



**Maina & another v Oundo (Civil Appeal E1378 of 2024)
[2025] KEHC 15859 (KLR) (Civ) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 15859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1378 OF 2024

FR OLEL, J

NOVEMBER 5, 2025

BETWEEN

JOSEPH KANYIRI MAINA 1ST APPELLANT

DAVID MBURU 2ND APPELLANT

AND

CHRISTINE OUNDO RESPONDENT

(Being an appeal from the Judgment and decree of the Hon Becky Cheloti Mulemia (PM) Sitting dated 30th October 2024 in Millimani CMCC Case No E429 of 2021)

JUDGMENT

A. Introduction

1. The Appellants were the defendant's in the primary suit, where they had been sued for compensation based on a tort of negligence arising from a fatal Road Traffic Accident which occurred on 11. 05.2020. The respondent averred that on the material day, her son, the late Brian Murage (Deceased) was lawfully walking along Falcon/Enterprise road in the direction of Lungalunga at a point approximately outside Bachu Steel Industries, when the Appellants authorized driver servant and/or agent negligently drove, managed and/or controlled the Appellants motor vehicle registration number KCH 161T Tata Lorry Tipper,(hereinafter referred to as the suit motor vehicle) which was being driven from the opposite direction that he caused it to violently knock down, and run over the deceased thereby causing him fatal injuries to which he later succumbed to at KNH on 17th May 2020.
2. It was her further contention that as a result the deceased estate had suffered loss and damage, thus justified to sue for compensation. The Appellants filed a joint statement of defence denying each and



every allegation of fact pleaded and put the respondent to strict proof thereof. In the alternative they also averred that it was the deceased who was negligent and his action contributed to the said accident.

B. Facts at Trial

3. The respondent testified and reiterated the contents of her witness statement, which she adopted as her evidence in chief. She also produced her trial bundle (documents) as exhibits before the court. Under cross examination she confirmed that she did not witness the said accident occur but was informed of what had transpired by businesswomen who owned vibanada around the accident scene. After the accident the deceased was rushed to KNH and later died on 17.05.2020.
4. PW2 PC Bernard Wenomi of traffic base industrial area produced the police abstract dated 12.06.2020. He confirmed that the said accident was reported to their station and that the circumstances were that the deceased had attempted to hike a ride but as he was on boarding missed, where he was to hold and fell on the road. He also confirmed that he did not visit the scene of the accident and that no adverse action was taken against the appellants driver.
5. DW1 David Mburu adopted his witness statement as his evidence in chief and stated that he was driving along Falcon road off Enterprise road, within industrial area ferrying murrum soil to Mukuru Kwa Njenja slums. The deceased had attempted to hang on the suit motor vehicle, while it was moving and had miscalculated his steps, thus fell down and was run over by the lorries left back wheels . He blamed the deceased for causing the accident by for not taking due care to ensure that he did not place himself in danger.
6. The trial court did consider the pleadings, evidence adduced and submissions filed. In her judgment, found both parties to be 50: 50 % liable for the said accident liable for the accident .On quantum she awarded the respondent as follows; General damages for pain and suffering Kshs.50,000/=,loss of expectation of life Kshs.100,000/= , loss of dependency Kshs.3,648,396/= (15,201.65/= x 12 x 30 x 2/3). Special damages pleaded and proved was awarded at Kshs.19,140/= plus cost and interest of the suit.
7. Being dissatisfied and aggrieved by the said award the appellants filed their memorandum of Appeal raising five (5) grounds of Appeal, Namely;
 - a. The learned Magistrate erred on fact and in law in apportioning liability equally as between the deceased and the defendants.
 - b. The learned Magistrate erred on facts and law in filing to find the deceased wholly liable for the said accident.
 - c. The learned Magistrate erred on fact and in law in assessing damages for loss of dependency at a sum that was so inordinately high as to constitute an entirely erroneous estimate having regard to the evidence on record.
 - d. The learned Magistrate erred in law by failing to give appropriate weight and consideration to submissions filed by the Appellants advocate and authorities cited therein.
 - e. The learned Magistrate's Judgment was rendered/delivered per in curium.

