butt v Khan (1977) KAR 1 as follows; "An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

26. Further, the Court of Appeal in the case of Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR stated as follows: "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance."

27. It was submitted that the deceased was 44 years and that there was no proof of earnings or the extent to which the dependents depended upon the deceased. That the trial court applied a global sum in awarding a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) under the head of loss of dependency. Reliance was placed in the case of Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] KEHC 5958 (KLR) the court stated thus: "….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."

    The the case of Nganga & another (Suing on Their Own Behalf and as the Administratixes of the Estate of the Late Bernard Karura Kibe alias Berard Karura) v Ileve (Civil Appeal E198 of 2021) [2024] KEHC 8273 (KLR) was cited in which the court awarded Kshs. 1,500,000/= for loss of dependency for the deceased who died at 44 years.

    Also, in the case of Samuel Kabuthia Ndana v Jeniffer Wawire Njeru & Another (2019) eKLR, the court awarded a global sum of Kshs. 1,300,000/=, where the deceased died aged 47 and was said to engage in informal employment which earned him an estimated income of Kshs. 90,000/= per month.

28. Under pain and suffering, reliance was placed in the case of Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR, where Majanja J. observed thus: "…it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.

    It is submitted for the Respondent that the sums awardable under this head have ranged from Kenya Shillings Ten Thousand (Kshs 10,000/=) to Kenya Shillings One Hundred Thousand (Kshs 100,000/=) from past precedents. Therefore, the sum of Kenya Shillings Fifty Thousand (Kshs 50,000/=) awarded by the trial court is reasonable as to preclude interference of the same.

29. As regards the award of special damages, it was submitted for the Respondent that the Appellant pleaded special damages of Kenya Shillings One Hundred and Seven Thousand, Five Hundred (Kshs. 107,500/=). At the trial court, the Appellant did not prove her claim for special damages and the learned Magistrate took judicial notice of the funeral expenses of Kshs. 150,000/=. It was submitted there is no reason to disturb the award of special damages.

30. It was finally submitted for the Respondent that the awards issued by the learned Magistrate provided adequate compensation, and therefore, this Honourable Court should find no legal basis to interfere with the awards which should be upheld.

31. As regards the issue of costs, it was submitted that the same be awarded to the Respondent. Reliance was placed in the case of Joseph Oduor Anode vs Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009(2012) eklr where it was stated as follows: "In matters of costs, the general rule as adumbrated in the aforesaid statute (the *civil procedure act*) is that costs follow the event unless the court is satisfied otherwise. That satisfaction must however be patent on record. In other words, where the court decides not to follow the general principle, the court is enjoined to give reasons for not doing so."

32. I have given due consideration to the record of appeal and the rival submissions. It is not in dispute that the Appellant has challenged the trial court's assessment of liability and the award on loss of dependency. It is also not in dispute that the Respondent has no problem with the assessment of liability and general damages as well as special damages by the trial court. The issues for determination are as follows:

    i) Whether the apportionment of liability in the ratio of 50:50% by the trial court was proper.

    ii) Whether the assessment of general damages on loss of dependency by the trial court was reasonable.

33. As regards the first issue, it is noted that the trial court apportioned liability between the parties herein at 50:50 and that the learned trial magistrate in her judgment appeared to entertain doubts about the role of the deceased in jumping off the moving motor cycle. The learned trial magistrate seemed to have been persuaded by the report of the Respondent's insurer through its investigators wherein it reported that the deceased had jumped from the said motor cycle and fell on the path of the Respondent's truck and that the deceased was ran over. Learned counsel for the Appellant has taken great exception to the learned trial magistrate's opinion since according to him the Respondent ought to have pleaded the alleged particulars of negligence on the part o the deceased. Learned counsel for the Appellant contended that the Respondent was barred from relying on documents other than the pleadings. It was the Appellant's counsel's view that since the Appellant pleaded particulars of negligence against the Respondent in the Plaint, then the Respondent should have also done the same regarding the Appellant. It was therefore the view of the Appellant's counsel that the learned trial magistrate was not supposed to rely on documents yet the issue was not pleaded by the party. Indeed, it is trite law that parties are bound by pleadings and that a party is under obligation to present such material facts and plead them before hand so that the other party can respond thereto. Looking at the particulars of negligence as filed by the Respondent against the deceased, there is no such averment to the effect that the deceased jumped from the moving third-party motor cycle and hence I agree with the sentiments of the learned counsel for the Appellant that the learned trial magistrate made an error when she relied on purported evidence which had not been pleaded. It is instructive to not that the Respondent opted not to present witnesses to testify and that had they been called, the issue could have been canvassed substantially. Even though the purported document had been produced by consent, the same could not be said as real evidence in view of the fact that the makers thereof were not called to testify so

