



Mwathi & another (Suing as the legal representative of the Estate of the Late Peter Njau Ndungu - Deceased) v Gachie (Civil Appeal 7 of 2024) [2026] KEHC 4601 (KLR) (27 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 7 OF 2024
PJO OTIENO, J
MARCH 27, 2026**

BETWEEN

NDUNGU MWATHI & WANGARI NDUNGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE PETER NJAU NDUNGU - DECEASED) APPELLANT

AND

JANE WANGECHI GACHIE RESPONDENT

JUDGMENT

1. Before the court is an appeal against the Judgement of the Chief Magistrate's Court at Naivasha, Civil Suit No. 258 of 2019. The suit was a claim for damages under the *Fatal Accidents Act* and the *Law Reform Act* following a road traffic accident that occurred on 25th April 2018, along the Nairobi-Naivasha Highway at the Karai area.
2. The Plaintiffs alleged that on the material date, the deceased was lawfully a pillion passenger on a motorcycle traveling along the said highway when the Defendant's vehicle, through the negligence of her driver, servant, or agent, lost control and collided with the motorcycle. That at all material times, the Defendant was the registered owner of the said motor vehicle registration number KCK 550M. This collision resulted in the deceased sustaining grave injuries to which he succumbed while undergoing treatment at the Naivasha Sub-County Referral Hospital later that same day.
3. In its plaint, the Appellants articulated several specific heads of negligence against the Defendant including allegations that the driver of motor vehicle KCK 550M was traveling at an excessive speed given the prevailing road conditions, failed to keep any or any adequate lookout for other road users, and failed to apply brakes in a timely manner to avert the collision. The Appellants invoked the doctrine of res ipsa loquitur, asserting that the circumstances of the accident, where a motor vehicle loses control and knocks a pillion passenger, speak for themselves as to the negligence of the driver.



4. Following the filing and service of the Plaint and Summons to Enter Appearance, the Defendant failed to enter a memorandum of appearance neither did it file a statement of defence within the statutory timelines. Consequently, the Plaintiffs moved the court for interlocutory judgment. On 8th July 2019, the trial court entered an interlocutory judgment against the Defendant on the issue of liability and the matter was subsequently scheduled for a formal proof hearing to determine the quantum of damages.
5. The formal proof hearing proceeded before the trial court where the Plaintiffs presented their evidence through two witnesses: PW1, Ndungu Mwathi as the father of the deceased and PW2 Gitimu Kamau as an independent eyewitness. During the trial, various documents were produced as exhibits, including the police abstract, death certificate, and receipts for funeral expenses. After the close of the Plaintiffs' case, written submissions were filed and the court reserved the matter for judgment.
6. The trial court then delivered its judgment on 30th January 2024 and wherein it dismissed the suit in its entirety. The court's held that the Plaintiffs had failed to establish a nexus of negligence against the Defendant despite the existence of the interlocutory judgment. As a result, the magistrate suo motu set aside the interlocutory judgment and dismissed the claim with no orders as to costs.

The Appeal

7. The Appellants challenge the judgment and decree of the trial court delivered in Naivasha CMCC No. 258 of 2019 on several grounds of law and fact. The Memorandum of Appeal, filed in February 2024, sets out the following specific grievances against the trial court's determination:
 - a. The Learned Magistrate erred in fact and in law in dismissing the suit when there was already an interlocutory judgment in place against the Respondent.
 - b. The Learned Magistrate erred in fact and in law in disregarding the Appellants' testimony and in disregarding the evidence tendered by the Appellants' eyewitness during the hearing of the suit.
 - c. The Learned Trial Magistrate erred in fact and in law by not analyzing the Appellants' testimony and that of the witnesses in court, hence reaching an erroneous determination.
8. In light of these grounds, the Appellants seek from the court the orders that; the appeal be allowed; that the judgment and decree by the trial court be set aside in its entirety; that this Court finds the Respondent 100% liable for the accident; that this Court proceeds to assess the damages to be awarded to the Appellants; and that the costs of this appeal and the court below be provided for.

