

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E057 OF 2022

PENINA MUENI MUSYA alias

MUENI MUSYA

APPELLANT

-VERSUS-

**FRANCIS MUNYAO NDEWA & JOSEPHAT WAMBUA
MUTUKU**

***(Suing as legal representatives of the estate of FELIX
MWANZIA MUTUKU)***

..... RESPONDENTS

***(An appeal from the judgment of the Chief Magistrate's
Court at Makueni delivered on 28th September, 2022 in
Makueni CMCC No. E134 of 2021 by Hon. Sagero, SRM)***

JUDGMENT

1. The present appeal arises from the judgment of the Chief Magistrate's Court at Makueni delivered on 28th September, 2022 in **Makueni CMCC No. E134 of 2021**. In that suit, the Plaintiffs, suing as the legal representatives of the estate of the deceased, sought general damages under the **Fatal Accidents Act** and the **Law Reform Act** together with special damages, costs and interest, following a road traffic accident which occurred on 29th August, 2020 at Kathonzweni Market along the Makindu direction. It was alleged that the deceased, who was then pushing a handcart, was struck from behind by motor vehicle registration number KCC 625V driven by the Defendant, thereby sustaining fatal injuries.
2. The Defendant filed a defence denying liability and attributing negligence to the deceased. Upon hearing the parties, the trial Court apportioned liability at 80:20 in favour of the Plaintiffs and proceeded to assess damages. The Court awarded Kshs.50,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life and Kshs.1,357,200/= for loss of dependency, together with

special damages of Kshs.59,150/=, which after contribution resulted in a net award of Kshs.1,205,760/= plus costs and interest.

3. Being dissatisfied with both liability and quantum, the Defendant lodged the present appeal vide a Memorandum of Appeal dated 25th October, 2022 raising several grounds, *inter alia*:

a) The Learned Magistrate erred in law and in fact in the evaluation of the evidence holding the Appellant 80% liable for the accident that occurred on 29th August, 2020 despite her acquittal in Traffic Case No. E001 of 2020 at Makindu.

b) The Learned Magistrate erred in law and in fact in failing to hold that dependency was a matter of fact which had not been proven by the Respondents.

c) The Learned Magistrate erred in law and in adopting a multiplier of 25 years when the only proven dependant was the father of the deceased.

- d) The Learned Magistrate erred in law and in adopting a multiplicand of Kshs.13,572.00/= for a general worker contrary to the laid down legal provisions.*
- e) The Learned Magistrate erred in law and in fact in awarding special damages at Ksh. 59,100/=.*
- f) The Learned Magistrate erred in law and in failing to discount the award under the Law Reform Act from the award under the Fatal Accidents Act noting that the beneficiaries were the same.*

Submissions:

4. The appeal was canvassed by way of brief written submissions. On liability, the Appellant submitted that the trial court erred in holding her 80% liable despite the evidence on record and her acquittal in **Traffic Case No. E001 of 2020**. It was argued that the deceased suddenly joined the main road without ensuring that it was safe to do so and that the trial court misdirected itself as to the Appellant's submissions on apportionment of liability.

5. Counsel contended that the Appellant had in fact urged that the deceased be held wholly liable, or in the alternative that liability be apportioned at 70:30 against the deceased. The Appellant further submitted that dependency had not been proved since the deceased's father did not testify and no evidence was tendered to demonstrate the extent of reliance on the deceased.
6. On quantum, it was urged that the multiplier of 25 years was excessive where the only alleged dependant was a parent, that the multiplicand of Kshs.13,572/= was inapplicable to Wote which fell under "other areas" within the **Regulation of Wages Order**, and that special damages were not strictly proved as the receipts bore the name of a person not disclosed in the pleadings. The Appellant also contended that the trial Court ought to have discounted the award under the **Law Reform Act** from that made under the **Fatal Accidents Act** to avoid double compensation.
7. The Respondents opposed the appeal and supported both the finding on liability and the awards made by the trial Court. They submitted that an acquittal in a criminal case

did not bar a finding of negligence in civil proceedings and relied on the decision in *Ochieng vs Ayieko (1985) KLR 494* to urge that the Court was entitled to independently evaluate the evidence.

