



**Rightwys Trading Limited & another v Musee & another (Suing as the administrators of the Estate of the Late Daniel Katee Musee - Deceased) (Civil Appeal E075 of 2022) [2026] KEHC 4303 (KLR) (10 March 2026) (Judgment)**

Neutral citation: [2026] KEHC 4303 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E075 OF 2022  
LW GITARI, J  
MARCH 10, 2026**

**BETWEEN**

**RIGHTWYS TRADING LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ROBERT MWANZA MWEMA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FRANCISCA KIVIVYA MUSEE AND ERIC MUSEE KATEE (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE DANIEL KATEE MUSEE - DECEASED) ..... RESPONDENT**

*(An appeal from the judgement of the Chief Magistrate Court at Kitui delivered on 13th June 2023 (Hon. J. A. Asiago) In Kitui Cmcc No. E186 Of 2022)*

**JUDGMENT**

1. This is an appeal from the judgement of the Chief Magistrate's Court Kitui delivered on 13/06/2023 in Kitui Chief Magistrate's Court Civil Case No. E186/2022.
2. It is based on the following grounds in the Memorandum of Appeal:
  1. That the learned magistrate erred in law and in fact misdirected himself in law, principle and facts when he misapprehended and misunderstood the applicable principles and the law in assessing quantum thereby arriving at an award that is manifestly and inordinately high as to constitute an entirely erroneous estimate of damages in the circumstances of the case.
  2. The learned magistrate erred in law and fact by arriving at a finding on liability which went against the weight of evidence.



3. The learned magistrate erred in law and fact by making a finding in favour of the Respondents when they had not proved their case on a balance of probabilities.
  4. The learned magistrate erred in fact and in law in awarding the Respondents a global sum of Kshs. 1,500,000/= damages under the Fatal Accident's Act which award was too excessive in the circumstances considering that the deceased was aged 13 years at the time of the accident.
  5. The learned magistrate erred in fact and in law in awarding the Respondents a sum of Kshs. 200,000/= as damages under the Law Reform Act which award was too excessive in the circumstances.
  6. The learned magistrate erred in law by failing to deduct the damages award under the Law Reform Act from the total award.
  7. The learned magistrate erred in fact and in law in awarding the Respondent Kshs. 80,000/= being pain and suffering which award was too excessive in the circumstances.
  8. The learned magistrate erred in law and in fact in failing to accord due regard to the Appellant's missions and authorities on quantum on applicable principles for assessment of damages.
3. Based on these grounds the appellants pray that:
1. The appeal be allowed and the lower court judgement be set aside in its entirety.
  2. The award of the quantum of damages be set aside and vacated and fresh award based on proper application of the law, evidence, facts and principles be entered.
  3. That this court does award the costs in this application (sic) and in the lower court to the applicant.
4. This appeal was filed out of time pursuant to leave granted vide an order of this court issued on 25/9/2023 and dated 29/09/2023.

**Background:**

5. The respondents had filed a plaint dated 21/4/2022 claiming general damages for pain, special damages of Kshs. 53,170/= and costs of the suit. The claim was based on the facts that the deceased Daniel Katee Musee was travelling as a passenger in Tuk Tuk registration number KTWB 275B along Kitui Machakos road at Muluu when motor vehicle KDE 623E was negligently and/or carelessly managed or driven at a high speed that it lost control and hit the Tuk Tuk KTWB 275B from behind.
6. As a result of the collision, the deceased sustained fatal injuries and lost his life. The respondent filed the suit against the owner of motor vehicle KDE 623E claiming general and special damages. His contention was that the driver of the said motor vehicle was negligent for driving the motor vehicle at excessive speed and without due care and attention. That he drove the motor vehicle so dangerously and/or negligently without regard to other road users and in total violation of Traffic Rules.
7. He also contended that the driver failed to slow down, stop-brake swerve or take any other reasonable step to avoid the said accident. It was the respondents claim that the driver was driving a defective motor vehicle and caused the accident. The respondent further claims that the doctrine of *res ipsa loquitur* applies.
8. The respondent contended that the defendants were vicariously liable. The respondents filed the claims under the Fatal Accidents Act (Cap 32 Laws of Kenya) and the Law Reform Act Cap 26 Laws of Kenya. The learned magistrate held that the appellants were 100% jointly and severally liable for the accident.



