



Mombasa Cement v Wahome & another (Suing as the Legal Representatives of the Estate of Paul Gathungu Wambugu (Deceased)) (Civil Appeal E1071 of 2023) [2025] KEHC 9168 (KLR) (Civ) (30 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1071 OF 2023

AN ONGERI, J

JUNE 30, 2025

BETWEEN

MOMBASA CEMENT APPELLANT

AND

STEPHEN WAMBUGU WAHOME 1ST RESPONDENT

LUCY MUTHONI WAICHUNGO 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PAUL
GATHUNGU WAMBUGU (DECEASED)**

*(Being an appeal from the Judgment of Hon. B. M. Cheloti (PM) in Nairobi
Milimani CMCC Case No. E759 of 2022 delivered on 15th September 2023)*

JUDGMENT

1. The Respondent in this appeal filed Nairobi Milimani CMCC No. E759 of 2022 in her capacity as legal representative of the estate of Paul Gathungu Wambugu (deceased) who died on 17th June 2022 at Eastern Bypass when his motor cycle registration number KMEM 235F was hit by motor vehicle registration KDB 586Z lorry belonging to the Appellant which was being driven by the Appellant's driver.
2. The Respondent averred that the motor vehicle was negligently driven.
3. The Appellant filed a defence dated 27th October 2022 denying the Respondent's claim.



4. The Respondent's evidence in brief was that the deceased was lawfully riding the motor cycle registration number KMEM 235F when the Respondent's lorry registration number KDB 586Z which was on the wrong lane hit the motor cycle. The driver of the lorry was blamed for the accident.
5. The driver of the Appellant's gave evidence and said it was the motor cycle which hit the lorry. He said it was slightly dark.
6. The trial court found the Appellant 100% liable in negligence.
7. The damages were assed as follows:-
 - i. General damages for loss of dependency Kshs. 3,000,000/=
 - ii. Special damages Kshs. 526,150/=Total Kshs. 3,526,150/=
8. The Respondent was also granted costs of the suit and interest.
9. The Appellant has appealed against both liability and quantum on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact in failing to critically analyze the evidence on the issue of liability and arrived at the erroneous finding on liability.
 - ii. That the court failed to critically analyze and apply the causative role of the deceased and thus arrived at the erroneous finding wholly blaming the Appellants.
 - iii. That the learned trial Magistrate erred in law and fact in completely misapprehending the principles governing the assessment of damages, thereby arriving at an erroneous decision with regard to general damages.
 - iv. That the learned trial Magistrate failed to exercise her discretion judiciously in awarding general damages.
10. The parties filed written submissions as follows:-
11. The Appellants in their submissions challenged the trial court's judgment in Milimani CMCC No. E759 of 2022, arguing that the Respondent failed to prove negligence on the part of the Appellant's driver and that the awarded damages were excessive.
12. The appeal arises from a case where the trial court held the Appellant vicariously liable for the accident and awarded Kshs. 3,000,000 in general damages for the death of a 21-year-old.
13. On liability, the Appellants contended that the Respondent's evidence was inconsistent and insufficient to establish negligence.
14. The investigating officer (PW1) admitted that he did not visit the scene immediately and relied on accounts from other officers, while the OB extract indicated the deceased motorcyclist was on the wrong side of the road.
15. The Appellant's driver testified that the deceased suddenly encroached into his lane, leaving him no time to avoid the collision.
16. The Appellants argued that the Respondent failed to prove a causal link between the driver's actions and the accident, citing authorities like *Lawrence Chinditi v AINU Shamsi Ltd* and *David Kajogi M'mugaa v Francis Muthomi*, which emphasized that mere allegations of negligence are insufficient without strict proof.



17. Regarding quantum, the Appellants argue that the global award of Kshs. 3,000,000 was unreasonable and propose a reduced sum of Kshs. 1,500,000, referencing comparable cases such as *Geoffrey Obiero v Kenya Power* (Kshs. 1,200,000 for a 25-year-old), *Florence Mumbua Ndoo v Ezra Korir* (Kshs. 700,000 for a 20-year-old), and *Makuto v Saenyi* (Kshs. 1,300,000 upheld for a 20-year-old).
18. The appellant urged the court to set aside the trial court's findings, dismiss the suit for lack of proof, or, alternatively, reduce the damages to align with precedent.
19. In conclusion, the Appellants asked the court to award them the costs of the appeal, asserting that the Respondent's case lacked credible evidence and that the damages awarded were unjustifiably high.
20. The Respondents opposed the appeal and urged the Court to dismiss it and uphold the judgment of the trial court delivered on 15.09.2023 in Milimani CMCC No. E759 of 2022.
21. They argued that the appeal lacks merit, as the trial magistrate correctly assessed both liability and quantum based on the evidence presented.
22. On liability, the magistrate found the Appellant's driver fully responsible for the accident, a conclusion supported by witness testimony and police records, which showed the driver breached traffic rules by hitting the motorcycle from the left side on a demarcated road section.
23. The Respondents contended that the magistrate's analysis was thorough and free from legal error, warranting no interference by this Court.
24. Regarding quantum, the Respondents defend the award of KShs. 3,000,000 in general damages as reasonable, given the deceased's age (26) and occupation (carpenter), and they cited comparable precedents where similar or higher amounts were awarded.
25. They noted that the Appellant failed to propose alternative figures or challenge the award with specificity, rendering their objections baseless.
26. The special damages of KShs. 526,150 were uncontested and properly documented, justifying their full award.
27. The Respondents further argued that the Appellant's failure to file submissions at the trial court undermines their current complaints.
28. In conclusion, the Respondents asked for the dismissal of the appeal with costs, emphasizing that it unnecessarily prolongs litigation and burdens the Respondents.
29. They also prayed for interest on the awarded sums and costs, as provided under Section 27 of the *Civil Procedure Act*.
30. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether it would support the findings of the trial court. In *Selle v Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