8. It was argued that the deceased was hit from behind and that the Appellant, as a driver, bore the primary duty to keep a proper lookout and maintain a safe distance. On quantum, the Respondents maintained that the multiplier of 25 years was reasonable considering that the deceased was aged 35 years and in good health, and that the minimum wage adopted by the trial Court was proper. They further submitted that burial expenses are often incurred collectively within the family setting and that the receipts produced were admitted without objection at trial, hence the award of special damages was justified. The Respondents urged the court to dismiss the appeal with costs.

Analysis & Determination:

9. Having regard to the record before me and the submissions of parties, the issues for determination are as follows:

a) Whether the trial court erred in apportioning liability at 80:20 against the Appellant.

b) Whether dependency was proved and whether the trial court properly applied the multiplier, multiplicand and dependency ratio in assessing loss of dependency.

c) Whether the award of special damages was strictly proved.

d) Whether the trial court ought to have discounted the awards under the Law Reform Act from those under the Fatal Accidents Act.

10. This being a first appeal, this Court is under a duty to re-evaluate and re-analyze the evidence tendered before the trial Court and to draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and should therefore accord due allowance to that fact.

11. It was held in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123** that:

“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.”

Liability

12. Regarding the first issue, the Appellant challenges the finding of the trial Court which apportioned liability at 80:20 against her. It is common ground that the Appellant had earlier faced traffic proceedings arising from the same accident and was acquitted. The law is now settled that an acquittal in criminal proceedings does not absolve a party from civil liability. In ***Ochieng vs Ayieko [1985] KLR 494***, O’kubasu, J (as he then was) held as follows-

“Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate’s Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored.”

13. Similarly, in ***Kenya Power and Lighting Co., Ltd v Zakayo Saitoti Naingola & Another NRB HCCA No. 522 of 2004 [2008] eKLR***, Nambuye J., (as she then was) observed that-

“The legal effect and or bearing of the acquittal of the 4th defendant in the traffic proceedings, to these proceedings, is that the acquittal did not give the 4th defendant clean bill of unblamed-worthiness. This is so because the traffic court, was exercising criminal jurisdiction whose standard of proof was

different from the one applicable to civil proceeding. The one in the traffic proceedings was one beyond reasonable doubt. Whereas the one in civil proceedings is one of a balance of probability. Further this court has judicial notice of the fact that since the two courts were exercising different jurisdictions the court seized of the civil proceedings was not to be bound by the decision of the court exercising criminal jurisdiction. It was duty bound as it did, to re-evaluate the evidence on the record and arrive at its own conclusion. Likewise, this court, as an appellate court, is not bound by the findings of the lower court. It has a duty to re-evaluate the evidence on the record and then arrive at its own conclusion on the matter.”

14. The traffic Court judgment in **MCTR No. E001 of 2020** placed before this Court is instructive. The traffic court observed, verbatim, that-

“In the present case, different chain of events was given on how the accident occurred. It was the prosecution's case that the accident occurred when the accused while driving behind the deceased and speeding failed to slow down and/or stop ramming onto the deceased from behind.

The accused on her part said the accident occurred when the accused emerged into the road abruptly and without first stopping to check out. The prosecution would nonetheless not able to clarify if there was speed limit sign at the scene or at what speed she was possibly making at. However, it was not disputed that the incident was at a market place hence slow speed and more caution required. PW1 was however categorical that the accused was not Speeding in the circumstances of the case. PW1 said he blamed the accident on the accused for hitting the deceased from behind. PW2 while saying the accident could have been avoided if

the accused had she braked, he said he did not know who to blame for the accident.

