



**Tahmeed Coach & another v Nthenge & another (Suing as the Legal Administrators of the Estate of Gregory Mwanzia Nthenge) (Civil Appeal E028 of 2022) [2025] KEHC 9783 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9783 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E028 OF 2022  
TM MATHEKA, J  
JUNE 23, 2025**

**BETWEEN**

**TAHMEED COACH ..... 1<sup>ST</sup> APPELLANT**

**NASSOR KHALFAN ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FELISTERS KAMANTHI MALULI NTHENGE ..... 1<sup>ST</sup> RESPONDENT**

**COSMAS MALULI NTHENGE ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF GREGORY  
MWANZIA NTHENGE**

*(Being an Appeal from the Judgment of Hon. B. Ireri (SPM) in the Senior Principal Magistrate's Court at Makindu, Civil Case No.109 of 2019, delivered on 1st March 2022)*

**JUDGMENT**

1. The Respondents Cosmas Maluli Nthenge & Felisters Kamanthi Maluli Nthenge (Suing as the Legal Administrators of the estate of) Gregory Mwanzia Nthenge filed a suit in the lower Court seeking general damages under the Law Reform Act (LRA) and the Fatal Accidents Act (FAA) special damages, costs of the suit and interest on behalf of the Estate of Gregory Mwanzia Nthenge pursuant to a fatal road accident, involving motor vehicles KBN 435C and KBT 537U on 05/11/2016 (material day) along the Nairobi-Mombasa Road at Kanga area.
2. The Appellants Tahmeed Coach and Nasser Khalfan filed a joint statement of defence, denied every allegation of fact in the plaint and put the plaintiffs to strict proof of the claim. They averred that if at all an accident happened on the material day as claimed; it was solely and or substantially contributed to by the deceased.



3. After hearing the learned trial magistrate rendered judgment and apportioned liability in the ratio of 50:50 between the two vehicles and assessed damages as follows;

Pain & suffering.....kshs 50,000/=

Loss of expectation of life.....kshs 150,000/=

Loss of dependency.....kshs 4,970,000/=

Special damages.....kshs 316, 950/=

Total kshs 5,486,950/=

### **The Appeal**

4. Aggrieved by the award, the Appellant filed this appeal on 4 grounds as follows;
- a. The learned trial magistrate erred in law and fact by disregarding established legal precedent and thereby erroneously arriving at a wrong conclusion on quantum.
  - b. The learned trial magistrate erred in law and fact by holding all the defendants, including the appellants 50% liable as in total disregard of the circumstances leading to the cause of the accident.
  - c. The learned trial magistrate erred in law and fact in not making an award which was within limits of already decided cases of similar nature.
  - d. The learned trial magistrate erred in law and fact in awarding judgment without showing how he arrived at the figures and in total disregard of the submissions of the defendant on the issue of quantum.
5. The appeal be canvassed through written submissions and the only submissions on record are for the Respondents.

### **The Respondents' (Plaintiffs) Submissions**

6. With regard to liability, it was submitted that the plaintiffs discharged their burden of proving negligence by the Appellants and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants through testimony and documents hence the burden of proof tilted to the Appellants who did not produce anything contrary. Reliance was placed on Simon Waweru Mugo -vs Alice Mwangeli Munyao (2020) eKLR where the Court stated that;

“ 22. Where negligence has been established and where there is a head on collision the court is required to make a call on apportionment of liability. *Spry V P* in *Lakhamshi v Attorney General*, (1971) E A 118, 120 rendered himself thus:

“It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the



absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them....”

7. With regard to quantum, reliance was placed on *Jane Chelagat Bor -vs- Andrew Otieno Onduu* (1988-92) 2 KAR 288 (1990-1994) E.A 47 and *Kemfro Africa Ltd t/a Meru Express Service & Gathogo Kanini -vs- A.M Lubia & Anor* (1982-88) 1 KAR 777 for the submission that for an appellate court to interfere with award of damages, it should be satisfied that the Judge acted on wrong principles of law or has misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damages suffered.
8. On pain and suffering, reliance was placed, inter alia, on *Beatrice Mukulu Kang’uta & Anor -vs- Silverstone Quarry Ltd & Anor* (2016) eKLR where the court stated;

“As regards the damage for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard, while the accident occurred at 6am, the deceased passed on at 11.40am. I therefore award a sum of kshs 200,000/= for pain and suffering for this reason.”
9. On loss of expectation of life, reliance was placed on *Moses Akumba & Anor -vs- Hellen Karisa Thoya* (2017) eKLR where it was held that an award of kshs 200,000/=, for a deceased who was a fisherman, was not inordinately high. Reliance was also placed on the case of *Joseph Gatone Karanja -vs- John Okumu Soita & Anor* (2022) eKLR where an award of kshs 150,000/= was upheld.
10. On loss of dependency, it was submitted that the deceased was a clinical officer aged 33 years who had worked in Pumwani Hospital and Nairobi East Hospital and was earning approximately kshs 100,000/= . That the deceased operated his own clinic in the name of Sunrise City Medical Centre as evidenced by the documents produced. That he was also supporting his ailing parents and paying fees for his siblings. Reliance was placed on *Cornelia Elaine Wamba -vs- Shreeji Enterprises Ltd & Others* (2012) eKLR where the court stated;

