

**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E015 OF 2023**

**ISAAC MAKASA NDASA &**

**MARY MUTHOKI NDASA (Suing as the Administrators of  
the Estate of RICHARD KIOKO NDASA .....**

**..... APPELLANT**

**-VERSUS-**

**SAMUEL MUTHUI MAINA .....**

**RESPONDENT**

***(An appeal against the Judgment and Decree of the Chief  
Magistrates Court at Makueni by Honourable J.A. Otieno  
(Mrs.) dated 13th February 2023 in Civil Case No. E113  
of 2021 (test suit on liability) and E112 of 2021)***

**JUDGMENT**

1. This appeal is one of two connected appeals stemming from the same incident and judgment of the trial Court. The other appeal, **Makueni HCCA No. E016 of 2023**, also emanating from **Makueni CMCC No. E113 of**

**2021**, a personal injury case involving a pillion passenger injured in the same accident.

2. **CMCC No. E113 of 2021** was treated as the test suit for purposes of determining liability, with the outcome therein applied to **CMCC No. E112 of 2021**. Indeed, in its judgment, the trial court expressly stated that the fate of **CMCC No. E113 of 2021** “befalls” **CMCC No. E112 of 2021**.

3. The two appeals raise substantially similar questions of law and fact on liability, particularly on whether the Respondent may be held vicariously liable for the negligence of the authorized driver of motor vehicle registration number KCW 365F. The material distinction between them lies in the nature of the claims, in that in **HCCA No. E015 of 2023** concerns personal injuries, while **HCCA No. E016 of 2023** concerns a fatal claim brought by the deceased’s estate and dependants.

4. In the Memorandum of Appeal dated 23<sup>rd</sup> February, 2023, the Appellants challenge the entire judgment and decree of the trial Court on grounds which, in substance, mirror those raised in **HCCA No. E016 of 2023**.

## **Submissions:**

5. The appeal was canvassed by way of written submissions.
6. On behalf of the Appellants, counsel urged this Court to adopt its findings on liability in **HCCA No. E016 of 2023**, arguing that the same factual and legal considerations apply with equal force to the present appeal. It was submitted that the Respondent, as the owner of the suit motor vehicle, was 100% vicariously liable for the negligence of the authorized driver who left the vehicle unattended in circumstances that led to the fatal accident.
7. On quantum, the Appellants submitted that the deceased died while undergoing treatment, justifying an award for pain and suffering of Kshs.200,000/=, and loss of expectation of life of Kshs.200,000/=. On loss of dependency, it was submitted that the deceased was aged 29 years, unmarried, and supported his parents, and that an award of Kshs.3,478,324/= was justified using the minimum wage and a dependency ratio of two-thirds. Special damages of Kshs.68,550/= were also claimed as pleaded and proved.

8. The Respondent opposed the appeal and supported the judgment of the trial court. Counsel submitted that the trial court correctly found that, although negligence had been established, vicarious liability had not been proved. It was argued that the authorized driver was not at the scene at the time of the accident, that the vehicle was driven by an unauthorized person, and that no agency relationship existed to ground liability against the Respondent.
9. On quantum, the Respondent submitted that the issue did not arise, liability having failed, and in any event that the trial court's alternative assessment was reasonable and should not be disturbed.

**Determination:**

10. Having carefully considered the record of appeal, the grounds of appeal, and the submissions of counsel, and having already rendered findings on liability in **Makueni HCCA No. E016 of 2023** arising from the same accident, I am satisfied that the present appeal falls to be determined on substantially similar principles.

**11.**In **HCCA No. E015 of 2023**, this Court found that the trial Court erred in law in dismissing the suit notwithstanding its express finding that the authorized driver of motor vehicle registration number KCW 365F was negligent by leaving the vehicle unattended contrary to **Section 66(b)** of the **Traffic Act**.

**12.**The Court further found that the negligence arose in the course of the authority granted by the Respondent, that the Respondent had voluntarily entrusted possession and use of the vehicle to the authorized driver, and that the Respondent failed to adduce credible evidence sufficient to sever the causal and legal link between that negligence and the accident.

**13.**The factual matrix giving rise to the present appeal is identical. The accident occurred at the same location, during the same night, and arose from the same conduct of the authorized driver in leaving the suit motor vehicle unattended after it developed mechanical problems.

**14.**The trial Court expressly stated that the fate of **CMCC No. E113 of 2021** “befalls” **CMCC No. E112 of 2021**, and dismissed the present suit purely on the basis of its earlier findings on liability. No additional or distinct

factual findings were made in respect of the deceased rider's claim.

