



Seng'ete (Suing as the Administrator and Personal Representative of the Late Juliu Seng'ete Nthuku) v Board of Trustees, the Salvation Army Kenya East Territory (Civil Appeal E029 of 2024) [2025] KEHC 14420 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 14420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E029 OF 2024
NIO ADAGI, J
SEPTEMBER 30, 2025**

BETWEEN

**SAMUEL MBITHI SENG'ETE APPELLANT
SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF
THE LATE JULIU SENG'ETE NTHUKU**

AND

**THE BOARD OF TRUSTEES, THE SALVATION ARMY KENYA EAST
TERRITORY RESPONDENT**

JUDGMENT

1. The Appellant instituted suit in the Lower Court via a Complaint dated 06/07/2022 claiming the following: -
 - a. General Damages under *Law Reform Act* and Fatal Accident Act.
 - b. General Damages for pain and suffering loss; loss of expectation of life and loss of parental support.
 - c. Special Damages of Ksh.67,500/=
 - d. Costs of the suit and interest
 - e. Any other or further relief that the court might deem fit and just to grant.
2. Upon hearing of the case on merits judgment was delivered on 30/01/2024 wherein the Appellant's suit was dismissed with no order as to costs.
3. Being aggrieved by the said judgment, the Appellant lodged this appeal vide a Memorandum of appeal dated 09/02/2022 raising 8 grounds which challenge the entire judgment.



4. The record shows that the Respondent never participated in the appeal despite service. Parties were directed to file written submissions to canvas the appeal. The Appellant's submissions are 30/03/2025. The Respondent did not file any submissions.
5. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* and in *Peters v Sunday Post Limited* (1968) EA 123, (1958) EA page 424
6. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that:-

“A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it”.
7. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion.
8. This appeal arises from the decision of the trial court in a claim stemming from a fatal road traffic accident that occurred on 17th August 2020. The deceased, Julius Seng'ete Nthuku, was employed as a driver by the Respondent. The Appellant, as the administrator of the deceased's estate, claims that the Respondent is vicariously liable for the fatal accident, which occurred while the deceased was carrying out his duties as a driver.
9. The brief facts of the case are that on the day of the accident, the deceased was driving motor vehicle registration number KBR 703D, owned by the Respondent, when he sustained fatal injuries in a self-involving road traffic accident.
10. The Appellant's position is that the trial Magistrate erred in dismissing the claim as the deceased was acting in the course of his employment with the Respondent, which had insured the vehicle under Britam General Insurance Policy No. NR3/MPRV/POL/2095990 and that despite the clear facts indicating the Respondent's liability as the vehicle owner and employer, the trial court misapprehended the evidence and applied the law incorrectly, particularly with regard to vicarious liability.



11. The Respondent filed a Statement of Defence dated 02/08/2022 denying the Appellant's claim but did not adduce any evidence at trial of the case.
12. The trial Magistrate in her judgement stated as follows:-

On the issue of liability, the plaintiff reiterated his evidence and blamed the defendant for the accident because he was the owner of the vehicle. I have considered this line of argument and it must fail because there is no evidence the vehicle was unroadworthy and the deceased was compelled to drive it as this would have made the defendant liable.

In this case, the deceased was the person in active control of the vehicle and in MCCC E 149 OF 2022, I found he was reckless for not avoiding a pothole when the circumstances would have enabled him to see it. Further, I was convinced that he was driving at a very high speed and that is why the vehicle rolled.

With the above finding and despite the authorities the plaintiff has relied on, it becomes difficult for the court to find in favour of the deceased yet he is the one who had active control of the vehicle. The duty was on him to be on the lookout and drive prudently. This duty, he did not share with the defendant.

I find the plaintiff has not established the negligence of the defendant in this particular case.

With the above, I have considered the case of Christine Kalama -vs- Jane Wanja Njeru & Another (2021) eKLR where it was held that the court must assess quantum even when in doubt of the liability.

I have considered the plaintiffs submissions and I would have awarded the estate of the deceased as follows:

Kshs.20,000/= for pain and suffering since the deceased seems to have died at the scene of the accident. Kshs.100,000 for loss of expectation of life because it is considered the conventional sum and the deceased was hired by the defendant as a clergyman. On loss of dependency, I would have been persuaded to award a global sum of Kshs.600,000/= noting the deceased earned a monthly allowance. There was no proof of monthly salary but monthly allowances. I would not have awarded special damages because no proof was tabled in court in line with the law. I would have awarded the costs and interest of the suit”.

13. In conclusion, the trial Magistrate found that the Appellant had not proved their case on a balance of probability and accordingly, she dismissed the suit and declined to award costs noting the defendant did not show up for the hearing despite being notified.
14. I have carefully perused the Record of Appeal, considered and weighed the evidence that was adduced and the Appellant's submissions on the appeal. The only issue for my determination is whether the trial court erred in dismissing the Appellant's claim.
15. The record shows the accident herein was self-involving. I agree with the trial court that the Appellant did not adduce any evidence to show that the vehicle was unroadworthy and the deceased was compelled to drive leading to the accident. This would have made the Respondent liable.
16. The principle of “vicarious liability” is based on the doctrine of “respondeat superior” meaning “let the master answer”. The master will only be liable for the tort committed by his servant, if it was committed by the servant acting in the course of his employment. But if the servant was on his own frolics, the master cannot be liable. See Joel V. Morrison, (1834) 6C & P 501 at p 503. This principle only applies where a third party is injured as a result of negligence of the servant acting on his master's authority.
17. In this case, it is alleged that the Deceased was himself driving the Respondent's vehicle at the time of the accident and having stated that the Appellant failed to show how the Respondent contributed to



the occurrence of the accident, the principle of vicarious liability does not apply in the circumstances of this case.

18. For the above reasons, this court finds no reason to interfere with the trial court's judgment on liability and the same is upheld.
19. In regards to general damages, this court is of the view that the compensation for fatal injuries herein would have been better dealt with under the Work Injury Benefit Act (WIBA) and not through the Magistrate's court at the first instance. See Mohammed Hamud Sheikh –vs- Islamic Relief [2019] eKLR where the court stated that:

“Therefore, all work related, injuries are subject to the Work Injury Benefit Act, and all industrial accidents are to be legally reported to the Director and not filed with the lower court, this has been the case since 20th December 2007.”
20. Also, in Kyoga Hauliers (K) Ltd –vs- Benson Wanyama Mukudi [2014] eKLR where a driver sued his employer for injuries sustained in a road traffic accident it was held that the claim was subject of WIBA.
21. It is my finding that the appeal lacks merit. It is consequently dismissed with no order as to costs.

JUDGEMENT WRITTEN, SIGNED & DATED AT MACHAKOS THIS 30TH SEPTEMBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 30TH SEPTEMBER 2025

In the presence of :

Mr. Guda..... for Appellant

NA..... for Respondent

Milly..... Court Assistant