that the veracity or otherwise of the contents thereof could be determined. Learned counsel for the Respondent has sought reliance in the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 29, where the court highlighted the determinants of negligence as follows: "The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."

34. Also, in the case of Christine Kalama vs Jane Wanja Njeru & Another (2020) eKLR the court reiterated this principle and stated as follows: "How is the scope of negligence and duty of care determined?

    i. First that the respondents owed a duty of care to the appellant

    ii. Second, that the respondents breached that duty of care in the manner of their driving

    iii. That the breach caused the appellant to suffer personal injuries attracting recovering damages at Law

    iv. That the injury suffered by the appellant was as a result of the breach and negligence which was reasonably foreseeable.

35. The Respondent was of the view that in order to successfully assert a claim of negligence, a party must establish all of the essential elements of the tort. This requires a comprehensive examination of each element to determine if they have been met. Reliance was placed in the case of Trendsetters Tyres Ltd v John Wekesa Wephukulu (2010) eKLR, where the court stated that; "In an action for negligence, as in every action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence, it is for the plaintiff to adduce evidence of the facts on which he bases his claims for damages. The evidence called on his behalf must consist of such either proved or admitted and after it is concluded two questions arise,

    (1). Whether on that evidence, negligence may be reasonably inferior and

    (2). Whether assuming it may be reasonably inferred, negligence is in fact inferred, proof of liability is on a balance of probabilities as applied in civil claims and generally discerned from the evidence of the claimant as against the defendant. This is what the law stipulates in sections 107, 108 and 109 of the *Evidence Act*."

36. Further, it was contended by the Respondent that the Appellant's own actions or omissions contributed to the occurrence of the accident. Reliance was placed in the case of Wyne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, where the court held that "In this case, contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, on page 611, Lord Simon said:"……When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

37. Flowing from the foregoing authority, the Respondent maintained that the occurrence of the accident was a result of the Appellant failing to exercise due caution through carelessness by jumping off from the moving unknown third-party motorcycle, despite being aware of the risks. Further, counsel

contended that had the pillion passenger taken reasonable caution, the accident would not have occurred. That the deceased ought to have exercised caution in ensuring his safety while aboard the unknown motorcycle on such a busy road, but did not and that by jumping off a moving motorcycle in the middle of traffic, he contributed to the accident that led to his subsequent demise and hence, the Appellant was the author of his own misfortune. The Respondent therefore urges the court to agree that contributory negligence on the part of the deceased Appellant was proved.

38. Having gone through the assertions and contentions of the Respondent's counsel, it is noted that the Respondent opted not to present any witness to support its assertions. This cannot be compared to the Appellant's evidence which was not controverted regarding the accident itself. Again, the Respondent failed to plead as one of its allegations of negligence on the part of the Appellant vide its statement of defence unlike the Appellant who pleaded comprehensive particulars of negligence against the Respondent and its driver or agent. As noted in the preceding paragraphs aforesaid, the Respondent owed a duty of care to the Appellant by ensuring that it observed the High Way Code of Traffic. I find had the Respondent's driver been driving at reasonable speed and having a proper lookout for other road users, the accident could have been avoided. That being the position, I am satisfied that the Respondent's driver wholly contributed to the accident and hence the Respondent should have been held liable in damages to the Appellant at 100%. It is instructive that the deceased pillion passenger had no control over the manner in which the motor cycle was ridden or the Respondent's truck driven. If the Respondent felt that the rider of the motor cycle contributed somewhat to the accident, nothing prevented it from enjoining the same for purposes of contribution and/or indemnity. The Respondent therefore cannot run away from its responsibility and seeking to lay blame at the door step of the Appellant. Even if the deceased might have jumped off the motor cycle, the Respondent would still be responsible over the same as it had failed to maintain its distance and hit the motor cycle from behind. Indeed, the police abstract issued by the police indicated that the unknown motor cycle disappeared from the scene and since the Respondent did not pursue it then it must be prepared to shoulder the responsibility over the accident.

