Nderitu v Chege & another (Suing as the Legal Representatives of the Estate of the Late James Mathenge) (Civil Appeal 140 of 2019) [2025] KEHC 5727 (KLR) (Civ) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5727 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 140 OF 2019

HI ONG'UDI, J

MAY 8, 2025

BETWEEN

JAMES MWAURA NDERITU ..... APPELLANT

AND

SAMUEL MWANGI CHEGE ..... 1ST RESPONDENT

JOHN MACHARIA MIRII ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JAMES MATHENGE

(Being an appeal from the Judgment of Hon. J.B. Kalo (CM) in Nakuru CMCC No. 256 of 2017, dated 6th August 2019 and delivered on 13th August 2019)

JUDGMENT

1. James Mwaura Nderitu herein referred to as the appellant was the defendant in the lower court while the respondents were the plaintiffs. The respondents vide the plaint dated 5th April 2012 sued the appellant claiming damages under the Fatal Accident Act, damages under the *Law Reform Act*, special damages and costs of the suit plus interest at court rates.

2. The facts of the case are that on 14th June 2016 or thereabout the deceased herein was lawfully riding a motor bike along Elementaita-Pipeline road when the appellant by himself, servant, agent and/or employee so negligently drove, managed and/or controlled motor vehicle registration number KBD 850 N as a result of which it violently knocked the said motor bike and subsequently caused the deceased's death.

3. The suit was fully defended and the trial magistrate delivered a Judgment on 6th August, 2019 where the appellant was held 100% liable for the accident. Further, the court awarded kshs. 10,000/= for pain and

suffering, kshs. 100,000/= for loss of expectation of life, kshs. 2,160,000/= for loss of dependency and kshs. 49,000/= as special damages. The respondents were also awarded costs of the suit plus interests.

4. The appellant being aggrieved by the whole judgment lodged this appeal dated 19th August, 2019 setting out the following grounds: -

   i. That the learned trial magistrate erred in law and in fact in finding that the defendant/applicant was liable for the accident in issue.

   ii. That the learned trial magistrate erred in law and in fact in failing to accord due regard to the evidence by the defence witness and the defendant's submissionS in arriving at its judgment on liability.

   iii. That the learned trial magistrate erred in law and in fact in awarding Kshs. 2,160,000/= under loss of dependency which was inordinately high in the circumstances.

   iv. That the learned trial magistrate erred in law and in fact in relying on the wrong multiplicand hence arriving at an erroneous decision.

   v. That the learned trial magistrate erred in law and in fact in failing to accord due regard to the Appellant's submissions on quantum on applicable principles for assessment of damages.

   vi. That the learned magistrate erred and misdirected himself in law and in fact in misapplying the principles applicable to assessment of damages.

5. The Appeal was canvassed by way of written submissions. The appellant did not file any submissions despite him being accorded several chances to do so. The same are not in the court file or the CTS portal.

6. The respondents' submissions were filed by Gekonga & company advocates and are dated 13th February, 2025. Counsel drew the court's attention to the decision in Kiruga V Kiruga & Another [1988] KLR 348, where it was observed as follows:

   > " An appeal court cannot properly substitute its own. factual finding for that of the trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand..."
   >
   > See also:
   >
   > Kamau v Mungait & Another 2006 1 KLR 150

7. Counsel submitted that the trial court did not err in finding the appellant to be 100% liable for the accident. That PW2 in his testimony blamed the matatu registration number KBD 850N for careless driving and for failing to give way to the motor cycle which was on its proper lane. Further, that PW3 who was a police officer testified that the accident occurred when the said motor vehicle was overtaking carelessly. Furthermore, that the said witness told the court that the driver of the said motor vehicle was charged for causing death by dangerous driving. Additionally, that the appellant's witness DW1 confirmed that he was charged for causing death by dangerous driving.

8. On whether the trial court erred in the award of loss of dependency, counsel submitted that PW2 adduced evidence that the deceased died aged 20 years and was a bodaboda operator who used to earn kshs. 20,000/= per month which figure was proposed for multiplicand. He placed reliance on the decision in the case of Chania Shuttle V Mary Mumbi [2017] eKLR as held in Jacob Ayiga Marinja & Anor V Simeon Obayo CA 167/200 [2005].

9. He urged the court to uphold the finding of the trial court and ultimately dismiss the appeal with costs to the respondents.

Analysis and determination

10. This being a first appellate court, I am guided by the dictum in the case of Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123, where it was held that the first appellate court has to re-consider and re-evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances.

11. Similarly, in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the court stated with regard to the duty of the first appellate court, as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

12. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respondents, I opine that the issues for determination are:

    i. Whether the trial magistrate erred in finding the appellant wholly to blame for the accident.

    ii. Whether the award on loss of dependency was inordinately high.

13. On the first issue, I refer to the Court of Appeal decision in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR where it stated:

> " The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C 663 at pg 681 as follows;
>
> > " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide .....
> >
> > > " The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally".

14. Further, in Farah V Lento Agencies [2006] 1 KLR 124, 125, the Court of Appeal held that:

> " Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame".

15. Guided by the above cited authorities, it is my humble view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

16. This court has considered the evidence adduced before the trial court. It is not in dispute that the appellant is the owner of motor vehicle registration number KBD 850N which collided with motor cycle registration number KMCY 510F TVS belonging to the deceased respondent. During trial the respondents called three witnesses and PW1 testified that a Nissan overtook a trailer and indicated it was turning to the right.

17. That motor cyclist (deceased) was travelling in the opposite direction and decided to pass between the Nissan and the lorry to avoid a head on collision with the Nissan which was turning to the right. It was then that he hit the Nissan on the side and fell on the path of the lorry which crushed him on the chest and as a result the rider died on the spot. He blamed the driver of the Nissan for overtaking carelessly and for failing to give way to the motor cyclist. On cross examination, he confirmed that he witnessed the accident. Further, that the motor cycle was in between the lorry and the matatu when it hit the Nissan on the side near the back when it had already turned right. He stated that he did not record a statement with the police.

18. PW3 No. 49807 CPL Jackson Nkonge testified that the accident occurred when motor vehicle registration number KBD 850N belonging to the appellant was being driven from Elementaita towards pipeline when it overtook KBJ 292F/ZD6657 that was being driven in the same direction. That at the same time the driver of KBD 850N tried to turn to the right to join a feeder road in the process he knocked the oncoming motor cycle KMCY 510F. The said motor cycle lost control, swerved to the right side where it collided with motor vehicle KBJ 292/ZD6657 and the rider died on the spot.

19. He further testified that the driver of the appellant's motor vehicle was charged in Traffic case number 1570116 with the offence of dangerous driving contrary section 40 of the *Traffic Act*. He produced the police abstract and file and the same were marked as P exhibit 2 and 8 respectively. On cross examination he confirmed that he was not the investigating officer and that he did not visit the accident scene. He also stated that the sketch plan was not in the police file and that he could not authoritatively tell the point of impact between the motor vehicle KBD 850N and the motor cycle.

20. The appellant on his part called one witness DW1 who gave sworn testimony. He testified that on the fateful day he was driving motor vehicle KBD 850N along Elementaita Pipeline road heading towards Pipeline at 8 pm. He was on the left side of the road and there was a trailer behind him. He put on an indicator to turn right to join a feeder road. That as he turned, he saw a motor bike at a distance being ridden from Pipeline towards Elementaita. The said motor cycle hit the left rear side of the vehicle he was driving and he fell under the trailer and was crushed to death.

21. On cross examination, he confirmed that he saw the motor cycle before turning. He stated that the point of impact between his vehicle and the motor cycle was on the side of the vehicles driving from Pipeline to Elementaita. He added that the motor cyclist was riding on his rightful lane.

22. The trial court in its judgment faulted the appellant's driver for causing the accident by making a turn without giving way to the motorcyclist. The court held the appellant vicariously liable for the negligence of DW1. For the said reason the appellant was found 100% liable for the accident.

23. After analysing all the evidence above, this court notes that it is not disputed that the deceased was knocked down while he was riding his motor cycle in his rightful lane. DW1 confirmed that he saw the motor cycle at a distance before turning though he failed to specify the distance. PW3 confirmed that there was no sketch map on the police file and that he had not visited the scene of the accident. One is left to wonder what investigations he conducted.

