



REPUBLIC OF KENYA



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**Wainaina v NL (suing as the administrator of the estate of SL (Deceased) (Civil Appeal E030 of 2024) [2025] KEHC 10763 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CIVIL APPEAL E030 OF 2024  
AK NDUNG’U, J  
JULY 23, 2025**

**BETWEEN**

**CHARLES KAMAU WAINAINA ..... APPELLANT**

**AND**

**NL (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SL  
(DECEASED) ..... RESPONDENT**

*(Appeal from the judgment passed on 13/08/2024 in  
Rumuruti SPM Civil Case No. E030 of 2023-E. Kitbinji (RM))*

**JUDGMENT**

1. Vide an amended plaint dated 14/03/2024, the Respondent sued the Appellant seeking general damages under the *Law Reform Act* and the *Fatal Accidents Act*, special damages and interest. It was averred that the deceased was lawfully riding motorcycle registration no. KMEG 457U as the rider thereof along Maralal Rumuruti road when motor vehicle registration no. KCV 080K coming from the opposite direction was negligently, carelessly or recklessly operated by the Appellant causing it to veer off the road and hit the deceased. It was averred that the accident was wholly occasioned by the negligence of the Appellant and the particulars of negligence are listed.
2. The Appellant filed an amended defence dated 22/03/2024 denying the occurrence of the accident and particulars of negligence and averred that if the alleged accident occurred, the same was caused by the sole and or contributory negligence of the rider of the alleged motor cycle and listed the particulars of negligence on part of the deceased. It was averred that the motor cycle was headed on opposite direction but suddenly encroached onto his lawful lane and in an attempt to flee the armed pillion passenger, the Appellant steered the motor vehicle onto the right lane and the deceased rider swerved the motor cycle onto the right lane and crushed onto his motor vehicle. He also denied the particulars of damages and dependency as was highlighted in the plaint.



3. The matter proceeded for hearing and the trial court blamed the Appellant wholly for the accident and awarded the Respondent a sum of Kshs.1,100,000/- in general damages and Kshs.150,000/- as special damages.
4. Being aggrieved by the trial court judgement, the Appellant appealed to this court vide a memorandum of appeal dated 12/09/2024 raising the following grounds of appeal;
  - i. That the honourable court erred in failing to consider the evidence tendered by the Appellant and during cross examination of the Respondent's witnesses.
  - ii. That the trial court erred when arriving at a decision that the Appellant was 100% liable despite there being evidence to the contrary.
  - iii. The Honourable trial court erred by awarding Kshs.100,000/- as funeral expenses.
5. In rejoinder, the Respondent's counsel filed a cross appeal dated 08/10/2024 and raised the following grounds of appeal;
  - i. The learned magistrate erred awarding Kshs.1,100,000/- as general damages for loss of dependency which was excessively low in the circumstances of this case.
  - ii. The learned magistrate erred in disregarding the letter of employment dated 06/07/2023 and the testimony of PW3 when no sufficient grounds existed for doing so.
  - iii. The learned magistrate fell into grave error in finding that there was no proof of earning and/or income from employment when there was sufficient evidence produced to prove the same.
  - iv. The learned magistrate erred and occasioned a miscarriage of justice by adopting a global method in calculating loss of dependency when the deceased's income was ascertainable.
6. The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that there was no eye witness but PW1 blamed the Appellant for the accident stating that the Appellant had failed to keep to his proper lane and hit the motorcycle KMEG 457U Boxer. Reliance was placed on the decision in *Kimani (suing as the administratrix of the Estate of Amos Kanina Kimani-deceased) v Mwangi (Civil Appeal No. 120 of 2021) (2024) KEHC 2434 (KLR)* where the court dismissed the appeal for lack of eye witness.
7. Further, it is urged that the trial court proceeded to make a determination on the point of impact from which the accident occurred in complete disregard of the fact that PW1 failed to produce legends, sketch plans or photos of the scene, an omission she acknowledged during cross examination and counsel relied on the case of *Postal Corporation of Kenya & another vs Dickens Munayi (2014)eKLR* where court observed that lack of such crucial evidence led the court to doubt the entire evidence.
8. He submitted that the trial court completely disregarded Appellant's defence and established legal principles governing the admissibility of hearsay evidence. That the trial court wholly shifted the burden of proof to the Appellant without due regard to the principles governing the law on burden of proof. The trial court disregarded the question of contributory negligence attributable to both the Respondent and the deceased's rider and also disregarded the evidence and submissions by the Appellant which demonstrated that the deceased rider was in blatant violation of the traffic regulations and materially contributed to the occurrence of the accident as was outlined in the defence. That had the rider not blocked him, the accident would not have occurred. That the recovery of the firearm at the scene of the accident was proof enough that the Appellant's life was in danger, a fact the court failed to appreciate.



