

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT THIKA  
CIVIL APPEAL NO. E090 OF 2025

SAMUEL KIBUGA.....1<sup>ST</sup>  
APPELLANT  
DAVID NYACHIO MONYONCHO.....2<sup>ND</sup>  
APPELLANT

-VERSUS-

JOSPHAT MURITHI M’ITWARUCHU &  
INYASIA KAIGONGI (Suing as legal representatives of the estate of  
Juster Gatwiri Murithi).....RESPONDENTS

***(Being an appeal from judgment and decree in the Chief Magistrate’s Court at Thika  
(Hon. J.N. Wambilyanga SPM) civil case number E437 of 2024 dated 25<sup>th</sup> March 2025)***

**JUDGMENT**

According to the plaint filed dated 10<sup>th</sup> June 2024 filed in the lower court, the respondents sued the appellants in their capacity as legal representatives of the estate of Juster Gatwiri Murithi (hereinafter referred to as ‘the deceased’) who had been involved in a fatal accident with motor vehicle registration number KCS 200V (hereinafter referred to as ‘the vehicle’) which was driven by the 1<sup>st</sup> appellant and registered to the 2<sup>nd</sup> appellant. The appellants filed a defence dated 12<sup>th</sup> June 2024 denying liability. Upon full hearing, where the 1<sup>st</sup> appellant was the only witness on their side and the respondents calling 3 witnesses, the court found the appellants 100 per cent liable for the accident and proceeded to award damages as follows;

- |                                |                   |
|--------------------------------|-------------------|
| 1. Pain and suffering          | Kshs 100,000/=.   |
| 2. Loss of expectation of life | Kshs 100,000/=.   |
| 3. Loss of dependency          | Kshs 7,680,000/=. |
| 4. Special damages             | Kshs 120,500/=.   |

The appellants were dissatisfied with the finding on both liability and quantum and have raised the following grounds of appeal;

1. **THAT** the learned Honourable Magistrate erred in law and fact in finding the Appellants 100 per cent liable for causing the accident completely disregarding the circumstances under which the accident occurred especially the police report on record that the deceased was crossing the road in an undesignated area when the accident occurred.
2. **THAT** the learned Honourable Magistrate erred in law and fact in failing to consider that the police officer's testimony was not supported by documentary evidence on record.
3. **THAT** the learned Honourable Magistrate erred in law and fact in finding in favour of the Respondent whereas he had not satisfied his burden of proof.
4. **THAT** the learned Honourable Magistrate erred in law and fact in finding that the traffic charges preferred against the 1<sup>st</sup> appellant conclusively determined that he was liable for the accident.
5. **THAT** the learned Honourable Magistrate erred in law and fact in applying a multiplier of 32 years which was too high considering the age of

*the deceased at the time of her death and thereby arriving at an excessive and inordinately high award of Kshs. 7,680,000.00 in respect of loss of dependency/lost years.*

6. **THAT** *the learned Honourable Magistrate erred in law and fact in failing to appreciate the plaintiff had failed to avail proof of the deceased's qualifications as a registered nurse.*
7. **THAT** *the learned Honourable Magistrate erred in law and fact in applying a multiplicand of Kshs. 30,000.00 whereas the letter from Mediva Wellness Centre dated 25<sup>th</sup> March 2023 indicated the deceased was offered employment for a temporary basis with no duration indicated and thereby arriving at an excessive award of Kshs. 7,680,000.00.*
8. **THAT** *the learned Honourable Magistrate erred in law and fact in applying a multiplicand of Kshs. 30, 000.00 without any credible evidence to establish and support that the deceased had started working at Mediva Wellness Centre and was still working at Mediva Wellness Centre at the time of the accident.*
9. **THAT** *the learned Honourable Magistrate failed to consider the respondent's second witness testimony who confirmed that he worked together with the deceased at a different place of employment, Seventh Avenue Ngoingwa Hospital.*
10. *The learned Honourable Magistrate erred in law and fact in applying a Multiplicand of Kshs. 30, 000.00 without appreciating that binding*

*decisions have determined that a net salary which factors statutory deductions should be applied where a deceased was working.*

- 11. **THAT** the learned Honourable Magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented and filed by the appellants and heavily relying on the submissions by the respondent.*
- 12. **THAT** the learned Honourable Magistrate erred in law and fact in awarding damages for lost years based on an unsubstantiated offer of employment and failed to apply a lump sum/global award where proof of earnings was not substantiated.*
- 13. **THAT** the learned Honourable Magistrate erred in law and fact by applying a high dependency ratio of 2/3 despite the deceased being survived with only one child and no dependency was proved by the deceased's father.*
- 14. **THAT** the learned Honourable Magistrate erred in law and fact in failing to indicate she had taken into account the award under the Law Reform Act when making the award under the Fatal Accidents Act thereby making the deceased's estate benefit twice.*
- 15. **THAT** the learned Honourable Magistrate awards under the Law Reform Act were inordinately high and excessive in the circumstances occasioning miscarriage of justice.*

*16. THAT the Learned Honourable Magistrate erred in law and fact in awarding special damages of Kshs. 120,500.00 without supporting receipts.*

There are three principals which will guide this court in disposing this appeal. First is that, this is a first appeal which calls upon this court to re-examine and re-evaluate the evidence of the parties as produced in the trial court and come to its own independent conclusions but bear in mind that it did not take the evidence of the witnesses first hand or have the advantage of observing their demeanour. The second principle is that the appellate court should not replace the judgment of the trial court with its own just because it would have arrived at a different decision.

The third principle is that the award of damages always at the discretion of the trial court and the appellate court should not disturb the discretion unless it is demonstrated that the trial court took into consideration a factor that it should not have taken or failed to take into account a factor it should have or the damages were too high or low that they amounted to an erroneous estimates.

These principles were restated in the following cases among others;

- ***Mursal & another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (2022) KEHC 282 (KLR)***, where Honourable Justice J.M. Mativo held as follows;

*‘A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing*

*in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.'*

- ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) KECA 174 (KLR)***. In this matter the Court of Appeal stated that;

*'The Court of Appeal may only interfere with the exercise of a court's judicial discretion if satisfied:*

- 1. The judge misdirected himself on law; or*
- 2. that he misapprehended the facts; or*
- 3. that he took account of considerations of which he should not have taken account; or*
- 4. that he failed to take account of consideration of which he should have taken account; or*
- 5. that his decision, albeit a discretionary one, was plainly wrong.'*

- ***Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) KECA 329 (KLR)*** in which the Court of Appeal had the following to say;

*'Assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country, such as inflation, and also prior relevant decisions. An appellate court should only interfere with such an award where the trial Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or where the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.'*

### ***The respondent's case***

The respondent's first witness was PC Paul Mutugi from Thika police station who told the court that he was in court to produce a police abstract in respect of an accident that occurred on 9-02-2024 at 10.00 pm along Thika-Mangu road involving the vehicle and the deceased. The vehicle was being driven by one Samuel Kibuga Njoroge who lost control and veered off the road to the left side and knocked the deceased who was walking off the road towards Thika direction. The deceased was rushed to Thika level 5 hospital by the driver using the same vehicle but she succumbed to the injuries while undergoing treatment. He added that after investigations, the driver was charged with offence of causing death by dangerous driving. He added that two witness witnessed the accident. He also stated that at the time the police abstract was issued, the case was still pending under investigations.

In cross-examination, the witness maintained that the driver of the vehicle was to blame for the accident. He made reference to occurrence book entry number 133/9/2/2024 and denied knowing another entry which blamed the deceased although he was not the investigating officer. The witness also stated that the point of impact was 1.5 metres from the road and he was not aware that a sketch map had been filed in court. He denied that the pedestrian was crossing the road but admitted that the driver had not yet been convicted. He concluded by stating that the vehicle was damaged on its left side.