39. It is noted that the learned counsel for the Respondent has urged this court to refrain from interfering with trial court's assessment regarding the aspect of liability since the trial court had the opportunity to do a proper assessment. Reliance was placed in the case of Khambi & Another v Mahithi & Another [1968] EA 70 where it was held that:-"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

40. The Respondent's counsel contended that the driver of motor vehicle registration number KBP 397K/ZD 5767 was neither reckless nor negligent and that his manner of driving was that expected of any reasonable and prudent driver. That the Respondent's driver could not slow down, swerve, or stop to avoid the accident as the deceased Appellant fell on the path and was in close proximity. Further, the Appellant never availed any investigation report as to the happenings of the accident and only depended on the testimony of PW1, who did not witness the accident as per the proceedings captured on page 102 of the record of appeal. That the Appellant did not call any other independent witness to corroborate the evidence of PWI. This position was also ably captured by the trial court in Paragraphs 9 and 10 of the judgment at page 95 of the record of appeal. Reliance was placed in the case of Amani Kazungu Karema v Jackmash Auto Ltd & another (2021) eKLR the court stated that; "in my view, where any person suffers damage as a result partly of his own fault and partly of the fault of the defendant the court can only apportion contributory negligence based on the pleadings and evidence."

41. It was contended that in the absence of evidence to the contrary, this Honourable Court should not interfere with the learned Magistrate's findings on liability at the ratio of 50%:50%.

42. It is noted that the Respondent produced an investigation report which was carried out by the Respondent's insurers who had sent the investigators to the scene of the accident. The report on page 9 of the investigation report captured on page 28 of the record of appeal, is a sketch of the scene, which confirms that the motor vehicle registration number KBP 397K/ ZD 5767 marked A thereon was trailing the motorcycle ferrying the deceased, which is marked B. That the position of the deceased after jumping from the motorcycle is marked B1. That the point of impact marked C thereon shows that the Appellant deceased fell in the path of the Respondent's vehicle registration number KBP 397K/ ZD 5767 and was consequently run over. Further, on page 14 of the investigation report, captured on page 33 of the record of appeal, it is shown that the "preliminary findings of police investigations revealed that the deceased was to blame for the accident as he jumped off a moving unknown third-party motorcycle in the midst of moving traffic and was consequently crashed by the insured's vehicle which was trailing the motorcycle".

    The above report could have been of great help had the Respondent seen the need to call the maker or the police officer to tender evidence so that the culpability or otherwise of the deceased could be determined. Indeed, the Appellant did not also call the police officers who visited the scene or even eye witnesses. It is instructive that the motor cycle on which the deceased was a pillion passenger was in front of the Respondent's truck and that being the position, the Highway Code of Traffic must kick in to establish whether the Respondent's driver or servant had observed the said Code. Indeed, the said Code provides that all motorists are under obligation to keep a safe distance when following other vehicles. The fact that the Respondent's driver hit the motor cycle from behind is clear evidence that he was not only moving at high speed but had failed to control the vehicle and to maintain safe distance. It is also instructive that the claim that the deceased had jumped off the moving motor cycle was not properly established since there was no eye witness called to testify. It is also noteworthy that even if the deceased jumped from the motor cycle as alleged, the same must have been as a result of the impact of the hit by the Respondent's truck on the motor cycle. Again, it is noted that the Respondent did not see the need to enjoin the rider or owner of the motor cycle as a third party for the purposes of indemnity and/or contribution and as such the Respondent must bear or shoulder the burden of the liability to the Appellant. On the whole, iam satisfied that the learned trial magistrate's assessment of liability was erroneous and that I must interfere with it. I find that the Respondent was wholly to blame for the accident and thus liable in damages to the Appellant at 100%. The finding on liability by the learned trial magistrate was erroneous as she had taken into consideration wrong principles regarding the issue of liability.

