



Flashmark (K) Limited v Mutunga & another (Suing as Legal Reps. to the Estate of Gerald Mulwa Masuni alias Jelard Mulwa Masuni - Deceased) (Civil Appeal E973 of 2022) [2025] KEHC 11576 (KLR) (Civ) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11576 (KLR)

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

CIVIL

CIVIL APPEAL E973 OF 2022

TW OUYA, J

JULY 31, 2025

BETWEEN

FLASHMARK (K) LIMITED APPELLANT

AND

ROSE MUKONYO MUTUNGA 1ST RESPONDENT

MICHAEL MUTUA MASUNI 2ND RESPONDENT

**SUING AS LEGAL REPS. TO THE ESTATE OF GERALD MULWA MASUNI
ALIAS JELARD MULWA MASUNI - DECEASED**

*(An appeal from the judgment of Hon. MW Murage, Senior
Resident Magistrate delivered in Nairobi on 4th November 2022)*

JUDGMENT

1. This is an appeal emanating from a claim based on the tort of negligence following a fatal road traffic accident where motor vehicle registration number KBX 774Q was negligently driven by the Appellant's authorized servant that it lost control and violently knocked down the deceased Respondent, thereby occasioning him fatal injuries.
2. The matter proceeded to full trial where three witnesses testified on behalf of the Respondents while one witness testified on behalf of the Appellant. At the end of the trial the trial court apportioned liability at 100% on the driver of Motor vehicle registration Number KBX 774Q. The court awarded general damages at kshs. 30,000.00, Ksh. 1,564,952.00 as damages for loss of expectation of life and Ksh. 7,010.00 as special damages.



3. Aggrieved and dissatisfied with the entire determination and finding of the court, the Appellant herein urging the following grounds:
 - i. The learned magistrate misapprehended the factual evidence on the circumstances of the accident and thereby made an erroneous apportionment of liability;
 - ii. The learned magistrate showed extreme prejudice by totally ignoring the Appellant's submissions on issues of law and fact and thereby made an erroneous apportionment of liability;
 - iii. The learned magistrate misapprehended the legal principles and guidelines set for the award of damages and thereby made a disproportionately high award of damages.
4. The Appellant urged that the Appeal be allowed and the judgment of the trial court be set aside and be substituted with an order dismissing the Respondent's suit.
5. The Respondent's case was hinged on a Plaint dated 13th June 2016 where it was averred that at all material times relevant to the suit the Appellant was the sole registered owner of Motor vehicle registration No. KBX 774QN which was so negligently, recklessly and or carelessly driven, managed and / or controlled by the Appellant's authorized agent and driver that it lost control and violently knocked down the Respondent on 15th June 2014 thus occasioning him fatal injuries.
6. The claim, that was based on the doctrine of res ipsa loquitur, itemized the particulars of negligence at paragraph 4 of the Plaint as follows:
 - i. Driving at a speed that was excessive in the circumstances
 - ii. Failing to have due regard other road users and especially the Respondent herein;
 - iii. Failing to observe known road traffic rules and regulations
 - iv. Driving a defective motor vehicle
 - v. Failing to hoot/ holler and or act in any manner so as to alert the deceased of the impending danger
 - vi. Failing to stop, brake, swerve, slow down and or act in any other manner to manage and or control the said motor vehicle to avoid causing the accident.
7. It was averred that the Respondent was 40 years old at the time of death and had been succeeded by a wife and five children. He had been a business man and a sand harvester earning Ksh. 24,000.00 per month and sought for general damages under the Law Reform Act and the Fatal Accident Act and special damages 46,010.00.
8. According to the deceased's Death Certificate dated 8th September 2016, the deceased died of multiple injuries due to blunt trauma due to Motor Vehicle Accident.
9. The Appellant filed a statement of defence dated 14th March 2017 where he denied the occurrence of the accident among other averments in the Plaint save for the paragraphs descriptive of the Appellant and the Respondent. Instead, the Appellant pleaded contributory negligence in that:
 - i. The Respondent deliberately endangered his safety by walking on the same section of the road reserved for Motor vehicles;
 - ii. The Respondent negligently dashed across the path of Motor Vehicle registration Number KBX 774Q; and