Accused's explanation on how the accident occurred may not be wholly acceptable but nonetheless plausible/a possibility.”

15. Turning to the civil proceedings before the trial Court, **PW1**, a police officer who was not the investigating officer, testified that the pedestrian was ahead of the motor vehicle and that the driver was to blame. **PW2**, who is a brother to the deceased, was not an eyewitness. The Appellant, on her part, testified that the deceased abruptly joined the main road while pulling a cart and that she was driving at about 40 km/hr and took precautions to avoid the collision. The trial Court, after considering the evidence and submissions, stated:

“I have considered the evidence on record and the exhibits that were produced by the parties including the proceedings in the traffic case in which the Defendant was acquitted and taking account all the circumstances including the

allegation that the deceased emerged into the road abruptly without stopping to check out for his safety. I apportion liability at 80:20 in favour of the Plaintiff.”

16. As a first appellate Court, this court is enjoined to re-evaluate the entire evidence and draw its own conclusions. Upon such re-evaluation, it becomes apparent that there was no independent eyewitness account clearly establishing how the accident occurred. The police officer who testified was not the investigating officer and his attribution of blame was not founded on direct observation. The evidence reveals two competing narratives: one that the deceased was ahead and was hit from behind, and the other that he abruptly joined the road. Even the traffic Court accepted that the Appellant’s explanation was plausible.

17. The Court of Appeal in ***Hussein Omar Farah v Lento Agencies [2006] eKLR*** stated as follows in circumstances such as these:

“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.”

18. In *Kamau & another v Kyalo & another (Civil Appeal E834 of 2022) [2025] KEHC 2491 (KLR) (Civ) (23 January 2025) (Judgment)* the Court stated:

“In the present case, there are two conflicting pleadings as to how the accident in question occurred. Each party insists that the other was to blame. None was however able to establish the fault of the other. This being the case, it is my finding that both parties were equally to blame for occasioning the accident. Accordingly, the trial court was correct in apportioning liability at the ratio 50:50. Both

the appeal and cross-appeal on liability have no basis.”

19. In the present case, the absence of the investigating officer, the lack of objective evidence on speed or point of impact, and the existence of two plausible accounts of how the accident occurred render the finding of 80% liability against the Appellant unsupported by the evidence on record. While a driver in a market setting bears a duty of heightened care, the evidence also points to contributory negligence on the part of the deceased, given the allegation that he entered or moved onto the roadway without ensuring it was safe to do so.

20. Accordingly, the trial Court erred in apportioning liability at 80:20, as little basis was provided for why that was. Guided by the authorities cited above and upon an independent evaluation of the evidence, liability is more appropriately apportioned at 50:50 between the Appellant and the deceased.

Dependency:

21. Regarding the issue of dependency, the Appellant appears to submit that dependency was not established

and that the only witness who testified on the issue, **PW2**, was a brother of the deceased who did not demonstrate actual reliance on the deceased. From the record before me, the Chief's letter dated 16th October, 2020 shows that the deceased's father authorised JOSEPHAT MWENDWA MUTUKU to attend to the matter and the record further demonstrates that both he and the deceased's father were issued with the grant *ad litem*.

22. Their appointment as administrators, however, does not of itself determine who qualifies as a dependant under the **Fatal Accidents Act**. **Section 4(1)** of the **Fatal Accidents Act** provides that:

“Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall be brought by and in the name of the execution or administrator of the person deceased] ...”

23. The statutory beneficiaries are therefore limited, and the Court must be guided strictly by the language of the Act. In *John Mungai Kariuki & Another -vs- Kaibei Kangai Ndethiu & 2 Others [2020] eKLR*, the Court emphasized this position, holding that:

“Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall ... be brought by and in the name of the execution or administrator of the person deceased] The brothers and sisters of the deceased are not dependants for purposes of the statute and language of the statute cannot be read, even by creative interpretation, to expand the list of dependants to include siblings of the deceased.”

