Mawingo Construction (2010) Limited v Jepkoech & another (Suing as the Legal Representatives and Administrator of Samuel Njoroge (Deceased)) (Civil Appeal E016 of 2024) [2025] KEHC 11810 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E016 OF 2024

HI ONG'UDI, J

AUGUST 6, 2025

BETWEEN

MAWINGO CONSTRUCTION (2010) LIMITED ..... APPELLANT

AND

JUDITH JEPKOECH & SIMEON NJOROGE KARANJA (SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATOR OF SAMUEL NJOROGE (DECEASED)) ..... RESPONDENT

(Being an appeal from the Judgment and decree of Hon. Wilson Rading (Principal Magistrate) in Naivasha CMCC No. 530 of 2018, delivered on 22nd February 2019)

JUDGMENT

1. The appellant herein was the defendant in the lower court while the respondents were the plaintiffs. The respondents vide the plaint dated 5th June 2018 sued the appellant claiming general damages under the *Law Reform Act* and *Fatal Accidents Act*, special damages for kshs. 86,100/= and costs of the suit plus interest at court rates. The claim was based on the injuries the deceased sustained as a pillion passenger on motor cycle registration number KMDT 678Q riding along Mai Mahui- Naivasha road at Munio area within Nakuru county when the driver of motor vehicle registration number KBR 428D/ ZE 0885 negligently stopped on the road without due regard to other road users resulting in an accident. The appellant denied the claim.

2. The matter was fully heard with both parties adducing evidence. In its judgment delivered on 22nd February, 2024 the trial court apportioned liability in the ratio of 70:30 against the appellant. It also awarded the respondent general damages for pain and suffering and loss of expectation of life under the *Law Reform Act* at kshs. 20,000/= and kshs. 100,000/= respectively, damages under the Fatal Accident Act at kshs. 2, 904,019.20/= and special damages of Kshs. 86, 100/= The respondent was also awarded costs of the suit plus interest.

3. The appellant being aggrieved by the whole judgment lodged this appeal dated 18th March, 2024 setting out the following grounds:

    i. That the learned trial magistrate erred in law and fact in failing to critically analyse the evidence on the issue of liability and arrived at an erroneous finding on liability.

    ii. That the learned trial magistrate erred in law and in fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellant.

    iii. That the learned trial magistrate failed to critically analyse and apply the causative role of the deceased and thus arrived at the erroneous finding; the appellant shouldering the larger blame.

4. The Appeal was canvassed by way of written submissions.

Appellant's submissions

5. These were filed by G & G advocates LLP and are dated 5th March, 2024. Counsel gave a brief summary of the lower court case and submitted that PW1 testified that the motor cycle KMDT 678Q was trailing the appellant's motor vehicle KBR 428D/ZE0885 when it rammed onto the rear of the appellant's motor vehicle. Further, that PW2 testified that the appellant's motor vehicle was not blamed as it was rammed from the rear side by the motor cycle. PW2 confirmed that indeed the appellant's motor vehicle was in motion and his evidence was not shaken at all.

6. He further submitted that the onus to prove negligence was on the respondents. Thus, by finding the appellant liable to the tune of 70% was erroneous. He placed reliance on Section 107 of the *Evidence Act* and the decision in Statpack Industries Ltd v James Mbithi Munyao [2005] eKLR where the court held as follows;

> "Coming now to the more important issue of causation, it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal nexus between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, the connection between the two may be drawn. Not every injury is a result of someone's negligence. An injury per se is not enough to hold someone liable for the same." (Emphasis supplied).
>
> See also;
>
> i. Lochab Transporters Limited v Arison Obara Obara & Winnie Moraa Obara suing as administrators of the estate of Dominic Mogaka (Deceased) & Another [2020] eklr.

7. He urged the court to allow the appeal and set aside the lower court judgment.

Respondent's submissions

8. These were filed by Wairegi Kiarie & associates LLP and are dated 16th June, 2025. Counsel gave a brief summary of the lower court case and identified two (2) issues for determination.

9. On the first issue whether the trial magistrate erred in apportioning liability to the appellant, counsel submitted that the trial magistrate apportionment of liability in the ratio of 70:30 was sound in law and

firmly anchored in the evidence on record. He placed reliance on the decision in Khambi and Another v Mahithi and another [1968]. EA 70, where it was held as follows

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge,"

10. Counsel further submitted that the magistrate's reasoning was consistent with the well-established principle that negligence is assessed against the standard of a reasonable and prudent person. He stated that the deceased acted lawfully and reasonably at all material times and no evidence was adduced to suggest that he was intoxicated or otherwise impaired. He added that DW1's testimony was implausible and the attempts to cure the evidentiary gaps was ineffective. Thus, the trial magistrate was right to assign minimal probative value to the said testimony.

