REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CIVIL APPEAL NO. E023 OF 2025

COUNTY GOVERNMENT OF THARAKA NITHI..... APPELLANT

VERSUS

OSCAR KIRUNJA (being sued as the Legal representatives of the estate of Mercy Kananu).....RESPONDENT

JUDGEMENT

1. This appeal arises from the judgment and decree of Hon. Joyce Gandani (CM) in Chuka CMCC No. E078 of 2022 delivered on 12th May 2025. By a plaint dated 22nd February 2022, the Plaintiff (Respondent) sued the Defendant (Appellant) for general and special damages arising out of a road traffic accident.

2. The Plaintiff's case was that on 25th August 2020 at around 12.30 hours Mercy Kananu (deceased)was lawfully and carefully walking along Chuka-Meru road when at Nithi Bridge area and/or while crossing the bridge, the Defendants drove, managed and/or controlled motor vehicle registration number 13CG029A that he lost control of the vehicle and caused or permitted the same to veer of the road and violently collided with the deceased as a result of which she sustained fatal injuries. The Plaintiff blamed the Defendant's driver for the accident whose actions the Defendant was vicariously liable for.
3. The Defendant filed a statement of defence dated 17th June 2022 which statement denied the averments contained in the plaint. The Defendant expressly denied the doctrine of Res ipsa loquitor and pleaded the defence of volenti non fit injuria.

In the alternative, the Defendant pleaded that if the accident occurred, the same was wholly caused or substantially caused and/or majorly contributed to by the negligence of the deceased.

4. The matter proceeded for hearing with the Plaintiff calling one witness and the Defendant closed its case without calling any witness. Judgment was entered in favour of the Plaintiff in the following terms: -

    i. Liability against the Defendant – 100%

    ii. Pain and suffering- Kshs. 30,000

    iii. Loss of expectation of life- Kshs. 100,000

    iv. Loss of dependency – Kshs. 1,500,000

    v. Special damages – Kshs. 694,650

    vi. Costs of the suit and interest.

5. Aggrieved with the judgement, the Appellant lodged the Appeal on grounds on the Memorandum of Appeal dated 1st July 2025 set out as follows: -

i. That the learned trial magistrate erred in law and in fact holding the Appellant 100% liable for causing the accident whereas the negligence on the Appellant was not proven during trial.

ii. That the learned trial magistrate erred in law and in fact by holding the Appellant 100% liable for causing the accident contrary to the evidence on record and/or adduced during trial.

iii. That the learned trial magistrate erred in law and in fact in awarding general damages for pain and suffering at Kshs. 30,000 which amount is manifestly excessive considering the deceased died at the scene of the accident.

iv. That the learned magistrate erred in law and in fact in awarding general damages

for loss of dependency at Kshs. 1,500,000 which amount is manifestly excessive.

v. That the learned magistrate erred in law and in fact in awarding special damages of Kshs. 694,650 which amount was not specifically proven to the required standards.

vi. That the learned trial magistrate erred in law and in fact in failing to consider the relevant facts relating to the suit thus arriving at a decision that is wholly erroneous in law and facts.

vii. That the judgment of the learned trial magistrate is against the law and weight of evidence on record and against the doctrine of stare decisis

6. The Appellant proposed that the appeal be allowed and the judgment of the lower court be set aside.

7. As this is a first appeal, the Court is obligated to re-evaluate, re-analyse, and reconsider the evidence on record and arrive at its own independent conclusions. In doing so, the appellate court must bear in mind that it neither saw nor heard the witnesses testify, while nonetheless scrutinising the entire record to ensure that the findings of the trial court are supported by the evidence. This duty was restated by the Court of Appeal in the case of **Imanyara & 2 others v Attorney General [2016] KECA 557 (KLR)** as thus: -

> **"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High 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 allowances in this respect."

8. The Appeal was canvassed by way of written submissions as directed by the court. The Appellant filed their written submissions dated 13th November 2025 raising the following issues for determination: -

   i. Whether the learned trial court erred in law and in fact holding the Appellant 100% liable for causing the accident whereas the negligence on the Appellant was not proven during trial.

ii. Whether the learned trial magistrate erred in law and in fact awarding general damages for pain and suffering at Kshs. 30,000 which amount is manifestly excessive considering the deceased died at the scene of the accident.

iii. Whether the learned magistrate erred in law and in fact in awarding general damages for loss of dependency at Kshs. 1,500,000 which amount is manifestly excessive.

iv. Whether the learned magistrate erred in law and in fact in awarding special damages of Kshs. 694,650 which amount was not specifically proven to the required standards.

v. Whether the learned trial magistrate erred in law and in fact in failing to consider the relevant facts relating to the suit thus arriving

at a decision that is wholly erroneous in law and facts.

vi. Whether the judgment of the learned trial magistrate is against the law and weigh of evidence on record and against the doctrine of stare decisis.

