REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL NO. E028 OF 2025

PAUL NGUNJIRI GACHICHI..... 1ST APPELLANT

JOSEPH KINGORI NJOORI..... 2ND APPELLANT

VERSUS

MARY WAMBUI NJUGUNA &
FLORENCE NYAMBURA KIAMA
(Suing as the legal representatives of the estate of the late SAMUEL MURAI NJUGUNA)**.....**

RESPONDENTS

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. Sandra Achieng Ogot, (Principal Magistrate) dated 11.4.2025, given in Othaya CMCC No. E004 of 2024.

2. The Memorandum of Appeal dated 8.5.2025 had 16 grounds of appeal:

    1. THAT the learned Principal Magistrate lacked the pecuniary jurisdiction to entertain this claim.

2. THAT the trial magistrate erred in law and in fact in finding that the Appellants were 90% liable for the occurrence of the alleged accident.
3. THAT the trial magistrate erred in law and in fact in finding that the Plaintiffs had discharged their burden of proof on a balance of probabilities.
4. THAT the learned magistrate erred both in law and in fact in failing to appreciate that the Plaintiffs' evidence was misleading.
5. THAT the learned trial magistrate erred in law and in fact by failing to consider the Defence evidence tendered to find the Plaintiffs' case as unproven.
6. THAT the learned principal magistrate misdirected herself in law by assessing damages that were manifestly excessive and incomparable to the common judicial awards.
7. THAT the learned magistrate erred in law and in fact by adopting the multiplier of 25 years in assessment of damages for loss of dependency despite acknowledging the fact that the deceased's job was high risk.
8. THAT the learned trial magistrate erred in law in failing to appreciate the applicable principles in assessment of damages in the Fatal Accidents Act and Law Reform Act.

9. THAT the learned magistrate erred in awarding the sum of Kshs. 10,918,699.00/= by way of general damages under the head of loss of dependency to the Plaintiffs.
10. THAT the learned magistrate erred in law in entertaining a claim of Kshs. 11,322,100.00/= less contributory negligence which award exceeded her pecuniary jurisdiction of Kshs. 10,000,000.00/=.
11. THAT the award in quantum of damages is in the circumstances so inordinately high that it amounts to a wholly erroneous estimate of the compensation due to the estate of the deceased.
12. THAT the award in Quantum of Damages is altogether disproportionate and is not in keeping with other comparable awards made in respect of similar circumstances.
13. THAT the learned principal magistrate erred both in law and in fact by giving a very high award in quantum contrary to the evidence given in court.
14. THAT the learned principal magistrate erred in law in making such a high award as to show that the magistrate acted on wrong principles of law.
15. THAT the learned principal magistrate's award on damages was inordinately high as to be entirely erroneous.

16. THAT the whole judgment on liability and quantum was against the weight of evidence before the court.

3. They raise three issues only. The cross appeal was in the form of a notice of cross appeal, and there was no memorandum. However, it raised only one issue that the award of damages was inordinately low. The respondent is the one who filed suit before a magistrate with jurisdiction of Ksh. 10,000,000/=. Section 7(1) of the Magistrates' Court Act provides as follows:

> (1)A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-
> (a) Twenty million shillings, where the court is presided over by a chief magistrate;
> (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
> (c) ten million shillings, where the court is presided over by a principal magistrate;
> (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
> (e) five million shillings, where the court is presided over by a resident magistrate.

4. There are only three issues addressed in submissions before the court below and before this court.
   a. The court lacked pecuniary jurisdiction.
   b. Liability.
   c. Damages were inordinately excessive/inordinately low.

5. The rest of the issues are ancillary, repetitive, prolix, and a waste of judicial time. The memorandum of appeal contravenes Order 42 Rule 1 of the Civil Procedure Rules, which provides as follows:

> **(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.**
> **(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.**

6. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] KECA 224 (KLR)**:

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has

> condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues…"

7. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. In the case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] KECA 472 (KLR),** the court of appeal observed that:

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether *Section 62* of the Kenya Ports Authority

Act ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

8. Vide a Plaint dated 25.3.2024, the Respondent filed suit claiming damages for an accident that occurred on 9.7.2022. The deceased was a pedestrian along Nyeri-Kiriaini Road at Cooperative area, and the 2nd appellant negligently and dangerously drove motor vehicle Registration No. KDH 605S, caused it to violently hit the deceased, who suffered fatal injuries.
9. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded special damages as well as general damages under the Law Reform Act and Fatal Accidents Act.
10. The Appellants entered an appearance and filed a defence denying the particulars of negligence and injuries pleaded in the plaint.

11. The lower court heard the parties and proceeded to render the impugned judgment in which the court found as follows:
    a. Liability at 90:10
    b. Special damages - Ksh. 203,550/=
    c. Pain and suffering Ksh. 100,000/=
    d. Loss of dependency - Ksh. 10,918,600/=
    e. Loss of expectation of life - Ksh. 100,000/=

12. The court awarded a sum of Ksh. 10,000,000/= as it was the limit of her jurisdiction.

Evidence

13. During the hearing, PW1 was Florence Nyambura Kiama. She was the spouse of the deceased and was born in 1992. The deceased was 32 years old at the time of death. She relied on her witness statement and produced the documents filed in court, both dated 25.3.2024. She testified that the deceased was a KDF Officer. According to her, they had 2 children, who are minors. TN was born on 8.11.2014, and LW was born on 27.07.2020. A demand notice was issued on 27.06.2023. She stated that the deceased was at Othaya Kenyatta National Hospital and later transferred to Defence Memorial Hospital, where he spent 8 days in the ICU. He blamed the appellant for the accident. She produced the supporting documents. She stated that the deceased was never suicidal. On cross-examination, she stated that the deceased was not drunk. The deceased was a KDF officer.

14. PW2 was Dr. Kisingu Sila. He was a pathologist. He conducted a postmortem on the deceased at Defence Forces Memorial Hospital. He did not conduct examinations related to an alcohol test on the deceased.

15. PW3 was No. 84399 Cpl. Mohamed Wako. He produced the police abstract. The accident occurred on 9.7.2022 at 2100hrs. He visited the scene. The motor vehicle hit the pedestrian who was crossing the road. The deceased was hit on the left side of the motor vehicle. The driver was to blame. He was yet to be charged. On cross-examination, he testified that he had not provided any sketch plans or an investigation diary; the case was pending investigation.

16. DW1 was Joseph Kingori Njoori. He adopted and relied on his witness statement dated 12.4.2024. He blamed the deceased. He was drunk. He jumped on the road. On cross-examination, it was his case that the deceased fell on the left side. This was the side of the Cooperative Bank. He was crossing to the right side, where there was a nightclub. He was driving slowly. He blamed the deceased for being drunk.

17. On cross-examination, he stated that the deceased fell on the right side of the road. The deceased was walking from the bank walking to the bar. He did not know if any witness recorded a statement showing the deceased was drunk.

<u>Submissions</u>

18. The Appellant filed submissions dated 26.1.2026. It was submitted that the court acted without jurisdiction as the value of the subject matter before the trial court was Ksh. 11,322,100.00/=. The judgment of the trial court was rendered by the Honourable Principal Magistrate whose pecuniary jurisdiction was Kshs. 10,000,000/=. Reliance was placed on section 7(1) of the Magistrate's Court Act and the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*.

19. It was further submitted that the Respondents failed to demonstrate on a balance of probabilities, that the Appellants' actions directly caused the accident. They cited *inter alia* **Kamau v Kimani & another** (Civil Appeal 159 of 2019) [2023] KECA 187 (KLR) (17 February 2023) (Judgment).

20. On pain and suffering, it was submitted that the lower court was unjust and unreasonable in awarding Kshs. 100,000/= for pain and suffering as Ksh. 30,000/= would be adequate. It was submitted that Ksh. 100,000.00/= for loss of expectation of life was fair, just and reasonable.

21. On loss of dependency, it was submitted that the award was excessive. That the Deceased's basic salary is Kshs. 56,966.00/= subjected to the 1/3 statutory deductions, as well as giving due regard to the element of taxation, resulting in Kshs. 37,977.33/=.

22. It was thus submitted that an award of Kshs. 3,949,642.32/= for loss of dependency guided by the multiplier approach of (Kshs. 37,977.33 x 12 x 13 x 2/3 = 3,949,642.32/=) would have sufficiently compensated the estate of the Deceased under this head.