11. On the second issue whether the trial magistrate erred in awarding damages to the respondent, counsel submitted that the trial court correctly applied the principles required to award damages under statute and under common law. He stated that the court awarded damages Ksh, 20,000/= for pain and suffering while relying on the case of Gilbert Kimatare Nairi & Lilian Napudoi Nairi (suing as personal re representatives of the Estate of Jackline Sein Lemayain (Deceased) v Civiscompe Ltd. Further, that the court awarded Ksh. 100,000/= for loss of expectation of life which was a fair assessment as held in the case of Easy Coach Bus Services & Another v Henry Charles Tsuma & Another (suing as the administrators and personal representatives of the estate of Josephine Wenyanga Tsuma Deceased) [2019] eKLR.

12. Counsel further submitted that the trial magistrate while relying on the decision in Rose Munyasa & Another v Daphton Kirombo & Another [2014] eKLR, decided to use 25 years as the multiplier as it was more or less the median of the appellant's and the respondent's proposal. Thus, the court awarded Ksh. 2,904,019/20 after noting that the deceased was 32 years old at the time of his death. He stated that the special damages awarded were pleaded and proved. Therefore, the trial magistrate's judgment was sound. He urged the court to dismiss the appeal with costs.

Analysis and determination

13. This being a first appeal, this court is called upon to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See:

    i. Selle & another v Associated Motor Boat & Others 1968 E.A 123.

    ii. Peters v Sunday Post Limited [1958] E.A 424.

14. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respondents, I opine that the issues for determination are:

    i. Whether the trial magistrate erred in apportioning liability in the ratio of 70: 30 in favour of the respondents.

    ii. Whether the award on quantum was inordinately high.

15. On the first issue, I refer to the Court of Appeal decision in Michael Hubert Kloss & Another V David Seroney & 5 Others [2009] eKLR where it stated:

> " The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in Stapley V Gypsum Mines Ltd (2) (1953) A.C 663 at pg 681 as follows;
>
> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide .....
>
> "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally".

16. Further, in Farah V Lento Agencies [2006] 1 KLR 124, 125, the Court of Appeal held that:

> " Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame".

17. Guided by the above cited authorities, it is my humble view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

18. This court has considered the evidence adduced before the trial court. It is not in dispute that the appellant is the owner of motor vehicle registration number KBR 428D/ZE 0885 which was rammed into by motor cycle registration number KMCY 510F TVS belonging to the deceased respondent. During trial the respondent called two witnesses and PW1 testified that he arrived at the scene when the accident had already occurred. However, he noted that the driver of the trailer had not switched on the hazards or erected the warnings signs on the road as required of him under the *Traffic Act*.

19. On cross examination, he confirmed that he did not witness the accident but was called to the scene by a good Samaritan. He was also not aware if the deceased had a driving licence but the motor cycle was insured. He further confirmed that the motor cycle hit the truck from behind.

20. PW2 No. 66274 PC Yusuf Sigei from Mai Mahui police station testified that the accident occurred on 31st December 2017 at 2305 hrs. He stated that the motor vehicle KBR 428D/ZE0885 was hit from behind by motor cycle KMBD 778Q Skygo. As a result, both the driver of the motor cycle and the deceased who was a pillion passenger died on the spot. He further stated that there was no witness on sight and it is the driver who narrated how the accident occurred. He concluded by stating that investigation was still pending so he produced the police abstract (P Exhibit 1).

21. On cross-examination, he stated that he was not the investigating officer and he was not aware of the status of the investigation. He confirmed that he was not able to trace the police file and that the motor cycle while attempting to overtake rammed into the truck which was in motion. He stated that the motor cycle was damaged on the rear side and the report on the accident was made based on what the police saw on the scene. He added that the driver of the truck was not blamed for the accident.

22. The appellant on his part called one witness DW1 who gave sworn testimony. He adopted his witness statement dated 5th May 2020 as his evidence in chief. He testified that the motor cycle was on a high-speed intending to overtake on a climbing lane when it hit their truck from behind. He blamed the driver of the motor cycle for the accident.

