Mzame v Lalu (Suing as the Administrator of the Estate of the Late Allen Warito Lalu) & another (Civil Appeal E077 of 2022) [2025] KECA 1742 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1742 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E077 OF 2022

P NYAMWEYA, KI LAIBUTA & GW NGENYE-MACHARIA, JJA

OCTOBER 24, 2025

BETWEEN

CROMWELL MZAME .... APPELLANT

AND

ZABLON MWANYUMBA LALU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE ALLEN WARITO LALU) .... 1ST RESPONDENT

SALOME YIEKO .... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Voi (A. Ong'injo, J.) delivered on 10th March 2022 in H.C.C.A No. E1 of 2020)

JUDGMENT

1. The genesis of the instant appeal and cross-appeal before us is the suit by the 1st respondent, Zablon Mwanyumba Lalu (suing as the administrator of the estate of the late Allen Warito Lalu) in the Principal Magistrate's Court at Voi in *PMCC No. 131 of 2018* against the appellant (Cromwell Mzame) and the 2nd respondent (Salome Yieko) *vide* a plaint dated 3rd April 2018. In his suit, the 1st respondent sought compensation for the loss and damage allegedly suffered by the estate of the said Allen Warito Lalu (Deceased) as a result of a fatal road traffic accident, which occurred at about 5:30 pm on 16th April 2015 along Mwatate/Voi Road.

2. The 1st respondent's case, which was brought under the *Law Reform Act* (Cap. 26) and the *Fatal Accidents Act* (Cap. 32) was that the deceased suffered fatal injuries as a result of a road traffic accident caused by motor vehicle Registration No. KBY 708Y, Toyota Probox Station Wagon, belonging to the appellant, who was described as the beneficial owner and the 2nd respondent, the then registered owner. In his plaint, the 1st respondent averred that the said motor vehicle was negligently and carelessly driven by one Dalmas Mashangu Mwachanje, the appellant's servant or agent for whom the appellant was vicariously liable. The particulars of negligence attributable to the appellant's driver were set out in the

plaint in which the 1st respondent prayed for: general damages for pain and suffering; special damages in the sum of Kshs. 22,050; loss of expectation of life; lost years; and interest at court rates on the general and special damages.

3. The 1st respondent further averred that, at the time of the accident, the deceased was 30 years old; and that he worked as a personal assistant to the area Member of County Assembly with a monthly salary of Kshs. 20,000.

4. In his defence dated 14th May 2018, the appellant denied liability and averred that the accident was caused by the deceased's negligence in, inter alia: failing to heed the presence of motor vehicles on the road; failing to see the appellant's motor vehicle in good time to avoid the accident; encroaching onto the road; suddenly dashing onto the road without warning; and by crossing the road when it was not safe to do so. He prayed that the suit be dismissed with costs.

5. The 2nd respondent did not file a defence to the 1st respondent's suit.

6. In his reply to defence dated 21st May 2018, the 1st respondent reiterated the contents of his plaint and averred that the defence was a mere denial; and that the accident was caused solely by the negligence of the appellant, his agent or driver. He prayed that the appellant's defence be dismissed with costs.

7. In its judgment dated 4th November 2020, the trial court (Karimi Njeru, RM.) found the appellant's driver solely responsible for the accident, fatal injuries, loss and damage suffered by the deceased. Accordingly, she entered judgment awarding damages to the 1st respondent as against the appellant and the 2nd respondent for: pain and suffering – Kshs. 100,000; loss of expectation of life – Kshs. 200,000; lost years – Kshs. 1,174,330; special damages as prayed – Kshs. 22,050; costs; and interest from the date of judgment until payment in full.

8. Dissatisfied by the trial Magistrate's decision, the appellant moved to the High Court of Kenya at Voi in *Civil Appeal No. E001 of 2020* on the following grounds:

> " 1. That the learned trial magistrate erred in law and in fact in making a finding of negligence against the appellant without evidence and/or in failing to apportion liability and in holding that the respondent had proved her case on a balance of probability.
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> 2. The learned trial magistrate exercised his discretion in making his findings on liability wrongly by, acting contrary to the weight of evidence that was before the court.
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> 3. The learned trial magistrate erred in fact and in law in failing to consider judicial precedent, and in failing to appreciate the doctrine of causation and blame worthiness hence arrived at a wrong decision on negligence and liability.
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> 4. The learned trial magistrate erred in law and in fact in failing to consider the issue of liability as a matter of fact by failing to analyze and appreciate the evidence on record on the issue of liability and causation.
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> 5. That the assessment of damages for loss of dependency, loss of expectation of life and pain and suffering that were inordinately high as to represent an entirely erroneous estimate.
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> 6. That the learned trial magistrate in assessing damages under the *Law Reform Act* viz loss of dependency and lost years under the Fatal Accident Act by failing

to apply the correct principles in determining the same hence arrived at an erroneous assessment or estimate of damages.

