Ndegwa v Misiko (Suing as the Administrator and Legal Representative in the Estate of Jacob Opanda Makokha - Deceased) (Civil Appeal E002 of 2021) [2025] KEHC 14081 (KLR) (2 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E002 OF 2021

REA OUGO, J

OCTOBER 2, 2025

BETWEEN

NELSON NDEGWA ..... APPELLANT

AND

ISAH MAKOKHA MISIKO (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE IN THE ESTATE OF JACOB OPANDA MAKOKHA - DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment/Decree of the Honourable J King'ori delivered on 1/12/2020 and reviewed on 23/03/2021 in Bungoma CMCC No 478 of 2015)

JUDGMENT

1. The appellant was the plaintiff at the subordinate court. The respondent herein was accused of driving motor vehicle KBG 535V negligently, losing control and knocking down the deceased, causing fatal injuries. The deceased was 22 years old with a widow and two children. His parents also depended on him. It was alleged that he was working as a boda boda operator earning Kshs 15,000/-.

2. The respondent denied the occurrence of the accident and averred that if the accident occurred, then it was caused by the careless act of the deceased.

3. The trial court, upon considering the evidence, found that the defendant was 30% liable and made the following award on damages:

    a. Loss of dependency Kshs 1,435,104

        Less 70% liability Kshs 1,004,572.8

        Kshs 430,531.20

b. Pain and suffering Kshs 10,000.00

c. Loss of expectation of life Kshs 100,000/-

d. Special damages Kshs 65,500/-

Total Kshs 606,031.20

4. The appellant is dissatisfied with the judgment of the trial magistrate and has lodged this appeal on the following grounds:

1. That the learned trial magistrate erred in law and in fact by holding the deceased 70% liable on negligence, which finding was not supported by evidence that was tendered, thereby occasioning a miscarriage of justice.

2. That the finding by the trial magistrate on liability was biased.

3. That the trial magistrate erred in law and in fact by not considering the appellant's submissions on liability.

5. The appellant seeks that this court find the respondent 100% liable, and he also seeks costs of the appeal.

6. The respondent was also aggrieved by the judgment and filed an appeal challenging the decision on the following grounds.

1. That the learned trial magistrate erred in fact and in law by apportioning 30% liability to the appellant (defendant) despite the respondent being entirely to blame for the accident.

2. That the learned trial magistrate erred in fact and in law by apportioning 30% liability to the appellant (defendant) by disregarding the evidence of the defence witness and police officer who entirely blamed the respondent (deceased) for the accident.

3. That the learned trial magistrate erred in fact and in law in finding in favour of the respondent (deceased) against the appellant (defendant) when there was totally no credible evidence or proof of negligence on the part of the appellant.

4. That the learned trial magistrate erred in fact and in law by adopting a multiplicand of 33 years, which was excessive and without taking into consideration the vicissitudes and vagaries of life.

5. That the learned trial magistrate erred in law and in fact in awarding loss of dependency of Kshs 1,435,104/-, an award which was excessive, considering that there was no proof of dependency.

6. That the learned trial magistrate erred in law and in fact in awarding loss of expectation of Kshs 100,000/- an award was excessive

7. That the learned trial magistrate erred in law and in fact in failing to find that the special damages pleaded had not been specifically proved as provided for by law.

8. That the learned resident magistrate erred in law and in fact in only subjecting loss of dependency to 70% less contribution by the respondent instead of subjecting the total award of loss of dependency, loss of expectation and special damages to 70% less contribution negligence by the respondent.

9. That the learned trial magistrate erred in law and in fact in failing to pay regard to authorities in the defendant's submissions that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the case she was deciding.

10. That the trial magistrate's exercise of discretion in the assessment of quantum was injudicious.

11. That the learned trial magistrate erred in law and in fact in failing to consider the appellant's submissions on both liability and quantum by completely disregarding the submissions and authorities of the appellant and as a result arrived an unjustified decision on quantum.

7. The respondent therefore seeks that the decree by the trial court be set aside; the court to re-evaluate the evidence of the parties and dismiss the plaintiff's suit with costs to the appellant (in the alternative, the court to re-assess the evidence on record on liability and quantum and make its own decision); and that the appellant be awarded costs of the appeal and the lower court.

8. The appellant, in his submission, testified that the investigating officer did not know who was to blame for the accident. Apportioning 70% liability to the appellant was a complete error on the part of the trial magistrate, as he totally disregarded evidence on pages 129, 130, and 152 of the record of appeal. The appellant supported the trial court's finding on the award of damages.

9. On the other hand, the respondent submitted that the appellant failed to prove negligence on the part of the respondent on a balance of probabilities. He challenged the testimony of Pw2 and submitted that it was not credible. Pw2 testified that there were other motorcycles in front of the deceased; however, the motorcycles were not hit.

10. It was submitted that the only reasonable conclusion is that the deceased left its lane on the right, while overtaking and collided with the motor vehicle KBG 535V on the left lane. This means while speeding, encroached on the respondent's lane.

11. On damages, the respondent urged the court to adopt a global award of Kshs 800,000/- in place of the award of Kshs 1,435,104/- made by the trial court under the lead of loss of dependency. In Joseph Muthuri v Nicholas Kinoti Kibera [2022] eKLR, the court awarded a 19-year-old Kshs 1,000,000/-. Stanley Muiru Njuguna & Ann Nkirote v SK, the deceased was 21 years old with no proof of income and was awarded Kshs 700,000/-. Stanwel Holding Limited & another v Racheal Haluku Emmanuel & another [2020] eKLR, the court awarded Kshs 1,000,000/- for loss of dependency for a 23-year-old.

Analysis And Determination

12. This being a first appeal, the Court is called to evaluate the evidence and draw its own conclusions, bearing in mind that it neither saw nor heard the witnesses (Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123).

13. Isah Makokha Misiko (Pw1) testified that he did not witness the accident as he was called after the accident occurred. He went to the scene and found the deceased's body had been taken to the Bungoma referral mortuary.

14. James Wabwile Kapima (Pw2) witnessed the accident while at Musikoma. He testified that the vehicle was coming from Mumias towards the Bungoma direction. He was driving at a high speed, overtaking a handcart when it hit the deceased. The vehicle lost control, veered off the road, into the side of the deceased and hit him, causing fatal injuries.

15. Jane Ovy (Pw3), police officer attached to Bungoma Police Station, produced the police abstract but testified that she could not tell who was to blame for the accident.

16. Lydia Melly (Dw1) testified that she was the investigating officer. As per her investigations, the deceased was overtaking several motorcycles, left its lane and was met by the oncoming motor vehicle. He found that the deceased was to blame for the accident. On cross-examination, he testified that he did not

witness the accident. Peter Kamuy Gitau (Dw2) testified that it was drizzling and he was driving at 60km/hr. At Musikoma, he saw 3 motorcycles approaching from the opposite direction. All of a sudden, the deceased attempted to overtake 2 motorcycles, and the deceased moved from his lane and rammed into the motor vehicle.

17. The only eyewitnesses were Pw2 and Dw2. Each blamed the other for causing the accident by overtaking without proper lookout. Dw1, the investigation officer, as per the police abstract, testified that he went to the scene and noted that the point of impact was on Dw2's lane. Therefore, the respondent's version of events is more plausible given the point of impact.

18. However, Dw2 testified that he was also driving above the speed limit of 50km/hr. Therefore, I find that Dw2 was driving at high speed and contributed to the deceased sustaining fatal injuries. Consequently, I find that the trial court fell into error when it awarded the respondent 30% liability. I set aside the trial court's finding on liability and substitute it with liability at 50:50.

19. In an appeal on damages, this Court must satisfy that the trial court, in assessing damages, either took into account an irrelevant factor, failed to take into account a relevant one, or that the award made is so inordinately low or so inordinately high as to constitute an entirely erroneous estimate of the damages. (See Kemfro Africa Limited t/a 'Meru Express Services (1976)' & Another v Lubia & Another (No 2) Civil Appeal No 21 of 1984 [1985] eKLR).

20. The respondent has urged the court to apply a global award instead of using the multiplier approach adopted by the trial court. In Mwanzia Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another, which was cited with approval by the court in Albert Odawa v Gichimu Gichenji (2007) eKLR; as follows:

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependancy, and the expected length of the dependancy are known 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."

21. Additionally, the court in Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] KEHC 5958 (KLR) stated thus:

> " where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

22. In this case, Pw1 testified that the deceased was a boda boda operator. He also died while riding a boda boda. Pw1 testified that the deceased was earning Kshs 15,000/-. In my view, the trial magistrate was correct to use the multiplier method. While the respondent maintains that the award was inordinately high, I am persuaded to the contrary that the trial court erred by categorising the deceased as an unskilled worker, notwithstanding the clear evidence of his occupation.

23. In Miriam Moraa v JOO & LNO (Suing as the legal representative of the estate of VNO), Kilgoris HCCA NO 8 OF 2021, the court held as follows:

> " [27]. The appellant submitted that there was no evidence that the deceased earned Kshs. 10,000/= per month. The Respondent on the other hand submitted that the deceased's wife testified that he earned 15,000/=. Other than the oral testimony of PW1, no evidence of proof of earnings of the deceased was provided. Some efforts towards this was necessary. However, I do not mean that only documentary evidence should prove earnings, for it is possible for one to hold a paid job or earn from an employment without formal documentation particularly in the informal sector and employment. See Jacob Ayiga Maruya & Another V. Simeon Obaya [2005] eKLR
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> [28]. In this case, there was proof that the deceased was a boda rider and earned therefrom. This fact was not disputed. The respondent claimed that the deceased's monthly earnings was Kshs. 15,000. The appellants disputed this. But the trial court adopted a sum of Kshs. 10,000/= per month. In light of the evidence adduced, the trial court was justified in adopting a reasonable pay for a motorcyclist at Kshs. 10,000/- per month."

24. I therefore find that the trial magistrate ought to have applied a multiplicand of Kshs 10,000/-. Accordingly, the loss of dependency is computed as follows: 10,000 x 12 x 33 x 2/3 = 2,640,000/-.

25. Consequently, the judgment of the subordinate court is set aside and re-computed as follows:

Pain and suffering Kshs. 10,000/-

Loss of expectation of life Kshs 100,000/-

Loss dependency Kshs 2,640,000/-

Kshs 2,750,000/-

Less 50% Kshs 1,375,000/-

Special damages Kshs 65,500/-

Total Kshs.1,440,500/-

26. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF OCTOBER 2025

R.E. OUGO

JUDGE

In the presence of:

Miss Masakhia -For the Appellant

Respondent - Absent

Wilkister .C/A