



**Simiyu (Suing as the Administrator of the Estate of John Charles  
Lusweti - Deceased) v Butali Sugar Mills Limited (Civil Appeal  
E120 of 2024) [2025] KEHC 9556 (KLR) (2 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 9556 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E120 OF 2024  
S MBUNGI, J  
JULY 2, 2025**

**BETWEEN**

**JACOB LUSWETI SIMIYU ..... APPELLANT  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHN CHARLES  
LUSWETI - DECEASED**

**AND**

**BUTALI SUGAR MILLS LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. R. S. Kipngeno, principal  
Magistrate delivered on 11th June 2024 in Butali MCCC 121/2018)*

**JUDGMENT**

**Background**

1. The appellant, Jacob Lusweti Simiyu, filed a suit as the plaintiff in the trial court in a representative capacity seeking compensation for fatal injuries sustained by the deceased on 17<sup>th</sup> February 2018.
2. The appellant case was that the deceased, while lawfully aboard the Respondent's Tractor Reg. No. KTCB 284P along Makhukhuni - Mwakwabuye murram road was negligently thrown off the trailer as a result of the Respondent's driver's reckless manner of driving. The Respondent denied liability and alternatively attributed the accident to the deceased's negligence.
3. After a full trial, the learned trial magistrate apportioned liability at 50:50 between the parties, finding that the deceased had stood precariously on the trailer and contributed to the accident.
4. The court awarded the appellant a total sum of Kshs. 1,037,334.20/=, comprising damages for pain and suffering, loss of expectation of life, loss of dependency, and special damages. After factoring in



the 50% contributory negligence, the net award stood at Kshs. 518,667.10/=, with costs and interest granted to the appellant(plaintiff) till payment in full.

### **The Appeal.**

5. Being dissatisfied with the trial court judgment, the appellant preferred this instant appeal on the following grounds:
  - a. That the learned trial Magistrate erred in law and in fact by holding the appellant 50% liable when there was no evidence of contributory negligence.
  - b. That the Learned Trial Magistrate erred in Law and in fact by adopting 27 years as the multiplier.
  - c. The learned Trial Magistrate misdirected himself by adopting 1/3 as the dependency ratio instead of 2/3, thus arriving at a wrong award and thereby occasioning a miscarriage of justice.
  - d. The learned Trial Magistrate erred in not taking into account the evidence presented by the appellant.
6. The appellant prayed for the following orders:
  - i. The court do set aside the decree of the subordinate court and do enhance the finding on liability in favor of the appellant.
  - ii. The multiplier be enhanced.
  - iii. The dependency ratio be enhanced from 1/3 to 2/3.
  - iv. Costs of this appeal and interest be awarded to the appellant.
7. The court directed that the appeal be canvassed by way of written submissions.

### **Appellant's Case**

8. In his submission dated 28<sup>th</sup> April 2025, the appellant identified the following issues for determination in this appeal:
  - i. Whether or not the trial magistrate erred in apportioning liability at 50 %: 50 % against the defendant.
  - ii. Whether or not the trial magistrate erred in adopting a multiplier of 27 years
  - iii. Whether or not the trial magistrate erred in adopting a dependency ratio on 1/3
9. On the first claim of liability, they cited the case of Michael Hubert Kloss & another vs. David Seroney & 5 others (2009) eKLR and Hussein Omar vs. Lento Agencies (2006) eKLR on apportioning of liability between the parties.
10. The appellant submitted that the accident occurred when Dw1 tried negotiating a corner while driving at a high speed, causing the two loaders who were aboard the motor vehicle to be violently thrown off and land on the road, causing the deceased to sustain serious bodily injuries and later succumb.
11. It was further argued that there were inconsistencies in DW1's testimony, which was never corroborated by the 4 loaders, and faulted the trial magistrate in holding the Appellant 50% liable despite the Respondent conceding to 70 % liable



