Muendu v Kalondu (Suing as the Legal Representative of the Estate of Jones Mwololo Mulai - Deceased) (Civil Appeal E121 of 2024) [2025] KEHC 18946 (KLR) (17 December 2025) (Judgment)

Neutral citation: [2025] KEHC 18946 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E121 OF 2024

CJ KENDAGOR, J

DECEMBER 17, 2025

BETWEEN

JUSTUS MWENDWA MUENDU ..... APPELLANT

AND

ESTHER KALONDU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JONES MWOLOLO MULAI - DECEASED) ..... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Hon. Okwengu, SRM, delivered on 17th January, 2024 in the Chief Magistrate's Court at Kilungu, Civil Case No. E069 of 2023.

2. The Plaintiff, who is the mother of the deceased, sued the Defendant following a road traffic accident which occurred on 17th September 2022 along the Nairobi–Mombasa Road. It was pleaded that the deceased was a pedestrian when he was fatally injured in an accident involving motor vehicle registration number KDB 016S, owned by the Appellant.

3. The Respondent sought damages under the *Law Reform Act* and the *Fatal Accidents Act*, special damages, costs and interest. The Appellant filed a defence denying liability and attributing the occurrence of the accident to the deceased.

4. At the trial, the Respondent called three witnesses, including a police officer and a stated eyewitness. The Appellant did not call any witness. Upon considering the evidence and submissions, the learned trial magistrate found the Appellant liable for the accident and apportioned liability at 90% against the Appellant and 10% against the deceased.

5. On quantum, the learned magistrate awarded damages under the *Law Reform Act* and the *Fatal Accidents Act*, together with special damages, leading to a total award of Kshs.2,565,710/=, which,

after factoring in contributory negligence, resulted in a net award of Kshs.2,309,139/-, plus costs and interest.

6. Being dissatisfied with both the finding on liability and the assessment of quantum, the Appellant lodged the present appeal challenging the entire judgment of the lower Court on the grounds:

   a) The learned magistrate erred in law and in fact in finding the Appellant negligent and liable for the accident contrary to the evidence on record.

   b) The learned magistrate erred in law and in fact by failing to consider and properly evaluate the Appellant's submissions and the authorities cited on the issue of liability, thereby arriving at an erroneous finding.

   c) The learned magistrate erred in law and in fact in assessing damages which were manifestly excessive and inappropriate in light of the evidence and applicable legal principles.

   d) The learned magistrate erred in law and in fact by failing to consider and apply the Appellant's submissions and authorities on quantum of damages, and instead relying wholly on the Respondent's position.

   e) The learned magistrate erred in law and in fact by failing to distinguish or apply the Appellant's cited authorities on the assessment of damages.

Submissions:

7. The Appellant contended that the learned trial magistrate erred in law and in fact in finding him liable for the accident. It was submitted that the Respondent failed to discharge the burden of proof on negligence, as the evidence on record was contradictory and unreliable. The Appellant pointed out that the police officer who testified stated that there was no eyewitness to the accident, while the alleged eyewitness neither reported the accident to the police nor recorded a statement.

8. It was argued that this inconsistency fatally undermined the Respondent's case on liability. The Appellant further submitted that the trial Court misapplied Sections 109 and 112 of the *Evidence Act* by shifting the burden of proof to the defence before the Respondent had established negligence on a balance of probabilities.

9. Reliance was placed on authorities including Daniel Toroitich Arap Moi v Mwangi Stephen Murithi & Another [2014] eKLR on the unchanging standard of proof in civil cases, and Kemfro Africa Ltd t/a Meru Express Services v A.M. Lubia & Another [1982–88] 1 KAR 727 on appellate interference with findings and awards.

10. On quantum, the Appellant submitted that the awards made were manifestly excessive and based on wrong principles. It was argued that the award for pain and suffering was unjustified given the evidence that the deceased died on the spot, and reliance was placed on decisions such as Moses Koome Mithika & Another v Doreen Gatwiri & Another Civil Appeal No. 60 of 2019.

11. The Appellant further challenged the award for loss of dependency, contending that the trial court adopted an incorrect multiplicand, an excessive multiplier, and an unsupported dependency ratio, contrary to established jurisprudence. The Appellant maintained that the authorities cited by the defence on quantum were neither distinguished nor applied by the trial court.