23. The trial court in its judgment faulted both the driver of the trailer and the motor cycle for the accident. He noted that their fleeing from the scene would direct the mind of reasonable person to conclude that they contributed to the accident.

24. After analysing all the evidence above, this court notes that it is not disputed that the deceased rammed into the truck belonging to the appellant. It is also not disputed that there was no witness at the scene of the accident save for DW1 who is the truck driver. Both the appellant and the respondents did not tell the court much on how the accident occurred. This court notes that the only document that attests to the occurrence of the accident is the police abstract. DW1 who is the driver of the truck blamed the rider of the motor cycle for the accident but unfortunately the said rider and deceased did not survive for them to tell their side of the story.

25. Further, no police investigations' report was produced to show whether either the rider of the motor cycle on which deceased who was a pillion passenger at the time of the accident or the driver of the motor vehicle KBR 428D/ZE 0885 was wholly to blame. The police abstract does not give sufficient details. However, it must be noted that DW1 and the other person he was with fled from the scene of the accident and this tells the court a lot about his conduct. If he was not to blame for the accident why did they escape? Also, why did they fail to call other persons to testify?

26. In view of foregoing, it is my view that the trial court considered the evidence tendered within the appropriate legal framework in arriving at a sound finding and apportioned liability in the ration of 70: 30 in favour of the respondents. I therefore find no basis upon which this court can interfere with the learned trial magistrate's finding on liability.

27. I now move to address the second issue, on whether the award on quantum was inordinately high.

28. It is trite law that an award is a discretionary exercise by the trial court. A superior court of Appeal will only interfere with that discretion if it finds that the trial court considered irrelevant factors and/or did not consider relevant factors as it made the award. This was the holding in the case of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini V A. M. Lubia and Olive Lubia (1985) I KAR 727 where the Court of Appeal stated:

> " 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 inordinately high that it must be a wholly erroneous estimate of the damage".

29. Regarding the award for pain and suffering and loss of expectation of the life the trial court gave awards of kshs. 20,000/= and kshs. 100,000/=respectively. The court in Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, observed as follows: -

> " The generally accepted principle, therefore, is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for Loss of expectation of life is Ksh. 100,000/- while for pain and suffering, the awards range from Ksh. 10,000/= to Ksh. 100,000/= with greater damages if the pain and suffering were prolonged before death."

30. Following the above, I see no justification for this court to disturb the said awards by the trial court as they are not excessive.

31. Regarding the award of loss of dependency, it is not disputed that the deceased was 32 years old at the time of his untimely death (EXB 4). PW1 in his testimony informed the court that the deceased was a teacher at a school known as Winds of Amani Play- nursery school. However, he confirmed that he had no documents confirming the same.

32. In assessing loss of dependency, the trial court while relying on several authorities computed the award on loss of dependency as follows;

20,166.80 x 18 x 12 x 2/3 = 2,904,019.20/=

33. The decision by the trial court to use the multiplier approach was purely a discretional one. Jurisprudence by the courts reveal that either the multiplier approach or an award of a global figure is applicable when it comes to assessing loss of dependency. In the case of Mwanzia vs Nagalali Mutua Kenya Bus Ltd cited in Albert Odawa vs. Gichumu Githenji [2007] eKLR the court gave guidance on when to use the multiplier approach as follows:-

> " The multiplier approach is just a method of assessing damages. It is not a principle of law of a dogma. It can, and must be abandoned, where the facts do no 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." [emphasis added]"

34. In the instant case no evidence whatsoever was adduced before the trial court on the deceased's earnings and this was equally noted by the trial magistrate. Thus, the correct approach would have been to assess the deceased's income by applying the global award approach. For the said reasons, I find that the trial court applied the wrong approach in assessing the damages for loss of dependency. I therefore set aside the award of Kshs. 2,904,019.20/= as loss of dependency and substitute it with a global award of 1,450,000/=.

35. Lastly, on the issue of the appellant's evidence and submissions not having been considered, I opine that the said allegation is false. I note that the trial magistrate in the judgment did a detailed summary to the parties' pleadings, evidence and submissions.

36. The upshot is that the appeal herein succeeds partially, and the Judgment of the lower court is set aside in terms of the award for loss of dependency which is substituted with the sum of kshs. 1,450,000/=. The other awards shall remain intact including costs and interest in the lower court.

37. The appellant shall get half costs of the Appeal.

38. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE