Nyamai v Kaloki & another (Suing as the Legal Administrators of the Estate of Christine Kaluki Mwendwa - Deceased) (Civil Appeal E072 of 2024) [2025] KEHC 15670 (KLR) (4 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15670 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E072 OF 2024

KW KIARIE, J

NOVEMBER 4, 2025

BETWEEN

FELIX KITHUKU NYAMAI ..... APPELLANT

AND

MWENDO MWENDWA KALOKI ..... 1ST RESPONDENT

FREDRICK KIOKO MWENDWA ..... 2ND RESPONDENT

SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF CHRISTINE KALUKI MWENDWA - DECEASED

(Being an appeal from the judgment and decree in the Tawa Senior Principal Magistrate's Court, SPMCC No. E038 of 2023 by Hon. S. Jalang'o (Senior Principal Magistrate)

JUDGMENT

1. Felix Kithuku Nyamai, the appellant, was the 2nd defendant in Tawa Senior Principal Magistrate's SPMCC No. E038 of 2023. He had been sued for a claim of general and special damages following a road traffic accident involving their motorcycle registration number KMDE 769L. As a result of the accident, the pillion passenger was fatally injured. The appellant was held 100% liable.

2. The appellant was dissatisfied with the judgment and submitted this appeal through MNM Advocates LLP. He raised the following grounds for appeal:

    a. The learned magistrate erred in law and in fact in finding liability at 100% as against the appellant despite overwhelming evidence to the contrary.

    b. The learned magistrate erred in law and in fact in failing to consider the appellant's evidence against the 2nd respondent.

c. The learned magistrate misdirected himself in failing to make a finding against the 2nd respondent herein despite the overwhelming evidence presented.

d. The learned trial magistrate erred in law and fact in failing to consider the submissions by the appellant together with the authorities relied on by the appellant.

e. The honourable learned magistrate erred in law and fact in awarding excessive general damages to the 1st respondent, amounting to Kshs. 1,178,789.80/= without sufficient evidence supporting the award.

f. The award of damages by the learned magistrate was excessive and an erroneous estimate of the damages that may be awarded to the 1st respondent, considering the circumstances of the case before the subordinate court and the weight of precedents in similar circumstances.

g. The learned magistrate erred in law and fact in disregarding crucial evidence in arriving at this decision.

3. The first respondent opposed the appeals through Kitindio Musembi & Company Advocates. They argued that the learned magistrate's judgment on liability and awards was supported by the facts and informed by earlier decisions.

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. The uncontested evidence on record was that the deceased was a pillion passenger. There was no evidence adduced to suggest that she may have contributed to the accident. The finding on liability cannot be faulted.

6. In the trial before the learned magistrate, the appellant alleged that the rider had stolen the motorcycle and used it without his authorization. He attributed this information to Pius Kimeu, whom he did not call as a witness. This evidence was hearsay and was rightfully dismissed as such. Similarly, even after claiming he had reported the theft to the police, he did not produce any evidence to support this assertion. He did not prove his claim on a balance of probabilities.

7. There are no material facts to warrant interference with the finding on liability.

8. The appellant complained that the learned magistrate erred in awarding excessive general damages to the 1st respondent, amounting to Kshs. 1,178,789.80/= without sufficient evidence supporting the award. 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.

9. The deceased died aged 51 years. The retirement age is 60 years. It is prudent to factor in the vicissitudes of life in determining the multiplier to be adopted. Courts have repeatedly addressed this issue with clarity. For example, in the case of Rose Munyasa & another v Daphton Kirombo & another [2014] eKLR, D.A. Onyancha J. stated:

> In determining a reasonable multiplier to be applied in a case such as this one, the court is required to apply the facts available before it. In the instant case, there is no evidence before the court as to when the deceased was to retire from employment. There is no guarantee that the deceased could have lived to the retirement age of 60 years, as suggested by the Plaintiffs. This court takes judicial notice of the fact that the life expectancy of an average Kenyan has, in recent years, gone down due to the increased incidences of poverty, the HIV/AIDS pandemic and other diseases.

The learned trial magistrate assumed that the deceased was going to retire at the age of 60. I am persuaded to set aside the 9-year multiplier and substitute it with a 6-year multiplier. The loss of dependency will therefore be as follows: 13,572.90 × 6 × 12 × 2/3 = Kshs. 651,499.20.

The award for loss of dependency of Kshs. 977, 248.80 is set aside and substituted with an award of Kshs. 651,499.20.

10. I have carefully looked at the awards on the other heads and I am satisfied that I have no reason to interfere.

11. The appeal has succeeded to that extent. The appellant will be entitled to one-third of the costs of this appeal.

DELIVERED AND SIGNED AT MAKUENI, THIS 4TH DAY OF NOVEMBER 2025

KIARIE WAWERU KIARIE

JUDGE