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.

In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

31. The issues for determination in this appeal are as follows:-
 - i. Whether the trial court was right in holding the Appellant 100% liable for the accident.
 - ii. Whether the assessment of damages was based on wrong principles.
32. On the issue as to whether the trial court was right in holding the appellant 100% on liability, the trial magistrate found that the appellant's driver was on the wrong lane.
33. The Respondent's evidence was that the deceased was lawfully riding his motorcycle when the Appellant's lorry, which was on the wrong lane, hit him.
34. The Appellant's driver, however, testified that the deceased suddenly encroached into his lane, leaving him no time to avoid the collision.
35. The trial court preferred the Respondent's version of events, supported by police records indicating that the Appellant's driver was on the wrong side of the road.
36. In assessing liability, the court is guided by the principle that the burden of proof lies with the plaintiff to establish negligence on a balance of probabilities.
37. In the case of *Lawrence Chinditi v AINU Shamsi Ltd* [2016] eKLR, the court emphasized that mere allegations of negligence are insufficient without strict proof.
38. However, in this case, the trial magistrate correctly relied on the police evidence and the testimony of the Respondent's witnesses to conclude that the Appellant's driver was negligent.
39. The OB extract, though indicating the motorcyclist was on the wrong side, was not conclusive, and the investigating officer admitted he did not visit the scene immediately.
40. The trial court's finding on liability was thus based on a proper evaluation of the evidence, and this court finds no reason to interfere with it.
41. On quantum, the trial court awarded Kshs. 3,000,000 in general damages for loss of dependency.
42. The Appellant contended that this award was excessive and proposes a reduction to Kshs. 1,500,000, citing comparable cases such as *Geoffrey Obiero v Kenya Power* [2021] eKLR (Kshs. 1,200,000 for a 25-year-old) and *Florence Mumbua Ndo v Ezra Korir* [2018] eKLR (Kshs. 700,000 for a 20-year-old).
43. However, the Respondent argued that the award was reasonable, given the deceased's age (26) and occupation as a carpenter.
44. The principles governing the assessment of damages were set out in *Butt v Khan* [1981] KLR 349, where the Court of Appeal held that an appellate court will only interfere with an award of damages if it is so inordinately high or low as to represent an entirely erroneous estimate.
45. In the case of *Makuto v Saenyi* [2021] eKLR, the High Court upheld an award of Kshs. 1,300,000 for a 20-year-old, while in *David Kajogi M'mugaa v Francis Muthomi* [2019] eKLR, the court emphasized that comparable cases should guide awards.



- 46. In this case, the deceased was 26 years old, and the global award of Kshs. 3,000,000 appears excessive when compared to recent precedents.
- 47. A more reasonable figure, considering the deceased's age and earning capacity, would be Kshs. 2,000,000 taking into account inflationary trends and comparable awards.
- 48. The special damages of Kshs. 526,150 were uncontested and thus properly awarded.
- 49. In conclusion, the appeal partially succeeds on quantum. The trial court's finding on liability is upheld, but the award of general damages is reduced from Kshs. 3,000,000 to Kshs. 2,000,000. The special damages remain undisturbed. Each party shall bear its own costs of the appeal.
- 50. Final orders to issue as follows;
 - i. The appeal on liability is dismissed.
 - ii. The award of general damages is reduced to Kshs. 2,000,000.
 - iii. Special damages of Kshs. 526,150 are upheld.
- 51. Each party to bear its own costs of the appeal.

**DATED, SIGNED AND DELIVERED THIS 30TH DAY OF JUNE 2025 IN OPEN COURT AT VOI.
ASENATH ONGERI**

JUDGE

In the presence of:-

Court Assistants: Maina/Millicent

.....for the Appellant

.....for the Respondents