Summary of the Trial Proceedings

9. The formal proof hearing proceeded before the trial court where the Plaintiffs presented their evidence through testimonies of two witnesses, PW1 Ndungu Mwathi as the father of the deceased and PW2 Gitimu Kamau as an independent eyewitness. PW1 testified that on 25th April 2018, his son was a pillion passenger on a motorcycle along the Naivasha-Nairobi Road when the motor vehicle KCK 550M lost control and knocked the motorcycle, causing his son severe injuries. He noted to have then rushed the deceased to the Naivasha Sub-County Referral Hospital but he succumbed to the injuries while receiving treatment on the same day.
10. He added that his son was 23 years old and in excellent health prior to the accident. He described the deceased as a casual labourer who earned an average of Kshs. 15,000 per month. He asserted that the deceased was the primary support for his family, including his elderly parents and siblings. He stated that since the death of his son, the family has suffered significant financial hardship. He produced



the formal documents required to sustain the claim, including the grant of letters of administration (P.Exh.2), the death certificate (P.Exh.4), the police abstract (P.Exh.15), and a series of receipts for funeral expenses (P.Exh.7-12).

11. Evidence by PW2 was that on April 25, 2018, he was traveling as a passenger in a matatu from Naivasha heading towards the Flyover having seated in the front seat, allowing him to witness the traffic ahead. Upon reaching the Karai area, he saw motor vehicle registration number KCK 550M coming from the direction of Nairobi. He stated that the said matatu was overlapping and being driven carelessly and at a high speed before it lost control and collided with a motorcycle that was carrying a rider and the deceased. He noted that both individuals on the motorcycle were seriously injured and were rushed to the Naivasha County Referral Hospital only to later learn that the pillion passenger had died while receiving medical attention. He categorically blamed the driver of motor vehicle KCK 550M for causing the accident through reckless and negligent driving.
12. The Defendant did not participate in the trial. There is no Memorandum of Appearance or Statement of Defence on record. Consequently, no evidence was led on behalf of the Defendant to rebut the allegations of negligence or to challenge the quantum of damages claimed by the Plaintiffs.

Summary of the Appellant's Submissions

13. The Appellants filed submissions in the High Court, challenging the trial magistrate's judgment on both liability and quantum. On Liability, the Appellants argue that the trial court erred in dismissing a suit where an interlocutory judgment was already in place. They submit that according to the rules of procedure, an interlocutory judgment settles the issue of liability, leaving only the assessment of damages to be conducted during formal proof. They contend that the magistrate acted suo motu and without jurisdiction by setting aside the judgment when the Respondent had not applied for such an order.
14. The Appellants further submit that they proved their case on a balance of probabilities. They maintain that the testimony of PW1 and PW2 provided a clear account of the accident, which was corroborated by the police abstract and the death certificate. They reject the magistrate's dismissal of PW2's testimony, arguing that the witness was an independent observer whose evidence was material and uncontroverted. They argue that any procedural delay in calling the witness should not have resulted in the dismissal of the entire suit, citing Article 159 of *the Constitution* which directs that justice should not be delayed by procedural technicalities.
15. On Quantum, the Appellants urge this Court to assess the damages that the trial court failed to award. Their proposed assessment is based on established judicial principles and comparable awards. On Loss of Dependency, the Appellants propose a multiplicand of Kshs. 15,000, arguing that documentary proof of earnings is not mandatory for informal workers as per *Jacob Ayiga Maruja v Simeon Obayo eKLR*. They propose a multiplier of 45 years, considering the deceased was only 23, and a dependency ratio of 1/3, totalling Kshs. 2,700,000.
16. On Pain and Suffering, it is submitted that an award of Kshs. 250,000 is appropriate, given the deceased survived for a few hours in the hospital, thus experiencing conscious pain. The Appellants further propose a sum of Kshs. 200,000 for a life cut short at the age of 23 for the award of Loss of Expectation of Life. Finally, the Appellants pray for the award of Kshs. 142,375, which they argue was strictly pleaded and proved by receipts.