The second witness was Elijah Mwaura who told the court that on the said date, the deceased and him were walking off the road when the motor vehicle came from behind at high speed, veered off the road and knocked them. He denied that the deceased was crossing the road. He added that they were rushed to Thika level five

hospital by a good samaritan named as Ann but the deceased succumbed to the injuries. He blamed the driver of the vehicle for failing to maintain his lane.

In cross-examination, he maintained that the vehicle veered off road and denied that the deceased jumped onto the road. He stated further that he went to the scene with the police and denied being paid to attend court to testify.

The 1<sup>st</sup> respondent came in as the third witness and told the court through his statement dated 10-06-2024 which he adopted as his evidence in chief that he was the father to the deceased who was involved in an accident on 9-02-2024. He stated that he received a call from one Ann who informed him that she had witnessed an accident where his daughter was involved and that she took him to Thika level five hospital in a critical condition where she died at the casualty. He went to mortuary in Thika on 10-02-2023 and confirmed at that the deceased had passed on. He added that the deceased was aged 28 years and was working as a nurse at Mediva Hospital in Juja earning a salary of Kshs 30,000.00 per month with which she supported him and her son. He produced a total of 14 exhibits in support of the case.

In cross-examination, he denied that the deceased caused the accident and admitted that the police abstract he had produced did not blame the driver. He stated further that the deceased was his daughter aged 28 years and insisted that the letter dated 25-03-2023 from Mediva hospital was not fake but admitted that the deceased was temporarily employed. He added that there were no payslips or education certificate for the deceased but he maintained that the deceased was supporting him and her child. He denied that the father of the child who had separated with the deceased was supporting the child.

### ***The appellant's case***

The 1<sup>st</sup> appellant confirmed in his testimony that he was the owner of the vehicle and he was also driving at the time of the accident. He added that on the material day, at classic area while he was driving at 50 kilometres per hour, a female pedestrian suddenly dashed onto the road from the left side in an attempt to cross the road and without checking the oncoming traffic and came into contact with the vehicle. He stopped and rushed her to hospital. He was thereafter arrested and taken to the police cells and his vehicle towed to the station for further investigations. He produced an investigation report dated 3-04-2024 as his exhibit.

In cross-examination, the 1<sup>st</sup> appellant admitted that he was charged with an offence he referred to as causing an accident and released on cash bail of Kshs 100,000.00. He admitted that he saw the deceased and applied brakes in vain and knocked the deceased. He maintained that he was driving at 50 kilometers per hour.

### ***Analysis and determination***

The appeal was argued by way of written submissions. The appellants filed their submissions dated 4<sup>th</sup> July 2025 while the respondents filed theirs dated 4<sup>th</sup> August 2025. From the submissions read together with the record of appeal, I have formed the opinion that the issues for determination in this appeal are;

- a. Who was to blame for the accident?
- b. Whether the trial court applied wrong principles in assessing damages.
- c. What was if any, the right quantum of damages?

The appellants have in their submissions raised an issue of lack of service of summons. This is an issue which is not pleaded in the memorandum of appeal neither was it an issue in the lower court. I will not take my time in discussing that foreign issue.

The appellants have not denied the ownership of the vehicle. The 1<sup>st</sup> appellant admitted in his testimony that the vehicle belonged to him while the record shows that the 2<sup>nd</sup> appellant was the registered owner. No party has raised the issue of ownership in this appeal and this court will not go into it. I gather from the submissions and evidence of the parties that the contest on liability is, who between the deceased and the 1<sup>st</sup> appellant was to blame for the accident.

The appellants have submitted that the evidence of PW2 and PW3 was contradictory as to how the accident occurred. They also add that the narrative that PW2 was also hit by the vehicle was not correct because he did not produce any evidence of injuries and treatment thereof and as such it was clear that only the deceased was hit by the vehicle. According to the appellants, these contradictions point to the fact that the version that the vehicle veered off the road was not adding up.

The appellants also took issue with the fact that there was no vehicle inspection report produced in proof of damage or roadworthiness of the vehicle neither did the respondents produce a sketch plan to show the point of impact. The appellants also submit that the point of impact was in the middle of the road and pointed out that the occurrence book entry extract contained in their investigation report blamed and showed that the deceased as having been hit while crossing the road. It is also

submitted that the trial court was wrong in basing its decision on liability on a charge in the traffic case without proof of conviction.

On their part, the respondents submit that the evidence of the witnesses was consistent and the trial court was right in finding the appellants 100 per cent liable. They indicated that the accident occurred off the road as narrated by the witnesses. They add that the police concluded investigations and the 1<sup>st</sup> appellant was subsequently charged after the Office of the Director of Public Prosecutions approved the charges and cited Section 7 of the Evidence Act. On the sketch plan, the respondents argued that PW1 had carried all the documents in court but the appellants did not interrogate or ask for them and as such, they should be stopped from challenging the same.

I have looked at the judgement of the trial court on the issue of liability. The court stated that there was an eye witness who gave evidence on how the accident occurred and that the police had completed their investigations and charged the 1<sup>st</sup> appellant in a traffic case and according to it, that was enough to impute liability on the appellants. It is true that PW2 was an eye witness but it should not be ignored that the 1<sup>st</sup> appellant was also an eye witness to the accident. The 1<sup>st</sup> appellant and PW2 gave different versions of how the accident occurred.

While the 1<sup>st</sup> appellant insisted that the deceased was crossing the road, PW2 maintained that the vehicle veered off the road and knocked him and the deceased. These are their words against each other and for the court to establish the truth between the two, it must consider other available evidence or pointers. The court must have a reason to believe one version and not the other. There were no sketch plans drawn by the investigating officer neither was there an occurrence book

extract produced by the respondents. The argument by the respondents that the appellants should have sought to interrogate the documents allegedly availed in court by the police does not hold water. The appellants had no duty to prove the case on behalf of the respondents. The appellants could not be expected to inspect or interrogate documents which had not yet been produced in evidence.

I have looked at the investigations report which was produced by the appellants without objection by the respondents. In the report, there is a sketch plan which shows the point of impact as the middle of the road. The report also has a copy of occurrence book entry which shows that when the accident was booked at the police station, it was reported that the deceased was crossing the road. I have also looked at the photographs of the vehicle which show damage to the vehicle was on front of the bonnet, grill and the windscreen. The damages except the windscreen are on the front middle of the vehicle. The damage on the windscreen is on the left bottom.

In ordinary circumstances, these damages denote the point of contact between the deceased and the vehicle. In my view the point of contact does not support the version of the evidence of PW2. There was no attempt by either party to show where the deceased finally landed which would have helped the court to visualise how the accident occurred. The appellants' version seems consistent with the damages on the motor vehicle and the occurrence book entry extract. If indeed DW2 went to the scene with the police as he told the court, the entry would not have indicated that the deceased was crossing the road unless the said witness did not give the police the correct position. At the same time, there is the ongoing prosecution of the 1<sup>st</sup> appellant which would not have been likely if the accident was as described by the 1<sup>st</sup> appellant.

The trial court stated that the appellant had been charged after investigations had been concluded. In my view, the fact that the 1<sup>st</sup> appellant had been charged with a traffic offence does not mean that he was 100 per cent to blame. The respondents did not give the status of the traffic case or show that the 1<sup>st</sup> appellant had been convicted. In that case, the existence of the case cannot be used to found liability against him without any other or further evidence. The totality of this is that this court cannot tell which of the two version is true.

In view of what I have stated above, there is a split as to how the accident occurred. It has been held and it is the position in law that, where the accident is proved to have occurred but the evidence before the court is not helpful to assist the court ascertain liability against either of the parties alone, the prudent way to settle the issue of liability is to apportion liability equally. In ***Ndatho v Chebet (2022) KEHC 346 (KLR)***, it was held that;

*‘The law is trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally.’*

Flowing from the above, I find that there was no basis to find the appellants 100 per cent liable. The same should have been 50 per cent to the deceased and 50 per cent against the 1<sup>st</sup> appellant. The 2<sup>nd</sup> appellant would as the registered owner and there being no evidence to exonerate him from the ownership of the vehicle be jointly and severally liable with the 1<sup>st</sup> appellant.