12. The Respondent submitted that the learned trial magistrate properly evaluated the evidence and correctly found the Appellant liable for the accident. It was argued that the occurrence of the accident

and the involvement of the Appellant's motor vehicle were not in dispute, and that the evidence tendered by the Respondent was credible and uncontroverted, the Appellant having called no witness.

13. The Respondent further relied on Section 47A of the *Evidence Act*, submitting that the conviction of the Appellant's driver in the related traffic case constituted conclusive evidence of negligence, as interpreted in Robinson v Oluoch [1971] EA 376.

14. On quantum, the Respondent submitted that the awards made by the trial Court were reasonable, moderate, and in line with comparable authorities. It was argued that the award for pain and suffering and loss of expectation of life fell within the conventional range established by decided cases, including H. West & Son Ltd v Shephard [1964] AC 326 and Otieno v Ngunyi & Another [1982–88] 1 KAR 1048.

15. With respect to loss of dependency, the Respondent submitted that the trial Court correctly applied the multiplier/multiplicand approach, having regard to the deceased's age, occupation, and dependants, and that the dependency ratio adopted was justified by the evidence.

16. The Respondent further submitted that there was no legal basis for deducting awards made under the *Law Reform Act* from those made under the *Fatal Accidents Act*, relying on Kemfro Africa Ltd t/a Meru Express Services v A.M. Lubia & Another (No. 2) [1987] KLR 30 and Hellen Waruguru Waweru v Kiarie Shoe Stores Ltd [2015] eKLR.

17. Accordingly, the Respondent urged the court to find that the appeal was devoid of merit and to uphold the judgment of the trial Court.

Issues:

18. The parties did not frame identical issues. However, their arguments substantially converged around two broad areas:

    a) Whether the learned trial magistrate erred in law and fact in finding the Appellant liable for the accident

    b) Whether the learned trial magistrate erred in principle in the assessment of damages under the *Law Reform Act* and the *Fatal Accidents Act*

    c) Whether the learned trial magistrate erred by failing to properly consider the Appellant's submissions and authorities on liability and quantum.

Determination:

19. This being a first appeal, this Court is enjoined to reconsider, re-evaluate and re-analyze the evidence on record and arrive at its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify.

20. The duty of a first appellate Court was succinctly set out in Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123, where the Court of Appeal stated as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

21. Similarly, in Peters v Sunday Post Ltd [1958] EA 424, the Court stated:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this is a jurisdiction which should be exercised with caution."

22. Accordingly, this Court will interfere with findings of fact only where it is demonstrated that the trial Court misdirected itself, acted on wrong principles, failed to consider relevant evidence, considered irrelevant matters, or where the decision is plainly wrong.

Whether the learned trial magistrate erred in law and fact in finding the Appellant liable for the accident

23. The accident, the subject of this appeal, occurred on 17th September, 2022 at about 3.00 a.m. and involved motor vehicle registration number KDB 016S and the deceased pedestrian. The ownership of the motor vehicle was not contested. What remained contested was how the accident occurred and who bore responsibility for it.

24. The Respondent bore the legal burden of proving negligence, as pleaded, in accordance with Sections 107, 108 and 109 of the *Evidence Act*. That burden did not shift merely because the Appellant filed a defence and elected not to call witnesses. It has long been settled that the failure by a Defendant to adduce evidence does not relieve a plaintiff of the obligation to prove the pleaded facts to the required standard.

25. In Daniel Toroitich Arap Moi v Mwangi Stephen Murithi & Another [2014] eKLR, the Court stated:

> " Even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. The trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim must be dismissed."

26. As has been repeatedly stated by the Courts, even where a defence is unsupported by oral evidence, the plaintiff must still prove the case to the requisite standard.

27. In support of her case on liability, the Respondent called three witnesses. PW1, the police officer, testified that an accident occurred involving the Appellant's motor vehicle and a pedestrian. He further stated that the vehicle was traced, the driver arrested, charged with causing death by dangerous driving, and fined.

28. However, in cross-examination, PW1 was categorical that there was no eye witness who recorded a statement with the police. He also conceded that the police abstract produced did not reflect the outcome of any traffic proceedings, and merely indicated that the driver had been released on cash bail. No charge sheet, proceedings, judgment, or certificate of conviction from the traffic court was produced. The police investigation file was likewise not availed.

29. PW2, the mother of the deceased, did not witness the accident and her evidence was limited to matters of identification and dependency.

30. PW3 testified that he witnessed the accident and blamed the driver of the motor vehicle. However, his evidence presented difficulties. He admitted that he did not report the accident to the police, did not record a statement, did not wait at the scene for the police to arrive, and did not see the motor vehicle's registration number. His written statement did not describe, in factual terms, the manner in which the accident occurred, beyond reiterating the pleaded particulars of negligence.

31. The Respondent further invited the trial Court to rely on Section 47A of the *Evidence Act*, contending that the alleged conviction of the Appellant's driver constituted conclusive proof of negligence. Section 47A applies only where a final judgment of a competent criminal Court is proved before the civil Court. In Robinson v Oluoch [1971] EA 376, the Court of Appeal held that a conviction for a traffic offence may constitute evidence of negligence, but the existence of the conviction itself must first be established.

32. From the record before me, there is no evidence of Judgment from the traffic Court, nor was any produced at trial, rendering Section 47A inapplicable. I note that the trial Court accepted that submission. ection 47A presupposes proof of a final judgment of a competent criminal Court. In the absence of evidence of such a conviction, the provision could not properly be invoked. The testimony of PW1 was insufficient to trigger the statutory effect contemplated under Section 47A.

33. On the other hand, it is noted that the Appellant filed a statement of defence denying liability and attributing blame to the deceased.

34. The Appellant did not, however, call any witness, including the driver of the motor vehicle, to explain how the accident occurred. The effect of a defence unsupported by evidence is settled. In Trust Bank Limited v Paramount Universal Bank Limited & 2 Others [2009] eKLR, the Court held:

> " Where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact."

35. The law is settled that where a party fails to call evidence that is within its knowledge or control, the Court may draw an adverse inference that such evidence would have been unfavourable to that party. In Nesco Services Limited v CM Construction (EA) Limited [2021] eKLR, Odunga J (as he then was) stated:

> " Where a party has custody or is in control of evidence that that party fails or refuses to tender or produce, the court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party."

36. At the same time, that does not relieve the Plaintiff of her duty to prove her case. What emerges from the totality of the evidence is that there was no clear, cogent, and reliable account of how the accident occurred. Courts have consistently held that a police abstract, standing alone, is not proof of negligence. In Kennedy Nyangoya v Bash Hauliers (Milimani HCCA No. 8 of 2015), the Court held that a police abstract merely confirms the occurrence of an accident and does not establish liability.

37. There was no independent eye witness whose evidence was tested through reporting to the police. The police evidence did not explain the point of impact, the position of the deceased on the road, or the conduct of either party immediately before the collision. The police abstract, which was the only record produced, was itself deficient and did not reflect the alleged outcome of the traffic case.

38. Nevertheless, the absence of clarity will not inevitably lead to a finding of no liability. Drivers of motor vehicles owe a higher duty of care to other road users. The law imposes on drivers a duty to keep a proper

lookout, drive at a safe speed, and exercise due care at all times. The duty is even greater, especially at night.

39. Even where the precise manner of occurrence of an accident is unclear, a Court may properly find that a driver bears some responsibility if the circumstances suggest a failure to exercise that heightened duty of care. The Court in PW v Peter Muriithi Ngari (2017) eKLR observed as follows in similar terms:

> " The driver and pedestrian owe a duty of care to others as road users. The Appellant should be vigilant enough to observe the wider view of the road including any intervention from both sides of the road, and the respondent to observe the old age traffic practice "Look right, look left, right again" before crossing the road."

40. Further in Robert Gitau vs Charles R. Kahiga & 2 Others [2010] eKLR the Court too took the view that:

> " Every driver on a public road owes the other road users a duty of care to ensure that he does not expose any such user to any danger. As was held by the Court of Appeal in Alfarus Muli Vs. Lucy M. Lavuta & Another Civil Appeal No.47 of 1997, vehicles when properly driven on the road do not run into each other."

41. From the facts before me, the accident occurred at night, involved a pedestrian, and resulted in fatal injuries. The Appellant's driver did not testify to offer an explanation of how the accident occurred or to demonstrate that all reasonable care was taken. Equally, the Respondent's evidence fell short of establishing that the negligence of the driver wholly caused the accident. The gaps in the evidence and inconsistencies preclude a finding of exclusive liability on either party.

