Nunguni FSA Community Based Organization v Ngwava (Suing as the administrator of the Estate of the Late Fredrick Mulinge Richard) & 2 others (Civil Appeal E025 of 2023) [2026] KEHC 2463 (KLR) (18 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2463 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E025 OF 2023

CJ KENDAGOR, J

FEBRUARY 18, 2026

BETWEEN

NUNGUNI FSA COMMUNITY BASED ORGANIZATION .... APPELLANT

AND

ELIZABETH NZULA NGWAVA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE FREDRICK MULINGE RICHARD) .. 1ST RESPONDENT

MAKINDU MOTORS .... 2ND RESPONDENT

PATRICK MWANZA MUTISO .... 3RD RESPONDENT

(Being an Appeal against the Judgment and Decree of Hon Felix Makori, Principal Magistrate at Kilungu Magistrate's Court MCCC No. E006 of 2020 delivered on 10th January, 2023)

JUDGMENT

1. This Appeal arises from the Judgement and decree of the Chief Magistrate's Court at Kilungu delivered by Hon. F. Makoyo (Principal Magistrate) on the 10th January, 2023 in Civil Suit No. E006 of 2020. In the trial Court, the Plaintiff instituted proceedings by a Plaint dated 2nd September, 2020 seeking damages arising out of a fatal road traffic accident involving motorcycle registration number KMDV 087L which occurred on 10th December, 2016 along the Nunguni – Mutongu Road.

2. The 1st Defendant denied liability and took out a Third-Party Notice against the Appellant. Upon hearing the matter, the trial Court found the 2nd Defendant and the Third Party liable at 100% and entered judgment for a total sum of Kshs.2,203,450/=. Being dissatisfied with the entire Judgement and decree, the Appellant lodged the present Appeal vide a Memorandum of Appeal dated 3rd April, 2023 on the grounds inter-alia:

i. The Learned trial Magistrate erred in law and fact in dismissing the suit against the 2nd Respondent (the 1st Defendant in the lower Court matter).

ii. The Learned trial Magistrate erred in law and fact and misdirected himself on the principles governing the establishment of ownership and the way he weighed evidence brought before Court to determine the issue of ownership of the motorcycle. The Appellant clearly established ownership of the motorcycle to be that of the 3rd Respondent (the 2nd Defendant in the lower Court) and the Learned trial Magistrate in his Judgement so agreed with the Appellant. As such, the Learned Magistrate misguided himself by condemning the Appellant to take 100% liability.

iii. The Learned trial Magistrate erred in law and fact by holding that the Appellant is liable for the accident given that the Appellant established not to have been in possession of the motorcycle. In this case, it was proven that the 3rd Respondent herein was in actual possession and the only beneficial owner of the motorcycle at the material time. No form of any agent-principal relationship, or any kind of relationship at all, was proven for the Court to lay the burden of liability upon the Appellant.

iv. The Learned trial Magistrate erred in law and fact by failing to consider the evidence adduced by the Appellant in defending their case. Specifically, the Learned trial Magistrate failed to consider the ledger, as filed by the Appellant, that proved that the 3rd Respondent was the owner and in actual possession of the motorcycle and that the Appellant was only involved in the purchase transaction as the 3rd Respondent's lending institution. Implicating the Appellant for the acts of the 3rd Respondent therefore causes absurdity and confusion, thereby occasioning them injustice.

v. The Learned trial Magistrate erred in fact and law in the way he weighed the evidence before the Court to determine the issue of whether there was an oral agreement between the Appellant and the 2nd Respondent (the 1st Defendant in the lower Court) on sale and purchase of the motorcycle, given that the Appellant gave enough proof to confirm that such an Agreement existed as the 3rd Respondent did in fact faithfully service the loan in full.

vi. The Learned trial Magistrate erred in law and in fact by failing to take into consideration the response and submissions of the Appellant on the issue of negligence on the part of the 1st and 3rd Respondents herein before he arrived at his decision.

vii. The Learned trial Magistrate misrepresented the facts and evidence and misinterpreted the law on the subject matter and the entire matter.

viii. That the Learned trial Magistrate erred in fact by condemning the Appellant to pay damages of Kshs.2,203,450.00/=, an amount that ought to be paid by the 3rd Respondent herein (the 2nd Defendant in the lower Court).

