



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E236 OF 2023

GIDEON MWANGI

PETER

NDUNG’U.....APPELLANTS

VERSUS

WATEI MWALIMU & JAMES MENGI MWALIMU

(suing as the legal representatives of Timothy

Mbiku

Mwalimu(deceased).....

.....RESPONDENTS

**(Being an appeal from the judgment of the Hon E.K.Suter (PM) delivered
on 24.08.2023 in MAVOKO CMCC NO E520 OF 2021)**

JUDGMENT

1. The respondents’ claim against the appellant was for special and general damages for fatal injuries occasioned to Timothy Mbiku Mwalimu (deceased) in a motor accident which occurred along the Nairobi Mombasa Highway on 1st October 2018 when the 1st defendant and /or his authorized driver carelessly and or negligently managed, drove the motor vehicle KAT 966S and

caused it to knock down the deceased thereby fatally injuring him.

2. In his written statement of defence dated 24.02.2022 the Respondent denied the particulars of negligence in the plaint and attributed the accident to the negligence and /or the contributory negligence of the deceased and prayed that the suit be dismissed with costs.

3. After hearing the parties and considering their submissions the court below awarded damages as follows:

- a. Liability 100% In favour of the Plaintiff
- b. Pain and suffering Kshs 100,000/-
- c. Loss of expectation of life Kshs 100,000/-
- d. General damages for loss of dependency Kshs 3,800,000/- **(as per ruling dated 24th August 2023 pursuant to the slip rule-Section 99 Of the CPR)**
- e. Special damages Kshs 70,700/-
- f. Costs and interest

4. Being aggrieved by the award the Appellant preferred this appeal. The same is premised on grounds that;

“a. The learned trial magistrate erred in law and in fact by finding the appellants 100% liable by putting reliance on the pleadings and ignoring the evidence by both the plaintiff and defence

witnesses which showed the deceased was to blame for the accident.

b. The learned trial magistrate erred in law and in fact by awarding kshs 3,800,000 as an award on loss of dependency which award was inordinately high considering there was no proof of income.

c. The learned trial magistrate erred in law and in fact in awarding a sum that is beyond statutory limit of kshs 3,000,000.

d. The learned trial magistrate erred in law and in fact in ignoring or neglecting to put into consideration the appellants submissions.”

5. The Appeal was canvassed by way of written submissions.

APPELLANTS SUBMISSIONS

6. Learned Counsel for the Appellant submitted that the particulars of negligence pleaded were not proved to the required standard as the witnesses admitted that they did not properly witness the accident. Reliance was placed on the case of **Francis K Righa vs Mary Njeri and Benter Atieno Obonyo vs Anne Nganga & Another [2021]eKLR.**

7. Counsel submitted that in the event that the court finds the appellant liable then it should attribute contributory negligence to the Respondent and apportion the liability equally.

8. On loss of dependency the court was urged to find that the award by the trial court was erroneous and excessive in the circumstances and that Kshs 1,300,000 was sufficient.
9. For the Respondent, it was submitted that the Appellant's contention that the trial court erred in finding the Appellants 100% liable was unfounded, that the trial magistrate meticulously analysed all evidence and applied the law correctly in reaching the finding on liability and hence there is no basis for disturbing the finding on liability.
10. Drawing from the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, FM (Minor suing through Mother and next friend MWM) v JNM & another [2020] eKLR, learned Counsel for the Respondent** submitted that the quantum awarded was fair, just and was supported by evidence and that the Appellant's argument that the quantum awarded was excessive is not only misplaced but also unfounded, seeking to unduly prolong the proceedings in an attempt to delay the enforcement of the judgment.
11. Counsel urged this court not to disturb the award of the trial court but instead uphold the same and dismiss this appeal with costs to the Respondent.

Analysis and determination

12. I have considered the evidence in the court below, the rival submissions here and in the court below and the law. The appellant took issue with the liability as apportioned by the trial court and the quantum of damages awarded.

13. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In **Khambi & Another v Mahithi & Another [1968] EA 70** the court stated:

"It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

14. From the testimonies it is clear that no one witnessed the accident. However, there was evidence which is uncontroverted that the driver of the Respondent's motor vehicle was charged with the offence of causing death by dangerous driving and that he was tried, found guilty, convicted and sentenced to a fine. The charge concerned the death of the deceased in this case and there is no evidence of an appeal having been filed. **Section 47A of the Evidence Act** provides that such a conviction is conclusive proof of guilt. This coupled with the evidence of PW3 that the appellant's vehicle was being driven at a high speed is

proof that the Appellant was liable for the accident. No evidence was adduced as would warrant this court to conclude that the deceased was at fault in any way. There was no pedestrian crossing in the vicinity and he was crossing at the appointed place. There is no evidence that he contributed to the accident as to attribute contributory negligence to him. I am therefore not persuaded that the learned magistrate erred for finding the Appellant 100 percent liable. The appeal against liability is therefore dismissed.

15. As regards the quantum of damages, the principles which should guide a court in considering whether or not to disturb an award of damages by a lower court were settled in the case of **Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lobia & another (N0.2)[1985]KECA137(KLR)** to be that **“either the court took into account an irrelevant factor, or left out a relevant one, or that, the amount of damages is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”** It is also a tenet of the law that similar injuries should attract comparable awards albeit taking the issue of inflation into account.

16. Applying the above principles to this appeal and having considered the evidence and submissions of the parties I find as follows; in respect to damages for pain and suffering I find that

the sum awarded was not inordinately high or low given that the deceased was pronounced dead on arrival at the hospital thus died the same day. My holding finds support in the case of **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR** where the court stated-

“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. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”

17. The above was also the holding in the case of **Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR**, where the court stated-

“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."

18. For loss of dependency, PW2 testified that the deceased was a student at Mt Kenya University aged 25 years. The award of Kshs 3,800,000 is contested for reason that it exceeded the sum of Kshs 3,000,000 limited in the **Insurance (Motor Vehicle Third Party Risks) Act** and that the award was inordinately high and excessive. The Respondent however disputed that and contended that the award was reasonable given the age of the deceased and the fact that he was a university student who was about to complete his studies and become a teacher and as a result of his death his mother had lost her dependency.

19. It is instructive that in arriving at the damages under this head the learned magistrate fully considered the submissions of both sides and several decisions all very relevant to the case. It is my finding that she did not misdirect herself in principle. Neither did she consider an irrelevant factor or leave out a relevant factor and the award is not inordinately high as to constitute an erroneous estimate of the damage. The award under this head is therefore upheld.

DISPOSITION

20. In the upshot, the appeal fails and is dismissed in its entirety and the judgment of the learned magistrate is upheld is as follows;

a. Liability	100
percent.	
b. Damages	
i. Pain and suffering	Kshs
100,000.00	
ii. Loss of expectation of life	Kshs
100,000.00	
iii. Loss of dependency	Kshs 3,800,000.00
c. Special damages	Kshs
70,700.00	
d. Total	Kshs
4,070,700.00	
e. Costs of the appeal and interest on the damages from the date of the judgment in the court below and interest on specials from the date of filing suit.	

Orders accordingly.

Judgment signed, dated and delivered virtually on this 14th day of November 2025.

E N MAINA

JUDGE

IN PRESENCE OF:

Miss Baliba for Nzioki for Respondent

Ms Njambili for Masika for the Appellant

C/A: Geoffrey

ORIGINAL