On quantum, the appellant has questioned all the heads of the damages. On pain and suffering, the appellants submits that the same were too high while the

respondents maintain that the award was commensurate with the suffering the deceased went through. The factors which should be considered in awarding this head of damages is the period of suffering and the nature of injuries and of course other comparable cases. The period of suffering is the time between the accident and the date and time of demise.

The deceased died at the casualty area of the hospital as she was waiting to be treated. The death certificate shows that the date of death was 9-02-2024 which is the same date of the accident. The accident is said to have been at 10.30 pm which was about one and half hours to the end of that day. It is therefore clear that the deceased died within one and half hour after the accident. Where a victim of an accident dies the same day of the accident, the pain and suffering is presumed to have been minimal of course depending on the nature of injuries.

Having looked at authorities of similar nature and the fact that the deceased died within one and half hours or less and considering the injuries indicated in the post mortem report, it is my opinion that a sum of Kshs 100,000.00 was too high and amounted to a wrong estimate. I would reduce the same to Kshs 50,000.00. I am persuaded by holding of the court in ***Hyder Nthenya Musili & another v China Wu Yi Limited & another (2017) KEHC 3063 (KLR)*** where it was held that;

*‘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 Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.’*

The appellants' quarrel with the damages on loss of expectation of life is not justified. The amount of Kshs 100,000.00 awarded by the trial court is within the region of the previous and recent awards as in the cases I have cited above. The trial court had the discretion to award damages as long as the same were not too high as compared to other decided cases. I see no reasons to interfere with that award.

The most contentious head of damages in this matter is the loss of dependency. The contest is in all aspects. The appellant has raised issues with the dependency ratio applied, the multiplicand and the multiplier. The trial court applied 28 years as the multiplicand and Kshs 30,000.00 as the multiplier and 2/3 as the dependency ratio. There would not have been a big issue on these parameters if there was clear proof of employment and earnings of the deceased. The lack of clarity of the earnings led the appellants in arguing that the trial court used inappropriate approach in assessing damages for loss of dependency.

The appellant submits that the appropriate approach for award of damages for loss of dependency would have been the global one. This is because there was uncertainty as to the income of the deceased. The only evidence produced in an effort to prove employment and earnings was a letter dated 25-03-2023 from Mediva Wellness Centre which was an offer of temporary employment. The letter shows that the deceased was offered a job as a registered nurse with earning of Kshs 1,500.00 per day.

The trial court held that since there was evidence that she was working as a nurse it meant that she had an income at the time of the accident and he proceeded to take it that she was earning Kshs 1,500.00 per day for five days a week translating to

Kshs 30,000.00 per month. I have looked at the letter and I find three interesting areas of concern. The letter offered a temporary employment without stating the period of engagement. It is dated 25-03-2023 and one would wonder whether the said temporary employment obtained up to 9-02-2024 when she was involved in the accident. The other interesting thing is that the institution does not appear to be a hospital as the 1<sup>st</sup> respondent stated in his testimony.

It is not clear why the trial court took upon itself to decide that the deceased was working for five days per week as there is nothing to that effect in the letter. I would expect that there were some modes of payment of the deceased's salaries. There may not have been payslips but definitely for a registered nurse's payments, there should be proof especially where she had worked for about a year.

There was no evidence that the deceased was a registered nurse. The respondents did not produce her academic or professional qualifications certificate which would have guided the court to accept that she was a nurse. In these circumstances, I hold the view that the respondents did not prove that the deceased was earning the amount she purportedly earned from the wellness center.

