



Rundii & another v Kendi (Suing as Legal Representative and Administrator of the Estate of Peter Mugambi Ringera - Deceased) (Civil Appeal E051 of 2024) [2025] KEHC 7163 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E051 OF 2024
RM MWONGO, J
MAY 28, 2025**

BETWEEN

MOSES NJAGI RUNDII 1ST APPELLANT

HENRY NYABUTO MAGATI 2ND APPELLANT

AND

RUTH KENDI (SUING AS LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF PETER MUGAMBI RINGERA - DECEASED) RESPONDENT

(Appeal arising from the decision of Hon. D. Endoo, RM in Embu CMCC No. 27 of 2023 delivered on 14th May 2024)

JUDGMENT

The Memorandum of Appeal

1. The appeal herein has been filed vide memorandum of appeal dated 13th June 2024 wherein the appellants, are seeking orders that:
 - a. This appeal be allowed with costs;
 - b. The Judgement delivered by Honourable Magistrate D.Endoo Magistrate Court Civil Suit No. 27 of 2023 delivered on 14th May, 2024 be set aside in its entirety on liability and quantum and the same be determined and assessed afresh; and
 - c. The costs of this Appeal and that of the trial court be awarded to the Appellant.
2. This appeal is premised on the grounds that:



1. The learned magistrate erred in law and in fact by finding that the 1st Appellant was 100% liable for the accident against the weight of evidence adduced by the 1st Appellant that the accident was wholly caused by the negligence of the Respondent;
2. The Learned Trial Magistrate erred and misdirected herself as to the exact cause of the accident and therefore erred in law and in his findings on liability;
3. The Learned Magistrate misdirected himself in determining that the 1st Appellant was to bear greater blame for the accident, which fact was against the weight of the evidence on record;
4. The Learned Magistrate erred in law and in fact in making an award on liability and quantum that was so excessive as to amount to an erroneous estimate of damage payable to the Respondent;
5. The learned magistrate erred in law and in fact in failing to appreciate the principles available for consideration in awarding general damages which led to an erroneous assessment of damages resulting in an award of damages so inordinately high as to represent an entirely erroneous estimate of the compensation to which the Respondent was entitled;
6. The learned magistrate erred in law and in fact in awarding Kshs.3,720,000 general damages and special damages of Kshs.28,250 plus interest and costs which amount is/was excessive, unjust in the circumstances considering the nature of claim, and the conventional awards in relation to such claim;
7. The learned Magistrate erred in law and in fact by failing to appreciate the 1st Appellant's written submissions and authorities attached thereto in respect to awards granted by other judicial officers in cases where the victims with similar injuries with the Appellant have been granted;
8. The learned magistrate erred in law and in fact by failing to apply the relevant and pertinent judicial principles, precedents and trends regarding the award of quantum; and
9. That the learned trial magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

Background

3. Through a plaint dated 14th February 2023, the respondent alleged that the deceased was a lawful passenger on board motor vehicle registration number KCF 451G. When they reached Embu-Nairobi Road at Rupingazi river, the driver of the said motor vehicle drove so recklessly and negligently that he lost control of the motor vehicle and caused an accident which occasioned the deceased's fatal injuries. The respondent blamed the appellants for the accident and held them vicariously liable.
4. The respondent stated that the deceased was survived by a wife and 4 children. She claimed special damages of Kshs.29,250/=, general damages under the *Fatal Accidents Act* and the *Law Reform Act*, costs and interests. She produced documentary evidence in support of her case.
5. In his statement of defense, the 1st appellant denied the averments made in the plaint. He admitted that he was the driver of motor vehicle registration number KCF 451G, but imputed negligence on the drive of motor vehicle registration number KCW 689F. He produced documentary evidence in support of his case.