24. From the evidence on record, **PW2** expressly stated that the deceased neither had a wife nor children. The evidence that emerges therefore is that the only statutory dependant was the deceased’s father. While **PW2**

prosecuted the suit as an administrator, his role as a brother did not elevate him to the status of a dependant under the statute.

25. That said, the absence of proof of financial support is not fatal to a claim for dependency where a parent is concerned. Kenyan Courts have consistently recognized the social reality that adult children support their parents. In *Leonard O. Ekisa & another v Major K. Birgen [2005] KEHC 2214 (KLR)*, the Court observed that in an African family setting, it is not unusual for parents to be dependants and that such support does not necessarily require documentary proof, noting that:

“In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.”

26. Similarly, in *Joshua Muriungi Ng'anatha v Benson Kataka Lemureiyani [2016] KEHC 2367 (KLR)*, the Court cited with approval the Court of Appeal decision in *Kenya Breweries Ltd v Saro [1981] KLR 408*, where it was stated that:

“In the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a variable asset which the parents are proud of and are entitled to keep intact.”

27. The same reasoning was echoed by Kneller JA in *Hassan v Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457*, who stated that:

“The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated

against as a system of genontocracy [sic] at its worst.”

28. Guided by the foregoing authorities, I find that dependency by the deceased’s father was properly inferable from the evidence and the social schema recognized in our jurisprudence. The trial Court was therefore entitled to find that dependency existed and to apply a 1/3 dependency ratio for the deceased as a single person.

29. The evidence on record was that **PW2** testified the deceased earned Kshs.1,000/= per day as a cart pusher, but no documentary proof of earnings was produced. The trial Court therefore resorted to the statutory minimum wage and adopted a multiplicand of Kshs.13,572/=. The Appellant challenges that figure, arguing that the applicable wage under the **Regulation of Wages Order** for the area where the accident occurred was Kshs.7,240.95/=.

30. The accident occurred on 29th August, 2020. Vide **Gazette Notice No. 2672 of 26th June, 2020**, the Government retained the existing minimum wage levels

as set under Legal Notice No. 2 of 2019, being the **Regulation of Wages (General) (Amendment) Order, 2018.**

- 31.** Under the said wage order, the minimum wage for a general labourer in “other areas” was Kshs.7,240.95/=. The evidence places the accident at Kathonzweni Market within Makueni County, which falls within the “other areas” classification away from Nairobi and major cities. The trial Court therefore fell into error by applying the wage of Kshs.13,572/= which was applicable to Nairobi and certain municipalities, and not to the locality where the deceased worked.
- 32.** Accordingly, this Court will interfere with the multiplicand adopted by the trial Court and substitute the same with Kshs.7,240.95/=.
- 33.** Turning to the multiplier, the trial Court adopted a period of 25 years on the basis that the deceased, who was aged 35 years, would probably have worked until the age of 60. While that approach reflects the deceased’s potential working life, the assessment under the **Fatal**

Accidents Act must be directed at the probable period of dependency, not merely the remaining years of employment.

34. The evidence on record shows that the deceased neither had a spouse nor children and that the only dependant established was his father. The age of the father was not disclosed, and no evidence was tendered to demonstrate that dependency would subsist throughout the entire remaining working life of the deceased. In such circumstances, taking into account the vicissitudes of life, it is unlikely that support would have endured for the full balance of the deceased's working years.

35. Guided by these considerations, and bearing in mind that the multiplier must be fair, reasonable and proportionate to the nature of the proven dependency, I find that a multiplier of 15 years more appropriately reflects the probable duration of support to the deceased's father. The trial Court therefore fell into error in adopting a multiplier of 25 years, and the same is

hereby interfered with and substituted with a multiplier of 15 years.