42. In those circumstances, this Court is persuaded that the learned trial magistrate erred in holding the Appellant 90% liable. At the same time, a finding of no liability at all would fail to reflect the heightened duty resting on drivers and the unexplained circumstances under which a pedestrian was fatally struck. A fair and just determination, grounded in the evidence and applicable legal principles, is that liability be apportioned equally.

43. This position was taken by the Court, which stated:

> " The fact of the accident occurring as a result of which the deceased lost his life is not disputed. As to who was responsible for the accident, cannot be determined from the evidence on record. Our courts have held that in a case where liability is not clear, both parties are to bear liability equally"

44. The Court in that matter was led by the decision of the Court in Hussein Omar Farah v Lento Agencies [2006] eKLR where it had equally been held by the Court of Appeal that:

> " In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

45. Accordingly, I set aside the apportionment of liability at 90:10 and substitute therefor an apportionment of liability at 50:50 between the Appellant and the deceased.

Whether the learned trial magistrate erred in principle in the assessment of damages under the *Law Reform Act* and the *Fatal Accidents Act*

46. It is trite that an appellate Court will not interfere with an award merely because it would have arrived at a different figure, but only where it is demonstrated that the trial court took into account an irrelevant factor, failed to take into account a relevant factor, or that the award was so inordinately high or low as to represent an erroneous estimate.

47. The applicable principles were succinctly stated by the Court of Appeal in Kemfro Africa Ltd t/a Meru Express Services (1976) & Another v Lubia & Another (No. 2) [1985] eKLR:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge are that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

Pain & Suffering:

48. The deceased died on the spot. The trial Court awarded a sum of Kshs.100,000/= under this head. The consistent position in our Courts is that where death is instantaneous, or occurs shortly after the accident, only a modest award is justified. In Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] eKLR, Mativo, J. upheld an award of Kshs.50,000/= for pain & suffering where the deceased was said to have died on the spot.

49. In Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR), where Sewe J. reduced an award of Kshs.150,000/= to Kshs.50,000/= for instant death and sustained Kshs.200,000/=for loss of expectation of life.

50. The Appellant had urged that if liability was to be found, then an award of Kshs.10,000/= under this head would be appropriate. I think that is on the lower side. Guided by the authorities set out above, I will therefore substitute the trial Court's award under this head for an award of Kshs.50,000/=.

Loss of dependency:

51. The deceased was aged 40 years at the time of his death. It was common ground that he was unmarried and had no children, and that his sole dependant was his mother, PW2. The trial Court proceeded to award damages under the *Fatal Accidents Act* using a multiplicand of Kshs.19,668/=, a multiplier of 20 years, and a dependency ratio of one-half, arriving at an award of Kshs.2,360,160/=.

52. The Appellant challenged that award on several fronts. First, it was contended that there was no proof of income and that the deceased's earnings were not established. Secondly, it was argued that the 20-year multiplier failed to account for life's vicissitudes. Thirdly, the Appellant submitted that a dependency ratio of one-half was excessive in the circumstances of an unmarried adult whose only dependant was his mother.

53. On the question of the multiplicand, I am unable to agree with the trial Court. While PW2 testified that the deceased was a driver earning Kshs.40,000/= per month, no evidence was tendered to support either the alleged earnings or the nature of the employment. There was no evidence as to where the deceased worked as the said driver, who employed him, the class of vehicle he allegedly drove, or whether he held a valid driving licence.

54. Although the death certificate also described the deceased's occupation as "driver", that description was insufficient to establish the level of skill or the applicable wage category. In the absence of cogent evidence demonstrating that the deceased was engaged in skilled or commercial driving, the Court ought to have reverted to the general minimum wage applicable to an unskilled worker.

55. To adopt the statutory minimum wage for a driver in those circumstances was speculative. I therefore find that the appropriate multiplicand is the general minimum wage prevailing at the time of death, which stood at Kshs.8,109.90/= per month for an unskilled labourer.

56. On the multiplier, the deceased was aged 40 years at the time of death. While the trial Court adopted a multiplier of 20 years, I agree with the Appellant that this failed to sufficiently account for the vicissitudes of life. Although the deceased may, in theory, have had a longer working life ahead of him, it was not proper to assume uninterrupted employment over that extended period. In my view, a multiplier of 15 years strikes a fair balance between the deceased's age and the inherent uncertainties of life.