- iii. The Respondent failed to keep a proper look out for motor vehicles on the Road.
10. The Appellant averred that the claim was fatally defective for offending the provisions of Order 4 rules 1, 2 and 3 of the Civil Procedure Rules and should be struck out completely.
11. At the oral hearing, the Respondent called three witnesses to urge its case. PW1 testified that she was the wife to the deceased. She adopted her witness statement and clarified that she did not witness the accident. It was her evidence that the deceased used to earn Ksh. 800.00 per day. PW2, a security guard, testified that the driver of Motor vehicle registration no. KBX 774Q was to blame for the accident as he had stopped on the road and was stationery. He clarified that three motor vehicles were involved in an accident. He blamed the driver of KBX 774Q for the accident as he had left the vehicle stationery on the road. PW3 was a police officer, he testified that on 15th June 2014 at about 5.00am along North Airport road an accident occurred involving three motor vehicles KAP 521Z Mitsubishi that was being driven by Samuel Njenga, motor vehicle registration number KBX 774Q Tatu lorry being driven by Alfred Mwololo and motor vehicle KBY 432N Nissan Audi driven by Edward Nzeiya. KBX 774QTatu lorry, had stalled on the road due to lack of fuel when it was hit by motor vehicle registration number KAP 521Z, thus totally blocking the road. While the drivers of the said vehicles and the turn boys were deliberating on the accident, all over a sudden KBY 432N Nissan Audi came from behind and hit four of them pushing them towards the lorry. The deceased is among those who were hit and he died on the spot. The driver of motor vehicle KBX 774Q was blamed for the accident and charged in court. The witness testified on behalf of the Investigating officer, he produced the Occurrence book no. 8/45/6/2014. He was not at the scene of the accident.
12. DW1 testified on behalf of the Appellant, she was a court administrator at Makadara Law Courts. She produced the proceedings in TR 3868/14 where the Appellant's driver Alfred Mwololo Kingi was the accused person. The case was withdrawn under Section 87 (a) of the [Criminal Procedure Code](#).
13. By consent of the parties, the appeal was disposed through written submissions.
14. On liability, the appellant submitted that the testimonies of PW2 and PW3 were inconsistent with the particulars of claim in the Plaint. Whereas the Plaint alleges that the appellant's driver negligently drove the subject motor vehicle at a speed, the witness testimony state that the vehicle was stationery. Those particulars accurately fit motor vehicle registration number KBY 732 N and not the subject motor vehicle herein. In fact, it is KBY 732 N that hit the deceased and not KBX 774Q. Citing the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014]eKLR, the Appellant submitted that parties are bound by their pleadings. Therefore, the Appellant urged that the evidence tendered in court was at variance with the facts pleaded in the Plaint.
15. Further, it was submitted that, PW3 testified that the victims of the accident were by standers who were pushed by the impact towards the stalled lorry. This invariably shows that they might have been between the appellant's motor vehicle and motor vehicle registration number KBY 732N. Hence the appellant's motor vehicle could not have obstructed the vision of the driver of motor vehicle registration KBY 732N and prevented him from seeing the victims of the accident. Arguably, motor vehicle registration number KBY 732 N first hit the deceased before hitting the stationery KBX 774Q. As a result, the deceased and other bystanders ought to have known that congregating at the scene of an accident at around 5.00am could possibly lead to another accident. It was therefore urged that it was unfair to hold the appellant's driver wholly liable for the accident.
16. On quantum, the appellant submitted that the court reliance on a multiplier approach for 20 years was untenable as the deceased was 40 years old at the time of the accident. The multiplier approach resulted in an inordinately high award as the deceased might have died from some other cause. It was urged that