“the choice of a multiplier or multiplicand is a matter of the court’s discretion which discretion has to be exercised judiciously and with a reason. Some of the factors to be taken into consideration by a court in the exercise of its mandate on the choice of the two are the age of the deceased, nature of the profession he was engaged in, possibility of retirement from employment where the profession engaged in provides for a retirement age and lastly, possibility of death through natural causes and departure for greener pastures elsewhere.”
11. It was submitted that the trial court applied the correct principles in arriving at the award noting that the deceased had a promising future and prospects of promotion and or greener pastures in his career.
12. It was submitted that the special damages were specifically pleaded and prove by way of receipts.



13. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
14. I have considered the grounds of appeal, submissions and the record, the two issues for determination are;
  - a. Whether the trial court erred by apportioning liability in the ratio of 50:50 between the two vehicles.
  - b. Whether the quantum of damages should be disturbed.

**Whether the trial court erred by apportioning liability in the ratio of 50:50 between the two vehicles.**

**Evidence on Liability**

15. PW1 was Corporal Wilberforce Wambulwa of Mtito Andei Police station attached to Traffic duties. He stated that on 05/11/2016 at 3.00am, there occurred an accident along Mombasa-Nairobi highway at a place called Kanga involving motor vehicle registration KBT 537U, a bus and KBN 435C Toyota Wish. That the bus was from Nairobi direction while the Toyota Wish was from Mombasa direction. That the investigating officer (I.O) PC Saisi was transferred on 10/9/2019 and the abstract read (PUI)-pending investigations. That the deceased Gregory Mwanzia was in the Toyota Wish.
16. That in the Occurrence Book (OB), the IO indicated that the two vehicles collided when the Toyota Wish tried to overtake another vehicle. That the road is straight at the point of the accident and it was at night around 3.00am. That the IO had not made conclusive remarks on who may have caused the accident and so far, no one is to blame. PW1 presumed that either of the drivers could have been to blame and produced the police abstract as P. EX 1.
17. On cross examination, he testified that he was not the IO and was not familiar with the accident. That he had read from the OB. That he did not have a document in court showing that KBN 435C was overtaking. Gregory Mwanzia was in the said vehicle as a passenger. He did not know whether the vehicle was private or public. There were no eye witnesses and he had not come across any of their statements. He said that he could not blame KBN 435C and was not aware as to whether the deceased was a fare paying passenger. He did not have the police file in court.
18. On further cross examination, he said that he had been a traffic officer for 3 ½ years at Mtito Andei. That he had relied on the OB and abstract. That the OB is the first document in the police file and one can conclusively say which vehicle is to blame. He confirmed that he did not visit the scene but is familiar with the road. That from the initial report in the OB, the IO indicated that the vehicles collided. That, Rashid Hamed drove a bus carrying fare paying passengers and collided with vehicle KBN 435C driven by one Mathenge Kevin who died on the spot. That the driver of KBN 435C was to be charged for causing death by dangerous driving but he died. PW1 said that he could not tell the point of impact or position of collision. He said that he could not tell who was to be charged but from the OB, the driver of KBN 435C would preferably be charged for causing the accident.
19. DW1 was PC Joseph Mugo attached at Mtito Andei traffic police. He had an abstract dated 05/11/2016 which originated from Mtito Andei. That in regard to motor vehicle KBT 537U make Utom bus, the accident occurred on 05/11/2016 at 3.00am at Kanga area along Nairobi-Mombasa Road and motor vehicle registration KBN 435C make Toyota Wish. That the owner of KBN 435C was insured by CIC general insurance and the cover was to expire on 21/08/2017 hence it was valid at the time of the accident.