Submissions:

3. The Appellant submits that the trial Court erred both in law and fact in holding it liable for the accident and in awarding damages against it. On liability, the Appellant argues that its role was limited to financing the purchase of the subject motorcycle on behalf of the 3rd Respondent. It maintains that it neither retained ownership nor exercised physical control or beneficial use of the motorcycle at the material time.

4. According to the Appellant, the 2nd Respondent remained the registered owner while the 3rd Respondent was in actual possession, and the trial Court therefore misdirected itself by attributing liability to a party that was merely a lending institution. The Appellant further contends that no principal–agent or employer–employee relationship was established between it and the rider so as to justify vicarious liability.

5. The Appellant also faults the trial Court for allegedly failing to properly consider its documentary evidence, including the loan ledger, delivery records and related transaction documents, which it says demonstrated that the motorcycle had been financed for the benefit of the 3rd Respondent. It submits that the presumption of ownership under Section 8 of the *Traffic Act* was not displaced against the registered owner and that the Court misapplied the principles governing actual and beneficial ownership.

6. On negligence, the Appellant contends that the Respondents failed to prove liability on a balance of probabilities. It challenges the evidentiary weight accorded to the police abstract and the testimony of the police officer who testified, arguing that the officer did not conduct the investigations and that portions of the evidence amounted to hearsay. It further submits that the doctrine of res ipsa loquitur was improperly invoked and that no credible evidence linked the Appellant to the occurrence of the accident.

7. Regarding quantum, the Appellant maintains that damages ought not to have been awarded against it at all since liability was not established. It therefore urges this Court to allow the Appeal, set aside the entire Judgment and decree of the trial Court, and award costs of both the trial and the appeal in its favour.

8. The 1st Respondent opposes the Appeal and urges this Court to uphold the findings of the trial Court on both liability and quantum. On liability, the 1st Respondent contends that the evidence before the trial Court established that although the subject motorcycle remained registered in the name of the 2nd Respondent, it had already been sold to the Appellant, a fact which the Appellant's own witness admitted.

9. It is argued that the Appellant retained a demonstrable interest in the motorcycle through the financing arrangement with the 3rd Respondent and was therefore properly found to bear liability together with the 3rd Respondent. The 1st Respondent maintains that the trial Court correctly evaluated the evidence relating to ownership and possession and arrived at a proper conclusion.

10. With regard to quantum, the 1st Respondent submits that the awards made by the trial Court were reasonable and consistent with comparable authorities. It is argued that the award of Kshs.100,000/= for pain and suffering was justified given that the deceased survived for two days after the accident, while the award of Kshs.100,000/= for loss of expectation of life was modest and within the range of established precedents. On loss of dependency, the 1st Respondent supports the trial Court's adoption of the global sum approach in the absence of proof of earnings and submits that the award of Kshs.2,000,000/= was fair and not excessive. The 1st Respondent therefore urges the Court not to interfere with the trial Court's exercise of discretion on damages.

11. The 2nd Respondent likewise opposes the Appeal and submits that the trial Court properly assessed the evidence before arriving at its decision. It is argued that the 2nd Respondent, being a dealer in motor vehicles and motorcycles, had already sold the subject motorcycle to the Appellant and handed over the relevant documents, including the logbook, for purposes of transfer. According to the 2nd Respondent, it was not in possession or control of the motorcycle at the time of the accident and therefore bears no liability.

12. The 2nd Respondent contends that the Appellant's own evidence confirmed that it financed the purchase of the motorcycle on behalf of the 3rd Respondent and that the financing arrangement created sufficient interest to justify the trial Court's finding against the Appellant. It is further submitted that the Appeal is frivolous, lacks merit, and is merely intended to delay the Respondents from enjoying the fruits of their judgment.

13. On costs, the 2nd Respondent argues that costs follow the event and urges the Court to dismiss the Appeal with costs to the Respondents.

Analysis & Determination:

14. The issues for determination are as follows:

    a. Whether the trial Court erred in holding the Appellant liable as the owner of the motorcycle;

    b. Whether the finding on negligence was supported by the evidence on record;

    c. Whether the award of damages ought to be disturbed;

    d. Who should bear the costs of the appeal.