23. The Respondent filed submissions dated 10.11.2025. It was submitted that the Respondents proved their case on a balance of probabilities that the driver of the accident motor vehicle was to blame for the accident. They cited inter alia **Masembe v Sugar Corporation & Another (2002) EA 434.**

24. It was also submitted that DW1 did not prove contributory negligence. They prayed that liability be apportioned at 100% against the Appellant and relied on their cross appeal dated 15.6.2025.

25. On quantum, it was submitted that the Respondents were entitled to damages both under the Law Reform Act and the Fatal Accidents Act.

26. On pain and suffering, it was submitted that the deceased underwent prolonged suffering for 6 days after the accident when he died. They submitted Ksh. 300,000/= under this head.

27. On loss of expectation of life, they submitted that Ksh. 250,000/= would suffice.

28. On loss of dependency, it was submitted that the deceased died at 32 years. They submitted a multiplier of 28 years and a multiplicand of the net salary of Ksh. 54,593/= at a dependency ratio of 2/3, making Ksh. 12,228,832/=. I shall ignore this part of the submissions, since the matter was before a Principal Magistrate whose pecuniary jurisdiction is 10,000,000/=.

Analysis

29. 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 demeanor of the witnesses and hearing their evidence firsthand.

30. This court's jurisdiction to review the evidence should be exercised with caution. In the cases 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…"**

31. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

> "...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 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 allowance in this respect..."

32. The Appellant urged that the court ought to have found the deceased 100% liable for the accident, while the Respondents asked the court to find the Appellants 100% liable. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the deceased and the Respondent were equally to blame for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereto, and in this case, the Respondent. 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."

33. Only evidentially burden shifts to a defendant and not the legal burden of proof. In **Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR** it was held that:

> "As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore, the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

34. 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 that 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."

35. 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 even 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….."

36. 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."

37. It was the common position of the parties that the deceased was crossing the road at the time of the accident. The Appellant's witness was of the view that the deceased was drunk. There was no other witness other than the driver. There was no contradiction that the deceased was crossing the road and that the driver was not driving at high speed. However, if the driver was driving at such a moderate speed, he could surely have seen the deceased. The deceased owed

other motorists the duty of care to cross the road when it was safe to do so. The court correctly stated that the deceased was hit when he had just entered the road. This is in congruence with the evidence of the appellant.

38. When a situation arises, as in this case where both parties were negligent, the court erred in finding 90:10. The finding of 10% contributory negligence was without basis as it was not borne out of the facts.

39. Whereas the respondents proved their case to the required standard, it was the duty of the Appellants to prove contributory negligence. The appellant gave cogent evidence on how the accident occurred. They thus proved contributory negligence on part of the deceased. The question of contributory negligence was addressed in the case of **Mac Drugall App V Central Railroad Co (RBR) 63 Cal 431**, where the court held that:

> "In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

40. In the circumstances, I find that the court below was plainly wrong. The appellant was able to show negligence on the part

of the deceased in crossing the road when it was not safe to do so. However, from the impact, it is also clear that the driver was on high speed in a highly populated area, with banks and bars. The court should be guided by the reasoning of the Court in the case of **Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] KEHC 1105 (KLR),** where Nyakundi J referred to *Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan*, and held as follows:

> "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, at 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."

41. The court notes that the court below did not hear witnesses. They were heard by Hon. N.W. Wanja, but she transferred the

file to Court 1. In the circumstances, her appreciation of the facts is the same as the High Court, having not seen the demeanor of the witnesses.

42. In the case of **Sugut v Jemutai & 3 others** (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth:

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and

findings of fact were therefore from a reading of what was recorded by the previous judge."

43. PW1 was not at the scene. She arrived after the accident had occurred. PW2 described the nature of the injuries. The injuries were described as extensive. PW3 was the investigating officer. He alleged that the driver was to blame, but there were no eyewitnesses. Therefore, the court can only infer from the evidence. It is evident that both parties were negligent. However, there was no evidence on which of the two was more negligent.