7. That the learned trial magistrate misapprehended the evidence and misapplied, misunderstood and/or overlooked the correct legal principles and judicial precedent and submissions by parties that he made an award under the *Law Reform Act* and the *Fatal Accidents Act*, that was inordinately high hence the erroneous estimate of damages, which the deceased and his estate suffered.

8. The learned trial magistrate erred in law and in failing to appreciate that dependency is a matter of fact, its subsisting is pegged on the dependant's life.

9. The learned trial magistrate erred in law and in fact in failing to take into account the fact that the beneficiaries both under the *Law Reform Act* and the *Fatal Accidents Act* were the same while assessing damages under both heads."

9. In its judgment dated 10th March 2022, the High Court (A. Ong'injo, J.) upheld the trial court's finding on liability. With regard to the assessment of general damages for loss of expectation of life and lost years, the learned Judge was of the view that the multiplier of 25 years was on the higher side and reduced it to 20. But for the multiplier, the learned Judge upheld the other awards of general and special damages, costs and interest.

10. As the learned Judge observed:

" 28. ..... Awards where death occurs immediately are normally minimal. Therefore, in this case the award of Kshs. 100,000 for pain and suffering is reasonable.

... .

32. ...this court finds that the trial magistrate properly assessed damages save for the multiplier of 25 years was on the higher side considering the uncertainties and vagaries of life and considering that the deceased who was aid to be a personal assistant to the MCA would have been rendered jobless by the end of the MCA's term. A multiplier of 20 years would be more reasonable. Damages for lost years should therefore be 11,743.30 × 12 × 20 × 1/3 = 939,464."

11. Aggrieved by the learned Judge's decision, the appellant moved to this Court on 2nd appeal on 9 needlessly argumentative grounds, namely:

" 1. The learned judge sitting as the first appellate court failed and erred in law in failing to re-evaluate the evidence afresh and deal with it like a retrial and make her own finding of fact.

2. That the learned judge erred in law and failed to address the key component of the appeal on the issue of negligence viz the contradictory/conflicting evidence by the respondent's sole alleged eye witness Rashid Mwaghada Ngele.

3. That the learned trial magistrate and judge erred in law in failing to consider the *ratio decidendi* in the binding decision of *Paul Mutie Kaimu & Another v Judy Wambui Ndurumo* [1997] eKLR the provisions of Section 68(3) of the *Traffic Act* and the Highway Code on the obligation of a pedestrian who intends to cross the road.

4. The learned trial magistrate and judge erred in law and in fact in holding that the respondent had proved the case on negligence (causation and blameworthiness) to the required standard and without any evidence at all hence the holding was perverse.

5. That the learned judge erred in law in holding that the age of the dependants is not a relevant factor while assessing damages for lost years/loss of dependency hence ended up making a choice of multiplier that was inordinately high and this subsequently led to an award for lost years/loss of dependency that was inordinately high.

6. That damages for loss of expectation of life and for pain and suffering were inordinately high and awarded without regard to the relevant principles hence amounted to a wrong exercise of discretion and this court should interfere with them.

7. That the learned appeal judge erred in law and in fact and in making an award of Kshs. 22,050/- special damages when there was no appeal before her on the refusal by the trail magistrate to award special damages.

8. That the learned trial magistrate and judge misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principles and judicial precedence and submissions by parties that he made an award under the *Law Reform Act* and the *Fatal Accidents Act*, that was inordinately high hence an erroneous estimate of damages, which the deceased and his estate suffered.

9. The learned trial magistrate and judge erred in law in failing to appreciate that dependency is a matter of fact its subsisting is pegged on the dependant's life."

12. On his part, the 1st respondent filed a notice of cross-appeal dated 20th September 2022 on the grounds that the learned Judge erred in fact and in law by setting aside and reducing the award on lost years awarded by the trial court; and in failing to award costs of the proceedings before the superior court to the respondent.

13. In support of the appeal and in opposition to the cross-appeal, learned counsel for the appellant, M/s. Jengo Associates, filed written submissions and a list of authorities dated 24th February 2023 citing an impressive number of 27 judicial authorities, which we have taken to mind.

14. In response to the appeal and in support of the cross-appeal, counsel for the 1st respondent filed written submissions and a list and digest of authorities citing 10 judicial authorities which we have also considered.

