Ngumba & another v Mutuku & another (Suing as the Legal Representatives of the Estate of Simon Mutuku Mutinda (Deceased)) (Civil Appeal 298 of 2019) [2025] KEHC 14997 (KLR) (Civ) (22 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14997 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 298 OF 2019

JM OMIDO, J

OCTOBER 22, 2025

BETWEEN

JAMES MUNGAI NGUMBA ..... 1ST APPELLANT

SARIS HARDWARE LIMITED ..... 2ND APPELLANT

AND

GRACE MWONGELI MUTUKU ..... 1ST RESPONDENT

SARAH WARINGA GATHAGE ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF SIMON MUTUKU MUTINDA (DECEASED)

(Being an Appeal from the Judgement and Decree of Hon. P.N. Gesora, Chief Magistrate delivered on 17th May, 2018 in Milimani CMCC No. 5999 of 2016)

JUDGMENT

1. This appeal emanates from the judgement and decree of Hon. P.N. Gesora, Chief Magistrate delivered on 17th May, 2018 in Milimani CMCC No. 5999 of 2016 Sarah Waringa Gathage & another (Suing as theLlegal Representatives of the Estate of Simon Mutuku Mutinda (Deceased) v James Mungai Ngumba & another.

2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 28th May, 2019 upon which he seeks to upset the judgement and decree of the lower court may be summarized as follows:

i. The learned trial Magistrate erred in fact and in law in reaching a finding that the Appellants were 100% liable in tort.

ii. The learned trial Magistrate erred in fact and in law in failing to properly consider the evidence before him.

iii. The learned trial Magistrate erred in fact and in law in applying the wrong principles in assessing damages.

3. The Appellants propose that the appeal be allowed and that this court sets aside the trial court's judgement and decree and substitutes the same with an order dismissing the Respondents' suit before the lower court with costs to the Appellants.

4. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of Selle v Associated Motor Boat Co. Ltd [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the trial court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.

5. In Selle, Sir Clement De Lestang observed that:

> " This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.
>
> However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

6. The duty of the first appellate court was also discussed by the Court of Appeal for East Africa in the case of Peters v Sunday Post Limited [1958] EA 424 in which it was held that the appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> " i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
>
> ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
>
> iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

7. The matter before the trial court, based on tortious liability (a personal injury/fatal claim), was commenced by way of a plaint dated 12th August, 2016 filed by the Respondents herein (the Plaintiffs before the trial court).

8. The Respondents pleaded that the 1st Appellant was at all material times the beneficial owner of motor vehicle registration number KBP 027Q while the 2nd Appellant was the registered owner thereof and that the same was at the time material to the claim being driven by the authorized driver, servant, agent or employee of either or both of the Appellants.

9. The Respondents pleaded that on or about the 8th of October, 2014, the Appellants' aforesaid motor vehicle was driven along Utawala Eastern Bypass Road by the Appellants' driver, agent, servant and/or employee in a manner that was careless and /or negligent as a result of which the same was allowed to collide with the Deceased's motor vehicle registration number KBQ 328S, which was lawfully being driven from the opposite direction by the Deceased.

10. The Respondents pleaded the following particulars of negligence as being attributable to the driver of motor vehicle registration number KBP 027Q:

    a. Driving motor vehicle registration number KBP 027Q at an excessive speed.

    b. Driving into the lane of motor vehicle registration number KBQ 328S thereby causing the accident.

    c. Failed to have any proper control of the said vehicle KBP 027Q.

    d. Failed to swerve, stop or in any other way so as to control the said motor vehicle KBP 027Q from colliding with KBQ 328S.

    e. Failed to swerve or adhere to the provisions of the Highway Code and the *Traffic Act* Cap 403 Laws of Kenya as far as they are applicable in this case.

11. The Respondents sought to rely on the doctrine of res ipsa loquitor.

12. The Respondents pleaded that as a result of the said collision, the Deceased, who was 49 years old and worked as a business man earning a monthly average income of Ksh.25,000/-, sustained fatal injuries and his Estate suffered loss and damage that the Respondents wholly attributed to the Appellants' driver, servant, agent and/or employee and held the Appellants vicariously liable.

13. The Respondents pleaded that the Deceased was survived by the following dependants:

    a. Sarah Waringa Gathage – Widow.

    b. Grace Mwongeli Mutuku – Adult daughter.

    c. Kelvin Ndungi Mutuku – Adult son.

    d. Victor Mugwo Mutuku – 13-year-old son.

    e. Ian Wendo Mutuku – 6-year-old son.

14. The Respondents pleaded the following particulars of special damages:

    a. Transport - Ksh. 95,000.00.

    b. Fees for obtaining limited grant ad litem - Ksh. 60,000.00.

    c. Clothing and shoes - Ksh. 25,000.00.

    d. Coffin - Ksh. 50,000.00.

    e. Copy of records - Ksh. 500.00.

    TOTAL - Ksh. 230,500.00.

15. The Respondents sought judgement in the following reliefs against the Appellants:

    a. Special damages Ksh. 230,500/-.

b. General damages under the *Fatal Accidents Act* and the *Law Reform Act*.

c. Costs of the suit.

d. Interest.

16. The Appellants resisted the claim by filing a statement of defence dated 26th September, 2016 denying liability to the Respondents. The Appellants, in the alternative, pleaded that if the accident in question occurred, the same was solely caused and/or substantially contributed to by the negligence of the Deceased.

17. The Appellants pleaded the following particulars of negligence as being attributable to the Deceased:

a. Driving motor vehicle registration number KBQ 328S Toyota Probox at a speed that was excessive in the circumstances.

b. Driving without due care and attention and specifically without regard to other road users particularly the driver to the motor vehicle registration number KBP 027Q.

c. Failing and/or blatantly declining to give way to the motor vehicle registration number KBP 027Q.

d. Driving on the path or way of the motor vehicle registration number KBP 027Q Isuzu Canter.

e. Failing to observe the *Traffic Act* and Highway Code.

f. Causing obstruction to motor vehicle registration number KBP 027Q.

g. Driving in a manner that was injurious to other road users, more so the driver to the motor vehicle registration number KBP 027Q.

h. Causing the accident.

18. Consequently, the Appellants denied that the Deceased's Estate suffered any loss or damage that can be attributed to them and sought that the trial court dismisses the Respondents suit with costs to the Appellant.

19. The 1st Respondent testified as PW1 and told the trial court that the deceased was her husband and that he met his demise on 11th October, 2014 undergoing treatment, following the road traffic accident that occurred 8th October, 2014.

20. After the death of the Deceased, burial arrangements were made and he was interred. The Respondents incurred Ksh.230,500/- in laying him to rest.

21. PW1 told the trial court that before meeting his demise, the Deceased was a business man and operated two bars from which he made a minimum profit of Ksh.25,000/- per month. She stated that the deceased and herself were blessed with four issues, two adults and two minors.

22. PW1 produced the following documents in support of the Respondents' case:The Deceased's certificate of death.Grant of Letters of Administration Ad Litem.Medical records.Two single business permits.Letter from Nairobi City County dated 5th June, 2014.Copies of the Deceased's children's certificates of birth.Copy of records.Letter dated 19th June, 2015.Letter from the Chief dated 31st October, 2014.Burial permit.Receipts in support of special damages.Financial statement.

23. The second witness that the Respondents called was Martin Bundi Gitonga (PW2) who told the trial court that he witnessed the accident that occurred on 8th October, 2014 between motor vehicles

registration number KBQ 328S Toyota Probox and another vehicle that he described as a Canter. The witness told the trial court that he was driving along the Eastern Bypass and the Toyota Probox was about 40 metres ahead of his vehicle at an area with an inclination.

24. The witness stated that he saw the Canter overtaking another vehicle that was ahead of it and in the process got onto the lane of the Toyota Probox that was being driven in the Canter's opposite direction and ahead of his vehicle. He then heard a big bang when the two collided. He stopped his vehicle and together with other people who went to the scene, removed the driver of the Toyota Probox, who was unconscious and profusely bleeding, from the car. He then took him to hospital.

25. The witness blamed the driver of the Canter for the accident, stating that he caused the collision by overtaking another vehicle without first ensuring that it was safe to do so. He stated that there was little the Toyota Probox driver could do to avoid the accident as there was a cliff to his left side of the road and that he could not swerve in that direction.

26. The Respondents called Police Constable Alex Osoro as PW3. The witness produced a police abstract and occurrence book extract following a report of a fatal road traffic accident that occurred between motor vehicles registration number KBQ 328S Toyota Probox and KBP 027Q FH Minibus along the Utawala Eastern Bypass on 8th October, 2014.

27. PW4 was Emmanuel Musyoka, a Certified Public Accountant, who told the court that he prepared the Deceased's businesses' books of accounts. The witness told the trial court that the Deceased's two businesses cumulatively made profits of Ksh. 304,513/- and Ksh. 309,630/- in the years 2013 and 2014, respectively. The average monthly net profit from the Deceased's businesses was Ksh. 25,802/.

28. The witness produced his reports/statements of accounts.

29. PW3 and PW4 were not cross examined as Counsel for the Appellants did not attend court on 30th January, 2018 when the two witnesses testified, the hearing date having been taken by the consent of the parties.

30. Both the Respondents' and the Appellants' cases were closed at that stage and the parties subsequently filed their respective submissions.

31. The trial court delivered its judgement on 17th May, 2018, finding in favour of the Respondents as follows:

    a. Liability - at 100% against the Appellants.

    b. Pain and suffering - Ksh. 50,000/-.

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

    d. Loss of dependency - Ksh. 2,400,000/-.

    e. Special damages - Ksh. 203,500/-.

    Total - Ksh. 2,753,500/-.

32. What I note from the final figure in respect of special damages is that the learned trial Magistrate erroneously stated the amount awarded as Ksh. 203,500/- yet what he awarded under the said head in the body of the judgement was Ksh.230,500/-. The total amount awarded should therefore have been Ksh.2,780.500 and not Ksh. 2,753,500/-.

33. I have perused and considered the record of appeal, the submissions by the two sides and the record of the trial court. What is clear to me is that the Appellants challenge the trial court's findings on both

liability and quantum. The facts that are undisputed are that the accident involving motor vehicles registration number KBQ 328S and KBP 027Q occurred along the Utawala Eastern Bypass on 8th October, 2014 and that the Deceased, who was the driver of the former, met his demise three days later, as a result of the accident.

34. Thus then, the issues for this court to address and determine are as follows:

    a. Who between the driver of motor vehicle registration number KBP 027Q and the Deceased, who was the driver of motor vehicle registration number KBQ 328S was to blame for the accident and to what extent?

    b. Whether the trial court properly assessed general damages under the head of loss of dependency and whether the award made by the learned trial Magistrate under the said head was inordinately high or excessive.

    c. Whether the trial court properly assessed damages under the head of pain and suffering and whether the award made by the learned trial Magistrate under the said head was inordinately high or excessive.

    d. Whether the trial court's assessment of special damages was in respect of items that were specifically pleaded and strictly proved.

    e. A determination as to the costs of this appeal.

35. The first issue for me to determine is whether the learned trial Magistrate reached the proper finding on the issue of liability, that between the driver of motor vehicle registration number KBP 027Q and the Deceased, it is the former who was wholly to blame for the accident, resulting in vicarious liability against the Appellants to the same extent.

36. The legal burden of proof in civil cases lies on the party alleging the existence of a certain fact, to prove the same on a balance of probabilities. This burden was discussed in the case of Evans Nyakwana v Cleophas Bwana Ongaro [2015] eKLR where the court stated as follows:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the Act that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

37. What amounts to proof on a balance of probabilities was discussed by Kimaru J. (as he then was) in the case of William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLR 526 where the court held as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

38. On the same subject, the Court of Appeal in the case of Palace Investment Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR observed as follows:

> " Denning J. in Miller v Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.""

39. In view of the above, the burden of proof lay with the Respondents to establish their claims, on a balance of probabilities, that the driver of motor vehicle registration number KBP 027Q was to blame for the accident.

40. From the evidence in the record of the trial court, the Respondents called an eye witness (PW2) who explained how the accident occurred. He stated that the Deceased's vehicle was being driven on its rightful lane when another motor vehicle which he described as a Canter emerged from the opposite direction and embarked on overtaking another vehicle without ensuring that it was safe to do so, and was effectively driven on the wrong lane (the Deceased's rightful lane) as a result of which a collision occurred with the Deceased's vehicle.

41. PW2 explained that there was no way that the Deceased would have avoided the accident by swerving to his left as there was a sharp cliff to his left side of the road.

42. Although PW2 did not state the registration number of the vehicle that he referred to as a Canter, the traffic police officer who testified as PW3 confirmed that the report that was made to the police was that the vehicle that collided with the Deceased's vehicle was motor vehicle registration number KBP 027Q.

43. The evidence of PW2 as to how the accident occurred and that of the police officer went largely unchallenged as there was no other explanation as to how the accident occurred. The Appellants did not call any witness to controvert the narration by PW2 and therefore did not demonstrate that the Deceased was in any way responsible for or contributed to the occurrence of the accident.

44. From the above available evidence, the Respondents discharged the burden of proving that the driver of motor vehicle registration number KBP 027Q was wholly to blame for the accident and Appellants were therefore vicariously liable to that extent. The learned trial Magistrate therefore reached the correct finding on liability.

45. The second issue for determination is whether the trial court properly assessed general damages under the head of loss of dependency and whether the award made by the learned trial Magistrate under the said head was inordinately high or excessive.

46. The Appellants challenged the multiplicand of Ksh.25,000/- mainly on the reason that the business licences that the Respondents provided were in the name of his spouse and that his monthly earnings were therefore not proved. The Appellants further made whether of the statement of account/financial report that was produced by the accountant (PW4) and stated that the same was in respect of businesses that were run by the Deceased's spouse, and not the Deceased himself.

47. A perusal of the report leads me to agree with the Appellants, with the result that the Deceased's earnings were not proved and/or could not be ascertained. The multiplier/multiplicand approach in determining loss of dependency was not apt in the circumstances as the Appellant's income was not known, as no evidence on the same was tendered.