9. It is submitted that the rider of the motor cycle was a juvenile and had no license in contravention of Section 6 of the National Transport and Safety Authority (Operation of Motorcycles) Regulations, 2015 and Section 103B (3) and 103B (5) of the Traffic Act that requires the rider to have a valid driving license and every motorcycle to be insured. Therefore, it was not reasonable to apportion 100% liability to the Appellant as the Respondent did not discharge the burden of proof having left a lot of critical elements to speculation.
10. Regarding the award of Kshs.100,000/- as funeral expenses, it is submitted that the same was disproportionately excessive and he relied on the case of Jacob Ayiga Maruja & another v Simeon Obayo (2005)eKLR where the court reduced the amount of Kshs.117,325/- awarded as funeral expenses to Kshs.60,000/- and urged this court to adopt the same.
11. The Appellant's counsel further filed supplementary submissions and argued that the Respondent's cross appeal was not properly on record having been filed on 09/10/2024 which was beyond the prescribed 30 days commencing from the date of the judgment, 13/08/2024. Reliance was placed on the case of Bulsho Trading Company Ltd v Rosemary Likholo Mutakha & another (2020) eKLR.
12. On the issue of loss of dependency raised in the cross appeal, the court is referred to earlier submissions filed before the trial court.
13. The Respondent counsel filed written submissions and only submitted on the issue of damages as the issue of liability was dealt with in Nanyuki HCCA E029 of 2024 which was a test suit.
14. She urged the court to uphold Kshs.100,000/- for funeral expenses as was awarded by the trial court based on the fact that the Appellant did not demonstrate why the same should be set at Kshs.60,000/-. She submitted that funerals have become expensive in the recent past hence the amount awarded by the trial court was modest.
15. With respect to loss of dependency, counsel submitted that the trial court erred adopting a global sum approach whereas the deceased income was ascertainable through the letter of employment. The trial court also adopted very old precedents which were determined almost 20 years ago instead of relying on recent authorities. Hence, the trial court finding was not based on any cogent grounds thus occasioning grave injustice to the deceased estate. That the mere fact that the letter of employment was issued after the accident did not negate the fact that the deceased was employed as the employer himself testified in court confirming the employment and earnings. Further, he was in the informal sector and was not issued with any formal contract. That the Appellant was served with the said letter and had an opportunity to conduct investigations to confirm whether the deceased was employed. She urged the court to adopt the multiplier approach and adopt a multiplicand of Kshs.12,000, multiplier of 40 years since the deceased was 17 years old and placed reliance on the case of Crown Bus Ltd & 2 others v Jamilla Nyongesa & Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) (2020) eKLR where a multiplier of 39 years was adopted for a 21 year old deceased. She urged the court to enhance the award to Kshs.2,000,000/- if the court is inclined to global sum approach taking into account deceased's tender age.
16. This is a first appeal and therefore the duty of this court is to consider and evaluate afresh the evidence at the trial court and reach its own findings thereon. This is as established in *Selle & Another versus Associated Motor Boat & Co. Ltd. & Others* (1968) EX 123, where this principle was well explained in the following manner;

“...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..."

17. The Appellant's counsel raised a preliminary point of law to wit, that the cross appeal was not properly on record having being filed beyond the prescribed 30 days timeframe commencing from the date of the judgment and no application for enlargement of time was made by the Respondent.
18. Order 42 Rule 32 of the Civil Procedure Rules states as follow: -

“The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made or to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross- appeal.”
19. This rule does not provide for any timelines within which a Cross Appeal is to be filed. However, other courts of concurrent jurisdiction when faced with a similar issue have held that a cross appeal should be filed within a reasonable time, suitably before directions are given. The Appellant quoted the case of *Bulsho Trading Company Ltd v Rosemary Likhola Mutakha & another* (2020) eKLR where the court quoted *Kenya Power & Lighting Co. Ltd v Peter Langi Mwasii* [2018] KEHC 4833 (KLR), where the Court was of the view that a Cross Appeal has to be filed within a reasonable time, after the filing of the Appeal. The court held that;

“The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time.”
20. In *Safaricom Plc v Kibo Capital Group Limited & another* [2025] KEHC 4644 (KLR) the court held that;

“The Court is not persuaded that it should strike out the Notice of Cross Appeal as no prejudice to the Appellant has been shown. Striking out the Cross Appeal at this stage would amount to locking out the Respondent from being heard. This is despite the Act and the Rules specifying no specific timelines for filing. Had the Cross Appeal been filed after directions had been given, that would have been outside the purview of what is a reasonable time period. For now the Court holds that it was still within reasonable time.”
21. The Appellant filed his appeal on 18/09/2024 and the Respondent's cross appeal was filed on 14/10/2024, less than a month after the filing of the Appellant's appeal. The matter was mentioned on 15/10/2024 for direction on a preliminary application that was made by the Appellant. The directions on appeal were given on 18/02/2025 hence the cross appeal was filed before the directions were given and was also filed within a reasonable time after the appeal was filed by the Appellant.
22. Taking the view that so long as a cross appeal is filed within 30 days of service of the appeal the same should be deemed as properly filed, and, alive to the need for the court to consider such filing in its



circumstances, I am satisfied that there being no specific timelines in law for the filing of a cross appeal, and on the facts herein, the cross appeal is properly on record.