12. The appellant thus urged this court to set aside the finding on liability and hold the respondent 100% liable.
13. The second issue the appellant submitted was that the court erred in adopting a multiplier of 27 years stating that the same was not backed by any authorities and proposed a multiplier of 37 years and quoted the case of Agnes Mutinda Ndoolo & Another (suing as administrators of the estate of James Ndolo Muthuku (DCD) vs. Mboya Wambua & Another (2017) eKLR and Kenya Power & Lightning Co. vs. Patience Mbulwa (suing as the Administrator of the estate of the late Bernard Wambua Mutisya (2019) eKLR where the court adopted a multiplier of 30 years for a deceased who was aged 24 years old.
14. The appellant submitted that the deceased was a cane loader in private employment and would have worked past the retirement age of 60 years for public servants and referred to the case of Stanwel Holdings Limited & another vs. Racheal Haluku Emanuel & Another (2020) eKLR.
15. They claim that the deceased was not sickly and that he left behind a widow and a daughter who depended on him financially and submitted that a multiplier of 37 years would be suitable.
16. On the issue of the dependency ratio, the appellant submitted that the trial court erred in adopting a 1/3 ratio despite clear evidence that the deceased left behind a widow and a daughter who depended on him, despite the appellant's failure to prove marriage through a marriage certificate. The appellant contended that a dependency ratio of 2/3 was proper and justified in the circumstances.
17. The appellant prayed that the appeal is merited and that the court allow it as prayed and award the costs of the appeal with interest from the date of the decree of the trial court.

### **Respondent's Case**

18. The respondent submitted that the trial court properly analyzed the evidence on record and arrived at a fair and reasoned determination on liability and quantum.
19. On liability, the respondent supported the trial court's apportionment of fault at 50:50, arguing that the respondent cannot be faulted or apportioned greater liability over an injury that the deceased inflicted upon himself. That the respondent had no duty of care towards the deceased who illegally and unlawfully boarded their tractor from behind.
20. They quoted the case of Phyllis Wairimu Macharia vs. Kiru Tea Factory (2016) KEHC 7259 (KLR) and in dismissing the case of liability, they quoted the case of Martha Shighadai vs. Kenya Power & Lighting Co. Ltd & another (1988) KEHC 15 KLR and Rabbi Kiogora Angaie vs. Jane Karimi Duati (2020) KEHC 6101 (KLR) where the respondent boarded a pick up motor vehicle knowingly and hence they had a duty of care to self and not expose them to danger.
21. The respondent denied liability holding that the deceased unlawfully boarded the tractor without the authority or knowledge of the driver.
22. On the issue of multiplier, they submitted that the deceased was 23 years at the time of his demise and held that the court in adopting 27 years as the multiplier was reasonable considering the vicissitudes of life and cited the case of Retco East Africa Limited vs. Josephine Kwaboka Nyachaki & another (2021) KEHC 5773 (KLR)
23. On the issue of the dependency ratio, the respondent argued that the trial court was correct in adopting a 1/3 ratio and quoted the case of Chania Shuttle vs. Mary Mumbi (2017) KEHC 6800 (KLR)



24. The respondent submitted that appellant failed to prove the extent of her dependency to the deceased and further that the allegation of marriage was not sufficient proof of dependency and further that the age of the alleged daughter to the deceased was ever proven.
25. They held that the trial magistrate was correct in adopting the dependency ratio of 1/3.
26. The respondent prayed that the appeal be dismissed with costs and the judgment of the trial court be upheld in its entirety, arguing that the appellant had failed to demonstrate any error in principle or fact on the part of the trial court.