48. In the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.
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> It was echoed with approval by this Court in Butt v Khan [1981] KLR 349 when it held as per Law, J.A that:
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> "An appellate court will not disturb an award of damages unless it is so 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."

49. Thus then the question that abounds is whether the learned trial Magistrate correctly applied the multiplier/multiplicand formula and whether this court can interfere with the trial court's discretion.

50. The answer to this question, gladly, is to be found in the decision of Albert Odawa v Gichimu Githenji; Nakuru HCCA No. 15 of 2003 where Ringera J (as he then was) expressed himself 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 dependency and the expected length of the dependency 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."

51. Following the dicta above, the multiplier approach was not suitable in the case before the trial court for the simple reason that there was no evidence to prove the deceased's income. It is then my persuasion that the learned trial Magistrate, in employing the multiplier/multiplicand approach in a situation where the income of the deceased could not be ascertained, applied the wrong principle in addressing the claim under the head of loss of dependency. He therefore fell into error on that.

52. The global sum approach was the correct formula, in the circumstances of the case before the trial court.

53. Under Section 4(1) of the *Fatal Accidents Act*, Cap 32 Laws of Kenya, an action brought by virtue of the provisions of the statute shall be for the benefit of the wife, husband, parent and child of the person

whose death was so caused. The persons who were named all qualified under the provision, as they were the Deceased's spouse and four children.

54. Considering the age at which the deceased met his demise, which as per the certificate of death was 49 years, the fact that he left behind a spouse and four children, two of whom were minors, it is my considered view that a global sum of Ksh.2,000,000/- under the head of loss of dependency would be suitable in the circumstances.

55. The third issue for me to address is whether the trial court properly assessed damages under the head of pain, suffering and loss of amenities and whether the award made by the learned trial Magistrate under the said head was inordinately high or excessive.

56. The contention by the Appellants is that the award of Ksh.50,000/- under this head was excessive, considering that the Deceased died after 3 days.

57. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. We have seen in the case in the case of Gitobu Imanyara (supra) the principles upon which the court can interfere with the trial court's discretion.

58. It is not sufficient for a party to merely state that the amount awarded was excessive. The party seeking the appellate court's intervention must go on to demonstrate the existence of the principles that would warrant the interference with the trial court's discretion.

59. In my view, the award of Ksh.50,000/- for pain, suffering and loss of amenities was justified by the learned trial Magistrate, who explained in his judgement the basis thereof when he stated as follows:

> "On quantum under the head of pain and suffering, I note that the Deceased succumbed three days after the accident while undergoing treatment at Kenyatta National Hospital. He definitely underwent through immense pain."

60. The fourth issue for this court to address was whether the trial court's assessment of special damages was in respect of items that were specifically pleaded and strictly proved.

61. The general rule that guides the award of special damages is that the same must be specifically pleaded and strictly proved (See Equity Bank Limited v Gerald Wang'ombe Thuni [2015] eKLR). Of the items that the Respondents pleaded, receipts were produced for the following:Transport - Ksh. 95,000/-.Clothing and shoes - Ksh. 25,000/-.Fees for obtaining letters ad litem - Ksh. 60,000/-.Coffin - Ksh. 50,000/-.Copy of records - Ksh. 500/-.Total - Ksh. 230,500/-.

62. The Respondents were therefore entitled to recover the amount of Ksh.230,500/- as having been specifically pleaded and strictly proved by production of receipts.

63. Being of the foregoing findings, I will proceed to allow the appeal only to the extent that the Ksh.2,400,000/- awarded under the head of loss of dependency is hereby set aside and substituted with a global award of Ksh. 2,000,000/- under the said head. The amount inadvertently stated to be Ksh. 203,500/- as a result of an accidental slip by the trial court is hereby corrected to read Ksh. 230,500/- under Section 99 of the *Civil Procedure Act*.

64. Interest on the awards (as clarified in this appeal) on the heads of loss of dependency, loss of expectation of life and pain, suffering and loss of amenities shall accrue at court rates from the date of delivery of the judgement in the lower court while interest on special damages shall accrue at court rates from the date of filing the suit in the lower court.

65. Lastly, when the court makes an award under the head of loss of dependency, it is required, under Section 4(1) of the *Fatal Accidents Act*, to apportion or divide the same among the Deceased's Dependants. If minors are involved, a scheme of investment is also supposed to be approved by the court. To that end, I direct that the Respondents file the appropriate application(s) for consideration by the trial court.

66. With respect to costs of the appeal, as both sides are partly successful, each party shall bear their own costs.

67. This file is hereby closed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 22ND DAY OF OCTOBER, 2025.

JOE M. OMIDO.

JUDGE

For Appellant: No Appearance.

For Respondent: Mr. Getange.

Court Assistants: Mr. Juma & Mr. Ngoge.