



Mehta v Mburu (Suing as the Personal Representative of the Estate of Patrick Macharia Ndungu (Deceased)) (Civil Appeal 053 of 2025) [2026] KEHC 4579 (KLR) (6 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 053 OF 2025**

PJO OTIENO, J

MARCH 6, 2026

BETWEEN

MOSES MBUGUA MEHTA APPELLANT

AND

**EMILIA NDUATA MBURU (SUING AS THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF PATRICK MACHARIA NDUNGU
(DECEASED)) RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Hon. Alice C. Towett
(PM) delivered on the 11/12/2024 in Naivasha Civil Case No. E450 of 2023)*

JUDGMENT

Background facts of the Appeal

1. The genesis of the dispute before the court is found on the alleged fatal road accident that occurred on the 2nd of July 2022 at around 6:00 pm. along the Naivasha-Moi South Lake Road at the Sawela area. The accident involved a motor vehicle, a Scania Trailer registration number KBK 874X, owned by the Appellant.
2. on the material day, the deceased was pleaded to have been lawfully riding a motorcycle registration number KMDQ 107X when he was struck by the Appellant's vehicle, which was allegedly being driven recklessly and at a high speed. The impact was fatal, and the deceased succumbed to his injuries instantly at the scene.
3. Following the death, the Respondent, being the widow of the deceased, filed a suit on behalf of the estate and the dependents of the deceased after obtaining Letters of Administration Ad Litem in Naivasha Miscellaneous Succession Cause No. E077 of 2022. In the suit, the respondent sought for general damages for pain and suffering, loss of expectation of life, and loss of dependency, as well as special damages in the sum of Kshs 21,550.



4. The matter first saw an Interlocutory Judgment entered on 18/10/2023 due to the Appellant's failure to enter appearance or file a defense. That default judgment was subsequently set aside by consent on 3/04/2024, and the Appellant was permitted to file his defense. On 17/04/2024, the parties recorded a consent on liability, agreeing that the Appellant would bear 90% of the blame while the deceased was apportioned 10% contributory negligence. The trial then proceeded primarily on the assessment of damages.
5. In its judgement delivered on 11th November, 2024, the learned trial Magistrate assessed damages payable, on the basis of the consent judgment on liability, as follows:
 - a. Liability – apportioned by consent at 90%:10% in favour of the Respondent and against the Appellant.
 - b. Pain and Suffering – Kshs.20,000/=
 - c. Loss of Expectation of Life – Kshs.100,000/-
 - d. Loss of Dependency – Kshs.1,920,000/-
 - e. Special damages – Kshs.1,550/-

The Appeal

6. The Appellant, through his Memorandum of Appeal dated 26th May, 2025 raises five grounds of appeal against to the judgment of the trial court. In summary, the Appellant contends that the learned trial magistrate grossly misdirected herself by failing to apply correct legal principles and disregarding binding and persuasive authorities on the assessment of quantum cited in the Appellant's submissions.
7. A central point of contention is the award for loss of dependency. On it, the Appellant argues that the learned magistrate erred in law and fact by calculating and awarding damages for loss of dependency using an arbitrary multiplicand of Kshs. 60,000 for a period of 13 years without any evidentiary basis to support such an award and thus arrived at an exaggerated sum. The decisions in *Mbogori & Another vs Pan African Chemicals Ltd (2025) KEHC 5481 (KLR)* and *Kiarie Vs Wanjiru (2022) KEHC 15592 (KLR)* are cited for the proposition that the duty of a claimant to prove its case is not exonerated by failure by the respondent to rebut the allegations and that damages must not be based on figures plucked from the air
8. Furthermore, the Appellant asserts that the trial court failed to properly evaluate the evidence and exhibits tendered before it, specifically criticizing the court's reliance on a business permit as conclusive proof of the deceased's monthly income. The Appellant maintains that the damages awarded were excessive, manifestly unjust, and wholly out of proportion to the evidence adduced, leading to a miscarriage of justice.

Summary of the Evidence led

9. The Respondent's case was built on the assertion that the deceased was the sole breadwinner and a robust provider for a family of five. PW1, the Plaintiff and widow of the deceased in her testimony informed the court that the deceased was her husband got involved in the said accident that occurred on 2/07/2022. She confirmed to have visited the scene on the same day.
10. PW1 maintained that the deceased was the sole provider for the family and that the family had lost their entire means of support and sought compensation that reflected the vigour of the deceased's life and the potential duration of his working years until the retirement age of 60. She adopted her witness



statement and the bundle of documents filed on 4/09/2023 that provided details of the deceased's employment at Oloidien Estate & Engineering Limited and his business ventures. The bundle of documents included the deceased's payslips for February, April, and May 2022, showing that he earned a monthly salary of about Kshs 30,000 a business permit for a retail shop-gas at Kamere Centre, a KRA PIN certificate, and M-Pesa earnings records. The Respondent estimated his total monthly earnings at Kshs. 60,000.