23. Moving on, the parties raised three issues for determination to wit;
- i. Liability
  - ii. Award on loss of dependency
  - iii. And award on funeral expenses

### **Liability**

24. This court dealt with the issue of liability in Nanyuki HCCA E029 of 2024 which was a test suit as follows and the finding thereon is to apply in this appeal.

### **Quantum**

25. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of Butt v. Khan [1981] KLR 349 per Law, J.A that:

“An appellate court will not disturb an award of 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.”

26. The Respondent’s counsel challenged the trial court’s award on loss of dependency on account that the trial court disregarded the letter of employment that was produced to show that the Respondent was employed and earning a salary of Kshs.12,000/- a month. Further, the trial court disregarded the evidence of PW3, the deceased’s employer who confirmed that he had employed the deceased and was paying him Kshs.12,000/-.
27. The trial court while adopting the global sum approach noted that the Respondent produced letter of employment but the multiplier approach could not apply as there was no proof of earnings or income from the employment the deceased were engaged in and based on the case of Gammel versus Wilson (1981) 1 All E.R 575 and Albert Odawa vs Gichimu Gichenji NKU HCCA No. 15 of 2003 (2007) eKLR, awarded the Respondent Kshs.1,100,000/- as general damages.
28. During trial the Respondent’s counsel had urged the trial court to adopt the multiplier approach as follows;
- $Kshs.12,000/- \times 12 \text{ months} \times 40 \text{ years} \times 1/3 = Kshs.1,920,000/$
29. The Appellant’s counsel in his submissions had proposed a multiplicand of Kshs.7,240 for general labourers, multiplier of 35 years and a ratio of a 1/3 since the deceased was not married and had no children.
30. Regarding the award of damages under this head, the court in Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749, stated that:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would



have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. ...”(emphasis added)

31. In D K M (Suing as Legal Representative to the Estate of J M M – Deceased) vs. Mehari K. Towolde [2018] eKLR the court stated that it cannot calculate the loss of dependency based on the total pay as the deductions do not necessarily go to the benefit of the dependants.
32. In Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased) [2020] eKLR the court stated thus:

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”
33. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. The letter of employment that was produced is dated 6/7/23. This was 8 months after the accident. In my view, evidence of employment ought to be existent during the course of the employment. Further, the letter did not state whether the amount indicated therein was the deceased net income or not. PW3 also failed to mention whether Kshs.12,000/- was the net income. This left a lot for speculation and the trial court was perfectly right in adopting a global sum approach.
34. A pertinent issue not addressed by any of the parties is whether in any event the deceased had the capacity to be in employment noting that he was a minor. Even assuming that he could have been in employment, this must have been child labour and the purported employer ought to have faced the law over the same. This buttresses the position that the global sum approach was the suitable one in assessment of loss of dependency.
35. The Respondent’s counsel in her submissions urged this court to enhance the amount awarded by the trial court to Kshs.2,000,000 taking into consideration the tender age of the deceased if this court is inclined in adopting the global figure approach.
36. As to whether I should enhance the amount awarded by the trial court, I have reviewed the trial court’s assessment of damages for loss of dependency. It is my finding that the damages are not inordinately high or low and neither did the trial magistrate apply wrong principles. I find no basis upon which to interfere with the damages awarded under this head.
37. The other issue was on funeral expenses. The Appellant submitted that the award of Kshs.100,000/- was excessive given the circumstances of the case and guided by the case of Jacob Ayiga Maruja & another v Simeon Obayo (2005) eKLR where an award of Kshs.60,000/- was made as funeral expenses. The court is urged to adopt the same amount.
38. Damages in respect of the funeral expenses of the deceased person, are allowed to be recovered by section 6 of the Fatal Accidents Act. An expense incurred in relation to the funeral of a deceased is recoverable if it was reasonably incurred. Section 6 provides that;

“In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in



respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.”

39. It is noteworthy that in Jacob Ayiga case (supra) the matter was decided in 2005.
40. There were no receipts that were produced to substantiate the claim for funeral expenses. However, the court in Achenda & another (Suing as the legal representatives/administrators of the Estate of the Late Jophan Achenda) v West Kenya Sugar Company Ltd (Civil Appeal E004 of 2022) [2023] KEHC 18044 (KLR) noted that a perusal of the authorities revealed that where funeral expenses are pleaded, they may still be awarded even though no receipts have been produced to support such expenses. The court proceeded and awarded Kshs.100,000/- as funeral expenses. In Ojilong (Suing as the Legal Rep. of the Estate of Rodgers Ochiko Ojilong - Deceased) v Board of Governors & 3 others (Civil Appeal E001 of 2022) [2024] KEHC 7181 (KLR), the court enhanced the mount of Kshs.100,000/- awarded by the trial court as funeral expenses to Kshs.150,000/-.
41. In light of the above, the award of Shs. 100,000 for funeral expenses was spot on.
42. With the result that the Appeal and cross appeal lack merit and are dismissed. Each party to bear its own costs.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 23<sup>RD</sup> DAY OF JULY 2025.**

**A.K. NDUNG’U**

**JUDGE**

