

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. E032 OF 2025

WEST KENYA SUGAR COMPANY
APPELLANT

- VERSUS -

JANET NAFUNA JUMA (Suing as the Administrator & Personal Representative of the Estate of GODWIN WANJALA JUMA (DCD)).....
.....1ST RESPONDENT

DAVID SIMIYU NJIULE (Suing as the Administrator & Personal Representative of the Estate of GODWIN WANJALA JUMA (DCD)).....
.....2ND
RESPONDENT

RAHAB NJOKI NDUNGU..... 3RD
RESPONDENT

(Being an appeal from the judgment and decree of the Magistrate's Court in Kimilili in Kimilili SPMCC No. 189 of 2019 delivered by Hon. W.K. Onkunya, PM on the 31st January 2025.)

JUDGMENT

1. The 1st and 2nd Respondents filed a suit against the appellant through a plaint dated 6/11/2019, in which they sought general and specific damages on behalf of their deceased son, who succumbed to his injuries following a

road traffic accident on 11/12/2017 along the Kitale - Kamukuywa road at Kamukuywa bridge.

2. The appellant filed a statement of defence dated 6/07/2020, denying all material allegations of fact pleaded against him and further asserting that, if any accident did occur, it was caused by negligence and/or omissions on the part of the deceased. The appellant also attributed negligence to an unknown third party.
3. The appellant filed a Third-Party Notice dated 16/03/2021 against Cosmus Ngula Masesi, whom they sought to have enjoined in the suit for contributing to the accident. Additionally, the appellant filed another Third-Party Notice against the 3rd respondent on 23/06/2021.
4. In her judgment, the trial magistrate found in favour of the 1st and 2nd respondent and entered judgment as follows: -
 - a) Liability - 50:50 between the appellant and 3rd respondent**
 - b) Pain & suffering - Kshs. 10,000/-**
 - c) Loss of expectation of life - Kshs. 100,000**
 - d) Loss of dependency - Kshs. 2,000,000**
Total - Kshs. 2,110,000
 - e) Special damages - Kshs. 48,900**
Total - Kshs. 2,158,900
 - f) Costs & Interest of the suit**

5. Being dissatisfied with the said Judgment, the appellant lodged this appeal via the Memorandum of Appeal dated 21/2/2025 and raised six (6) grounds of appeal as follows:

- a) ***That the learned trial magistrate erred in law and in fact in holding the appellant 50% liable despite the evidence adduced and/or on record.***
- b) ***That the learned trial magistrate erred in law and fact by allowing the 1st & 2nd respondents' claim against the appellant which was not proved on a balance of probabilities as required by law.***
- c) ***That the learned trial magistrate erred in law and fact in failing to dismiss the 1st & 2nd appellants' suit against the appellant with costs.***
- d) ***That the learned trial magistrate erred in law and in fact by awarding damages for loss of dependency which were excessive in the circumstances in view of the evidence on record.***
- e) ***That the learned trial magistrate erred in law and in fact relying on authorities that were not comparable to this case in awarding damages for loss of dependency.***
- f) ***That learned trial magistrate erred in law and fact by failing to consider the appellants' written submissions on the issues of quantum while***

assessing damages payable to the 1st & 2nd respondents.

6. The parties agreed to dispose of the appeal through written submissions. The appellant argued that the trial court erred in dividing liability equally at 50:50 between itself and the 3rd respondent, despite clear evidence indicating that the Matatu driver was solely to blame, as PW3's testimony absolved it from responsibility for the accident. It was further contended that, consequently, the 3rd respondent should bear full responsibility for the accident and be held liable at 100%. The appellant also argued that the trial court applied the wrong principles and overlooked relevant factors in assessing the quantum of loss of dependency, resulting in an award that is clearly excessive. Additionally, it was submitted that no evidence regarding dependency was presented by the 1st and 2nd respondents, and therefore, the award should be set aside and replaced with a comparable award ranging between Kshs. 500,000/= and Kshs. 800,000/=. Reliance was placed on the following cases;

- i). Mwangangi & Another v FKM (Suing as the legal representative of the Estate of the late AMK) (Civil Appeal E11 of 2021) [2021] KEHC 291 (KLR) (22 November 2021) (Judgement)** where the court

awarded a global award of **Kshs. 800,000/-** as loss of dependency for a deceased who was 12 years old.

- ii). **Dismus Omolo Odongo & Another v Interior Inspirations Ltd & 2 Others [2017] KEHC 3543 (KLR)** where the deceased was aged 17 years old at the time of the accident and the court awarded **Kshs. 500,000/-**
7. The 1st and 2nd respondents argued that, based on the circumstances of the case and the evidence presented, the trial magistrate made a fair and reasonable decision regarding liability. Concerning the quantum, they contended that the award was not excessive, as it constituted fair compensation. Reliance was placed on the following cases;
- i). **Patrick Makau Mutesy & Another [2019] eKLR** where the deceased was aged 16 years old and the court awarded **Kshs. 30,000/-** for loss of expectation of life, **Kshs. 100,000/-** and **Kshs. 1,500,000/-** for loss of dependency which was upheld on appeal.
- ii). **Felistus Kaniru Ndenda (Suing as the administrator & personal representative of the Estate of Erick Mutuku) [2020] eKLR** where the deceased was 12 years old at the time of death and the court awarded a global sum of **Kshs. 2,500,000/=** for loss of dependency, **Kshs. 50,000/=** for pain & suffering and **Kshs. 100,000/=** for loss of expectation of life.

ANALYSIS AND DETERMINATION

8. As this is a first appeal, the Court is obliged to reassess the evidence from the trial court independently and make its own findings and conclusions. (See *Selle & Anor vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123.)
9. Before the trial court, the 1st and 2nd respondents contended that on 11/12/2017, the deceased was a passenger in a Matatu, registration number KBN 686K, which was involved in an accident with the appellant's motor vehicle, registration number KTCB 769H. They called three witnesses in support of their case.
10. Pw1 Janet Nafula Juma, the deceased's mother, adopted her statement dated 8/8/2019 as her evidence-in-chief. She testified that she did not witness the accident; that the deceased was 16 years old and a student; and that she spent Kshs. 165,000/= on the deceased's burial expenses. On cross-examination, Pw1 testified that she was informed about the accident by a neighbour, that she knew the deceased used to pay for his own fees, and that she sold her land to pay for the funeral expenses.
11. PW2 No. 75181, Corporal Judy Cherop, produced the accident abstract as P.Exh 1 and stated that the accident occurred at night, around 8pm, and was fatal, with 18 people dying, including the deceased herein. The driver of the tractor with registration KTCB 769 was charged with causing

death by dangerous driving. During cross-examination, PW2 testified that visibility was poor at night at the time of the accident. The Matatu was overcrowded, not insured, and, according to the OB report, was held responsible for causing the accident. In re-examination, PW2 blamed the driver of the Matatu for causing the accident but informed the court that the driver had also passed away. PW2 stated that the tractor lacked rear lights and that the accident occurred at night.

12. Pw3 Linda Kalayi Wasike testified that she witnessed the accident. She adopted her witness statement dated 20/8/2023 as her evidence in chief and stated that she was involved in the incident. She further explained that the Matatu was behind the tractor, which stopped suddenly in the middle of the road, causing the Matatu to collide with it from behind. On cross-examination, Pw3 testified that she was seated on the mudguard of the tractor at the front and that the driver of the tractor did not signal and stopped on the road. She stated that she was not sure whether the driver signalled, as if he had, the people behind the tractor would have seen. She further explained that, similarly, if the Matatu was not speeding, it could have stopped in time to avoid a collision with the tractor. In re-examination, Pw3 reiterated that the tractor stopped in the middle of the road.

13. The appellant's case was that both the deceased and the driver of the Matatu with registration no. KBN 686K contributed to the accident. To support this claim, the appellant called one witness, Titus Wanjala Wanyama, who testified as Dw1 and was the driver of tractor registration KTCB 769. He adopted his witness statement dated 24/01/2018 as his main evidence and stated that he was driving towards Kamukuywa Bridge when he noticed an accident in the distance. He then engaged low gear and heard a loud bang from the rear of his trailer, which threw him into the bushes. When he regained consciousness, he saw the tractor lying on its left side, with the Matatu having entered the rear of the trailer. He blamed the Nissan for the accident. During cross-examination, Dw1 denied carrying Pw3 on the tractor's front mudguard and stated that his conductor was Joseph Wambwale, who sat on the mudguard of the tractor.
14. Based on the aforementioned facts, the trial court arrived at its decision. From the foregoing, the grounds of appeal may be summarised into two, viz,

i). that the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on liability and wrongly apportioned liability equally between the appellant and 3rd respondent; and

ii). that the trial court misdirected itself in ignoring the evidence, submissions, authorities and principles applicable on quantum and consequently came to a wrong conclusion on damages for loss of dependency which were too high.