11. In cross-examination, she admitted that while she had testified in the criminal case against the driver (Samuel), she had not sued him personally, focusing her civil claim against the owner of the vehicle. She confirmed incurring costs of Kshs. 20,000 for obtaining the Letters of Administration Ad Litem.
12. PW2, the investigating officer in the matter confirmed the details of the accident as reported on 2/07/2022 at 6:40 pm along Moi South Lake Road. He described the scene, noting that only the motorcycle and the body of the deceased were present upon his arrival, the motor vehicle having been moved or stopped elsewhere. He confirmed that his investigation led to the conclusion that the driver of the Scania Trailer was at fault, leading to his prosecution for dangerous driving. The Respondent closed her case, and the matter was adjourned for submissions.
13. On the other hand, the Appellant opted not to call any witness at trial despite the defense filed on 2/04/2024 which denied every allegation in the plaint including negligence and particulars of loss. After the consent on liability, the Appellant's focus shifted to the quantification of the claim.
14. On the deceased's income, the Appellant conceded that the deceased was an employee of Oloidien Estate & Engineering Limited earning the disclosed salary but, challenged the supplementary income claim regarding the M-Pesa business.
15. It was their case that the Respondent had not strictly proved the earnings from the retail shop. Further, that the production of a business permit did not equate to proof of profit and that the widow's testimony was uncorroborated. The Appellant proposed that the court should rely solely on the proven salary of Kshs. 30,000 for the dependency calculation and suggested nominal awards for pain and suffering of Kshs.s. 20,000 given the instantaneous nature of the death.
16. The Court directed that the appeal be canvassed by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions.

Summary of the Appellant's Submissions

17. The Appellant's submissions on appeal dated 26/11/2025 are focused on a critique of the multiplicand used by the trial magistrate. The Appellant argues that while they concede the employment salary of Kshs. 30,000, which was supported by payslips, the additional Kshs. 30,000 attributed to the M-Pesa shop was purely speculative. They argue that the burden of proof for special damages (which loss of earnings often resembles in terms of proof) was not met.
18. The Appellant relies heavily on the case of Mbogori & another v Pan Africa Chemicals Limited & another (2023) eKLR to assert that the lack of rebuttal by the defense does not exempt the claimant from the burden of proving income. They further cite Kiarie v Wanjiru & another (2023) eKLR for the position that income claims must be substantiated with more than just oral assertions and a business permit, which only grants authority to operate rather than proof of success.
19. On the heads of pain and suffering, the Appellant submits that because death was instantaneous, the award should have been nominal. They argue that the trial court's award of Kshs.s. 50,000 for pain and suffering and Kshs.s. 100,000 for loss of expectation of life was excessive. They propose a revised net



award of Kshs. 2,872,350, arguing that the trial court's award of Kshs 5,770,395 was a wholly erroneous estimate.

Summary of the Respondent's Submissions

20. The Respondent's submissions dated 04/07/2025 defend the trial court's judgment as being based on a sound evaluation of the evidence. It is submitted that as a first appellate court, the High Court must exercise restraint in upsetting the discretion exercised by the trial court unless the trial court is shown to have acted on wrong principles. For that submission, the decision in *Francis Lokadongoy Lokogy v Reuben Kiplagat Kiptarus (2021) eKLR* is cited.
21. The Respondent argues that the income from the M-Pesa business was sufficiently proven by the production of the business permit, KRA PIN, and M-Pesa earnings statements. They contend that these documents, combined with the uncontroverted testimony of the widow, satisfied the balance of probabilities. A key part of their submission is the principle of estoppel; they argue that since the Appellant did not object to the production of these documents at trial and did not cross-examine the witness on these specific earnings, they are now estopped from challenging them.
22. The respondent relies on the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another (2023) eKLR* for the position that where income has been adopted by a trial court based on evidence, an appellate court should not vary it without material reasons. They pray for the appeal to be dismissed with costs.