36. Having settled the multiplicand at Kes 7,240.95 and the dependency ratio at 1/3, the loss of dependency is recalculated as follows:

$$\text{Kes } 7,240.95 \times 12 \times 15 \times 1/3 = \text{Kes } 434,457/=$$

Special damages:

37. Turning to the specials, the Appellant challenges the award of Kshs.59,150/= on the basis that some receipts were issued in the name of Dominic Mutua. The record shows, however, that the receipts related to funeral expenses and were produced in evidence without objection. It is trite that special damages must be specifically pleaded and strictly proved. In ***Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited [2016] eKLR***, the Court of Appeal stated:

“We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only

be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.

38. The evidence before the trial court showed that Dominic Mutua was a member of the deceased's family. I take judicial notice that as regards funeral arrangements within Kenyan society, expenses are frequently incurred collectively by relatives, and the mere fact that certain receipts bear the name of another family member does not negate proof of the expenditure. The receipts were admitted in evidence and aggregate to the pleaded funeral expenses. The challenge to the sum of Kshs.59,150/= therefore lacks merit.

39. The record further shows that the Plaintiffs had produced a receipt for Kshs.25,000/= relating to the grant ad litem. The trial Court declined to award this item

without giving reasons, yet the expense had been specifically pleaded and supported by documentary proof. I will therefore interfere with that omission and reinstates the sum of Kshs.25,000/=-.

Subtraction of award under LRA:

40. Finally, the Appellant contends that the learned magistrate erred in law by failing to deduct the damages awarded under the **Law Reform Act** from the damages awarded under the **Fatal Accidents Act**, thereby occasioning what is described as double compensation. The Respondents oppose that contention and submit that the law does not require such deduction.

41. The trial Court awarded Kshs.50,000/= for pain and suffering and Kshs.100,000/= for loss of expectation of life under the **Law Reform Act**, and separately assessed damages for loss of dependency under the **Fatal Accidents Act**. The record shows that the trial Court identified each head of damages distinctly and made separate awards. There is nothing to demonstrate that the court compensated the same loss twice. The mere fact

that the beneficiaries overlap does not justify a mathematical deduction of one award from the other.

42. **Section 2(5) of the Law Reform Act** addresses the relationship between claims made for the benefit of a deceased person's estate and claims made by their dependants under the **Fatal Accidents Act**. It provides that:

“The rights conferred for the benefit of the estates of deceased persons by this Act shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act or any other written law.”

43. The plain wording of the statute makes it clear that claims under the **Law Reform Act** and those under the **Fatal Accidents Act** are distinct, accrue to different beneficiaries, and are intended to coexist. The estate benefits under the Law Reform Act, while dependants benefit under the **Fatal Accidents Act**.

44. In any event, the matter has long been settled by the **Court of Appeal in Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR)** where the Court held 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 under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise.”

45. I have nothing more to add.

Disposition:

46. Resultantly, the appeal partially succeeds as follows:

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

b) The award for loss of dependency is set aside and substituted with Kes 434,457/-

c) The awards of Kes 50,000/- for pain and suffering and Kes 100,000/- for loss of expectation of life are upheld.

d) The award on special damages is varied from Kes 59,150/- to Kes 84,150/-.

e) The total award is therefore tabulated as follows:

*Pain and suffering Kshs.
50,000/=*

*Loss of expectation of life
Kshs. 100,000/=*

**Loss of dependency Kshs.
434,457/=**

**Special damages
Kshs.84,150/=**

**Total
Kshs.668,607/=**

**Less 50% contribution
Kshs.334,303.50/=**

**Net award
Kshs.334,303.50/-.**

g) The Respondents shall have interest on the net award at court rates from the date of the judgment of the lower court in respect of general damages and from the date of filing suit in respect of special damages.

h) As the appeal has succeeded in part, each party shall bear its own costs of the appeal.

47. Orders accordingly.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this **18TH** day of **FEBRUARY, 2026.**

.....

HON C KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Ngechu, Advocate for Appellant

No appearance for Respondent