15. Unless otherwise provided, this Court's mandate on 2nd appeal is limited to points of law. Section 72 (1) of the *Civil Procedure Act* provides that:

72. Second appeal from the High Court

1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

a. the decision being contrary to law or to some usage having the force of law;

b. the decision having failed to determine some material issue of law or usage having the force of law;

c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

16. In *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR, this Court held that:

> " We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law."

17. In the same vein, this Court held thus in *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR that:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Stephen Muriungi and another v Republic* (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:
>
> 'We would agree with the view expressed in the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.'"

18. In our considered view, only 5 issues of law arise for our determination, namely:

(i) whether the age of the deceased's dependants is a relevant factor in assessing damages for lost years/loss of dependency;

(ii) whether dependency is a matter of fact, and whether it is pegged on the dependants' life;

(iii) whether the award of loss of expectation of life, and for pain and suffering under the *Law Reform Act* and the *Fatal Accidents Act* were inordinately high;

(iv) whether the learned Judge was at fault in upholding the trial court's award of special damages; and

(v) whether the 1st respondent's cross-appeal has merit.

19. On the 1st and 2nd closely related issues, we hasten to observe that Loss of Dependency is a claim for compensation under the *Fatal Accidents Act*. Section 4 (1) of the *Fatal Accident Act* provides:

> Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such

damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought

20. This Court in *Francis K. Righa v Mary Njeri (Suing as the Legal Representative of the Estate of James Kariuki Nganga* [2021] eKLR referenced the case of *Butler v Butler* [1984] KLR 225 on the assessment and reassessment of damages and observed that:

> " ... assessment of damages is more like an exercise of discretion by the trial court and that an appellate court should be slow to reverse the trial judge's findings unless he has either acted on wrong principles or alternatively the award arrived at is so inordinately high or low that no reasonable court would have arrived at such an award or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and in the result arrived at a wrong decision ...."

21. We find nothing to suggest that the learned Judge acted on wrong principles or that the award of damages was inordinately high or low that no reasonable court could have arrived at such an award. Neither had the learned Judge taken into consideration irrelevant matters or disregarded any matter necessary for consideration in quantifying the damages for lost years and dependency under the *Fatal Accidents Act*. To our mind, the learned Judge was not by any means at fault in reckoning the deceased's age, and by using the reduced multiplier of 20 to award damages for lost years with regard to which the dependants' age is irrelevant.

22. In *Albert Odawa v Gichimu Githenji* [2007] eKLR, Koome J (as she then was) quoted Ringera J in *Mwanzia v Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another* [2007] eKLR where he stated that:

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma ... It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation."

23. Be that as it may, it is not lost on us that the general method of approach in assessment of damages is that comparable injuries should as far as possible be compensated by comparable awards. This Court stated in *Mbaka Nguru and Another v James George Rakwar* [1998] eKLR that:

> " The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions"

24. Having considered the record as put to us, we find nothing to suggest that, by upholding the trial court's awards in respect of lost years and dependency (save for the reduced multiplier of 20), the learned Judge departed from the line of judicial precedents that set the pace for comparable awards.

25. The High Court at Kitale in *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR persuasively stated as follows:

> " As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death

followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

26. As for the related issue of dependency, we hasten to observe that dependency is a matter of fact and must be proved by evidence. The High Court at Mombasa in *Abdalla Rubeya Hemed v Kayuma Mvurya & Another* [2017] eKLR persuasively observed that:

> " Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent."

27. As to whether the age of the deceased's dependants is a relevant factor in assessing damages for lost years/loss of dependency; and whether dependency is a matter of fact pegged on the dependants' life, the learned Judge correctly observed that "... it is the age of the deceased that is used to quantify damages" with regard to loss of dependency, but not the dependents' age as submitted by counsel for the appellant. Notably, counsel for the respondents made no submissions on the 1st and 2nd related issues.

28. Having considered the impugned judgment, the cited authorities and the law on the foregoing issues, we reach the conclusion that the age of the dependants is not relevant in computing damages for lost years and loss of dependency, and that dependency is a matter of fact not pegged on the dependants' life. To the contrary, damages for lost years and dependency are pegged on the age of the deceased. Accordingly, we find nothing to fault the learned Judge's conclusion in that regard.

29. Turning to the 3rd issue as to whether the award on loss of expectation of life and for pain and suffering under the *Law Reform Act* and the *Fatal Accidents Act* were inordinately high, the learned Judge had this to say:

> " 28. For pain and suffering and loss of expectation of life under the *Law Reform Act*, the deceased was said to have died the following day after the accident and awards under this heading are made according to the time taken before the deceased succumbs to his injuries. Awards where death occurs immediately are normally minimal. Therefore, in this case the award of Kshs. 100,000 for pain and suffering is reasonable.
>
> 29. For loss of expectation of life, ... nominal damages should be awarded if death followed immediately after the accident. In consideration of the authorities relied upon which were pronouncements made in 2017 and 2018, this court finds that the same are reasonable."