- the multiplier be reduced to 15 years. Reliance was placed on the case of Crown Bus services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) [2020] eKLR
17. The Respondent on the other hand submitted that the actions of the appellant's driver offended the provisions of Section 53 of the *Traffic Act* on obstruction. Reliance was placed on the case of Peter Ochieng & 2 others v Serfina Atieno Okwaro & another [2015]eKLR where it was observed that the main cause of the accident was the presence of a stationary tractor that had stalled in the middle of the road, without any warning signs placed at a reasonable distance. A similar holding was made in EN v Hussein Dairy Limited & 3 Others where it was held that the 2nd Respondent who had recklessly parked his employer's motor vehicle on the road ignited the chain of events that even if his motor vehicle was stationary on the road, he cannot be exonerated from the blame.
 18. On the issue of the incongruency between the facts and the pleadings, the Respondent cited the case of Simon Muchemi Atako & Another v Gordon Osore (2013) eKLR where it was held that the departure by the Respondent from its pleading did not cause a failure of justice to the appellants as the appellants had fair notice of the case it had to meet and the departure was a mere irregularity not fatal to the case of the respondent whose evidence departed from its pleadings.
 19. The Respondent also submitted that the fact that the appellant's driver's case at Makadara Law courts had been withdrawn under Section 87 (a) of the CPC did not have impact on the present case as the standard of proof in civil cases is on a balance of probabilities. Also, third party liability proceedings commence against the driver of KBY 732 N by the appellant did not materialize as he failed to enter appearance despite being served. Citing John Wambua v Matthew Makau Mwololo & another (2020)eKLR, the Respondent submitted that the claim in the third-party proceedings relates to the third party's liability to the Appellant and not to the Respondent.
 20. While urging this honourable court to uphold the finding on liability at 100%, the Respondent submitted that leaving an unlighted, stationary vehicle in a road at night is prima facie evidence of negligence.
 21. On quantum, the Respondent submitted that the award of Ksh. 30,000.00 for pain and suffering is not inordinately high. Reliance was placed on Josephine Kiragu v Vyas Hauliers Limited [2017] eKLR which enhanced an award of pain and suffering from Ksh 10,000.00 to 30,000.00
 22. Under the heading of loss of expectation of life, it was submitted that the deceased was in good health and therefore the ward of Ksh. 100,000.00 was adequate reliance was placed on Benard Kyalo Maithya v Philomena Kyumwa Mbithi & Joseph Mutunga suing as the legal representative of the estate of Mutinda Mbithi [2019]eKLR where an award of Ksh. 120,000.00 was upheld for loss of expectation of life for a 24-year-old deceased.
 23. On loss of dependency, it was submitted that though there was no documentary evidence to prove earnings, requiring production of documents to prove earnings would be a herculean task from litigants. Nevertheless, the court applied the minimum wage for unskilled labour in the year 2014, being Ksh. 9,780.95 and used the same to arrive at the amount in question. Citing the case of Nation Media Group Limited b Thuo and another suing as the administrator of the estate of Josephat Nduati Kung'u- deceased Civil Appeal 157 of 2019, the Respondent submitted that the court has discretion to either apply the multiplier method or the global assessment method. Therefore, the multiplier approach for 20 years was reasonable as the trial court found that the deceased would work for another 20 years before he turns sixty. The dependency ratio was determined at 2/3 for the wife and five children.



24. Therefore, the Respondent urged the court to uphold the award of Ksh. 1,564,952 for the loss of dependency.
25. On special damages, the Respondent submitted that the special damages proved was Ksh. 28,760.00 and not Ksh. 7,010.00 as awarded by the trial court.
26. The Respondent thus prayed that judgment be entered in favour of the Respondent and his appeal be dismissed with costs.
27. I have considered the grounds of appeal, the pleadings in the lower court, the evidence adduced before the trial court, the written submissions filed by counsel for the respective parties and the authorities cited. Having done so, I find that it is not disputed that an accident involving the aforesaid motor vehicles occurred on 13th June 2016 leading to the death of the deceased on the spot.
28. Parties filed their written submissions which I have duly considered. The Appellant challenges the judgment both on the finding on liability and the assessment and award of damages. The issues for determination are thus the following:
 - i. Whether the trial Court erred in finding the Appellant 100% liable.
 - ii. Whether the assessment and award of damages was erroneous.
29. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However, the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and Another v Associated Motor Boat Company Ltd. & Others* (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

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 (*Abdul Hameed Saif –v- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).
30. On whether the trial Court erred in finding the Appellant 100% liable. The Appellant submitted that motor vehicle KBY 432N as well as the deceased ought to have been held liable for the accident.
31. From the evidence tendered before the trial court, there is no doubt that a series of accidents occurred flowing from the fact that motor vehicle registration number KBX 774Q had stalled on the road: in the first instance, KAP 521Z Mitsubishi first hit the stalled KBX 774Q, as the driver and turn boys of the said vehicles stepped out to deliberate on the accident, a crowd of people also gathered to witness the accident scene, in the process, motor vehicle registration number KBY 432N came driving and hit the stalled KBX 774Q killing three people, including the deceased, on the spot. According to the evidence of PW3 who investigated the cause of the accident, the motor vehicle KBX774Q stalled due to lack of fuel.
32. The police abstract, though not conclusive, supported the finding that the appellant's actions caused the accident. Furthermore, the evidence showed that the appellant vehicle stalled on the road, which contributed to the collision. In *Kenya Ports Authority v East African Power & Lighting Company Ltd.*



[1982] KLR 445, it was held that a police abstract is prima facie evidence of facts reported to the police, and in the absence of contrary evidence, it can be relied upon.