57. As regards the dependency ratio, I note that although courts have in more recent times leaned towards a ratio of one-half even where the deceased was unmarried, such an approach is not automatic and must still be based on evidence. The only dependant was the deceased's mother. There was no evidence placed before the Court as to the extent of support rendered, the regularity thereof, or whether the deceased devoted a substantial portion of his income to her upkeep.

58. In those circumstances, and bearing in mind that dependency is a question of fact to be proved, I am not persuaded that a ratio of one-half was justified. I am satisfied that a dependency ratio of one-third more accurately reflects the evidence on record and accords with long-standing judicial practice in cases involving unmarried adults with parental dependency only.

59. Applying the foregoing, the award for loss of dependency under the *Fatal Accidents Act* is recalculated as follows: Kshs.8,109.90 × 12 × 15 × ⅓ = Kshs.486,594/=.

60. The award of Kshs.2,360,160/= made by the trial Court under this head is accordingly set aside and substituted with an award of Kshs.486,594/=.

Loss of expectation of life:

61. The trial Court awarded a sum of Kshs.100,000/= under the head of loss of expectation of life. here was no evidence that he was suffering from any pre-existing illness or disability before the accident. His life was therefore prematurely cut short. Courts have, over time, settled on awards ranging between Kshs.100,000/= and Kshs.150,000, depending on the age and circumstances of the deceased. An award of Kes 100,000/= has repeatedly been upheld as reasonable. I shall not disturb that award.

Special damages:

62. Special damages must be specifically pleaded and strictly proved. That principle is settled and admits of no exception. At the trial, receipts were produced and admitted in evidence in support of those claims. The trial Court was therefore satisfied that the pleaded sums had been proved to the required standard and proceeded to award special damages in the sum of Kshs.5,550/=.

63. Upon re-evaluation of the record, I find no basis to interfere with that award. Accordingly, the award of Kshs.5,550/= under the head of special damages is upheld.

Whether damages awarded under the *Law Reform Act* ought to be deducted

64. The Appellant further took issue with the trial Court's failure to deduct the awards made under the *Law Reform Act* from the damages awarded under the *Fatal Accidents Act*. That argument has been the subject of consideration by our superior Courts.

65. The Court of Appeal (Waki, Nambuye and Kiage JJA) in the case of Mombasa Maize Millers Limited vs. Chrispine Asoyo (Suing as Personal Representative/ Administrator of the Estate of Martina Asoyo Akinyi) [2018] eKLR stated that:

> " ...this court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise... The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act* the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

66. Section 2(3) of the *Law Reform Act* expressly provides that the rights conferred for the benefit of the estate of a deceased person are "in addition to and not in derogation of" the rights conferred on dependants under the *Fatal Accidents Act*.

67. The distinction between "taking into account" and "deducting" has been clarified by the Court of Appeal. In Kemfro Africa Ltd t/a Meru Express Services (1976) & Another v Lubia & Another (No. 2) [1985] eKLR, the Court stated:

> " To be taken into account is not synonymous with to be deducted. There is no requirement in law that damages awarded under the *Law Reform Act* must be deducted from those awarded under the *Fatal Accidents Act*."

68. The principle is to be mindful to avoid overcompensation. I find no error on the part of the trial Court in declining to deduct the awards made under the *Law Reform Act* from the damages awarded under the *Fatal Accidents Act*.

Disposition:

69. In the result, the appeal succeeds in part as follows:

    a. The finding on liability by the trial court is hereby set aside and substituted with an apportionment of liability at 50:50 between the Appellant and the deceased.

    b. The awards on damages are adjusted as follows:

        i. Pain and suffering – Kshsh. 50,000/=;

        ii. Loss of expectation of life – Kshs.100,000/=;

iii. Loss of dependency – Kshs.486,594/=;

iv. Special damages – Kshs.5,550/=;

c. The total award therefore stands at Kshs.642,144/=, subject to the agreed apportionment of liability at 50:50, resulting in a net award of Kshs.321,072/=;

d. Each party shall bear its own costs of the appeal. The costs of the suit in the lower court shall remain as ordered.

70. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 17TH DAY OF DECEMBER, 2025.

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Kamau, Advocate for the Appellant

Ms Ndiege, Advocate holding brief for Mr. Waiganjo for the Respondent