Issues, Analysis and Determination

17. Upon a thorough and careful perusal of the trial record, the memorandum of appeal, and the written submissions of the Appellants, this Court identifies the following core issues for determination: (i) Whether the learned trial magistrate erred in law and fact by setting aside the interlocutory judgment and dismissing the suit suo motu during a formal proof hearing; (ii) Whether the Appellants proved their case on liability on a balance of probabilities, particularly in light of the blamelessness of a pillion passenger; and, (iii) Whether the trial court erred in failing to assess and award damages, and if so, what is the appropriate quantum of damages under the various heads of claim?
18. On whether the learned trial magistrate erred in law and fact by setting aside the interlocutory judgment and dismissing the suit suo motu during a formal proof hearing, the court notes that an interlocutory judgment is not a mere procedural placeholder; it is a decisive adjudication on the question of liability. Order 10 of the Civil Procedure Rules governs situations where a defendant fails to appear or file a defense. Rule 4 specifically provides for interlocutory judgment in cases of unliquidated damages, followed by a formal proof hearing to assess those damages. However the interlocutory judgment effectively deems the allegations of negligence and duty of care in the plaint to be admitted by the defendant. The Court of Appeal in *Kavindu & Another vs Mbaya & Another* KLR 164 established that once an interlocutory judgment is regularly obtained, the issue of liability is res judicata between the parties unless and until that judgment is set aside through a formal application under Order 10 Rule 11.
19. This Court observes that an interlocutory judgment settled the question of liability in favor of the Plaintiffs on 8th July 2019. In the absence of an application by the Defendant to set aside this judgment under Order 10 Rule 11, the trial court was bound by the finding of liability. The trial magistrate's decision to revisit the issue of liability during the final judgment stage and to set aside the interlocutory judgment suo motu is a procedural misapprehension. Once an interlocutory judgment is entered, the issue of liability is res judicata for the purposes of the trial court, unless and until it is set aside through a formal application where the defendant demonstrates a meritorious defense and a reasonable explanation for the delay.
20. The Trial Magistrate's critique of the eyewitness, PW2, centered on two fronts: the delay in his appearance and the procedural filing of his statement. The standard of proof in a civil suit remain that of balance of probabilities whether it is more likely than not that the incident occurred as alleged. In civil litigation, the resurfacing of a witness years later is not, in itself, a ground to reject their testimony unless that testimony is proven to be incredible or contradictory. In an undefended suit, where the witness's version of events is the only version before the court, the Trial Magistrate had a duty to evaluate the testimony on its own merits rather than on the timing of the witness's availability.
21. Even if this Court were to re-evaluate the evidence on liability after dismissing the testimony of PW2, the Plaintiffs' case remained robust. From the records, it is not in doubt that the deceased was a pillion passenger on a motorcycle that was struck by motor vehicle KCK 550M. It is a well-settled principle that a passenger, pillion or otherwise is a blameless victim in collisions between vehicles. As a passenger, the deceased had no control over the motorcycle and could not have done anything to avoid the accident. In *Ndatho vs Chebet* KEHC 346 (KLR), it was held that a pillion passenger has no control of the motorcycle and cannot be found contributorily negligent for the mechanics of the collision.
22. The Plaintiffs provided a police abstract which, although not conclusive of liability, corroborated the fact that the accident involving the Respondent's vehicle occurred on the date and at the place alleged. In the absence of any defense or evidence to the contrary from the Respondent, and the deceased having



