Muthuri v Kirimi (Suing as the Legal Representative of the Estate of Nicholas Mwenda Kirimi (Deceased)) (Civil Appeal E157 of 2023) [2025] KEHC 10630 (KLR) (21 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E157 OF 2023

SM GITHINJI, J

JULY 21, 2025

BETWEEN

JULIUS KIRIMI MUTHURI ..... APPELLANT

AND

STEPHEN KIRIMI ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NICHOLAS MWENDA KIRIMI (DECEASED)

(Being an Appeal from the Judgment of Hon. D. W. Nyambu (CM) in Meru CMCC No. E014 of 2020 delivered on 5th April, 2023)

JUDGMENT

1. This Appeal arises from the judgment of the learned Chief Magistrate Hon. D.W. Nyambu, delivered on 5.4.2023 in Meru Civil Suit No. E014 of 2020, wherein judgment was entered in the following terms;
    1. Liability 50%
    2. Pain and suffering Ksh. 100,000
    3. Loss of Dependency Ksh. 3,000,000
    4. Loss of Expectation of Life Ksh. 100,000
    5. Special Damages Ksh. 151,050
2. Aggrieved by the said Judgment, the Appellant set forth the following grounds in the Memorandum of appeal dated 26th May, 2023;

1. The Learned Magistrate erred in law and fact in holding the Appellant 50% liable for the accident and ignoring the set laws and principles of traffic and decided cases.

2. The Leaned Magistrate erred in law and fact in relying on the evidence of the Police Officer who was not the investigating officer, noting that the Police Abstract produced by the said Police officer does not blame the Appellant for the accident since it indicated that the matter was pending and was still under investigations.

3. The Learned Magistrate erred in law and fact in failing to consider the doctrine of violenti non fit injuria, noting that the deceased did not have a valid driving license and was drunk while riding motorcycle registration number KMDV 149C without wearing any protective gear at the time of the accident.

4. The Learned Magistrate erred in law and fact in failing to consider the Police Abstract filed by the Appellant, which blamed the Deceased for the accident.

5. The Learned Magistrate erred in law and fact in failing to consider the testimony of the Appellant.

6. The Learned Magistrate erred in law and fact in reaching its decision while apportioning liability.

7. The Learned Magistrate erred in law and fact in adopting a multiplicand of Kshs. 30,000/- despite the fact that no evidence was tendered by the Respondent in support of the same.

8. The Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 100,000/- as compensation for pain and suffering despite the fact that the deceased died on the spot as per the post-mortem report filed by the Respondent.

9. The Learned Magistrate erred in law and fact in awarding the Respondent Kshs. 151,050/- as special damages despite the fact that the said amount was not specifically proved by the Respondent.

10. The Learned Magistrate erred in law and fact in failing to consider the Appellant's submissions.

11. The Learned Magistrate erred in law and fact, in failing to find that the Respondent had failed to discharge their burden of proof to the required standard against the Appellant.

Evidence at Trial

3. PW1 Stephen Kirimi, the Respondent herein and the father of the deceased, adopted his statement dated 31/8/2020 as his evidence in chief. He also produced a Grant Ad Litem, Certificate of Death, Post mortem Report, copy of records for KCG 426 Z, Admission to Mt. Kenya University, and receipts for operation as exhibits. He stated that he did not witness the accident, and the Appellant was the owner of the motor vehicle that hit his son. Although the deceased was riding a motorcycle, he was a student and was from Godown area in Meru heading to Isiolo.

4. PW2 CPL Pius Njagi from Timau Traffic Base produced the police abstract as Exhibit 4. He was familiar with the accident that took place on 4/3/2019 at 19:24 Hours along Isiolo Meru Road at TM Trading Centre, which involved motor vehicle Registration No. KCG 426 X Toyota Premio and Motor Cycle Registration No. KMEP 616 L. The motor vehicle was being driven by the Appellant while the motorcycle was being ridden by the deceased, and the rider died after the accident. The police abstract in the defence list of documents, which originated from Timau Police Station blamed the motor cycle, while the police abstract he had, which equally originated from the said station, stated

that the matter was pending investigations. He could not tell whether the Appellant was speeding or not and he did not visit the scene because he was not the investigating officer.

