



**Sunculture Kenya Limited v Ndwiga & another (Suing as Administrators
of the Estate of Jeremiah Mbogo Mugo) & 3 others (Civil Appeal
E019 of 2024) [2025] KEHC 16080 (KLR) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E019 OF 2024
RM MWONGO, J
NOVEMBER 5, 2025**

BETWEEN

SUNCULTURE KENYA LIMITED APPELLANT

AND

**MICHEK MUREITHI NDWIGA & MARY MBULA (SUING AS
ADMINISTRATORS OF THE ESTATE OF JEREMIAH MBOGO
MUGO) 1ST RESPONDENT**

ZAMBEZI AUTO LIMITED 2ND RESPONDENT

ELEASE LIMITED 3RD RESPONDENT

EPHANTUS NDUNG’U WANYEKI 4TH RESPONDENT

*(Appeal arising from the decision of Hon. Robert G. Mundia, PM
in Embu CMCC No. E157 of 2022 delivered on 01st February 2024)*

JUDGMENT

The Appeal

1. By a memorandum of appeal dated 29th February 2024, the appellant seeks orders that:
 - a. That this appeal be allowed and the Judgement of the Lower Court be set aside;
 - b. That the suit against the Appellant in the Lower Court be dismissed in its entirety;
 - c. That without prejudice to (a) and (b) above, the Court be pleased to re-assess and thereby reduce damages assessed by the Lower Court;
 - d. That the costs of this Appeal and the Lower Court be borne by the Respondents herein; and



- e. Any other or further relief the Honourable Court shall deem fit and just to grant.
2. This appeal is premised on the grounds that:
 1. The learned Magistrate erred in law and fact by failing to make a determination on the legal effect of the 3rd Respondent Elase's Limited agreeing expressly and in writing to take up comprehensive insurance cover for the motor vehicle KDG 724K;
 2. The learned Magistrate erred in law and fact by failing to hold that the taking up of comprehensive insurance cover by the 3rd Respondent, Elase Limited was an acceptance by the 3rd Respondent to take the risk for liability such as the one arising from the accident giving rise to the suit in the Trial Court;
 3. The learned Magistrate erred in law and fact in by failing to hold that by virtue of the clause to take comprehensive insurance cover for the motor vehicle, then the 3rd Respondent was obligated to fully indemnify the Appellant for the liability arising from the suit in the Lower Court;
 4. The learned Magistrate erred in law and fact in awarding a sum of Kshs.30,000/= as special damages when the Plaintiffs had disowned a receipt for the said amount in Court during testimony;
 5. The learned Magistrate erred in law and fact in applying a multiplier of 18 years without considering the vicissitudes of life;
 6. The learned Magistrate erred in law and fact by failing to give weight to, consider and fathom the Appellant's written submissions and authorities; and
 7. The learned Magistrate erred in law and fact in awarding costs of the suit and interest against the Appellant.

Background

3. By a plaint dated 30th November 2022, the 1st respondent/plaintiff sought judgment against the appellant and the 2nd, 3rd and 4th respondents/defendants for damages under the Fatal Accidents and Law Reform Acts, special damages of Kshs.31,550/=, reasonable burial expenses, Costs of the suit and interest.
4. It was their case that on 20th May 2022, the deceased was lawfully parking his motor cycle registration number KMFU 750U at a boda boda parking shade along Mama Ngina Street in Embu Township when the 4th respondent drove motor vehicle registration no. KDG 724K so negligently that it lost control and veered off its lane. It then violently knocked down the deceased causing him fatal injuries. According to the plaint, the 2nd respondent is the registered owner of the motor vehicle, the appellant and the 3rd respondent are the beneficial owners of the motor vehicle while the 4th respondent was the driver of the motor vehicle at the time of the accident.
5. The plaint detailed the particulars of negligence and stated that the 2nd, 3rd and 4th respondents were vicariously liable for the negligent actions of the appellant. The 1st respondent stated that the deceased was 42 years old at the time of the accident and he was a businessperson in Embu. That he was survived by a wife and 3 children.



6. The appellant filed its statement of defense denying the averments made in the plaint. It also stated that it would be seeking indemnity and contribution from the 2nd, 3rd and 4th respondents but no liability was admitted.
7. The 3rd respondent filed a statement of defense stating that at the time of the accident, the motor vehicle had been lawfully leased to the appellant. That it (the 3rd respondent) did not have use, possession or control of the motor vehicle and that the 4th respondent was an employee or servant of the appellant. It denied knowledge of the accident or any liability accruing to it as a result of the accident.

Summary of the Evidence

8. At the hearing, PW1 was PC Noor Adan of Embu Traffic Base who was the investigating officer in the case. He stated that he visited the scene and blamed the driver of the motor vehicle registration no. KDG 724K for the accident. He produced the police abstract as evidence. On cross-examination, he stated that the deceased died instantly. That at the time of the accident, the motor vehicle was insured by the 3rd respondent.
9. PW2 was Mary Mbula Munyithya, the deceased's wife, who stated that on the day of the accident, she received a call from one of her neighbours who informed her that her husband had been involved in a road accident and he had died. She went to Embu Level 5 Hospital mortuary and confirmed that indeed her husband was dead. She began making funeral arrangements which costs Kshs.150,000/= but she could not keep all the receipts as it was an emotional time and she was not able to track all the receipts.
10. After the burial of the deceased, they got a police abstract indicating that the appellant's motor vehicle registration no. KDG 724K which was being driven by the 4th respondent was to blame for the accident. She instructed an advocate and got letters of administration ad litem to enable her sue the appellant and all relevant parties. She testified that at the time of his death, the 42-year-old deceased was a businessman earning Kshs.30,000/= and he left behind a wife and 3 children who are all minors. On cross-examination, she stated that she did not have proof of earnings of the deceased. She also did not have receipts for funeral expenses. She did not know how the 3rd respondent became a party to the case.
11. PW3 was Alex Munene Njue. He testified that he was with the deceased before the accident. He stated that while they had both parked their motor cycles at the shade at the junction of Embu-Kiritiri road along Mama Ngina Street, the appellant's motor vehicle rammed into the deceased's motor cycle. He rushed to check on the deceased and noted that he was bleeding profusely from his head. He helped to call for help from the police who took the deceased to Embu Level 5 Hospital and he was looking lifeless.
12. The following morning, he heard that the deceased had been pronounced dead on arrival at the hospital. On cross-examination, he stated that he learned of the death of the deceased the following day thus he did not know whether the deceased died instantly. At the time of the accident, he did not engage the 4th respondent but a crowd attacked him before the police arrived. He said that the road was not busy at the time of the accident and there were about 6 other boda boda riders at the shade with the deceased at the time. He did not accompany the deceased to the hospital but he left his contacts with the police.
13. DW1 was George Kariuki Murani, an Engineer at the appellant company. He stated that the 4th respondent was an employee at the appellant company and on the day of the accident, he was given motor vehicle registration No.KDG 724K at about 8pm as he had a client engagement in Murang'a. The car was handed over to him at Lexo Petrol Station in Embu on 20th May 2022, the day of the



accident, but he was supposed to go to Murang'a the following day. He stated that the car was leased from the 3rd respondent, who, under the lease terms, had an obligation to have the motor vehicle insured comprehensively. At the time of the accident, the vehicle was duly insured under Britam Insurance thus the risk was assumed by the 3rd respondent.

14. The appellant learned of the accident at 10pm that day but the 4th respondent was not in his usual employment duties at the time because he was given the vehicle to park at home and use it the following morning for work duties. It was his evidence that the manner in which the 4th respondent was using that motor vehicle that night was unauthorized and this was unearthed during a disciplinary process. That he was using the vehicle for personal errands outside working hours and this was strictly prohibited. He stated that the appellant ought to be absolved from any liability arising from that case.
15. In cross-examination, he stated that the motor vehicle was given to the 4th respondent at 8pm in the evening of that day. He did not have the 4th respondent's work ID or terms of service. He also did not know whether the 4th respondent was drunk at the time of the accident because he was not at the scene but this emerged at a disciplinary hearing. The 3rd respondent did not have control over the actions of the 4th respondent but it had duly insured the motor vehicle. That by carrying the cooker in the vehicle, it was possible that the accident was imminent.
16. DW2 was Sismoda Karimi Mwaniki, an office administrator at the 3rd respondent company. She stated that once the motor vehicle was leased to the appellant, the 3rd respondent ceded all control over it. She referred to clause 3.1 of the lease agreement and stated that the 3rd respondent is not vicariously liable for the accident. That the insurance policy was only to cover for material damage to the motor vehicle and not where the driver was negligent such as was the case herein. This is why the 3rd respondent filed a suit against the appellant for compensation for material damage in Embu CMCC No. E009 of 2023. She referred the policy document which indicates that the appellant would be liable for upto 3 accident per year where its employee is held liable for negligence. On cross-examination, she stated that she was not present at the scene but she was informed of the accident. The insurer refused to take liability for the accident because it was exempt per the policy document.

Findings of the Trial Court

17. The trial court relied on the case of *Donoghue v Stevenson* [1932] AC.562 at 500 and *Morgans v Launchbury*, (1972) 2 All ER 606. It found that the 4th respondent was indeed a servant of the appellant but in the evidence, it did not emerge at what time his official duties ended even though he was blamed for using the vehicle outside working hours. The appellant was held vicariously liable for the accident which resulted in the death of the deceased, since the 4th respondent had the express authority of the appellant to use the motor vehicle. The trial court held that the 2nd and 3rd respondents were not vicariously liable for the acts of negligence of the 4th respondent. The appellant and the 4th respondent were held 100% liable for the accident.
18. The trial court assessed damages as follows:
 1. Pain and suffering: Kshs.60,000/=
 2. Loss of expectation of life: Kshs.150,000/=
 3. Loss of dependency: Kshs.1,167,696/=
 4. Special damages: Kshs.31,550/=



Parties Submissions on the appeal

19. This appeal was canvassed by way of written submissions.
20. The appellant submitted that it denied liability and issued notices against the 2nd and 4th respondents who never entered appearance and judgment was entered against them. That the trial court failed to determine the legal effect of the lease agreement between the appellant and the 3rd respondent which issue would have clarified the obligations of the insurance company. It was its argument that default judgment was entered against the 2nd respondent who was the registered owner of the motor vehicle in question while the 3rd respondent was its beneficial owner.
21. It argued that the lease agreement negotiated and entered into with the 3rd respondent did not limit the kind of risk that would be covered by insurance. That the case involved a third party claim and that the 3rd respondent should have been held accountable for the accident as a risk it took and insured. Following the accident, the 3rd respondent made a claim from its insurer. Reliance was placed on the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR). It challenged the assessment of damages and claimed that the multiplier applied by the trial court was too high and it proposed 14 years, referring to the case of Florence Ngina Nyalando Achacha v Daniel Munyua Njathi & another [2015] KEHC 7917 (KLR) and Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) [2020] KEHC 1806 (KLR).
22. The 1st respondents submitted that the trial court's findings are fair and should not be disturbed. They relied on the cases of Khambi & Another v Mahithi & Another [1968] EA 70, Jekawa Agencies Limited v Macharia & another (Suing as legal representatives of the estate of the Late Elijah Gachoka Macharia) [2023] KEHC 19328 (KLR), Catholic Diocese of Kisumu v Tete [2004] KECA 154 (KLR), Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] KEHC 1103 (KLR) and Mbero v Kibiku (Sued on their Own Behalf and as Administrators of the Estate of Simon Kibuku Kamau - Deceased) [2023] KEHC 23459 (KLR). They agreed with the assessment of damages by the trial court and urged this court to uphold the assessment.

Issues for determination

23. From the foregoing, the issues for determination are the following;
 1. Whether the trial court's finding on liability should be set aside; and
 2. Whether damages awarded should be reassessed.

Analysis and Determination

24. As a first appellate court, it is the duty of this court to reexamine the evidence adduced at trial. This was held in the case of Williamson Diamonds Ltd and another v Brown [1970] EA 1, thus:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”
25. In order to determine the first issue, it is important to look at the duties and obligations of the various parties in this suit. The 2nd respondent is the registered owner of the vehicle according to the motor vehicle government records. It was served with the plaint and summons to enter appearance but it neither entered appearance nor defended the suit. The 4th respondent who was the driver of the motor



