



Mutua & another (Suing as the Administrators and/or Personal Representatives of the Estate of Shadrack Kii Mutisya - Deceased) v Kathuli (Civil Appeal E093 of 2024) [2025] KEHC 16515 (KLR) (14 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL APPEAL E093 OF 2024
KW KIARIE, J
NOVEMBER 14, 2025**

BETWEEN

CHRISTINE KALEKYE MUTUA 1ST APPELLANT

JOSEPHINE MUTISYA KIIVA 2ND APPELLANT

SUING AS THE ADMINISTRATORS AND/OR PERSONAL REPRESENTATIVES OF THE ESTATE OF SHADRACK KIIO MUTISYA - DECEASED

AND

STEPHEN MUSANGO KATHULI RESPONDENT

(Being an appeal from the judgment and decree in the Makueni Chief Magistrate's Court, CMCC No. E005 of 2023 by Hon. J.E. Kemei (Resident Magistrate))

JUDGMENT

1. The appellants were the plaintiffs in Makueni Chief Magistrate's CMCC No. E005 of 2023. They had been sued for a claim of general and special damages following a road traffic accident involving their motor vehicle, with registration number KCM 019S, and a motorcycle with registration number KMCT 438V. As a result of the accident, the deceased was fatally injured. The learned magistrate apportioned liability equally between the parties. The respondent was awarded Kshs. 257,340.00 in special damages and Kshs. 2,900,000.00 in general damages.
2. The appellants were dissatisfied with the judgment and filed this appeal through Mutuku Wambua & Associates Advocates. They raised the following grounds for appeal:
 - a. The learned magistrate erred in fact and in law by failing to find the defendant 100% liable despite the overwhelming evidence on record.



- b. The learned magistrate erred in law apportioning liability as between the plaintiff and the defendant at the ratio of 50:50.
 - c. The learned magistrate erred in law and in fact by adopting a half (1/2) as the dependency ratio, yet prior to the death of the deceased, his wife, his two children, and his parents were fully dependent on him.
 - d. The learned magistrate erred in fact and in law by failing to adopt a dependency ratio of 2/3 when, before his accident, the deceased's wife, two children and the deceased's parents were fully dependent on him.
 - e. The learned magistrate erred in law and in fact by ignoring the evidence on record speaking on the issue of liability and dependency ratio.
 - f. The learned magistrate erred in fact and by law in ignoring the appellant's written submissions and authorities cited with regard to the issue of liability and dependency ratio.
3. The respondent opposed through Ngechu & Onderi Advocates LLP. He argued that the appeal has no merit.
 4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of *Selle v Associated Motor Boat Co. Ltd.* [1965] E.A. 123, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.
 5. Ivonne Mumo Kilaala (PW2) is a vegetable vendor. Her shop is on the left along Machakos road. Her evidence was that the accident occurred while the driver of the motor vehicle registration number KCM 019S was overtaking. There was a head-on collision with the motorcycle the deceased was riding. This was the gist of the evidence of CPL Paul Mogesi (PW3), who visited the scene after the accident was reported.
 6. The respondent blamed the rider, claiming the accident occurred in his lane. The evidence presented by the appellants heavily indicated that the respondent was at fault for overtaking when it was not safe to do so. The learned trial magistrate made an error in blaming the rider for the accident. The finding on liability is therefore set aside and replaced with a determination that the respondent is fully responsible for the accident.
 7. The appellant argued that the learned magistrate erred in adopting a dependence ratio of 1/2 instead of 2/3, for he had dependents, thus affecting the award in general damages. Before an appellate court can intervene in an award of damages, it must be satisfied that a wrong principle of law was applied, irrelevant factors were considered, relevant factors were omitted, or the award is inordinately low or high. These principles were established by the Privy Council in *Nance v British Columbia Electric Railways Co. Ltd.* [1951] AC 601 on page 613, where it stated:

The principles applicable under this head are not in doubt. Whether the assessment of damages is made by a judge or jury, the appellate court is not justified in replacing the awarded figure with another simply because it would have provided a different amount if it had initially tried the case. Even if the tribunal of first instance was a judge sitting alone, the appellate court must be satisfied that the judge, in determining the damages, applied an incorrect principle of law (such as considering irrelevant factors or omitting relevant ones); or, failing this, that the amount awarded is so inordinately low or high that it constitutes a



wholly erroneous estimate of damages (Flint v Lovell [1935] 1KB 354), as affirmed by the House of Lords in Davis v Powell Duffryn Associated Collieries Ltd. [1941] AC 601.

8. There was no dispute about what the deceased was earning. The only dispute was on the ratio of dependence.
9. Dependence is a matter of fact that requires proof. In Hussein Ahmed Hamshi & Another v Peter Gichuru Njoroge [2016] eKLR, the court said of loss of dependency as a head of damages:
...dependency is a matter of fact. The trial court, having received evidence that the deceased would give to the dependants, Kshs. 10,000 per month, to this court, it was not open to determine that another sum be ascertained and subjected to a dependency ratio. To leave the known sum and venture elsewhere would, with due respect to the trial court, be engaging in undue speculation.
10. Christine Kalekye Mutua (PW1) gave evidence to the effect that the deceased was her husband. She said they had two children. The deceased was supporting them and his elderly parents, who were in their 80s. There was no evidence to the contrary. Dependence was therefore proven.
11. In the case of Sarah Naitore M'Ikunyua v Geoffrey Mwangi Bor & another [2021] eKLR stated:
25. The Court considers that the circumstances of the case, involving the deceased who was a single parent and who supported her mother, call for enhancement of the dependency ratio from 1/2 to 2/3.
12. The dependency ratio of one-half adopted by the trial learned magistrate is set aside and replaced with a ratio of two-thirds.
13. Loss of dependence will therefore be calculated as follows:
 $15,000 \times \frac{2}{3} \times 12 \times 30 = 3,600,000$.
14. The appellant's appeal is allowed with costs to the extent that the dependency ratio of one-half (1/2) adopted by the trial Court is replaced with a ratio of two-thirds.

DELIVERED AND SIGNED AT MAKUENI, THIS 14TH DAY OF NOVEMBER 2025

KIARIE WAWERU KIARIE

JUDGE.