5. DW1 Julius Kirimi Matheri, the Appellant herein, adopted his witness statement as his evidence in chief. He told the court that he was driving from Isiolo to Meru at around 6.30 p.m at a speed of less than 100 kmph. The weather was dry, the road was very clear with no potholes, and when he approached TM Trading Center, there was an oncoming vehicle. Three vehicles were oncoming, and a matatu was leading. The motorcycle emerged from behind the matatu straight up to his lane, and it hit him head-on. The motorcycle tried to overtake the matatu when it came into his lane, and the distance between his car and the motorcycle was less than 10 metres. The point of impact was on the left side of the car he was driving, and the cyclist came towards him and hit him. He did not recall whether the cyclist had a reflective gear, and he denied veering off the road. After the accident, he landed in a ditch, and he later learnt that the rider had died while receiving treatment.

Appellant's Submissions

6. The Appellant through the firm of Meritad Law Africa LLP Advocates filed submissions dated 4th December, 2024, citing Selle v Associated Motor Boat Co. (1968) E.A 123 on the duty of the first appellate court. Counsel argued that the deceased was the author of his misfortunes, by riding the motorcycle carelessly, without a valid licence while drunk, and cited Dharmagma Patel & Another v T.A (a minor suing through the mother and next friend HH) (2014) eKLR, Ndatho v Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022), Kenya Commercial Bank Ltd v Thomas Wandera Oyalo (2005) eKLR, Catherine Mbithe Ngina v Silker Agencies Limited (2021) eKLR, Mercy Ben & Another v Mt. Kenya Distributors & Another (2022) eKLR, Benter Atieno Obonyo v Anne Nganga & Another (2021) eKLR and Wambugu & another (Suing as the Legal Representatives and Administrators of the Estate Wisdom Wambugu Wachira – Deceased) v Gitu*a & another (Civil Appeal E212 of 2022*) [2024] KEHC 8937 (KLR) (11 July 2024) (Jdgment). Counsel submitted that an award of Ksh. 10,000 for pain and suffering would be sufficient because the deceased died on the spot, and cited Moses Koome Mithika & Another v Doreen Gatwiri & Another (Suing as legal representatives and administrators of the Estate of Phineas Muriithi (2020) eKLR. Counsel urged the court to award a global sum of Ksh. 2,000,000 for loss of dependency because the deceased was unemployed and still in school, and cited Mombasa Maize Millers Kisumu Limited & another v Muchwenge & another (Suing as legal representatives of the Estate of Isabellah Nelma Wafula – Deceased) (Civil Appeal E075 OF 2022) [2023] KEHC 19225 (KLR). It was contended that the pleaded special damages of Ksh. 151,050 were not proved, and the court was implored to allow the appeal with costs.

7. The Respondent through the firm of Murango Mwenda & Company Advocates filed submissions dated 27th January 2025, citing Kingoo & 2 Others v Ntenge (Civil Appeal E798 OF 2022) (2024) KEHC 7606 (KLR), Mbogo & Another v Shah (1968) EA 93 and Peters v Sunday Post Limited (1958) EA 424, on the duty of the first appellate court. Counsel contended that the apportionment of liability equally between the deceased and the Appellant was supported by the evidence on record, and cited Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another (2005) 1 EA 334, South Nyanza Sugar Co. Ltd v Mary A. Mwita & Another (2018) eKLR, Michael Hausa v The State (1994) 7-8SCNJ 144, Mburu v Muhoro (Commercial Appeal 2 of 2023) (2024) KEHC 8679 (KLR), Masembe v Sugar Corporation & Another (2002) 2 E.A 434, Joseph Muturi v Nicholas Kinoti Wabera (2022) eKLR, Lakhamshi v Attorney General (1971) EA 118, Khambi & Another v Mahithi & Another (1968) EA 70, China General Merchants Xtreem Ltd v Chen Zhebit & Another (2022) eKLR and Farah v Lento Agencies (2006) 1 KLR 123. Counsel urged the court to dismiss the appeal, and cited Woodruff v Dupont (1964) EA 404, Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No. 284

of 2001 (2004) 2 KLR 55, Stanley Maore v Geoffrey Mwenda (2004) eKLR and Hahn v Singh, Civil Appeal No 42 of 1983 (185) KLR 716.