9. The learned magistrate awarded damages as follows:
  - a. Pain and suffering – Kshs. 80,000/=
  - b. Loss of expectation of life – Kshs. 200,000/=
  - c. Loss of dependency – Kshs. 1,500,000/=
  - d. Special damages – Kshs. 21,550/=Total – Kshs. 1,801,550/=
10. The defendants in their statement of defence denies that at all materials times the 1<sup>st</sup> defendant was the registered owner of motor vehicle registration number KDE 623E or that the 2<sup>nd</sup> defendant was the actual registered owner of the said motor vehicle.
11. The defendants further denied that, the deceased was travelling as lawful passenger in Tuk Tuk registration number KTWB 275B or that motor vehicle KDE 623E was driven negligently. The appellants denied the allegations of negligence and in the alternative blamed the deceased for boarding unroadworth and defective motor vehicle which was also being driven by an incompetent rider.
12. The appellants denied all the allegations in the plaint pertaining to the said accident and prayed that the suit be dismissed with costs.
13. The proceedings before the learned magistrate have no record showing that parties adduced evidence in the submissions by the plaintiff in the lower court. He had stated that there was no consent on liability or on quantum and therefore the court was called upon to determine both liability and quantum.
14. It was however submitted by the respondents that the matter is a sister file to Kitui C.MC.C. E187/2022 where the court held that the defendants (appellants herein) were 100% liable for he subject accident.
15. On the other hand, in the appellant’s submissions before the trial court were that contributory negligence by the respondents (plaintiff) be assessed at 100%. The alleged judgement in the sister file Kitui C.MC.C. E187/2022 is not included in the record of appeal. The proceedings which are at page 92 – 96 of the record are not indicative of how the issue of liability was arrived at. No evidence was adduced before the learned trial magistrate and there is nothing to show why the parties filed submissions without evidence being adduced before the trial court.
16. Order II Rule 4 (5) of the Civil Procedure Rules provides that-

“The Judge, Magistrate, Deputy Registrar or Case Management Judge shall where the parties have failed to settle the case or undergo an alternative dispute resolution mechanism, direct that the case may be set down for hearing and may in the circumstances, determine the date on which the case shall be set down for hearing.”
17. Order 12 of the Civil Procedure Rules deals with the procedures for hearing and the consequence of non-attendance. The record of the lower court does not show that there was compliance with the procedure as to the hearing of the suit. This is a court of record and the court should only determine the case with what is on record. It therefore follows that the parties should avail the evidence which court can rely on to arrive to a just determination.
18. It is my view that the record lacks the necessary information as to how the learned magistrate arrived at his decision on liability.



19. In the absence of the judgement which the learned magistrate relied on to determine liability, the record is either incomplete or is based on no evidence. This court has to determine what should happen given those circumstances.

20. Section 1A & 1B of the [Civil Procedure Act](#) provides as follows:

- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”

21. This court is called up to do substantive justice. Section 3A of [Civil Procedure Act](#) gives court wide discretion to make such orders as may be necessary for the ends of justice and to prevent abuse of court process. The section provides:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

22. Order 42 Rule 26 Civil Procedure Rules provides as follows:

“If upon the hearing of an appeal it shall appear to the court to which the appeal is preferred that a new trial ought to be had, it shall be lawful for the said court, if it shall think fit, to order that the judgment and decree shall be set aside, and that a new trial shall be had.”

23. The rule allows the court to order a re-trial. It is my view that there should be a retrial on the issue of liability as the record of the trial court lacks evidence on how the decision was arrived at. The court may order a retrial where the interests of justice demands it and there are procedural flaws.



24. The court has discretion to order a retrial. In *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75 at 76 C & E it was stated:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgement he does on such terms as may be just...

The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the same rules.”

25. In *Shah v Mbogo* (1967) E.A. 116 at 123 B the court while dealing with the issue of exercise of discretion stated as follows:

“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”

26. Further in *Mbogo v Shah* (1968) EA 93 and *Shabir Din V vs- Ram Parkash Anand* (1955) 22 E.A.C.A. 48. The Court of Appeal stated:

“I consider; that under Order 9 Rule 20 the discretion of the court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised, ... must depend on the facts of a particular case.”

27. In this case, as I have observed above it is not clear from the court record and the parties as to how the issue of liability was arrived at. The issue of liability is central as claims arises from road traffic accident and should be determined based on evidence. For this court to determine the appeal it should be clear as to how the learned magistrate arrived at his decision.

28. Guided by the above decision which states that courts have wide powers to exercise discretion to avoid injustice, I find that this is a suitable case for this court to order a retrial on the issue of liability. I therefore order that:

1. The finding on liability by the learned magistrate is set aside.
2. There shall be a retrial on the issue of liability before the Chief Magistrate.
3. The re-trial shall be heard and determined within ninety (90) days.
4. The appeal on quantum of damages shall be determined upon the determination on the issue of liability.
5. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 10<sup>TH</sup> DAY OF MARCH, 2026.**

**HON. LADY JUSTICE L. GITARI**

**JUDGE**