20. That the investigating officer blamed the driver of KBN 435C and he was to be charged with causing death by dangerous driving. That the IO is PC Saidi Bwana Iddi and the result of investigation was indicated as pending under investigations. That the accident was reported on OB 04/5/11/16 and it was signed on 05/11/2016. He produced it as exhibit 1. He testified that he was at the scene of the accident with the I.O.
21. He testified that KBT 537U was being driven from Nairobi to Mombasa and KBN 435C was being driven from Mombasa to Nairobi. That the point of impact was on the lane to Mombasa-an indication that KBN 435C had left its lane to the opposite lane when the accident occurred. That KBT 537U was on its right lane which is the left side as you face Mombasa. That the driver of KBN 435C was Kevin Ndegwa Mathenge and would have been charged with causing death by dangerous driving.
22. On cross-examination, he said that Cpl Wambulwa was his colleague but he was not aware that he had testified in court. he agreed that he(DW1) was not the IO but said that he visited the scene. That the time of the accident was 3.00am and he got to the scene at around 3.15am. That from the view of the scene of accident, the point of impact was clear due to the debris. That it was a straight road but visibility is poor at 3.00am. He could not tell the speed at which the two vehicles were being driven at. That KBT was from Nairobi to Mombasa and KBN from Mombasa to Nairobi. That the point of impact was on Mombasa Lane as you face Mombasa near the middle of the road. That the sketch plan was taken by PC Saidi. That KBN was hit in front and bus was damaged on the front right wheel. That it was not purely head-on. That the I.O could have blamed the driver of KBN. That to avoid the accident, the driver of KBT tried to pull to his left. He agreed that he did not see him swerving. That maybe he could have avoided the accident if he applied brakes and if there was enough time. DW1 said that he didn't know the distance of the motor vehicles. That the witnesses are PC Saidi Bwana Iddi, PC Abdalla Baila and from the OB, Inspector Kiplimo, PC Mugo, MC Gladys were all at the scene.
23. On further cross-examination, he said that he visited the scene of the accident on 05/11/2020 and the bus was on far off edge of the road and Toyota Wish was on left off the road. That the point of impact is indicated by broken lights, spilled oil or debris. DW1 could conclusively say that the IO would have charged the driver of KBN 435C as per the date of the abstract. Kevin Ndegwa Mathenge died on the spot. PC Saidi was based at Mtwapa Police station and DW1 had come to testify on his behalf. Rashid Hamid was the driver of KBT 537U and he recorded a statement but he is not a witness. Two abstracts were issued for the two vehicles and both of them show that the case is pending further investigations. That one cannot authoritatively say who was to blame for the accident.

## Analysis

24. At the time of testifying in court, PW1 and DW1 were police officers based in the Traffic department of Mtito Andei police station and both of them produced police abstracts on behalf of the parties who had called them to testify. The undisputed facts which are discernible from their testimonies are that; the accident happened on 05/11/2016 at around 3.00am. The accident involved motor vehicles KBT 537U (the bus) and KBN 435C (Toyota Wish). The bus was headed towards the Mombasa direction from Nairobi while the Toyota wish was headed towards the Nairobi direction. The I.O was P.C Saidi Bwanaidi and had been transferred from Mtito Andei police station at the time of hearing the case. Further, it is a fact that the deceased was a passenger in the Toyota Wish.
25. In *Khambi & Anor -vs- Mahithi & Another* [1968] EA 70, it was held that:

“It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous,



and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”

26. In this case, both PW1 and DW1 made reference to the abstracts which stated that the case was still pending under investigations. Hence there was no conclusive evidence as to who was to blame. Neither of the two witnesses could tell and whether or not it was either of the two drivers, it was speculation. The Officer who drew the sketch plan did not testify neither did the driver of KBT 537U who recorded a statement. Clearly therefor there is no reason to overturn the apportionment by the trial magistrate at 50:50.

#### **Whether the quantum of damages should be disturbed.**

27. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In *Butt –vs Khan (1977)1KAR* it was held that;

“An appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely 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.

28. Further, an appellate court will not disturb an award simply because it would have awarded a different figure if it had tried the case in the first instance.

#### **Award under the Fatal Accidents Act**

29. It was pleaded that the deceased was self-employed as a Clinical Officer (C.O) earning kshs 80,000/= per month. The deceased’s mother, PW2, testified that the deceased was a C.O at Pumwani and later at Nairobi East Hospital. That he operated his own clinic in the name of Sunrise City Medical Centre and used to earn around kshs 100,000/=.
30. The trial magistrate used the multiplier approach whereby he adopted a multiplicand of kshs 300/= per hour for 8 hours a day hence kshs 2,400/= per day translating to kshs 72,000/= per month. He deducted the PAYE (30%), NSSF (200/=) and NHIF (500/=) and got a final multiplicand of kshs 49,700/= per month. Further, the trial magistrate used a multiplier of 25 years and made a finding that the deceased would use 1/3 of his earnings to support his elderly parents and siblings. The loss of dependency computed was therefore 4,970,000/=.
31. In their Memorandum of Appeal, the Appellants did not point out the specific aspect that they were dissatisfied with in the computation of damages and all they stated is that the trial magistrate disregarded ‘established legal precedent and thereby erroneously arrived at a wrong conclusion on quantum’. They also faulted the trial magistrate for ‘not showing how he arrived at the figures but the judgment is clear on how the figures were arrived at and as such, that ground of appeal should fail.
32. As to whether the figures used by the trial magistrate are justifiable, the Appellants did not produce any evidence to prove the pleaded earnings of kshs 80,000/= per month but they produced a certificate showing that the deceased was a registered C.O. The only document which indicated the deceased’s earnings was a letter from Pumwani Maternity Hospital which states that the deceased was hired by the Hospital Board from 2011 December to 2015 December on Locum Basis and his rate of pay was kshs 300/= per hour.