30. The foregoing decision sits well with the afore-cited case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* (*supra*). Accordingly, we find no fault in the learned Judge's decision to uphold the trial court's award for loss of expectation of life – Kshs. 200,000; and for pain and suffering – Kshs. 100,000 both of which are, to our minds, modest and in consonant with recent judicial precedents.

31. On the 4th issue as to whether the learned Judge erred in upholding the award for special damages, we need not overemphasise the fact that the sum of Kshs. 22,050 was pleaded and remained uncontested. Be that as it may, the learned Judge was at fault in concluding that

> " "... perusal of the judgment of the trial court has established that the prayers that are referred to at page 8 that the trial Magistrate failed to make any finding on the same. This was obviously an oversight on the part of the trial Magistrate and since the same appears to have been proved in the trial court, it will form part of the award to the respondent herein".

32. Contrary to the learned Judge's opinion, the trial Magistrate made a finding that

> " "... special damages pleaded have not been contested. I find the same reasonable. I award the same as prayed".

33. This Court in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR held that:

> "We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc."

34. We agree that special damages of Kshs. 22,050 were pleaded and remained uncontested even though not strictly proved. Such damages fall within the category contemplated in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* (*supra*) in respect of which the Court is bound to take judicial notice and allow as a matter of notoriety and convention. Accordingly, we find no fault in the learned Judge's decision to uphold the award as prayed.

35. Turning to the 5th and last issue as to whether the 1st respondent's cross-appeal has merit, the 1st respondent took issue with the learned Judge's use of the multiplier of 20 in computing damages for lost years under the *Law Reform Act*. It is noteworthy that she reduced it from the initial 25 years applied by the trial court to 20 years. According to the learned Judge:

> "... this court finds that the trial magistrate properly assessed damages save for the multiplier of 25 years was on the higher side considering the uncertainties and vagaries of life and considering that the deceased who was said to be a personal assistant to the MCA and would have been rendered jobless by the end of the MCA's term."

36. According to counsel for the appellant, if the Judge had considered the age of the sole dependant, the relevant case law and the life expectancy in Kenya, she would have given a multiplier lower than the one applied. Counsel submitted that a multiplier of 12 would have sufficed.

37. On their part, and in support of their cross-appeal, the 1st respondent urges the Court to uphold the findings of the trial court with regard to the multiplier of 25 years.

38. We elect to differ from both views. The deceased died at 30 years of age. We also take to mind the fact that the award of dependency ratio is premised on the duration that the deceased would have lived to support his/her dependants. Moreover, no evidence was produced to show that the deceased could not have lived and work for another period of 20 years to support his dependants.

39. We have had occasion to acquaint ourselves with comparative authorities and have this to say: In *Joseph Kahiga & Paul Mathaiya Kahiga (suing as administrators of the estate of the late Lydia Wanjiku Kahiga & Elizabeth Murugi Kahiga – both deceased) v World Vision Kenya & 2 Others* [2014] eKLR; and *Melbrimo Investment Company Limited v Dinah Kemunto & Another (suing as personal representatives of the estate of Stephen Sinange Alias Reuben Sianange - Deceased)* [2022] eKLR, the deceased's were aged 35 years and the trial courts applied a multiplier of 20 years. Accordingly, we find no fault in the learned Judge's decision to apply a reduced multiplier of 20 years.

40. On the issue as to whether the learned Judge was in error in failing to award the 1st respondent costs of the 1st appeal, the 1st respondent contends that he was the successful party, and that he ought to have been awarded costs. All that the appellant submits on this limb of the 5th issue is that "costs follow the event".

41. The event is that the 1st respondent substantially succeeded in his appeal in the High Court and, therefore, was entitled to costs thereof.

42. Having carefully examined the record of appeal and of the cross- appeal, the grounds on which they are anchored, the impugned judgment, the rival submissions of the respective counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal and the cross-appeal fail and are hereby dismissed, save that the cross-appeal is hereby allowed to the extent only that the costs of the 1st appeal to the High Court be borne by the appellant.

    Consequently, the judgment and decree of the High Court of Kenya at Voi (A. Ong'injo, J.) in *Civil Appeal No. E001 of 2020* dated 10th March 2022 be and is hereby upheld save that costs of the appeal therein be borne by the appellant.

43. The appellant do bear the costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER 2025.

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR