



Nzau & another v Abdi & another (Suing as the Legal Representatives of the Estate of Adan Ali) (Civil Appeal E203 of 2023) [2026] KEHC 492 (KLR) (27 January 2026) (Ruling)

Neutral citation: [2026] KEHC 492 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E203 OF 2023
SM GITHINJI, J
JANUARY 27, 2026**

BETWEEN

PATRICK MUSYOKI NZAU 1ST APPELLANT

PASHA ENTERPRISES LIMITED 2ND APPELLANT

AND

JAMILA ABDI 1ST RESPONDENT

MOHAMUD ALI DAWA 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ADAN ALI

*(Being an Appeal from the Judgment of Hon. L. Mutai (C.M) in
Isiolo CMCC No. 48 of 2015 delivered on 24th of October, 2023)*

RULING

1. This Appeal arises from the judgment of the learned Chief Magistrate Hon. L. Mutai delivered on 24.10.2023 in Isiolo Civil Suit No. 48 of 2015 wherein judgment was entered in the following terms;
 1. Liability 100%
 2. Pain and Suffering Ksh. 80,000
 3. Special Damages Ksh. 30,000
 4. Loss of Expectation of Life Ksh. 100,000
 5. Loss of Dependency (Ksh. 36,000 × 12 × 20 × ²/3) = Ksh. 5,760,000
 - i. Less Ksh. 1,706,027 paid to counsel for the Respondents on 18/10/2017 = Ksh. 4,263,973.



2. Aggrieved by the said Judgment, the Appellants set forth the following grounds in the Memorandum of appeal dated 13th November, 2023;
 1. The learned magistrate erred in fact ended up misdirecting herself in awarding exorbitant quantum of damages of Ksh. 4,263,973/= for pain and suffering, loss of dependency and loss of expectation of life by failing to appreciate and be guided by the prevailing range of comparable awards, the age of the deceased, the deceased's dependants and vicissitudes of life.
 2. The learned magistrate erred in fact and law by issuing a conflicting decision that is erroneously higher than the decision that had been made previously by the same court with similar jurisdiction.
 3. The learned magistrate erred in law and fact by disregarding the proceedings of the court and the judgment/orders that had been issued therein on the same subject matter, issued by a magistrate of similar jurisdiction.
 4. The learned magistrate erred in law and fact in the manner she apportioned liability at 100% against the appellants which was against the weight of the evidence adduced.
 5. The learned magistrate misdirected herself into using wrong principles in the assessment of loss of dependency and the multiplier applicable and thus awarding sums that are inordinately high in the circumstances.
 6. The learned magistrate erred in law and fact in not finding that the respondent failed to prove liability on the part of the appellants.
 7. The learned magistrate erred in law and fact in failing to analyze the evidence adduced by the appellants.
 8. The learned magistrate erred in law in making such a high award as to show that the magistrate acted on a wrong principle of law.
 9. The learned magistrate's award on general damages was so high as to be entirely erroneous.
 10. The learned magistrate's award for general damages was made without considering the evidence before the Court and failed to appreciate the age of the deceased, dependants and the profession of the deceased, and authorities on comparable awards and hence ended up making an excessive award.
 11. The assessment and award on damages is manifestly excessive and inordinately high.
 12. The learned magistrate erred in law and fact by awarding damages that were inordinately high.
 13. The whole judgment and award on damages was against the evidence before the court.

Oral evidence

3. PW1 Jamila Abdi, one of the Respondents herein, adopted her witness statement dated 13/6/2015 as her evidence in chief, and produced the documents filed therewith as exhibits. She told the court that her husband, the deceased herein was aged 35 years. The deceased was the breadwinner and he worked with Isiolo Youth against Aids & Poverty, earning Ksh. 30,000 per month. The deceased fed, paid school fees and medical expenses for his 2 siblings in addition to supporting his parents and their young child.



4. PW2 PC Charles Mwita, told the court that he was not the investigating officer in this case, and the driver of the accident motor vehicle could not be charged because he escaped.
5. PW3 Jamal Ibrahim told the court that the deceased worked at IAP, as a trainer on democracy, good governance, HIV, Reproductive etcetera, earning Ksh. 36,000 per month.
6. DW1 Jane W. Wairimu adopted her statement dated 17/7/2023 as her evidence in chief and produced the list of documents as exhibits. They settled the decree, which was subsequently set aside, because they had insured the motor vehicle involved in the accident.