15. In those circumstances, and for the reasons set out in detail in **HCCA No. E016 of 2023**, which reasoning I adopt and apply mutatis mutandis, I find that the trial Court similarly erred in law in dismissing **CMCC No. E112 of 2021** after having found that negligence had been established on the part of the authorized driver.

16. The defence that the vehicle was driven by an unauthorized or unknown person at the precise moment of impact does not, in the circumstances of this case, displace liability. The negligent act found by the trial court leaving the vehicle unattended occurred while the authorized driver was in lawful possession of the vehicle with the Respondent's consent, and it was that act which created the risk that ultimately materialized.

17. The Respondent did not call the authorized driver to testify, nor did he institute third-party proceedings against him, despite admitting that he knew his identity and whereabouts. The explanation of an unknown intervening actor was unsupported by investigation evidence and was rejected in **HCCA No. E016 of 2023**.

18. I therefore reach the same conclusion in this appeal: the Respondent is vicariously liable for the negligence of the authorized driver, and the dismissal of the suit by the trial Court on liability was erroneous.

**Quantum:**

19. The trial Court made an alternative assessment of damages, which I shall now consider.

20. On pain and suffering, the evidence shows that the deceased succumbed to his injuries while undergoing treatment. An award of Kshs.200,000/= as proposed by the Appellants. This is, in my view, on the higher side.

21. Jurisprudential trends show that the award under this head stands at a tidy Kshs.100,000/=. For instance, my brother Kizito, J. sitting at Kisii in **TB v MOO & another (Suing as the legal representatives of the Estate of the Late LM - Deceased) (Civil Appeal 79 of 2021) [2025] KEHC 3520 (KLR) (6 March 2025) (Judgment)**, awarded of Kshs.100,000/= for pain & suffering where the deceased was said to have died while receiving treatment.

22. On loss of expectation of life, I similarly award Kshs.200,000/=, there being no basis to depart from conventional awards under this head. I am guided by **Citi Hoppa Bus Limited & Another v Maria Clara Rota [2021] eKLR** and **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)** in that respect.

23. On loss of dependency, the deceased was aged 29 years at the time of death, unmarried, and supported his parents. The Appellants proposed a multiplicand based on the minimum wage of Kshs.14,025.50/=, a dependency ratio of two-thirds, and a multiplier of 31 years.

24. It is not lost on me that conventionally our courts have taken married persons and particularly those with children to spend more on their families than themselves and apportioned a dependency ratio of 2/3.

25. On the other hand, Courts have apportioned a dependency ratio of 1/3, which has, over time, been enhanced to 1/2 owing to the evolving rigours of life. Therefore, given that in this case the deceased was

unmarried with only his parents as dependants, a dependency ratio of 1/2 is fitting by my calculations.

26. I am guided in this respect by among other, **Steve Ongingo & Another v Susan Adongo Otieno & Another (2018) eKLR** where Cherere, J. multiplicand of one-half (1/2) in respect of an unmarried person as well as **Attorney General v Savinah Francis (Suing as the personal representative of the estate of Peter Muse Muema (2020) eKLR** where my sister Ong'undi, J. used a multiplicand of one-half (1/2) in respect of an unmarried person.

27. Therefore, on the material before the Court, and bearing in mind comparable awards, I adopt the multiplicand of Kshs.14,025.50/=, a dependency ratio of one-half, and a multiplier of 25 years.

28. The award for loss of dependency is therefore:  
(Kshs.14,025.50 × 12 × 25 × ½ = Kes 2,103,825)

29. Special damages of Kshs.68,550/= were pleaded and proved and are awarded as such.

30. The total award is therefore as follows:

**a) Pain and suffering - Kshs.100,000/=;**

**b) Loss of expectation of life - Kshs.200,000/=;**

***c) Loss of dependency - Kshs.2,103,825/=;***

***d) Special damages - Kshs.68,550/=;***

***Total: Kshs.2,472,375/=.***

**Disposition:**

31. The appeal is allowed.

32. The judgment and decree of the Chief Magistrate's Court at Makueni in **CMCC No. E112 of 2021** delivered on 13<sup>th</sup> February, 2023, is hereby set aside.

33. Judgment is entered for the Appellants against the Respondent on liability at 100%, with damages awarded as set out above.

34. The Appellants shall have the costs of the suit in the trial Court and of this appeal. Interest shall accrue at Court rates from date of judgment to payment in full.

Orders accordingly.

**DATED, DELIVERED and SIGNED at NAIROBI** through the Microsoft Teams Online Platform on this **17<sup>TH</sup>** day of **DECEMBER, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

**In the presence of:**

Court Assistant: Beryl

Mrs. Mwendawa, Advocate for the Respondent

No attendance for the Appellant

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