15. Regarding ownership of the subject motor-cycle, Section 8 of the *Traffic Act* (Cap 403) provides as follows:

    > "The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

16. Indeed, in Joel Muga Opija v East African Sea Food Limited [2013] eKLR, the Court stated:

    > "...We agree that the best way to prove ownership would be to produce to the Court a document from the Registrar of Motor Vehicles showing who the registered owner is..."

17. The Appellant's case before the trial Court, and on appeal, was that although the motorcycle remained registered in the name of the 2nd Respondent, it had entered into an arrangement with that Respondent under which it paid the full purchase price for motorcycles which would thereafter be funded to purchasers such as the 3rd Respondent. It's witness stated that payments were made to the 2nd Respondent and that motorcycles would subsequently be taken up by members of its group.

18. In support of that arrangement, the Appellant relied on a report on the register of shares said to show the 3rd Respondent's association with it, together with a loan ledger card bearing the 3rd Respondent's particulars and entries relating to a loan facility. The ledger was presented as demonstrating that the motorcycle had been financed to the 3rd Respondent and that repayments were made over time.

19. The material placed before the trial Court did not include a sale agreement between the Appellant and the 3rd Respondent. There was also no document setting out the terms of the alleged financing arrangement, nor any record showing the nature of the proprietary interest retained or released upon disbursement of the alleged loan. While it was asserted that the loan had been fully serviced and that documents had been handed over to facilitate the transfer, no executed transfer forms or acknowledgements were produced to demonstrate that these steps had in fact been taken.

20. The Appellant's own witness further stated that the Appellant purchased the motorcycle from the 2nd Respondent and would thereafter deal with its clients. The evidence on record, therefore, reflects an arrangement whose precise legal character, whether sale, conditional sale, or financing facility, was not

reduced into writing before the Court. The share register extract and the loan ledger were relied upon as the primary basis upon which the Appellant sought to show that beneficial interest had moved away from it.

21. The record also contains a delivery note dated 13th July, 2016 from the 2nd Respondent to the Appellant showing that the subject motorcycle, together with others, had been delivered to the Appellant. The existence of that document was not disputed. It formed part of the Appellant's own narrative that motorcycles would be purchased in bulk from the 2nd Respondent before being made available to individual members or clients.

22. The Appellant's witness, DW1, stated in examination that the Appellant purchased the motorcycle from the 2nd Respondent and thereafter dealt with its own clients. He further stated that payments to the 2nd Respondent were made through the Appellant and that the 2nd Respondent did not know the eventual purchasers. The same witness indicated that it was the Appellant's practice to retain documentation until completion of payments, after which the client would be sent to the 2nd Respondent to facilitate transfer.

23. According to that evidence, the Appellant assumed that the 3rd Respondent had effected transfer after completion of payments. However, no material was produced showing the nature of that assumption, the date upon which documents were allegedly handed over, or the terms upon which the Appellant relinquished its interest. The loan ledger relied upon by the Appellant contained entries relating to repayments, but it did not set out the underlying contractual arrangement between the parties, nor did it identify the motorcycle as having been transferred out of the Appellant's interest at any specific point.

24. The Appellant's position was that it operated as a lending institution. Yet, as I have hitherto observed, aside from the share register extract and the ledger entries, there were no institutional records placed before the Court demonstrating the structure of the alleged financing model, whether the transaction constituted a loan secured against the motorcycle, a conditional sale, or some other arrangement. In particular, there was no written agreement between the Appellant and the 3rd Respondent defining rights of possession, ownership, or the point at which beneficial interest would pass.

25. Indeed, it is trite that ownership may pass whilst still remaining in name to another on paper. In Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR, the Court observed that:

> " ...whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case..."

26. However, in this case, the absence of such documentation sits alongside the Appellant's own evidence that motorcycles were first acquired by it from the 2nd Respondent before being taken up by individual members. If, as stated, the Appellant's role was confined to financing, the record is silent as to why there were no records setting out the terms of that financing or clarifying whether the motorcycle, upon delivery to the Appellant, ceased to be held for its benefit.

27. In those circumstances, the learned Magistrate cannot be faulted for having concluded that the Appellant had not displaced the presumption arising from the evidence of its own involvement in the transaction. Having revisited the record, I am unable to say that the learned Magistrate fell into error in approaching the issue in that manner. There was nothing to show that the Appellant was not a beneficial owner of the said motorcycle.

28. On who was to blame for the accident, the evidence relating to the occurrence of the accident was primarily tendered through PW1, No. 117299 PC Evans Kipkemboi of Kilungu Police Station. He

testified that the accident occurred on 10th December, 2016 at about 7:30 p.m. at the Kivingoni area involving motorcycle registration number KMDV 087L and a pedestrian.

29. According to his testimony, the rider failed to keep to his lane and knocked down the deceased, who later succumbed to injuries. He produced a police abstract as an exhibit. In cross-examination, PW1 stated that he did not draft the police abstract and that it had been prepared by CPL Webi, who had since been transferred. The witness also indicated that the rider was to be charged with causing death by dangerous driving, but was still at large.

30. The Appellant criticized that evidence on the basis that PW1 was not the investigating officer and that portions of his testimony were therefore hearsay. The learned trial Magistrate nevertheless considered the totality of the evidence, including the abstract, the testimony of PW1 and the fact that the circumstances of the accident as narrated by the Plaintiff remained largely uncontroverted. The Magistrate observed that the rider veered off his lane and knocked down the deceased and proceeded to determine liability on that basis.

31. Sections 33 and 35 of the *Evidence Act*, provide that:

> "In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall... be admissible as evidence of that fact if the following conditions are satisfied ...
>
> (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable."

32. The judgment reflects that the learned Magistrate did not rely on the abstract in isolation. Rather, he considered the testimony that the rider veered off his lane and fatally injured the deceased, noting that the account of the accident remained uncontroverted. The Appellant did not place before the Court any alternative version of events, nor did it call evidence addressing the manner in which the accident occurred.

33. I find no basis to fault the manner in which the learned trial Magistrate approached the evidence of PW1 in accepting it as sufficient proof of negligence against the Appellant and the 3rd Respondent.

34. On quantum, the learned trial Magistrate awarded damages under the various heads and entered judgment in favour of the Plaintiff in the total sum of Kshs.2,203,450/=. In doing so, he assessed damages for pain and suffering at Kshs.100,000/=, loss of expectation of life at Kshs.100,000/=, loss of dependency at Kshs.2,000,000/= under the global sum approach, and allowed special damages in the sum of Kshs.3,450/= as pleaded and proved.

35. The learned trial Magistrate adopted the global sum approach upon finding that the alleged earnings of the deceased had not been proved. In doing so, he relied on Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of Ben Siguda Okach (Deceased)) [2021] eKLR. The deceased herein was aged 32 years, with one identified dependant and no proof of earnings, circumstances in which the global sum approach was plainly available to the Court. The award of Kshs.2,000,000/= cannot be said to be so inordinately high or low as to warrant interference.

36. I would only add the decision in Car General Kenya Limited v Nene & another (Suing as the Administrator of the Estate of Agnes Wavinya Joana – Deceased) (Civil Appeal 60 of 2022) [2023] KEHC 3260 (KLR) (17 April 2023) (Judgment), where the Court considered a claim involving a deceased aged 32 years and found a global award of Kshs.2,500,000/= for loss of dependency to be appropriate. That authority demonstrates that awards within and even above the range adopted by the learned trial Magistrate have been made in comparable circumstances.

37. The awards made under the remaining heads were, equally, not excessive in the circumstances of this case. The learned trial Magistrate considered the evidence before him, including the period the deceased survived after the accident and the applicable principles on assessment of damages. I am not persuaded that the sums awarded disclose any error of principle or are so inordinately high or low as to warrant appellate interference, and I shall not disturb them either.

Disposition:

38. Consequently, the appeal is dismissed in its entirety. The judgment and decree of the Chief Magistrate's Court at Kilungu delivered on the 10th January, 2023 in Civil Suit No. E006 of 2020 are hereby upheld.

39. The costs of this appeal are awarded to the Respondents.

40. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 18TH DAY OF FEBRUARY, 2026.

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HON C KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms Maina holding brief for Waiganjo, Advocate for 1st Respondent

Mr. Simiyu, Advocate for 2nd Respondent

No appearance for Appellant