43. As regards the second issue, this court is guided by the principles that govern an appellate Court in considering whether to review an award of general damages. The said principles were stated by the court in the case of Butt v Khan (1977) KAR 1 as follows; "An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

44. Further, the Court of Appeal in the case of Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR stated as follows: "It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance."

45. It is noted that the deceased died at the age of 44 years and that there was no proof of earnings or the extent to which the dependents depended upon the deceased. The trial court applied a global sum in awarding a sum of Kenya Shillings Two Million (Kshs. 2,000,000/=) under the head of loss of dependency. It is a fact that whenever parties are unable to provide proof of income, the courts are at liberty to resort to awarding a global sum in general damages under the head of loss of dependency. In the case of Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] KEHC 5958 (KLR) the court stated thus:

> " ....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."

Learned counsel for the Respondent placed reliance in the case of Nganga & Another (Suing on their own behalf and as the Administratixes of the Estate of the late Bernard Karura Kibe alias Berard Karura) v Ileve (Civil Appeal E198 of 2021) [2024] KEHC 8273 (KLR) in which the court awarded Kshs. 1,500,000/= for loss of dependency for the deceased who died at 44 years.

Also, in the case of Samuel Kabuthia Ndana v Jeniffer Wawire Njeru & Another (2019) eKLR, the court awarded a global sum of Kshs. 1,300,000/=, where the deceased died aged 47 and was said to engage in informal employment which earned him an estimated income of Kshs. 90,000/= per month.

Learned counsel for the Appellant had raised a ground in the memorandum of appeal that the award of Kshs 2,000, 000/ by the trial court as general damages for loss of dependency was low and contended that the authority relied by the trial court related to a deceased who only had 2 children as compared to the deceased herein who left behind five children. The said counsel however did not cite any authority in support of his view unlike the counsel for the Respondent who cited authorities in which the global awards are within the range awarded by the trial court after the incidence of inflation has been factored. Learned counsel for the Respondent in his submissions has urged the court to uphold the award by the trial court. I find the award of Kshs 2,000,000/= to be reasonable and not inordinately low as contended by the Appellant.

46. As regards the award of pain and suffering, learned counsel for the Respondent supported the amount awarded by the trial court while counsel for the Appellant did not also contest the same. In the case of Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR, Majanja J. observed thus: "...it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.

It is noted that the deceased is said to have died on arrival at Ambira hospital while the Respondent maintains that he died on the spot. I find that either way, the deceased must have felt excruciating pain before breathing his last. Learned counsel for the Respondent submitted that the sums awardable under this head have ranged from Kenya Shillings Ten Thousand (Kshs 10,000/=) to Kenya Shillings One Hundred Thousand (Kshs 100,000/=) from past precedents and that the sum of Kenya Shillings Fifty Thousand (Kshs 50,000/=) awarded by the trial court is reasonable in the circumstances. I will uphold the said award.

47. As regards the award of special damages, it was suggested by counsel for the Respondent that the Appellant pleaded special damages of Kenya Shillings One Hundred and Seven Thousand, Five Hundred (Kshs. 107,500/=). It was contended that the Appellant did not prove her claim for special damages but the learned trial Magistrate took judicial notice of the funeral expenses of Kshs. 150,000/=. It was submitted by the Respondent's counsel that there is no reason to disturb the award of special damages. That being the position, I will uphold the said award.

48. In view of the foregoing observations, it is my finding that the Appellant's appeal partially succeeds to the extent that the apportionment of liability by the learned trial magistrate is hereby set aside and substituted with apportionment against the Respondent at 100% in damages to the Appellant. All the other awards shall remain undisturbed. The Appellant is awarded half costs of the appeal and full costs in the lower court.

DATED AND DELIVERED VIRTUALLY AT NAIVASHA THIS 24TH DAY MARCH 2026.

D.KEMEI

JUDGE

In the presence of:

N/A Ooro E............for Appellant

N/A Odhiambo...................for Respondent

Maurine...............Court Assistant