- vehicle at the time of the accident was also served but he failed to enter appearance or to defend the suit. The 1st respondent prayed that judgment be entered against them and the trial court made the order accordingly.
26. In the plaint, the 3rd respondent is described as the beneficial owner of the motor vehicle in question. In its defense, the 3rd respondent admitted that it was the beneficial owner of the motor vehicle but stated that at the time of the accident, the vehicle had been leased out to the appellant. It produced a lease agreement dated 02nd March 2022 as proof. One of the obligations of the lessor under clause 3.3 of the lease was to ensure that throughout the period of the lease, the motor vehicle is comprehensively insured with a reputable insurance company. This requirement was met and it was never in dispute and it was disclosed that the vehicle was insured by Britam Insurance.
27. In the police abstract produced by PW1 as evidence, the insurance policy was made out to the 3rd respondent. However, the fact that the vehicle was insured by the 3rd respondent did not clarify whether the cover extended to the user of the vehicle, who in this case was the appellant as a lessee. No policy document was produced as evidence to disclose any conditions attached to the insurance.
28. Section 4(1) of the Insurance (Motor Vehicle Third Party Risks) Act provides:
- “Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.”
29. Section 7 of the Insurance (Motor Vehicle Third Party Risks) Act provides:
- “(1) A certificate of insurance shall be issued by the insurer to the person by whom a policy of insurance is effected.
- (2) Such certificate shall be in the prescribed form and shall contain such particulars of any conditions subject to which the policy is issued and of any matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.” [Emphasis added]
30. As I understand them, these provisions mean that the person to whom the insurance policy is made out, is the insured and that the motor vehicle user should be either him or person authorized by him and on such conditions as specified. In other words, the user of the motor vehicle should be insured and such insurance should also provide for third party risks. In this case, at the time of the accident, the vehicle was being used by the appellant, a lessee, through its employee, the 4th respondent. As the driver was using the vehicle, the obligations of the appellant under the Insurance (Motor Vehicle Third Party Risks) Act were not satisfied.
31. The trial court was not presented with a chance to see any conditions of the insurance certificate or policy in light of the fact that that motor vehicle was being leased to the appellant. Given that there is an undisputed lease agreement in place the appellant and the 3rd respondent do not have a fiduciary relationship. Theirs is an actual contract with obligations that stand in law inter se.
32. This is why the appellant had an obligation to insure the motor vehicle by itself before using it as lessee. It means that the appellant should have pursued transfer of the insurance certificate to itself for the period of the contract in order for the requirements for insurance to be satisfied under the Act, or



ensure that the insurance conditions in place provide for it as a lessee. It, therefore, goes without saying, that the 3rd respondent could not be held liable for the accident because:

- i. It fulfilled its obligation to comprehensively insure the motor vehicle before leasing it out; and
 - ii. It did not have an obligation to oversee how the motor vehicle was being used by the lessee after it was leased out.
33. The concept of liability is like a moving target. It is like a game of musical chairs where, when the music stops, the party left standing loses. It may also be likened to a game of passing a hot potato around and the person who drops it loses. Loss, in this case, is the occurrence of the negligent act. From the previous paragraphs, it has been established that 3rd respondent cannot be held liable. This is because before leasing the vehicle, the 3rd respondent bore liability but once the vehicle was leased, the risk of liability was passed to the lessee, who is the appellant. The appellant had the duty to mitigate that risk of liability by getting insured under the Insurance (Motor Vehicle Third Party Risks) Act, or obtaining a full indemnity under the lease agreement.
34. The 1st respondent's case was that as a result of the 4th respondent's negligent driving, the deceased suffered fatal injuries. Throughout the case, it was abundantly clear that the 4th respondent was the appellant's employee. DW1 confirmed this and even stated that the 4th respondent was misusing the vehicle, and may even have been driving while drunk. He testified that the company conducted disciplinary proceedings internally following the accident and the 4th respondent was dismissed from employment.
35. This evidence establishes that the Appellant is vicariously liable for the negligent acts of its driver employee, the 4th respondent. Vicarious liability, according to the 9th Edition Black's Law Dictionary means:
- “Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”
36. The trial Court correctly found (at pg.12 of the Judgment), that the 4th Respondent took over the vehicle at 2000 hours and the accident occurred at 2200 hours; that the appellant did not state at what time the driver's duty stopped running; and opined that the driver had the appellant's express authority; and was thus vicariously liable having not produced any evidence that the driver was on a frolic on his own.
37. In the case of *Khayigila v Gigi & Co Ltd & another* [1987] KECA 53 (KLR), the Court of Appeal, in determining an appeal on the sole issue of vicarious liability, opined thus:
- “For the vehicle owner to be responsible for the negligence of the agent, that agent must have been detailed to do a task beneficial to or on behalf of the owner. The recent decision of this court in *Nakuru Automobile House Ltd v Nasiruddin Ziauddin* Civil Appeal No 63 of 1986 based its decision on *Morgan v Launchbury and Others* [1972] 2 All ER 606 and held that the owner of the car was not vicariously liable for the negligence of the driver of the car who had borrowed it to enjoy the rally. The driver was not at the time of the accident driving the vehicle as a servant or an agent of the owner. In the present appeal, the second respondent was not driving the vehicle as a servant or agent of the first respondent. The second respondent was not driving for the benefit of the first respondent nor did he have a task to do for and on behalf of the first respondent. He was driving the car for his own benefit



and interest. I would also dismiss this appeal.” (see also the case of *Ndungu v Ndungu* [2025] KEHC 2025 (KLR))

38. Therefore, the findings of the trial court on liability ought not to be disturbed as they are based on the well propounded principles of law.
39. On the issue of assessment of damages, the trial court awarded Kshs.60,000/= for pain and suffering. PW3 was with the deceased on the night of the accident and he stated that he was informed that the deceased was pronounced dead on arrival at Embu Level 5 Hospital. PW2, the wife of the deceased testified that she was informed to go to the same hospital as her husband had been involved in an accident. She went and confirmed that he had already died.
40. This evidence proves that the deceased did not suffer before he died and so the award in this case should be kept at the minimum. The trial court stated that it had considered all factors and the case of *Mercy Muriuki & another v Samuel Mwangi Nduati & Anor* (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR) where the court observed:
- “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 Ksh.100,000/- while for pain and suffering the awards range from Ksh.10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
41. In the premises, the award by the trial Court of Kshs.60,000/= as general damages for pain and suffering is fair, considering all factors.
42. The award for loss of expectation of life was assessed at Kshs.150,000/= which is also fair, considering all factors. This point was considered in the case of *Benham v Gambling*, (1941) AC 157 where the court stated:
- “In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”
43. For general damages for loss of dependency, the trial court resorted to the multiplier method because there was no proof of earnings of the Kshs.30,000/= pleaded by the deceased’s wife. The deceased died on 20th May 2022, a few months after the passing of the Regulation of Wages (General) (Amendment) Order 2022 which was applicable at the time. PW2 testified that the deceased was a boda boda operator at the time of his death. According to that Order, the deceased, who was a boda boda operator in Embu town falls under the category 1 of the Schedule for workers whose minimum wage is Kshs.8,109.90/=. This is the correct multiplier. The figure of damages should therefore be $8,109.90 \times \frac{2}{3} \times 18 \times 12 = 1,167,825.60$.
44. On the issue of multiplicand, the court applied 18 years, looking at the formal retirement age in Kenya. In the present case, a multiplicand of 18 years is sufficient given the nature of the deceased’s daily business and the fact that he was in good health. The trial court applied a $\frac{2}{3}$ ratio because there was proof that the deceased left 3 dependant children who are all minors. This is fair in the circumstances.



45. For special damages, the 1st respondent produced 3 receipts totaling Kshs.31,550/=. That amount was correctly awarded.

Disposition

46. In light of the foregoing detailed discussion, I find nothing in the appeal to persuade me to interfere with the trial court's judgment. Accordingly, the appeal lacks merit and is hereby dismissed.

47. The findings of the trial court on liability are hereby upheld. Similarly, the findings on quantum are upheld save for the award of damages for loss of dependency which I hereby review upwards to Kshs.1,167,825.60/= $(8,109.90 \times \frac{2}{3} \times 18 \times 12)$.

48. Each party shall bear their own costs of the appeal.

49. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 5TH DAY OF NOVEMBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Ogola holding brief for Ms. Burungu for Appellants

Ms. N. Magee for 3rd Respondent

K. Ndolo for 1st Respondent

No Representation for 2nd Respondent

No Representation for 4th Respondent

Francis Munyao - Court Assistant