Issues, Analysis and Determination

23. The court has carefully considered the evidence in record and the rival submissions herein. It is not in dispute that liability was agreed on by the parties on 17/04/2024 whereby the Appellant agreed to shoulder 90% liability while the deceased was apportioned 10% contributory negligence. The issue for determination is thus limited to the assessment of quantum of damages.
24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In the case of *Mbogo and Another vs Shah [1968] EA 93* the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

25. In the context of an appeal on the assessment of damages as herein, the threshold for interference is high. The principles derived from *Kemfro Africa Ltd t/a — Meru Express Services|| & Another v Lubia & Another (No. 2) [1987] KLR 30* dictate that an appellate court should only disturb an award if it is convinced that the trial judge took into account irrelevant factors, ignored relevant ones, or if the amount is so inordinately high or low that it represents an erroneous estimate of damages. The court stated in its own words: -

“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 that 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.”

26. Being so properly guided, the court’s first task is to determine the most contented award for lost dependency and the adopted multiplicand. The trial court in adopting the figure of Kshs. 60,000, consisting of Kshs. 30,000 from formal employment and Kshs. 30,000 from business was convinced that the deceased operated an Mpesa business on the basis that there was a business permit exhibited and an Mpesa statement.
27. The Appellant challenges the latter as speculative on the basis that a business permit only allowed the operation of such business but is never the evidence of income. The court appreciates that proving income from the informal sector such as an M-Pesa shop or retail business does often poses evidentiary challenges. In *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] KECA 318 (KLR), the court acknowledged that small-scale traders rarely keep formal accounts and that testimonial evidence, supported by some documentation like business permits, can be sufficient to establish income on a balance of probabilities. The court emphasized the position in *Jacob Ayiga Maruja & Another v Simeone Obayo CA Civil Appeal No. 167 of 2002* [2005] eKLR where the court of appeal stated as follows:
- “We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things”
28. The Appellant relies on the case of *Mbogori & Another v Pan Africa Chemicals Ltd* [1985] eKLR for the position that the burden of proof remains on the Plaintiff. Here, while the court notes that the Respondent did produce a business permit for a business described as retail gas, a KRA PIN, and M-Pesa statements, there was no evidence that the Mpesa statement in the name of Trojan Communication Ltd, Mapema shop was operated by the deceased.
29. in addition, even if the same was operated by the plaintiff, the court takes the view that having been on a full-time employment, the shop was operated by another and the death of the deceased is not an obvious death of the business. More importantly, the Mpesa statement, covers one day, the 31.7.2022, some 28 days after the deceased had died. It shows one thing clearly, that the business went on even after the deceased died but fails to show what was the monthly taking as profits.
30. In his assessment of the evidence, the trial magistrate found the documents credible and noted that there was no rebuttal from the defense. In concluding so, the trial court erred. There was nothing to point at an earning of Kshs 30,000 availed. It was thus a figure plucked from the air. Proof of income demand some cogency. The court finds that the additional income of Kshs 30,000 was never proved and that the deployment of Kshs 60,000 as the multiplicand was plainly erroneous.
31. For that error the award of kshs 6,240,000, for Loss of Dependency based on the erroneous multiplicand is set aside, and in its place substituted an award based on the proved income of Kshs 30,000. Because no issues were raised against the multiplier and dependency, no issue arises on the two parameters and therefore the award calculates thus: -

$$30 \times 12 \times 13 \times \frac{2}{3} = 3,120,000/$$



32. On Pain and Suffering, and Loss of Expectation of Life, the trial court awarded Kshs. 50,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life. The Appellant argues these are excessive for instantaneous death. While it is true that pain and suffering awards are nominal for immediate death, modern awards have moved away from the very low figures of the past. The trial magistrate enhanced the award to Kshs. 50,000 to account for inflation since 2019. This is a relevant factor under the principles of *Kemfro Africa Ltd t/a Meru Express Service v Lubia & Another* (1987) KLR, which encourages courts to consider inflation to maintain the stability of awards.
33. The award of Kshs. 100,000 for loss of expectation of life is the current conventional award in Kenya. In the cited case of *Mbogori vs Pan Africa Chemicals* (2023) eKLR, the High Court upheld Kshs. 100,000 as a standard figure. Thus, the trial court's awards under these heads were reasonable and did not deviate from established legal norms.
34. The upshot of the foregoing is that the appeal succeeds to the limited extent that the multiplicand of 60,000 is set aside and substituted with a sum of Kshs 30,000. Based on that disturbance, the award for Loss of dependency is made in the sum of Kshs 3,120,000. The rest of the awards remain upheld and shall be subjected to the agreed contribution.
35. Because the appellant has succeeded, the cost of the appeal are awarded to it.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH, 2026

PATRICK J O OTIENO

JUDGE