### **Analysis and Determination**

27. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co Ltd* [1968] EA 123.
28. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

“An appeal court cannot properly substitute its own factual finding for that of a 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 but this is a jurisdiction which should be exercised with caution.”
29. This court is called upon to determine whether the trial magistrate erred in apportioning liability equally between the appellant and the respondent, and whether the award therein was sufficient.
30. The trial magistrate apportioned liability at 50:50 but gave no reasons for doing so. While this omission is regrettable, this court is not precluded from examining the evidence afresh to determine whether the apportionment was justified.
31. From the evidence on record, it is undisputed that the deceased was riding at the back of a tractor being driven by the defendant’s driver when the accident occurred. Whilst the accident occurred due to the sudden turn caused by the driver, I find that the deceased, due to the nature of his work, must have known the risks involved.
32. Accordingly, the deceased’s decision to board the trailer constituted a voluntary assumption of risk. The court takes judicial notice that sugarcane tractors are not designed or insured for the transportation of persons. The principle in *Statpack Industries v James Mbithi Munyao* [2005] eKLR applies herein, where the court held that a person who voluntarily takes a known risk must bear the consequences to the extent of that risk. The deceased therefore contributed to the circumstances that led to the accident.
33. On the other hand, the respondent’s driver owed a duty of care not only to persons aboard the vehicle but also to other road users. The investigating officer (PW1) and an eyewitness (PW3) both testified that the driver was negotiating a bend at high speed, which caused the deceased and another to be ejected from the trailer. There is no indication that the driver took precautions to ensure safe



transport or gave any warning to unauthorized persons who had boarded the trailer. The respondent is vicariously liable for the negligence of its driver in this regard.

34. In the circumstances, the trial magistrate's finding of contributory negligence at 50:50, though not reasoned in the judgment, was not without basis. The court is satisfied that the apportionment was lawful and supported by the evidence on record. Accordingly, the finding on liability at 50:50 is upheld.
35. On the issue of the dependency ratio, the trial court adopted a ratio of 1/3. The appellant produced a chief letter which indicated that the deceased was survived by a wife and a minor. The respondent opined that there was no evidence of an existing marriage between the appellant and the deceased.
36. In *Albert Odawa v Gichimu Githenji* [2007] eKLR, the court emphasized that the absence of formal proof of marriage or parentage does not negate factual dependency when it stated thus:

“The court must therefore do the best it can to arrive at a fair figure bearing in mind the deceased's station in life, the earnings he was likely to be making, and the number of dependants left behind. The absence of marriage certificates or birth certificates of children is not fatal to a claim for dependency, if there is other credible evidence to prove that the deceased indeed had dependants.”

37. The court in held that;

“The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth of certificates or any other documents to confirm the same...”

38. The plaintiff produced a chief letter as proof of the existing union and had left behind a child. In my view, the fact that the deceased had dependents was sufficiently proven. There is no dispute that the deceased was 23 years old, as the same is captured in his death certificate.
39. This court finds that a dependency ratio of 2/3 was appropriate in the circumstances and ought to have been applied. The trial court erred in adopting a lower ratio despite the existence of dependants.
40. The trial court adopted a multiplier of 27 years. The deceased was 23 years old at the time of death. According to the World Health Organization, the average life expectancy for males in Kenya as at 2018 was 62.68 years. Nonetheless, it cannot be denied that in life there are vicissitudes that can shorten one's life. In the absence of evidence of ill health or other limiting factors, a multiplier of 35 years is more reasonable, given that most individuals work up to the retirement age of 60. In *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another* [2014] eKLR, the Court of Appeal adopted a multiplier of 35 years for a deceased person aged 25.
41. The appellant did not raise any objection on the pain and suffering and loss of expectation of life and the same was not disputed by the respondent.
42. Accordingly, the appeal has merit. I shall therefore proceed to award compensation as follows:

Liability .....50:50  
Pain and suffering .....Kshs. 20,000/-  
Loss of expectation of life.....Kshs. 200,000/-  
Loss of dependency (6,896.15\*12\*35\*2/3).....Kshs 1,911,612.78/-



Special damages.....Kshs. 72,550/-

Total – Kshs. 2,204,162.78/-

Less 50% contribution.....Kshs. 1,102,081.39/-

43. From the above, the respondent shall therefore pay Kshs. 1,102,081.39/- to the appellant.
44. Costs awarded to the appellant at court rates from the date of this judgment till payment in full.
45. Right of appeal 30 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2<sup>ND</sup> DAY OF JULY, 2025.**

**S. N MBUNGI**

In the presence of:-

Court Assistant-Elizabeth Angong'a