33. The Appellants also produced a certificate showing that the deceased was carrying on business in the name of Sunrise City Medical Centre which was registered on 27/12/2013. The letter from Nairobi East Hospital shows that the deceased worked there on part time basis from March 2015 to November 2016. It is therefore clear from the evidence that the deceased was running his own private clinic and was also taking part-time jobs from other hospitals. The inference to be drawn is that the deceased had multiple sources of income hence my view that the multiplicand used by the trial magistrate is reasonable.
34. As for the multiplier, the deceased died at the age of 33 and the trial magistrate sought guidance from the retirement age of civil servants (60 years) to arrive at a multiplier of 25 years. According to Section 4 (1) of the *Fatal Accidents Act* an action brought under the Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused. In our case, it is clear from the evidence that the deceased was not married and had no child. The only dependents therefore are his father and mother whose ages were indicated in the chief's letter to be 63 and 55 years respectively. Applying a multiplier of 25 years means that the dependency was upto 88 and 80 years respectively. Taking into account the life expectancy and vicissitudes of life, the multiplier of 25 years is excessive and I am of the view that 17 years is ideal, 80 and 72 years is not excess for rural folk.
35. In *zee -vs- Muli* (Suing as the Legal Representative of Daniel Muli - Deceased) (Civil Appeal E160 of 2023) [2024] KEHC 8581 (KLR) (11 July 2024) (Judgment), a multiplier of 25 years was reduced to 10 years for a 27-year-old deceased who had no wife and child. The Judge opined that;
- “However court found that a multiplier of 25 years was ideal. The court used only the age of the deceased. The deceased was 27 with no children. The dependent was 63 and 58 years. Their multiplier of 25 was an excessive award. A multiplier of 10 years will have sufficed.....A multiplier of 25 years means that the dependency will be 96 years. It also does not take into consideration vicissitudes of life. It is true that he could have married and had children. However, the wife was non-existent at the time when death occurred and could not lose anything.”
36. As for the dependency, the deceased's parents testified that he used to buy medicines for them. The deceased's father, PW2, said that he used to receive around 30,000/= from the deceased and the deceased's mother, PW3, said that the deceased used to send kshs 20,000/= per month. It is trite that dependency is a question of fact and the deceased's parents could have produced transactional evidence at the very least. Be that as it may, a dependency ratio of 1/3 is proper and has been upheld by Appellate courts for a deceased person who had parents but no wife and children. In *Petronila Muli -vs- Richard Muindi Savi & Catherine Mwendu Mwindu* (2021) eKLR and *Rodgers Kinoti -vs- Linus Bundi Murithi & another* [2022] eKLR, a dependency ratio of 1/3 was used for deceased persons who were unmarried and survived by their parents.
37. The award for loss of dependency works out as follows;  $49,700 \times \frac{1}{3} \times 12 \times 17 \times 49,700 = 3,379,600$
38. With regard to special damages, the award of kshs 316,950/= was pleaded and proved.

#### **Award under the *Law Reform Act***

39. With regard to pain and suffering, the death certificate shows that the deceased died on the same day and the evidence of PW1 and DW1 suggests that he died at the scene of accident. The award of kshs 50,000/= is reasonable and supported by precedents such as *Sukari Industries Limited -vs- Clyde Machimbo Juma, Homa Bay HCCA NO. 68 of 2015* [2016] eKLR where the deceased died immediately after



the accident and the trial court awarded Ksh. 50,000/= for pain and suffering. On appeal, the court 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.”

40. The award of Kshs 150,000/= for loss of expectation of life is conventional and is not excessive.

41. The total award works out as follows;

Liability .....50:50  
Pain & suffering.....Kshs 50,000/=  
Loss of expectation of life.....Kshs 150,000/=  
Loss of dependency.....Kshs = 3,379,600  
Special damages.....kshs 316, 950/=  
Total Kshs 3,896,550/=  
Less 50% Ksh 1,948, 275/=  
Plus costs and interest at 14% here and below.  
The appellant will have 1/3 of the costs of the appeal

### **Disposition**

The appeal succeeds in part and the Judgment of the subordinate court is set aside and substituted as herein above.

**DATED SIGNED AND DELIVERED VIA CTS ON 23<sup>TH</sup> JUNE DAY OF JUNE 2025**

**MUMBUA T MATHEKA**

**JUDGE**

Appellants’ Advocates

Kimondo Gachoka & Co. Advocates

Respondents’ Advocates

Onyancha & Co. Advocates