C. Parties Submissions

- i. Appellants Submissions



8. The appellant broadly faulted the trial Magistrates finding on liability and the award on loss of dependency. The evidence lead conclusively confirmed that it was the deceased at fault for trying to on board a moving motor vehicle and had unfortunately slipped and was crushed by the left rear wheels. The trial Magistrate had erred in apportioning liability at 50:50, yet their driver was not at fault for what had occurred. That being the case, no link between the deceased injuries and their drivers alleged negligence had been proved and consequently urged the court to find that the liability ration arrived at was erroneous. Reliance was placed on *Mukwana V Mulilu & Another* (Suing as the legal representative of the Estate of the late Johnson Mulilu Shiangalangwa),(Civil Appeal 137 of 2018) {2022} KEHC 15497 9KLR), *Harrison Baya Yaa V Mash East Africa Limited* (2020) Eklr, *Lawrence Chinditi V AINU Shamsi Ltd* (2024) Eklr & *David Kajogi M'mugaa V Francis Muthomi* (2012) Eklr to emphasis that if negligence was not proved liability could not attach.
9. On the second issue raised, the Appellant faulted the trial Magistrate for awarding an excessive sum, when there was no chief letter attached to prove who were the exact number dependence of the deceased and secondly the trial court had further erred in using the Regulations of wages (General), (Amendment) order 2022, when the said accident had occurred in 2020. As a result, she had adopted the wages of a general labourer of Kshs.15,201.65/=, instead of Kshs.13,572.90/= as stipulated under the Regulation of wages order 2018.
10. The appellant further submitted that the multiplier used of 30 years was on the higher side as the respondent was not sure of her sons age. She had pleaded two different age of 26 years and 35years, and did not produce any death certificate to confirm the same. Be that as it may, even if the appellant age was assumed to be 26 years the multiplier applied was excess and they urged this court to reduce the same to 24 years. Reliance was placed in *Wilson Mwangi Kabiro* (Suing as administrator of the estate of Stephen Irungu Mwangi- Deceased) V *Charles Nyamumbo Mageto* (2015) Eklr & *Nyamira Tea Farmers Sacco V Wilfred Nyambati Keraita* (Suing as the personal repreasentive of Mary Nyaboke Keraita (2011) Eklr , where the court adopted a multipler of 24 years , where both deceased were 25 years old.
11. The final issue raised was that there was no basis for adopting two thirds ration given that it was not proved that the deceased had a son, thus the said ratio, should have been reduced to one third as the respondent was the only dependent proved to exist.
12. The Appellants thus urged this court to find that this Appeal has merit and be pleased to overturn the decision of the trial court in it entirety. In the alternative they prays that the finding on liability and dependency be re assessed afresh and reduced accordingly. The Appellants also prayed for costs of this Appeal.
 - ii. Respondents Submissions.
13. The respondent on their part submitted that they had presented cogent evidence to prove the link between causation and the Appellants driver negligence as the injuries sustained did not support the appellants contention that the deceased had fallen off a moving motor vehicle, but proved that he had been hit by the said motor vehicle and thus could not be blamed for the accident that occurred. Reliance was placed on *Statpack Industries Vs James Mbithi Munyao* (2005) eklr, *Kanyungu Njogu V Daniel Kimani Maingi* (2000) eklr, *Grace Kanini Muthini V KBS & Another* Nyeri HC No 270 of 2000 & *Khambi & Another V Mahithi & Another* (1968) EA 70 to support this contention.
14. On quantum, it was their contention that the Grant ad litem issued in *Milimani Succession* File No E517 of 2020 did prove the relationship between the respondent and the deceased and also the fact that the deceased left behind a young son, under the care of his mother, the respondent herein. The



deceased had died at 22 year of age as proved by the death certificate, which was admitted into evidence and thus the trial court could not be faulted for using a multiplier of 26 years.

15. The final issue raised was that it was not necessary for the respondent to prove the exact amount of income the deceased earned, as the law gave room for that presumption, given that not all persons kept their records of employment. Heavy reliance was placed in *Joseph Mwangi Wanyeki V Alex Muriithi Mucoki & Another (2019) eKLR* & Court of Appeal case of *Jacob Ayiga V Simon Obayo (2005) eKLR*.
16. In arrive at the appropriate quantum awarded under the heading of loss of dependency, it had not been proved that the trial magistrate had erred by taking into account irrelevant factors, or left out of account a relevant one or that the award issued was inordinately high to justify interference. The respondent thus urged the court to find that this Appeal lacks merit and be pleased to dismiss the same.

D. Analysis And Determination

17. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123*) & *Peters Vs Sunday Post Limited(1968) EA 123*
18. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *Civil Procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316*
19. In this Appeal, the Appellants are challenging both liability and the quantum of damages awarded by the trial court. In *Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142* and *Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981*, it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.
20. PW1 did not witness the said accident, but PW2 confirmed that the deceased was attempting to hike a ride on the suit motor vehicle, but miscalculated his steps and fell on the road. This evidence was corroborated by the evidence of DW1, who also adopted his witness statement, where he noted that, the deceased attempted to hang on the rear body of the suit motor vehicle, while it was moving. Unfortunately, he missed a step, slipped and was run over by the rear wheels of the vehicle.
21. The trial court did find that both parties owed each other a duty of care and therefore apportioned liability at 50:50%, but that finding was an error as clearly it was the deceased who was took a grave risk by trying to on board a moving lorry but unfortunately slipped and sustained fatal injuries as confirmed by the postmortem report, finding that the major injury suffered by the deceased was complete pubic rapture & pelvic fracture.
22. In the present instant, unfortunately, the respondent failed to bring credible evidence to prove that the accident that occurred was as a direct result of the Appellants driver negligence nor was it proved that he was known to the appellant and had allowed him to onboard a moving motor vehicle, to enable court find that he contributed to the said accident.



23. I therefore do find that in the present case, the respondent has failed to present credible evidence to prove that the accident was as a result of the Appellants agent negligence and unfortunate, as the circumstance maybe, the trial courts finding on liability cannot stand.

C. Disposition

24. The Appeal on liability is therefore allowed, and renders moot the issues raised on quantum. The entire award of the trial Magistrate is therefore set aside and the primary suit is dismissed with costs.

25. Each party will bear their own costs of this Appeal

26. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 5TH DAY OF NOVEMBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 5th day of November,2025.

In the presence of: -

N/AAppellant

N/A Respondent

Mr. Jarso..... Court Assistant