Summary of the Evidence in the Trial Court

6. PW1 was PC Noor Adan. He produced the police abstract in the deceased's case. He stated that the accident involved motor vehicle registration numbers KCF 451G and KCW 689F. That motor vehicle registration number KCF 451G was being driven from Embu to Nairobi but failed to keep its lane and thus collided with motor vehicle registration number KCW 689F which was being driven in the opposite direction by one Samuel Ringera.
7. As a result, one passenger died on the spot while 21 others were seriously injured. They were taken to various hospitals. He said that the impact was on the left lane toward the Embu direction from Nairobi direction. This is why he concluded that the 1st appellant, who is the owner of the motor vehicle registration number KCF 451G was to blame for the accident. In cross-examination, he stated that the drivers of both vehicles died on the spot.
8. PW2 was the respondent who stated that the deceased was her husband. He was 45 years old at the time of the accident and was in good health. She had been married to the deceased for 25 years and they have 4 children aged 25 years, 24 years, 13 years and 10 years. She said that the deceased worked as a driver and the whole family depended on him. The deceased sustained his family using the income he drew from his work as a driver.
9. PW3 was Purity Gacheri, the conductor in motor vehicle registration number KCW 689F. She stated that the vehicle had 5 passengers that day, that while on the road at the Rupingazi river bridge, she saw the motor vehicle registration number KCF 451G. The 2 vehicles collided and she witnessed the whole incident.
10. When the respondent closed her case, the appellants did not offer any defense and closed their case too.

The Trial Court's Judgment

11. The trial court found the appellants 100% liable for the accident and awarded the respondent Kshs.20,000/= as general damages for pain and suffering and Kshs.100,000/= for loss of expectation of life. The court applied the multiplier method to compute general damages for loss of dependency, using a multiplier of Kshs.30,000/= and a multiplicand of 15 years against a ratio of $\frac{2}{3}$. Under this head, the award was Kshs.3,600,000/=.

Parties' Submissions on the Appeal

12. Following the court's direction, the parties filed their written submissions in the appeal.
13. The appellant argued that the trial court's findings on liability and quantum is unfair and unjust. They relied on the cases of *Kanga v Manyoka* [1961] EA 705 and *Lukenya Ranching and Farming Co-op. Society Ltd v Kavoloto* [1979] E.A. 414 as cited in the case of *Paul Kipsang Koech & Another v Titus Osule Osore* [2013] KEHC 3561 (KLR). They argued that the damages awarded were erroneous and based on wrong principles. They also relied on the case of *Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd* [2013] KECA 528 (KLR) where the court held that the award of damages should be based on comparable awards.
14. They held the trial court in error for awarding Kshs.3,600,000/= as general damages for loss of dependency and argued that the award was inordinately high. They stated that the multiplier of Kshs.30,000/= was never pleaded in the plaint but the trial court picked the number from the respondent's testimony without further proof of the deceased's earnings. That the trial Court even



conceded that the income of the deceased was not proved. It was their argument that the trial court's formula in reaching the award was flawed on many fronts.

15. They stated that the multiplier method was not applicable in this case since the proof of earnings was missing. They placed reliance on the cases of *Mwanzia v Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa v Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR*. They urged the court to apply the 2017 minimum wage as the multiplier, with a multiplicand of 15 years against a $\frac{2}{3}$ ratio. The appellants urged the court to reassess damages and set aside the findings of the trial court.
16. The respondent submitted that the trial court did not err in its award of damages; that the award was reasonable in the circumstances; and urge that this court should not interfere with the findings of the trial court.

Issues for determination

17. From the foregoing, the issues for determination are the following;
 - a. Whether liability was properly apportioned by the trial court; and
 - b. Whether the damages awarded are just in the circumstances.

Analysis and Determination

18. As a first appellate court, it is the duty of this court to examine afresh the evidence adduced at trial and reach its own conclusions. This was held in the case of *Williamson Diamonds Ltd and another v Brown [1970] EA 1*, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

19. Liability is a matter of fact; hence, this court must re-evaluate the circumstances under which the accident in question occurred. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. Section 107 (1) of the *Evidence Act* provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

20. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of *Evans Nyakwana v. Cleophas Bwana Ongaro (2015) eKLR* the evidential burden was discussed and the court stated that:

“As a general proposition 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.”



21. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v. Minister of Pensions* (1947) 2 All ER 372 (supra) discussing the burden of proof the court 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.”

22. Now to the evidence. PW1 testified that the 1st appellant’s motor vehicle was to blame for the accident since the collision occurred on its lane, which was on the wrong side. The driver of the motor vehicle was driving on the oncoming lane when he caused the vehicle to collide with the oncoming vehicle. PW3 witnessed the accident as it happened. She stated that she was in the other motor vehicle KCW 689F when she saw the 1st appellant’s motor vehicle approaching their vehicle head on at high speed, leading to a collision. There was no evidence controverting this testimony. On a balance of probabilities, therefore, the evidence proves that the 1st appellant’s driver was liable for the accident. To that end, the trial court did not err in its finding of liability.

23. On the issue of quantum, the trial court awarded Kshs.20,000/= as damages for pain and suffering and Kshs.100,000/= for loss of expectation of life. In the case of *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed:

“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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

24. Considering that the deceased died on the spot, it is prudent to keep the award of damages for pain and suffering to a minimum. The trial court’s award of damages for pain and suffering is fair in the circumstances. As for damages for loss of expectation of life, the court held as follows in the case of *Benham v Gambling*, (1941) AC 157:

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

25. The trial court’s award under the head of loss of expectation of life is modest and just in the circumstances. Moreover, in their submissions, the appellants conceded that the award under this head is reasonable. There is thus no basis to interfere with the trial Court’s award here.



26. On the issue of general damages for loss of dependency, the respondent simply stated in the plaint that the deceased was 45 years old at the time of the accident and he was survived by a wife and 4 children. It is only during her testimony as PW2 that the respondent testified that the deceased was earning Kshs.30,000/- monthly. She also said that she did not have any documents to prove this assertion. In any event, the trial magistrate used this figure as the multiplier against a multiplicand of 15 years and a $\frac{2}{3}$ ratio.
27. From the circumstances herein, the multiplier method can indeed be used since the deceased was working as a driver, which was an uncontended fact. However, since his earning could not be proved, it was unsafe for the trial magistrate to consider the orally submitted salary as the multiplicand. However, the minimum wage can be applied in this case.
28. In the case of *Nyamai Petronila & another v Monica Usyoki & another* [2020] eKLR, the court held:

“ 8. In this appeal, the appellant contends on the loss of dependency that though the certificate of death shows that the deceased was aged 49 years old and was a plumber, there were no records to show previously his monthly earnings. On multiplicand, it was submitted that the court erred as it used a multiplicand of Kshs.10,000/- since there was no evidence of the deceased’s earnings and there was no evidence of the deceased’s employment. The court was urged to use the Multiplier approach in assessing damages which is a useful and practical method where factors such as age of the deceased, amount of annual month dependency are known. The Court was urged to assess the deceased income using the minimum wage of Kshs. 4,854/- which was the applicable minimum wage at the time of his death as published under Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013. In this regard, the Appellant relied on HCCA No. 108 of 2008 – *Machakos Philip Mutua v Veronicah Mule Mutiso* [2013] eKLR where it was noted that

“... on the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate is usually like a wage of an unskilled employee.””

Conclusions and Disposition

29. The applicable minimum wage, at the time of the accident, can be found in the Regulation of Wages (General) (Amendment) Order, 2018. The deceased can be categorized as a driver (medium sized vehicle) living in Embu. The minimum wage of such driver is Kshs.18,881.21/-. The applicable multiplier as applied by the trial court is 15 years, going by a retirement age of 60 years. The evidence shows that the deceased was survived by a wife and 4 children who all depended on him, therefore, a ratio of $\frac{2}{3}$ is appropriate. Therefore, the formula for calculating loss of dependency is as follows:

$$\text{Kshs.18,881.21} \times 15 \times 12 \times \frac{2}{3} = \text{Kshs.2,265,745.20/-}$$

30. As regards special damages, the court is bound to award only those amounts that are specifically pleaded and strictly proved. The respondent pleaded for Kshs.29,250/- but the only receipt availed in evidence



was for the funeral expenses worth Kshs.27,700/- showing that the amount was partly paid. In in the case of Maritim & Another v Anjere (1990-1994) EA 312 at 316 it was held:

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

31. For special damages, only Kshs.20,000/= was proved, hence that is the only amount that can be awarded under this head.

Disposition

32. Accordingly, the appeal partially succeeds and the court orders as follows:
- a. The finding of the trial court on liability is hereby upheld;
 - b. The appellants shall pay the respondent general damages with interest from the date of this judgement until payment in full, as follows:
 - i. Pain and suffering- Kshs.20,000/=
 - ii. Loss of expectation of life- Kshs.100,000/=
 - iii. Loss of dependency- Kshs.2,265,745.20/=
 - c. The appellants shall pay the respondent special damages of Kshs.20,000/= with interest from the date of filing the plaint until payment in full;
 - d. The appellants are awarded half of the costs of this appeal with interest; and
 - e. Interest on monetary awards shall be at court rates.
33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 28TH DAY OF MAY, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

1. Mugane for 1st Respondent.
2. Ms. Yegon for Appellant.
3. No Representation for 2nd Respondent.
4. Francis Munyao - Court Assistant.