24. However, PW1 who is an eye witness explained to the court how the accident occurred. Further, DW1 confirmed that the deceased who was riding a motorcycle was in his rightful lane and that he saw him before taking the turn to join the feeder road. This in my humble view is an admission that he was to blame for the accident. DW1 ought to have given way or slowed down when he saw the motor cyclist at a distance to allow him pass first in order to avoid the accident but he failed to do so. Further, the appellant failed to prove any negligence on the part of the motor cyclist at time of the accident.

25. In view of foregoing, it is my view that the trial court considered the evidence tendered within the appropriate legal framework in arriving at a sound finding on who was to blame for the accident. I therefore find no basis upon which this court can interfere with the learned trial magistrate's finding on liability.

26. I now move to address the second issue, on whether the award of Kshs 2,160,000/= for loss of dependency was inordinately high.

27. The Court of Appeal in Kemfro Africa Ltd t/a Meru Express & Another v A.M. Lubia & another (No.2) (1987)) KLR 30 stated 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 the trial judge were held by the former court of Eastern Africa to be that it must be satisfied that either the judge in assessing damages took into account a relevant or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly."

28. Loss of dependency is awarded under the Fatal Accident's Act. The principles to be considered were stated in Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another – Nairobi HCCC No. 1638 of 1988 (unreported) where the court observed 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 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."

29. The trial court in awarding the award on loss of dependency noted that no evidence was adduced to prove that the deceased earned Kshs. 20,000/=. It therefore adopted the income of Kshs. 15,000/= being the minimum wage for a person of his training, qualification and experience at the time of his death. The trial court considered that the deceased was twenty (20) years at the time of his demise and that he must have spent most of his income on himself.

30. The trial court further took into consideration Section 4, of the *Fatal Accidents Act* and adopted a 1/3 dependency ratio using a multiplier of 36 years based on the retirement age for the deceased's career.

31. The learned trial magistrate computed the award on loss of dependency as follows;-

    15,000 x 36 x 12 x (1/3) = 2,160,000/=

32. The decision by the trial court to use the multiplier approach was purely a discretional one. Jurisprudence by the courts reveal that either the multiplier approach or an award of a global figure is applicable when it comes to assessing loss of dependency. In the case of Mwanzia vs Nagalali Mutua Kenya Bus Ltd cited in Albert Odawa vs. Gichumu Githenji [2007] eKLR the court gave guidance on when to use the multiplier approach as follows:-

> " The multiplier approach is just a method of assessing damages. It is not a principle of law of a dogma. It can, and must be abandoned, where the facts do no facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of Justice should never do." [emphasis added]"

33. In the instant case no evidence whatsoever was adduced before the trial court on the deceased's earnings and thus the correct approach was to assess the deceased's income by applying the global award approach. For the said reasons, I find that the trial court applied the wrong approach in assessing the damages for loss of dependency. I therefore set aside the award of Kshs. 2,160,000/= as loss of dependency and substitute it with a global award of 1,500,000/=.

34. Finally, in addressing the issue raised by the appellant in the memorandum of appeal that the learned trial magistrate erred in law and in fact in failing to accord due regard to the evidence by the defence witness and the defendant's submission in arriving at its judgment on liability and quantum. Regarding the evidence adduced by the defence, I note that the trial magistrate in his judgment gave a summary of the testimonies by the both parties. Thus, the allegations by the appellant are not correct.

35. On the issue of his submissions not having been considered, I opine that the said allegation is neither here nor there and the same does not hold water. I am guided by the decision in Ngang'a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749, the Court held that:

> " As the practice has it and especially where counsel appears, a court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are

not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable." (Emphasis added)

36. The upshot is that the appeal herein succeeds partially, and the Judgment of the lower court is set aside and substituted with a Judgment in the following terms:

    i. The finding on liability at 100% is upheld.

    ii. An award of Ksh 1,500,000/= is made on loss of dependency.

    iii. Award of Ksh 10,000/= for pain and suffering is upheld.

    iv. Award of Ksh 100,000/= for loss of expectation is upheld.

    v. Special damages of Ksh 49,000/- is upheld.

    vi. Costs awarded in the lower court are upheld.

    vii. The appellant shall get half costs of the Appeal.

    viii. The award on interests by the lower court is upheld.

37. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 8TH DAY OF MAY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE