



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E103 OF 2023**

**BETWEEN**

**SAMUEL KAMAU NJOROGE.....1<sup>ST</sup> APPELLANT**  
**STEPHEN MWANGI MURIMI.....2<sup>ND</sup> APPELLANT**

**AND**

**MICHAEL MWATU PETER**  
**& EUNICE NDINDA MWATU (suing as legal representatives of the estate of BENJAMIN**  
**KIOKO KASYA-DECEASED) ..... RESPONDENTS**

*(Being an appeal from the judgment and decree in the Tawa Senior Principal Magistrate's Court, SPMCC No. E128 of 2022 by Hon. F. Makoyo (Principal Magistrate)).*

**JUDGMENT**

1. Samuel Kamau Njoroge and Stephen Mwangi Murimi were the defendants in Tawa Senior Principal Magistrate's SPMCC No. E128 of 2022. They were sued for a claim of general and special damages following a road traffic accident involving their motor vehicle, with registration number KAS 679B, and motorcycle registration number KMEL 433S, on which the deceased was a pillion passenger. As a result of the accident, the deceased suffered fatal injuries. The learned trial magistrate held the appellant 100% liable for the accident. The respondents were awarded Kshs. 740,960/= special damages and Kshs. 2,909,704/= general damages.
2. The appellants were dissatisfied with the judgment and filed this appeal through Evan Mbugua, Advocate. They raised the following grounds for appeal:
  - a) The honourable court erred in condemning the appellants and finding them negligent for the suit based on a written statement of the deceased, which the appellants had no opportunity to cross-examine to establish the credibility, veracity and accuracy of the allegations contained therein.

- b) The honourable court erred in relying on the contents of the police abstract that were not proved to shift the burden of proof on the appellants to disprove the respondents' allegations of negligence.
  - c) When no evidence existed that the deceased died of injuries that she sustained from the suit accident, the honourable court erred in awarding damages under the Fatal Accidents Act.
  - d) The honourable court erred in expecting the appellants to disprove the unproven allegation that the deceased died from injuries sustained from the suit accident.
  - e) The honourable court erred in awarding damages for loss of dependency when the oral evidence on behalf of the respondents did not address the alleged dependency, and the other material evidence did not establish the names and ages of any alleged dependants.
  - f) The honourable court erred in awarding general damages in a vacuum.
  - g) The honourable court erred in failing to consider relevant matters and in disregarding the relevant matters in arriving at the decisions on liability and in assessing damages.
3. The respondent opposed the appeals through Okao & Company Advocates. They argued it had no merit.
  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 respondent was a passenger in the appellant's bus. He was travelling with his father, who testified to an accident around the Sultan Hamud area. He blamed the bus driver for the accident. The respondent did not testify. **In Baker vs Market Harborough Industrial Co-Operative Society Ltd [1953] 1 WLR 1472 at 1476**, Denning L.J. (as he then was) observed inter alia as follows:  
*Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would*

*unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them...*

6. On the 27<sup>th</sup> day of December 2021, the deceased was involved in a road traffic accident, which the appellants are blamed for. Mr. W. Wokabi, a consultant surgeon, examined her on April 14, 2022. At the time, she was still bedridden owing to the injuries she sustained in the complained-of accident. The doctor observed that she was unable to stand or walk, use ordinary toilets, or perform any work, including domestic chores. This document was produced by consent of the parties.
7. The copy of the death certificate that was also produced by consent indicates that the cause of death was a road traffic accident.
8. Though Michael Mwatu Peter did not witness the accident, he relied on a statement made by the deceased while still alive. Indeed, this evidence was not exposed to cross-examination. It could not have been for the deceased, who had long passed away.
9. I agree with the trial court's conclusion that the accident mentioned in her death certificate is the incident that occurred on 27 December 2021. The surgeon's findings made it clear that the injuries from the accident caused her death.
10. Accidents do not just happen. **In Baker vs Market Harborough Industrial Co-Operative Society Ltd [1953] 1 WLR 1472 at 1476**, Denning L.J. (as he then was) observed inter alia as follows: -

*Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both.*
11. The appellants did not tender any evidence. The police, as shown in the abstract that was produced by consent, blamed the appellant's driver for the accident. The appellants presented no evidence. The learned magistrate did not consider any other version. They cannot argue that the liability was wrongly determined. The appeal on liability is dismissed.
12. The appellant argued that the learned magistrate made an error in awarding damages for loss of dependency without proof. 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.*

13. The appellants argued that dependency was not proven. Michael Mwatu Peter (PW1) testified that the deceased was his wife and that they had children who were dependents. This evidence was not controverted or challenged. The appellants cannot be heard to claim that the same was not proven.
14. The above analysis of the evidence concludes that the appeal has no merit. The same is dismissed with costs.

**Delivered and signed at Makueni, this 21<sup>st</sup> day of November 2025**

**KIARIE WAWERU KIARIE**

**JUDGE**