33. The appellant, as a driver, owed a duty of care to the respondent and all other road users. The appellant left a stationary lorry on the road with no due care or regard to other road users at such an early hour. Moreover, there is no evidence that he took any steps to warn the other road users failed to warn other road users of the presence of the stationary lorry. Also, he never put life savers or their equivalent which can be twigs or leaves to alert motorists of the situation that had befallen him. These actions amounted to a breach of duty. It is trite that legal causation must be determined by common sense and an analysis of the facts at hand. In the circumstances, I find that the breach of duty by the appellant directly resulted in the accident.
34. The appellant's assertion that the evidence tendered was at variance with the pleadings in the Plaint is misguided. The fact that the subject motor vehicle was stationary yet one of the particulars of negligence pleaded by the Respondent was that the subject motor vehicle was driven at an excessive speed does not negate the fact that other particulars of negligence have been proved. In any case, there is no legal requirement that all the particulars of negligence pleaded in the Plaint must be conclusively proved before liability can attach. The sufficient proof of one limb of negligence on a balance of probability suffices to demonstrate negligence by the Appellant. In the instant case, the Respondent successfully proved that the Appellant failed to have due regard to other road users, specifically the respondent, in the manner in which he controlled and managed the subject motor vehicle. Hence igniting the chain of events that ultimately led to the accident herein and the death of the deceased.
35. The appellant argued that liability should be spread across KBY 432 N which actually hit the deceased. From the record, I have noted that a third-party notice was taken against the said motor vehicle, however, there is no evidence that either the owner or the driver entered appearance. Therefore, his failure did not in and of itself affect the appellant's liability as there was no compelling evidence that the third party's vehicle's actions were the primary cause of the accident. Moreover, at the trial court, the appellant failed to provide convincing evidence that the third-party vehicle or any other factor was the primary cause of the accident. Therefore, the trial court's decision to hold the appellant solely liable was justified.
36. The second issue for determination is whether the assessment and award of damages was erroneous. In *Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003*[2007] eKLR Justice Ringera was of the following view:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”
37. From the cited authorities and the jurisprudence from our courts, where a deceased's earnings cannot be ascertained the trial court may at its discretion, adopt either the multiplier approach or global sum approach. The trial Magistrate applied the latter approach, having found, and rightly so, that there was no proof that the deceased earned Kshs. 800/= daily from his sand harvesting business. She thus applied the minimum wage as at 2014 of Ksh. 9,780.95 for unskilled laborers.



38. In the case of Dickson Simon Nyambori v Justus Omondi Obura [2018] eKLR, where Mrima, J. stated:

“I have previously dealt with this issue and held that whenever a court is charged with the duty of assessing general damages for loss of future earnings and the claimant fails to prove the income relied on, the court should be guided by the requisite wages approved by the Ministry of Labour and duly gazetted. I still hold that position. In this case there was no proof of income.”

39. The adoption of the multiplier approach fell within the discretion of the learned Magistrate. Accordingly, she cannot therefore be faulted for exercising her discretion in the manner that she did.

40. On the multiplier and dependency ratio, the record shows that the deceased died at the age of 40 years and was survived by a wife and 5 children aged between 2 years and 19 years. The learned Magistrate applied a multiplier of 20 years and a dependency ratio of 2/3, which in my view is reasonable. Accordingly, I find no basis for interfering with the finding of the learned Magistrate in this regard.

41. The Appellant has not made any submissions on the general damages, neither did he make any submissions on the award of special damages. I find no reason to disturb the same as those that were specifically pleaded and proved were awarded by the trial court.

42. The upshot is that the appeal fails. The finding of the trial court is upheld and the appeal is dismissed. Each party to bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST JULY, 2025.

HON. T. W. Ouya

JUDGE

For Applicant.....Miss Njoroge

For Respondent.....Ms Mwaunda

COURT ASSISTANT.....Brian