With lack of proof of earnings, it is my view that the trial court misdirected itself on that aspect. The court embarked on the exercise of assessing the damages based on assumptions rather than evidence which a court of law should not entertain. At least there should have been laid a basis of showing how the deceased used to live even if it meant production of some proof of expences. The documents produced by the respondents did not even show the level of dependency the respondents and the deceased's child used to enjoy from her.

The issue of multiplier versus global approach has been a debate in many High Court decisions. Citing two other cases, the Honorable Justice J. Njagi stated in ***Chabhadiya Enterprises Ltd & another v Sarah Alusa Mwachi (Suing as the legal Administrator and Personal Representative of the Estate of late Faiza Musa- (Deceased) (2018) KEHC 3300 (KLR)*** that;

*‘On the other hand there are some High Court judges who hold the view that the multiplier approach is not suitable in all cases as was stated by Ringera J (as he then was) in ***Mwanzia Vs Ngalali Mutua and Kenya Bus Services (Msa) Limited & another*** as quoted in ***Albert Odawa Vs Gichimu Gichenji, NKU HCCA No. 15 of 2003 (2007) eKLR*** where he held that:*

*‘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 the 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.’*

In the circumstances, I hold that although the trial court had discretion to decide which approach to adopt, it erred in adopting the multiplier/multiplicand approach as there is no evidence that would have guided the court in adopting the approach. The appropriate approach in this matter would have been the global approach.

In adopting a global approach, the court should be guided by the nature of the case, the lifestyle of the deceased prior to her demise, the number of dependants and the period the dependency was likely to have persisted. There is no dispute that the deceased in this matter had one child aged four years who definitely had a long way to go in life. The child was a dependant under the meaning of Section 4 of the Fatal Accidents Act and who would have depended on the deceased for another twenty years or so. The respondents could also be considered as dependants although at a lesser degree.

It is apparent that the deceased was residing in Juja and working in Thika but it is not clear whether she was living with her child. Her home was in Meru if the Chief's letter dated 2-05-2024 is anything to go by. This shows that she must have been earning as she obviously spent in sustaining herself in Juja although the amount has not been proved. She was 28 years and would have worked for another 32 years if she were in formal employment. It must be noted however that vicissitudes and uncertainty of life are points of consideration.

Considering all the above and doing all that I can, I am of the opinion that a global sum of Kshs 3,000,000.00 would be adequate for loss of dependency. In awarding this sum, I am guided by the decision of Honourable Justice A. Mabeya in ***Kidiga & another v Onguna & another (Suing as the Administrator of the Estate of Elvis Omondi Otieno- Deceased) (2025) KEHC 10523 (KLR)*** where he upheld a global award of Kshs 3,000,000.00 for loss of dependency in respect of a deceased who was aged 27 years and had left behind one child.

On special damages, the respondents produced receipts for processing of grant of letters of administration and for funeral expences. The amounts therein total to

Kshs 120,500.00. The appellants argue that there were no receipts to proof this and the costs of the processing the grant should be taxed. The issue of taxation can only be between the advocate and client or parties to the cause. The appellants were not parties to the succession cause and there is no dispute between the respondents and their advocates. In that case, there is no basis for taxation. The receipts were produced in evidence and this court does not have a reason to disallow them. The appeal on this ground is therefore disallowed.

The last issue in the appeal is the appellant's argument that the damages awarded under the Law Reform Act should have been deducted from the final award to avoid the estate of the deceased benefiting twice. My reading of Section 2(5) of the Law Reform Act Chapter 26 of the Laws of Kenya does not show that any of the damages under the two Acts should be an option for the other. There has been prepositions that where the dependants are the same under the two Acts, the court should deduct the award under the Law Reform Act but I take the position that all that is required of the court is to, while assessing damages under the Fatal Accidents Act, take into account the award under the Law Reform Act. To me, the court must not necessarily deduct the damages from the final award. In the circumstances of this case, I do not see reason for deducting the damages under the Law Reform Act. I decline to interfere with the judgement of the trial court on this aspect.

In the final analysis, I hold that this appeal partially succeeds and I proceed to hold that judgement of the trial court is hereby set aside and substituted for the following orders;