Submissions

7. The Appellants did not file any submissions.
8. The Respondents, through the firm of Kiautha Arithi & Co. Advocates, filed submissions dated 8/11/2025, citing *Abok James Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* (2013) eKLR, on the duty of a first appellate court. Counsel submitted that the admission of the deceased for 4 days justified the award of Ksh. 80,000 for pain and suffering, and cited *Sukari Industries Ltd v Clyde Machimbo Juma* (2016) eKLR and *Ndungu & another v Mwangi* [2024] KEHC 2109 (KLR). Counsel contended that the award of Ksh. 100,000 for loss of expectation of life was moderate, conventional and consistent with prevailing jurisprudence, and cited *Mwiti & another v Kanyua (Suing as legal representative of the estate of Joseph Kirya Mburu (Deceased))* [2022] KEHC 10924 (KLR), *Abdalla Rubeya Hemed v Kayuma Mvurya & another* [2017] eKLR, *Mwiti v Kangai & another* [2023] KEHC 25171 (KLR) and *Khalif v M'Kirea & another* [2022] KEHC 15932 (KLR). Counsel submitted that the fatal injuries sustained by the deceased were a direct consequence of the Appellants' negligence, and cited *Rukwaro & another v Maina* [2025] KECA 177 (KLR) and *James (Suing as the Legal Representative of the Estate of James Kayongi King'ori) v M'Mbirithi & another* (Civil Appeal E033 of 2024) [2025] KEHC 10642 (KLR).

Analysis and Determination

9. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions on the same.
10. In *Selle & another v Associated Motor Boat Co. Ltd* [1968] EA the court held as follows: "This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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."
11. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions on record.
12. The issues for determination therefore are whether apportionment of liability at 100% was proper and whether the awards made by the trial court were manifestly exorbitant.
13. The general rule is that a trial court's apportionment of liability should not be interfered with except in exceptional cases since it is an exercise of discretion. In *Khambi and Another v Mahitbi and Another* [1969] EA 70, it was held thus: "



- (i) An apportionment of liability made by a trial Judge will not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous (*Brown v. Thompson* (3) and *Shariff v. Shethna* (2) followed;
 - (ii) the trial Judge had taken into account all material facts and considerations and his apportionment should not be disturbed and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.”
14. With respect, the consent on liability recorded by the parties on 14/3/2017, was effectively set aside when the matter commenced afresh.
15. The Respondents pleaded that the deceased was travelling as a lawful passenger in motor vehicle Registration No. KBS 962 N when the 1st Appellant so negligently drove motor vehicle registration No. KBT 715 T that it veered off its lane and fatally hit the deceased. Those averments remained uncontroverted, as evidently from DW1’s testimony, she did not witness the accident.
16. The Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* [2016] KECA 153 (KLR), espoused that; “We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in *Karugi & Another v. Kabiya & 3 Others* (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgement, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis.”
17. In the absence of any rebuttal by the Appellants that the deceased was contributorily negligent, I am satisfied that the Appellants were wholly to blame, and trial court’s apportionment of liability was proper.
18. The principles to be considered by an appellate court in deciding whether to disturb the trial court’s assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus case of *Butt v Khan* [1978] eKLR thus; “An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”
19. On pain and suffering, the 2nd Respondent recorded in her statement that, “We took the deceased together with his two friends to Waso medical centre where he stayed for around two hours, we took him to Kiirua hospital where he was admitted for two days thereafter he was referred to Nyeri Outspan where he was admitted for two days and passed away on the third day.”
20. I find that the sum of Ksh. 80,000 was justified in view of the prolonged and agonizing pain the deceased endured before he eventually succumbed to his injuries.



21. On loss of expectation of life, it is trite that the conventional figure awardable under this head is Ksh. 100,000, which is what the trial court awarded.
22. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency were extensively dealt with by Ringera, J (as he then was) in *Marko Mwenda v Bernard Mugambi & another* Nairobi HCCC No 2343 of 1993 that: “In adopting a multiplier the court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”
23. The 2nd Respondent produced a letter from Isiolo Youth against Aids and Poverty dated 2/8/2015, evincing that the deceased was earning a monthly income of Ksh. 36,000. The contents of that letter were authenticated by PW3, who told the court that; “I know of a letter dated August 215. I wrote it as project coordinator IAP. It’s for Adana who worked with us. He used to receive some allowance. He used to get some benefits. He was earning 9000/= per week and 36000/= per month depending on activities.”
24. I find that the adoption of a multiplicand of Ksh. 36,000 was supported by documentary evidence adduced and therefore apt.
25. On the multiplier, the deceased was aged 35 years when his life was untimely cut short by the Appellants’ negligence.
26. I find that the multiplier of 20 years was reasonable, bearing in mind the vicissitudes and vagaries of life that may invariably shorten the normal working life of sixty years.
27. The Respondents pleaded that the deceased was survived by his wife, a young child, 2 siblings and parents, who relied entirely on him for provision and sustenance.
28. The definition of dependants under section 4 of the *Fatal Accidents Act* does not encompass siblings, and therefore, the rightful beneficiaries of the deceased herein were his parents, wife and his young child.
29. In light of the foregoing, I find that the dependency ratio of $\frac{2}{3}$ was in order and appropriate.
30. The bottom line is that the appeal lacks merit and is hereby dismissed with costs for the Respondent.

DATED AND DELIVERED AT MERU THIS 27TH DAY OF JANUARY, 2026.

S.M. GITHINJI

JUDGE



Appearances:

Ms. Kerubo holding brief for Mr. Kiura for the Respondent

Mr. Muli for the Appellant (absent).