15. Regarding liability, the appellant was held jointly and equally responsible with the 3rd respondent for causing the accident. In *Stapley v Gypsum Mines Limited (2)* (1953) A.C 663 at p. 681, a point reiterated in the case of *Ndatho v Chebet* (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment), Lord Reid explained that:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it ... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the

accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally."

16. It is trite law that he who alleges must prove. **Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya**, provides that: -

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

17. In **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that: -

"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the

court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

18. Accordingly, it was the duty of the 1st and 2nd respondents to adduce evidence that the appellant was responsible for causing the accident that resulted in the deceased's fatal injuries.
19. Pw2 Corporal Cherop, in her testimony on cross-examination testimony, stated that the appellant's tractor lacked rear lights and that the area where the accident happened had poor visibility, especially at night. He further mentioned that if the Matatu had been driven at a reasonable speed, the accident would not have occurred.
20. On his part, Pw3 stated that the accident occurred because Dw1 stopped the tractor in the middle of the road. This was firmly refuted by Dw1, who denied carrying Pw3 on his tractor. However, his evidence that he carried a loader on the mudguard remained uncorroborated.
21. On a balance of probabilities, it is clear that both the Dw1 and the driver of the Matatu KBN 686K are to blame for the accident. In my view, the failure to have working rear lights (tail lights or brake lights), especially at night or in poor visibility, is a significant breach of duty of care and a major factor in determining liability. Such a failure often results in a finding of negligence against the driver of the unlit vehicle, though this should not be considered in isolation, as the

evidence indicates that the Matatu driver, in which the deceased was a passenger, was also speeding. According to Pw2, he would have avoided the accident if he had been driving at a more reasonable speed.

22. In the circumstances, I see no reason to interfere with the trial court's apportionment of liability and therefore uphold it.
23. Regarding quantum in the award for loss of dependency, the appellant argued that the trial court's award of Kshs. 2,000,000/= was excessive and not consistent with comparable awards.
24. The law regarding the circumstances under which the court will interfere with an award of quantum by the trial court is well-settled: the appellate court will only interfere with the damages award if, in exercising its discretion, the trial court misdirected itself on certain matters and reached an erroneous decision, or was manifestly wrong in exercising that judicial discretion, resulting in injustice, as held in the cases of; Mbogo & another Vs Shah (1968) EA and Mkube v Nyamuro 1983 KLR 403.
25. The principle was re-stated by the Court of Appeal in **Kemfro Africa Ltd v A.M. Lubia and Another (1988) KAR 722**, thus: -

“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 were held by the former Court of Appeal of Eastern Africa to be 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. The same position was taken in Denshire Muteti Wambui V. KPLC (2013) eKLR.”

26. The trial court awarded a total of Kshs. 2,000,000/= for loss of dependency. The appellant challenged this amount as excessive and suggested an award between Kshs. 500,000/= and Kshs. 800,000/=. Conversely, the 1st and 2nd respondents urged the court to uphold the trial court’s award as fair. In evaluating comparable awards, I have considered the decisions cited by both parties and their submissions on the matter. In *D M (Suing as the Administrator and Legal Representative of the Estate of L K M) v Stephen Johana Njue & Another* [2016] eKLR, the court on appeal increased the sum from Kshs. 700,000/- to Kshs. 1,200,000/- for a 16-year-old who was in school. In the case of *Macharia & another v Onkundi & another* (Suing as Personal of the Estate of BO (Deceased)) (Civil Appeal

E004 of 2023) [2025] KEHC 11336 (KLR) (31 July 2025) (Judgment), the High Court on appeal upheld a global sum of Kshs. 1,500,000/- for loss of dependency where the deceased was 14 years old. I agree with the appellant that an award of Kshs. 2,000,000/= was excessive given the circumstances. I find that an award of Kshs. 1,500,000/= would be appropriate, considering factors of inflation.

27. I find that the instant appeal is partially successful insofar as the award of loss of dependency is concerned. For avoidance of doubt, the award of loss of dependency of **Kshs. 2,000,000/=** is hereby set aside and replaced by one of **Kshs. 1,500,000/=**. Each party to bear their own costs. It is so ordered.

Dated, signed and delivered at Bungoma this 3rd Day of March 2026 .

**R. OUGO
JUDGE**

In the presence of:

Miss Langat - For the Appellant

Respondent - Absent

For the 3rd Respondent

Wilkister - C/A