9. The Respondent filed his written submissions dated 11th November 2025 raising the following issues for determination: -

i. Whether the learned trial magistrate erred in holding that the case was proved despite the non-production of a police abstract.

ii. Whether the failure by defence to call a witness/file a witness statement automatically rendered the case unopposed.

iii. Whether the Respondent proved his case on a balance of probabilities.

10. From the pleadings on record, the grounds of appeal and respective submissions by the parties, I find the following issues for determination: -

i. Whether liability was proven and properly apportioned.

ii. Whether the damages awarded were inordinately high.

Liability

11. The Appellant submitted that the burden of proof lay with the Respondent who did not call an eye witness yet he was not present at the scene of the accident. That the Respondent did not produce the police abstract which would have been a confirmation that the accident occurred nor did he call an investigating officer. In support of their

arguments, the Appellant relied on the following cases: -

i. **Daniel Musyoka Muviku (Suing as the legal representative of the Estate of Christine Ndanu Kimanzi- Deceased) v Mutemi Mutuku [2022] eKLR** where the appellate court sustained the lower court's decision dismissing the Plaintiff's case for failing to call an eye witness and for failing to call the investigation officer.

ii. **ZOS & CAO (Suing as the Legal representative of the estate of SAO (deceased) v Amollo Stephen [2019] eKLR** where the court held that a police abstract only provides particulars of the reported accident and not how the accident occurred.

12. The Appellant further submitted that the accident occurred at Nithi bridge which is a known blackspot with designated pedestrian crossing areas thus the deceased ought to have been careful to use the designated pedestrian crossing area to avert the accident. In support of this argument, the Appellant relied on the case of **Samuel Kimani & Another v Mary Wanjiku Kamau & Another [2019] KEHC 96969 (KLR).** The Appellant urged the court that if the Appellant is likely to be found liable, then the court should apportion a significant share of liability to the Respondent.

13. The Respondent on his part submitted that a police abstract is not conclusive proof of occurrence of an accident but merely serves as a secondary confirmation of such occurrence. That what matters is whether the evidence as a whole

establishes the occurrence of the accident and the involvement of the Appellant's vehicle.

14. The Respondent further submitted that he had produced documents which contained material particulars ordinarily captured in a police abstract which documents when taken together provide cogent and sufficient proof of the occurrence of the accident and the involvement of the Appellant's vehicle. Thus, the absence of the police abstract is not fatal to the Respondent's case.

15. The Respondent also submitted that he produced eye witness testimony and other corroborative evidence which the Appellant neither rebutted nor produced contrary evidence to dislodge the Respondent's version. In support of their argument, they relied on the case of **Simon Mumo Malonza v British American Tobacco (K) Ltd** where Okwengu J**.** (as she the) observed

that although the Appellant had not produced any police abstract, report of the accident or a P3 form, it was apparent from the exhibits produced that the Appellant was involved and or injured in a road accident. He also relied on the case of **Thuranira Karauri v Agness Ncheche CA 192/96** where the Court of Appeal stated that abstracts only give the salient facts of the occurrence of an accident without purporting to be an active copy of a police report.

16. The issue for determination is whether the Respondent discharged the burden of proving negligence against the Appellant to the requisite standard, and whether the trial court was justified in apportioning liability at 100%.

17. The legal burden of proof is anchored under Sections 107 and 109 of the Evidence Act, which place the obligation upon the party who asserts a

fact to prove it. In negligence claims, this entails proof of a duty of care, breach of that duty, and resultant damage. Lord Denning 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 the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof 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' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

18. The Appellant's principal contention is that negligence was not proved due to the absence of an eye witness, a police abstract, and the failure to call the investigating officer. While such evidence would undoubtedly strengthen a claimant's case, its absence is not necessarily fatal. Each case must be determined on the totality of the evidence presented.

19. In this regard, the Court of Appeal in **Nandwa v Kenya Kazi Ltd [1988] eKLR** cited, with approval, **Barkway v South Wales Transport**

Company Limited [1956] 1 ALLER 392,393 B follows: -

> **"The application of the doctrine of *res ipsa loquitor*, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the**

established facts negligence was to be confirmed."

20. From the record, the Respondent adduced evidence placing the Appellant's motor vehicle at the scene and attributing the accident to the manner in which it was driven. That evidence was neither discredited nor contradicted. The Appellant, despite specifically pleading negligence on the part of the deceased and raising defences such as ***volenti non fit injuria,*** did not tender any evidence in support thereof.

21. The effect of a defendant's failure to adduce evidence was considered in **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007**, where Ali-Aroni, J. cited with approval the decision in **Edward Muriga through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal**

No. 23 of 1997, which held that where a party filed a Defence but failed to adduce evidence to support the assertions made therein, the evidence of the Plaintiff remained uncontroverted.

22. On the question of the absence of a police abstract or investigating officer, I am persuaded by the case of **Kanithi Kimunya v Aden Guyo [2014] eKLR a police abstract is not proof of the occurrence of an accident, but of the occurrence of an accident reported at a particular police station**.

23. The Appellant further urged that the deceased contributed to the accident by failing to exercise due care at a known blackspot. While that may be a plausible argument, it remained unsubstantiated. In **Stapley v Gypsum Mines Ltd 2 [1953] AC 663**, it was held that contributory negligence must be proved as a matter of fact, and liability can only

be apportioned where there is evidence demonstrating fault on the part of both parties.

24. In the absence of any such evidence, the trial court had no basis upon which to apportion liability. The Respondent's evidence, though not supported by a police abstract or investigating officer, was coherent and uncontroverted, and it established, on a balance of probabilities, that the accident was caused by the negligence of the Appellant's driver.

25. In the premises, I find no error in the trial court's finding on liability. The Respondent discharged the burden of proof, and in the absence of any rebuttal or evidence of contributory negligence, the apportionment of liability at 100% against the Appellant was warranted.

Quantum

26. The trial court awarded Kshs.30,000 for Pain and Suffering.

27. The Appellant submitted that from the evidence on record, the deceased died on the spot at the scene of the accident and therefore the pain was not prolonged. The Appellant proposed a sum of Kshs. 10,000/= relying on the case of **James Gakinya Karienye & Another (Suing as the legal representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji [2015] KEHC 7688 (KLR)** where the court awarded Kshs. 10,000 for pain and suffering and Kshs. 80,000 for loss of expectation of life for death taking place immediately after the accident.

28. The Respondent on the other hand, submitted that the award of Kshs. 30,000 for pain and suffering was modest and consistent with precedents such as **Benham v Gambling [1941]**

AC 157 where the court recognised nominal damages in cases of immediate death.

29. The award for pain and suffering is made under the Law Reform Act, and is intended to compensate the estate of the deceased for the physical and mental anguish endured between the time of injury and death. The award is dependent on the particular circumstances of a case.

30. It is now settled that where death occurs instantaneously or shortly after the accident, only nominal damages are awardable under this head. In **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR,** Odunga J. (as he then was) stated as follows;-

> **"...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 awards range from Kshs. 10,000/=to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged death."

31. It is trite that where death is immediate, conventional awards range at the lower end of the scale. **In Sukari Industries Limited v Clyde Machimbo Juma [2016] KEHC 8278 KLR** Majanja J. (as he then was) held as follows: -

"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."

32. In the present case, the uncontroverted evidence on record is that the deceased died at the scene of the accident. There was no indication of prolonged suffering prior to death. In such circumstances, the award under this head ought to be modest, reflecting the minimal duration, if any, of conscious pain endured.

33. Taking into account the comparable authorities and the circumstances of this case, an award in the

range of Kshs. 10,000 to Kshs. 50,000 would be considered reasonable where death is instantaneous. The Appellant proposed a sum of Kshs. 10,000, while the Respondent supports the trial court's award as being reasonable. The guiding principle is not mathematical precision but the exercise of judicial discretion within acceptable limits.

34. Accordingly, if the trial court awarded a sum that falls within or reasonably near this range, this Court would be slow to interfere, as interference with an award of damages is only justified where it is shown that the trial court acted on wrong principles or that the award is inordinately high or low as to represent an erroneous estimate. This principle was restated in **Butt v Khan [1978] KECA 24 KLR.**

35. In the premises, given that the deceased died at the scene and there is no evidence of prolonged suffering, the appropriate award under this head ought to be nominal. The award of Ksh.30,000 was within range, and so uphold.

Loss of dependency

36. The Appellant submitted that it was clear that the deceased died at the age of 22 years survived by her parents and that there was no proof of income. They urged the court to consider the case of **Kwanzia v Ngalali Mutua & Another as quoted in J N K (Suing as the legal representative of the Estate of MMM (deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR** where Ringera J (as he was then) stated: **-**

> **"The multiplier approach is just a method of assessing damages. It is not a**

principle of law or a dogma. It can and must be abandoned where facts do not facilitate its application."