44. The police investigations cannot bind the court. There was no sketch plan to show who was more to blame than the other. In the case of **Platinum Car Hire and Tours Limited v Samuel Arasa Nyamesa & another [2019] KEHC 8796 (KLR),** DAS Majanja J held as follows:

> No doubt in coming to the conclusion that both parties were to blame the trial magistrate had in mind the decision of the Court of Appeal in Berkley Steward Limited v Waiyaki [1982-1988]1 KAR where it cited with approval the decision in Baker v Market Harborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472, 1476 where Denning LJ., observed inter alia as follows:
> Everyday, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One

or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court
would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw
any distinction between them ….
11. In other cases, where the court is unable to determine who is to blame it has apportioned liability equally as illustrated by the Court of
Appeal in Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005 [2006] eKLR, where it was observed that:

> In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this situation, the question arises whether both drivers should be held responsible. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

12. At the end of the day and after evaluating the entirety of the evidence, I too come to the conclusion that following the collision, the appellant and 2nd respondent must share culpability in the absence of any other evidence exonerating one or either party.

45. The mere production of a police abstract does not, *ipso facto*, mean that the driver is to blame. The respondent has a duty to tender cogent evidence on how the accident occurred. They inferred negligence only from the police investigation, but the exact circumstances remain unknown. A police

abstract cannot be evidence of who is to blame. In the case of **Warutumo v Kinyua & another** (Civil Appeal E058 of 2022) [2024] KEHC 16257 (KLR) (20 December 2024) (Judgment), the court held as follows:

> *A police abstract, really does not show who is to blame. It is the police officer's preliminary view on the cause of accident. A sketch plan gives a more succinct view of the accident.*

46. However, given that there were no eyewitnesses, the court has to use the doctrine of *res ipsa loquitor*. A vehicle properly maintained and driven does not get into an accident. In this case, there was a smash-up that resulted in severe injuries that kept the deceased in the ICU for 8 days. The appellant's driver did not show why he could not brake, swerve, or avoid the accident. They had a degree of blameworthiness.
47. The accident occurred as the deceased was just joining the road. It means he disregarded his own safety. It is doubtful who between the two was more negligent. Where there is doubt, the court ought to have found both the deceased and appellant equally liable. Therefore, I set aside the award of 90:10 and substitute the same with 50:50. The cross appeal against liability is therefore dismissed, and the appeal on liability is allowed as aforesaid.

48. The next question is on damages. This will be addressed under three limbs, that is:

a. General damages

b. Special damages, and

c. Pain and suffering

49. The principles guiding this Court, as the first appellate court, have crystallized. This is in recognition that the award of damages in discretionary. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** as follows:

> 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 that 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.

50. An appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance. The Court of Appeal in **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru**

Mwenya) vs Kiarie Shore Stores Limited [2015] eKLR stated thus:-

> "As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court 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 high that it must be a wholly erroneous estimate of the damages."

51. Larger sums impede service to the community as premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. The words of Lord Denning in the *West (H) & Son Ltd (1964) A.C. 326* at page 341 on excessive awards on damages are important to replicate herein thus:

> **"I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of**

> **higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."**

52. The bottom line is that the award of general damages must not be on the runway but should be limited to be commensurate with the injuries suffered. The words of Lord Denning were reiterated by Nyarangi, JA. in **Kigaragari v Aya** [1985] eKLR thus:

> "I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

53. The estimate of damages is objective, and this court will intervene only if the award by the lower court was inordinately

high or inordinately low in the circumstances. In the case of **Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294,** being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> **"The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."**

54. It is thus common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of **H. West and Son Ltd v. Shepherd** [1964] AC.326 (supra) where it was stated that:

> …but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional…..”

55. With the above guide, if the award is inordinately high, or low, then I will have to set it aside. If, however, it is merely high or low rather than inordinately high or inordinately low, I will not do so. For the appellate court to interfere with the award, it is not enough to show that the award is high, or that if I had handled the case in the subordinate court, I would have awarded a different figure.

56. Finally, in deciding whether to disturb the quantum given by the lower court, the court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously, considering the circumstances, to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

57. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is **Nance vs British Columbia Electric Co Ltd, in the**

decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:

> "The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance…"

58. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. *To ascertain whether the Court applied irrelevant factors or left out relevant factors.*

    b. *To ascertain whether the award is too high as to amount to an erroneously assessment of damages.*

    c. *To ascertain whether the award is simply not justified from evidence.*

59. The court awarded a sum of Ksh. 100,000/- under the head for pain and suffering. The deceased died after 8 days in the ICU. He must have suffered pain. However, it was ameliorated by the treatment. Therefore the court must balance on this aspect of pain and suffering. In Civil Appeal No. 42 of 2018 **Joseph Kivati Wambua vs SMM & Another** (suing as the Legal Representatives of the Estate of EMM-

Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -

> "The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident, during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.

60. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted, unlike in a case where a deceased dies later on. In this case, the deceased passed away 8 days after the accident. The amount

that the court award of Ksh. 100,000/= was not inordinately low or high. An appeal in that respect is dismissed.

61. On loss of expectation of life, a sum of Ksh. 100,000/= was awarded. The said sum is not inordinately low as submitted by the Respondents. There was no evidence that the deceased was of ill health and Ksh. 100,000/= was within the conventional award. In **Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another** (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was 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 for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

62. Under the dependency ratio, to interfere with the finding of the lower court on loss of dependency, this court has to find a basis. In **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another**, Nairobi HCCC No. 1638 of 1988 it was held as follows:

> 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 many years purchase. 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 dependants and the chances of life of the deceased and dependants. 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

63. The deceased herein was 32 years old and was married. He had two children, both minors. There was proof of income. The deceased was earning a basic salary of Ksh. 56,966; total earnings of Ksh. 66,966. He had a total deduction of Ksh. Ksh. 14,638 with net income of Ksh 52,328/=. I decline the invitation to recalculate the income. The court will use gross earnings less statutory deductions, that is, Government housing rent, armed forces (INSR), and PAYE of Ksh. 12,473 totaling Ksh. 14,638. The amount to be used as the multiplicand is Ksh 52,328/=.

64. The deceased died at the age of 32 on 09.07.2022. The children were aged between 2 years and 8 years. They will have depended on their father for over 16 years. The wife was

30 years old at the time of the husband's demise. The deceased could have worked up to 55 or 60 years. This is between 23 and 25 years. The court arrived at a multiplier of 20 years in its calculation and 25 in its findings. The deceased died at 32 years old and would be expected to work until the retirement age of 60 years. Regarding the vicissitudes of life, a 20-year multiplier would be appropriate in the circumstances. In **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, Ringera J, as he then was, 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 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 dependants and the chances of life of the deceased and dependants. 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."

65. I also find that the award of dependency based on the ratio of 2/3 was not erroneous and did take into consideration that the deceased was married and had 2 children both minors. I will not interfere with it. As was held by Odunga J (as he then was) in **J W N v Kassam Haulers Limited [2020] eKLR**:

> 17. Conventionally, courts have taken married persons, more so with children, to spend more on their families than themselves and apportioned a dependency ratio of 2/3. On the other hand, they have taken unmarried people to spend more on themselves than their dependents, more so parents, hence have apportioned a dependency ratio of 1/3, which has over time been enhanced to 1/2. In this case it was submitted that as the deceased was married with 3 children he spent more on his family than self hence a dependency ratio of 2/3 would suffice.

66. The court relied on the case of **Hyder Nthenya Musili & another v China Wu Yi Limited & another** [2017] KEHC 3063 (KLR). It is not clear what the age of dependants was. The authority is thus not on all fours. A multiplier of 20 years will suffice, given the age of the dependents, the vicissitudes of life, and the age of the deceased.

67. A multiplier of two-thirds, as adopted by the court, is proper and not disputed. This works out to be:

Ksh 52,328/= x 2/3 x 12 x 20 = Ksh. 8,372,480/=

Less 50% ..... Ksh. 4,186,240/=

Sum due ..... Ksh. 4,186,240/=

68. On special damages, the Respondents pleaded Ksh. 203,550/=, which the court awarded as the amount that was proved. The special damages must be particularized and proved specifically. In the case of **David Bagine V Martin Bundi [1997] KECA 54 (KLR)**, the Court of Appeal [E. Gicheru, A.B. Shah and G. S. Pall], posited as follows:

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera Store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> “Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it."

69. In this case, the special damages awarded were to be proved specifically. A sum of Ksh 103,000/= was produced as

funeral expenses to cover the hearse, coffin, lowering gear, and wreath. These were proper funeral expenses. The receipts from Starlight Hotel do not form part of the funeral expenses. The same with the fees for taking out letters of administration. In the circumstances, reasonable expenses must have been incurred. Therefore, a sum of Ksh 130,000/= will suffice. Anything above this will be extravagant. Therefore, I set aside the amount of Ksh. 203,550/= and substitute with a sum of Ksh. 130,000/=.

70. The court also finds that the Honourable magistrate did not exceed her pecuniary jurisdiction. The award was also within the range permissible for pecuniary jurisdiction under the Chief Magistrate's Court in which the suit was filed, and it would be wrong to punish the Respondents merely on the basis that the magistrate who handled the matter lacked pecuniary jurisdiction.

71. There is no evidence that the court lacked jurisdiction. Where a court finds it does not have pecuniary jurisdiction, it can award its maximum or place the file before a senior court to make the award. The misconception must have arisen from misconstruing the holding in the case of Pho**enix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR**) where, the court of appeal [Karanja, Gatembu & Sichale, JJ.A] stated as follows:

> Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph

> Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-
>
> "When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction.
>
> We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.

72. However, in this matter, these were general damages. They were at large. The magistrate could only exercise discretion up to the maximum limit of her discretion. When it comes to general damages, the same are at large. In the case of **Nyambati Nyaswabu Erick v Toyota Kenya Limited & 2 others [2019] KEHC 9928 (KLR)**, D.S Majanja held as doth:

> "General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries.

> In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but, it must be recalled that no two cases are exactly the same."

73. This leaves the issue of costs, which 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.

74. The case of Phoenix of **E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service** [supra], related to special damages which exceeded the pecuniary jurisdiction. The claim was set forth as follows:

4. Following the accident, the respondent reported to the appellant which was supposed to indemnify the respondent for the loss covered under the said policy. The motor vehicle was taken to a garage for repairs but in the meantime, as the respondent was duty bound to distribute the newspapers, he hired another motor vehicle at the daily rate of Kshs. 1,500.00. for that purpose. The motor vehicle was detained at the garage for a total of 1,138 days, slightly over 3 calendar years. When the appellant declined to pay the amount claimed, the respondent filed PMCC No. 918 of 1991 before the Principal Magistrate's Court at Nairobi vide a plaint dated 18th January, 1991 where particulars of the claim were set out at paragraph 9 as hereunder:-

"The plaintiff's claim against the defendant is for damages for loss of user of the said motor vehicle (as per particulars set out here below) which loss would not have been suffered by the plaintiff had the defendant indemnified the plaintiff timeously in accordance with the terms of the said policy."

Although the amount claimed was not specified on the face of the plaint, a multiplication of 1,138 days by the daily rate of Kshs.1,500 yields the total amount claimed which was Kshs.1,707,000.00.

75. This is different from general damages that cannot be ascertained before damages are assessed. In any case, on reassessment, the court found that the court below was wrong in the assessment of damages. The maximum award given by

this court was Ksh. 8,372,480/=. The question of jurisdiction, therefore, becomes moot.

76. Costs are, as a general rule, discretionary. However, that discretion must be exercised judiciously and not arbitrarily. 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.

77. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Rai & 3 others v Rai & 4 others [2014] KESC 31 (KLR),** 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.

78. Given that the appellant has won both the appeal and cross appeal, they shall have costs. The appellant shall have the costs of Ksh. 205,000/= for both the cross appeal and the appeal.

Determination

79. In the upshot, I make the following orders: -

a) Judgment of the lower court on liability is set aside and substituted with liability of 50%:50% between the appellants jointly and severally and the Respondent on the other hand.

b) The award of general damages for loss of dependency is Ksh. Ksh8,372,480/=, less 50%, making a sum of Ksh. 4,186,240/=.
c) The award of damages for pain and suffering and loss of expectation of life is upheld.
d) The award on special damages is set aside. In lieu thereof, an award of Ksh 130,000/= is awarded as funeral expenses.
e) The appellant shall have costs of Ksh. 205,000/= for both the cross appeal and the appeal.
f) 30 days stay of execution.
g) 14 days right of appeal.
h) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **15th** day of **April, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Olunga for the Appellant

Ms. Wanjiru Muriithi for the Respondent

Court Assistant – Michael/Martin