



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**CIVIL APPEAL NO. E030 OF 2022**

**BETWEEN**

**MILLY LOGISTIC LIMITED..... 1<sup>ST</sup> APPELLANT**  
**JOHN MURIUKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CHARLES KIOKO MALILI (suing on behalf of the estate of Judith Ndunge Malili-  
DECEASED..... RESPONDENT**

*(Being an appeal from the judgment and decree in the Kilungu Principal Magistrate's Court,  
PMCC No. E237 of 2021 by Hon. F. Makoyo (Senior Principal Magistrate).*

**JUDGMENT**

1. The appellants were the defendants in Kilungu Principal Magistrate's PMCC No. E237 of 2021. They had been sued for a claim of general and special damages following a road traffic accident involving their motor vehicles, with registration numbers KCH 596W/ZE 4656, and KBH 866C. As a result of the accident, the deceased was fatally injured. The appellants were held 100% liable. The respondent was awarded Kshs. 316,120 in special damages and Kshs. 2,321,520.00 general damages.
2. The appellants were dissatisfied with the judgment and submitted this appeal through S.M. Righa & Company Advocates. They raised the following grounds for appeal:
  - a) The learned trial magistrate erred in law and in fact by failing to apportion liability to the deceased, considering that the accident occurred due to the deceased voluntarily exposing himself to danger.
  - b) The learned trial magistrate erred in law and in fact and misdirected himself by failing to consider at all the submissions made before him by the defendant and reached an erroneous conclusion, thereby occasioning a miscarriage of justice.

- c) The learned magistrate erred in law and in fact by making a holding that the defendants were wholly liable in the absence of any evidence and by having disregarded the submissions by the defendants and cited legal authorities.
  - d) The learned trial magistrate erred in law and in fact and misdirected himself by failing to consider at all the submissions made before him by the appellant, and reached an erroneous conclusion, thereby occasioning a miscarriage of justice.
  - e) The learned trial magistrate erred in law and in fact by awarding loss of dependency to the sum of Kshs. 1,171,520/= when the same was not proved and by having disregarded the submissions by the appellant and cited legal authorities.
  - f) The learned trial magistrate erred in law and in fact by awarding pain and suffering to the sum of Kshs. 50,000/= when the same was manifestly high and by having disregarded the submissions by the appellant and cited legal authorities.
  - g) The learned trial magistrate in assessing the quantum of damages considered irrelevant factors and wrong decision principles, and arrived at a wrong decision and excessive award on the quantum of damages.
3. The first respondent opposed the appeals through Mutua Mathuva & Company Advocates. They raised the following grounds:
- a) The trial court's findings on liability were sound, proper, faultless and bereft of any error.
  - b) The proof of dependency was done to the required standards of a balance of probabilities
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 vs 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. PC Jonah Kiprop (PW1) testified that after they received a report of an accident, he visited the scene with other officers. It was established that the accident occurred at a sharp bend when the driver of the motor vehicle with registration numbers KCH 596W/ZE4656 was overtaking a convoy of vehicles. There was no other evidence to the contrary. The appellant did not testify. The finding on liability cannot be faulted.

6. The appellants argued that the learned magistrate erred in awarding excessive damages, specifically loss of dependency, amounting to Kshs. 1,171,520/=, when such was not proven. They also argued that an award of Kshs. 50,000/= for pain and suffering was evidently excessive. 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 vs 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 vs Lovell [1935] 1KB 354), as affirmed by the House of Lords in Davis vs Powell Duffryn Associated Collieries Ltd. [1941] AC 601.*

7. The deceased died aged 40 years. The retirement age is 60 years. There was no proof of earnings by the deceased. When a similar issue confronted Ringera J. (as he then was) opined, in **Mwanzia vs. Ngalali Mutua and cited D.M.M (Suing as The Administrator and Legal Representative Of The Estate Of L K M vs. Stephen Johana Njue & another [2016] eKLR** 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 facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of 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.*

8. In the instant case, though the earning was not proved, the trial court ought to have used the global award approach. The award, in my view, was high in the circumstances. The same is set aside and substituted with a global sum of Kshs. 1,500,000.00.
9. An award of Kshs. A sum of 50,000/= for pain and suffering cannot be described as excessive. I find no reason to interfere with it.
10. The appeal has been partially successful, as indicated in paragraph 8 above. The respondent will bear the costs of this appeal.

**Delivered and signed at Makueni, this 5<sup>th</sup> day of November 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**