- only been a passenger in the incidence, the circumstances sufficiently establish liability at on either the driver of the motorvehicle or the motorist. The suit herein was brought against the Respondent who were claimed to have been fully liable for the accident. This court thus faults the trial magistrate's finding of the nexus having not been established to be an erroneous estimate of the evidence presented.
23. Given that liability is established at 100% as in the above, this Court must now perform the task the trial court failed to do: the assessment of damages. This Court is guided by the principles in *Butt v Khan* KLR 349, which require that awards for damages be commensurate with the injuries sustained and consistent with comparable past awards.
 24. On Pain and Suffering, the record indicates that the accident happened on April 25, 2018, and the deceased died later that day in the hospital. While death was relatively quick, it was not instantaneous, meaning the deceased experienced conscious pain before passing. Recent judicial trends for pain and suffering in cases of near-instant death range from Kshs. 10,000 to Kshs. 100,000. Considering the deceased survived for some hours, the court finds an award of Kshs. 50,000 to be reasonable and sufficient.
 25. In the case of *Sukari Industries Limited vs Clyde Machimbo Juma*, Homa Bay HCCA NO. 68 of 2015 [2016] EKLR where the deceased had died immediately after the accident and the trial court had awarded Ksh. 50,000/= for pain and suffering, Majanja J. held that:

“On the first issue, I hold that 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. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”
 26. On Loss of Expectation of Life, the court notes that this is a conventional award for the shortening of a person's life. For a 23-year-old, life expectancy was severely cut short. Current conventional awards on the head range from Kshs. 100,000 to Kshs. 200,000. In *High Plateau Limited v Namalwa* KEHC 10311 (KLR), the court upheld an award of Kshs. 200,000 for loss of expectation of life. The court hereby award the sum of Kshs. 100,000 under this head.
 27. On Loss of Dependency, the Appellants presents that the deceased was a casual labourer earning Kshs. 15,000 per month. However, there were no bank statements or any evidence presented in court to confirm the deceased's alleged earnings. The court opts for a multiplicand formula for assessment of dependency. The multiplicand herein will be from the minimum wage guideline, the deceased having been engaged in informal employment where it is difficult to tell the actual regular income.¹
 28. The applicable minimum wages is regulated by the Regulation of Wages (General) Amendment order of 2018 which came into force on 1st May, 2018. However the accident herein occurred slightly prior to this date on on 25th April 2018. The applicable regulations then is the Regulation of Wages (General) (Amendment) Order, 2015. The Karai area along the Nairobi–Naivasha Highway is not classified as a city neither a municipality so the applicable rate for a general labourer falls under the “All Other Areas” rate of KSh 5,844.20/= per month under the Regulations.

¹ *Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu* [2021] eKLR.



29. The deceased was 23 years old. While he could have worked until 60, the court must account for the vicissitudes of life such as illness or unemployment. For a person in their early 20s, a multiplier between 30 and 35 years is standard. The court will adopt a multiplier of 32 years. The deceased at the time of his death was supporting his elderly parents and siblings. The conventional ratio for a single man with no children is 1/3, as he would spend the bulk of his income on himself. This was affirmed in the case of *Muthondu vs Muratha* (Suing through the legal representative of the Estate of the Late Erick Kimathi Gitari) & another [2024] KEHC 13851 (KLR) where the court stated that:
- “The dependency ratio, is the fraction of the income that a person is expected to give to his dependents in his lifetime. If a person is married, it is expected that the person would spend 2/3 of his income to support his dependents but where the person unmarried it is accepted that 1/3 of his income utilized in support of his dependents.”
30. To that end the award should be Kshs. 748,057.60 worked out as $5,844.20 \times 32 \times 1/3$. The learned trial magistrate exercised discretion to use a multiplier and based on the evidence before him and not global sum.
31. Special damages must be strictly pleaded and proved. The Plaintiffs claimed Kshs. 142,375 for burial and related expenses. They produced 11 receipts in support of these costs. The court finds that these expenses were reasonable and well-documented and award the sum of Kshs. 142,375 for the same.
32. In upshot, this Court finds that the instant appeal is highly merited. The court therefore allow the appeal in its entirety. The consequence is that:
- a. The judgment and decree of the trial court is hereby set aside.
 - b. Liability is assessed at 100% against the Respondent
 - c. The Appellants are awarded general damages in the sum of Kshs. Kshs. 748,057.60
 - d. The appellant is awarded special damages in the sum of Kshs. 142,375
 - e. The Appellants shall have the costs of this appeal and the costs of the proceedings in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH, 2026

PATRICK J O OTIENO

JUDGE