37. The Appellant proposed the sum of Kshs. 1,000,000 under this head. He relied on the following authorities: -

i. **Mary Khayesi Awalo & Another V Mwilu Malungu &** (as she then was) **Another [1999] eKLR** where Nambuye J. opted for the principle of a lump sum award instead of relying on the parties' estimates in the absence of proper accounting books.

ii. **Gilbert Kimatore Nairi & Another (Suing as personal representatives of the estate Sein Lemayian (Deceased) V Civiscope Limited [2021] eKLR** where the court upheld the trial court decision awarding a global figure of Kshs. 600,000 for loss of dependency

where the deceased was a 31 year old, farmer allegedly earning Kshs. 50,000.

iii. **Paul Ouma v Rosemary Atieno Onyango & Another (Suing as the legal representative of the estate of Joseph Onyango Amollo (deceased) [2018] eKLR** where the court allowed the appeal and awarded the sum of Kshs. 800,000 for loss of dependence in the case where the deceased was a 38-year-old watchman.

38. Upon re-evaluating the evidence and the applicable principles, this Court notes that the deceased was aged 22 years and was survived by her parents, who were her dependants within the meaning of the Fatal Accidents Act. Although no documentary evidence of income was produced, it is now settled that lack of such evidence is not, of itself, fatal to a claim for loss of dependency.

39. In **Jacob Ayiga Maruja & Another v Simeon Obayo [2005] KECA 202 KLR**, the Court of Appeal held as follows: -

> **“…….We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and**

the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail."

40. In the present matter, the deceased was a young adult with the potential to secure gainful employment and support her parents. It is recognised that parents were entitled to expect support from their children, and such expectation forms a proper basis for an award under this head**. In Hassan v Nathan Mwangi Kamau Transporters & 4 Others [1896] KECA 42 KLR, the Court of Appeal** affirmed that dependency is not limited to actual financial contributions at the time of death but extends to the reasonable expectation of future support.

41. Given the uncertainty surrounding the deceased's income, the trial court was justified in adopting a global sum approach. In the **Mary Khayesi Awalo case (supra)** Nambuye J. went on to state;

> ***"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."***

42. The trial court awarded Kshs. 1,500,000 under this head. This Court is mindful that assessment of damages is a matter of judicial discretion, and an appellate court will only interfere where it is shown

that the trial court acted on wrong principles or that the award is so inordinately high or low as to represent an erroneous estimate.

43. Taking into account the age of the deceased, the fact of dependency by her parents, and the prevailing range of awards in comparable cases, I am not persuaded that the sum awarded was so excessive as to warrant interference. The trial court properly exercised its discretion, and the award, was within reasonable limits.

44. In the premises, the award of Kshs. 1,500,000/- for loss of dependency is upheld.

Special damages

45. The Appellant submitted that special damages must not only be pleaded but should also be specifically proved. It was submitted that the Respondent was awarded special damages in the sum of Kshs. 694,650 yet the receipts produced

before the trial court did not amount to the awarded sum. They relied on the case of **Agnes Wanjiku Ndegwa v David N. Waweru [2014] eKLR.**

46. The Respondent on his part submitted that he produced receipts which were admitted without objection.

47. In its judgment, the trial court noted that what was pleaded and proved in special damages was Kshs. 694, 650 and awarded the same instead of Kshs. 810,850 which had been pleaded.

48. I have reconsidered the record in light of the parties' submissions and I am satisfied that the trial court properly exercised its discretion in awarding Kshs. 694,650 as special damages. While it is a settled principle that special damages must be specifically pleaded and strictly proved, the standard of proof does not demand a rigid or

mechanical itemization where documentary evidence has been produced and admitted without objection.

49. In this case the Respondent produced receipts which were admitted into evidence without challenge, and the trial court, having had the benefit of examining them firsthand, was entitled to assess and accept the proven sum. On this appeal, the Appellant has complained that the receipts produced did not add up to Kshs.694,650/- without showing his own calculation of the proven amount.

50. I find no basis to interfere with that finding. The trial court reduced the pleaded sum to what it considered proved, which demonstrates a careful and reasoned approach. I therefore uphold the award of Kshs. 694,650 as special damages.

51. In the end, I uphold the judgement and award by the trial court. The appeal has no merit and is dismissed with costs to the Respondent.

Orders accordingly.

Judgement delivered, dated and signed at Chuka this 12th day of May, 2026.

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R. LAGAT-KORIR

JUDGE

Judgement, delivered in the presence of Mr. Mbetera holding brief for Mr. Mutwiri for the Respondent; N/A for the Appellant; Muriuki (Court Assistant)