Analysis and Determination

8. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions on the same.

9. In Selle & another v Associated Motor Boat Co. Ltd [1968] EA the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect."

10. I have considered the appeal herein, the trial court's judgment, which is the subject of this appeal, as well as the submissions by counsel.

11. From the grounds of appeal, the issues for determination are whether the trial court erred in apportioning liability at 50%, whether the adoption of a multiplicand of Ksh. 30,000 was proper, and whether the award of Ksh. 100,000 for pain and suffering was justified.

12. On liability, the only eyewitness was the Appellant, who testified that, "Weather was dry, visibility was poor, we were unable to see clearly. It was around 7.20 PM visibility cannot be good I was very cautious. Motor cycle appeared suddenly from behind the matatu. Motor cycle appeared suddenly from behind the matatu. My evidence is that the motor cycle was overtaking the matatu. I was not on high speed 85 KMPH is reasonable and high speed as well."

13. With the Appellant's admission that the visibility was poor because it was at night, I find that the speed of 85 kmph was relatively high in the circumstances. On the flipside, I find that the deceased was contributorily negligent in that he suddenly emerged from behind a matatu he attempted to overtake thereby colliding with the Appellant's vehicle.

14. Consequently, I find that the trial court's apportionment of liability at 50% was justified and supported by the evidence adduced.

15. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus case of Butt v Khan [1978] eKLR thus;

> "An appellate court will not disturb an award of damages unless it is so 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."

16. On pain and suffering, I am persuaded by Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR, where the court (D.S Majanja J) espoused 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."

17. The Appellant acknowledged in his testimony that the deceased died while receiving treatment at the hospital. He recorded in his statement that, "The motorcycle rider was taken by an ambulance."

18. The Post mortem report indicates that the deceased was pronounced dead upon arrival at Meru Level 5 Hospital, and therefore, the sum of Ksh. 100,000 was justified given the prolonged and agonizing pain the deceased endured before he eventually succumbed to the injuries.

19. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency were extensively dealt with by Ringera, J (as he then was) in Marko Mwenda v Bernard Mugambi & another Nairobi HCCC No 2343 of 1993 that:

> "In adopting a multiplier the court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

20. On the multiplicand, the Respondent recorded in his statement that,

> "My son was a student at Mount Kenya University. He was pursuing a degree in Education. He was a 4th year student aged 23 years he had a great passion for teaching. His mother is also alive. She is called PAULINE MWONTHEA. We have 8 siblings, some older and others younger. As parents, we had great expectations from him. We hoped that he would finish his studies, get employed and help us now and in our old days. The death has dashed those hopes and expectations."

21. Whilst the deceased was not gainfully employed at the time of his death, he had a defined career path, considering that he was at the tail end of completing his teaching career at Mount Kenya University, as evinced by the documents produced by the Respondent.

22. Courts have countlessly emphasized the need to consider the profession a deceased was pursuing in the assessment of damages for lost years. In Rosemary Mwasya v Steve Tito Mwasya & another [2018] eKLR, the Court of Appeal noted that;

> "As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions which in our view would have amounted to one third of the figure chosen as

the multiplicand which would work out as Kshs. 118,546/= x 1/3 = 39,512. When factored into the figure chosen as the multiplicand, it gives a final figure of Kshs 79,034/=."

23. I find that the trial court's adoption of a multiplicand of Ksh. 30,000 for a fully trained teacher, who was on the verge of entering the job market, was reasonable.

24. I find that the special damages of Ksh. 151,050 were specifically pleaded and proved as evidenced by the exhibited receipts.

25. The trial court is faulted for failing to consider the Appellant's submissions and cited authorities. That fault is nonetheless unfounded, as the trial court duly juxtaposed the Appellant's submissions and authorities with those of the Respondent, before it reached the impugning decision.

26. In conclusion, I find that the appeal is in want of merit and it is hereby dismissed with cost to the respondent.

DATED AND DELIVERED AT MERU THIS 21ST JULY, 2025

S.M. GITHINJI

JUDGE

APPEARANCES:-

Mr. Murango Mwenda for the Respondent.

Mr. Ojong'a for the Appellant

Mr. Ojong'a – I pray for 30 days stay to enable payment of the decretal sum.

Court: 30 days stay is granted.