



Mbugua v Chepchirchir (As legal representative of Edwin Kimutai Chemwono - Deceased) & another (Civil Appeal E087 of 2023) [2025] KEHC 11934 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11934 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E087 OF 2023
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

DAVID KIARIE MBUGUA APPELLANT

AND

**JUDITH CHEPCHIRCHIR (AS LEGAL REPRESENTATIVE OF EDWIN
KIMUTAI CHEMWONO - DECEASED) 1ST RESPONDENT**

DAVID GITAU MBATA 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. Y.N. Barasa (P.M)
delivered on 28th September 2023 in Naivasha CMCC No.1080 of 2017)*

JUDGMENT

1. The 1st respondent who was the Plaintiff in the Lower court sued served the appellant and 2nd respondent jointly and severally for general damages under the Law Reform Act and under the Fatal Accidents Act special damages of Kshs.585,000/= plus costs and interest.

The claim is based on an accident said to have occurred on 16th January 2015 at Kiriko area along Nairobi-Naivasha road involving motor vehicle registration No.KAT 666E and motor vehicle registration No.KBQ 00IC

The 1st respondent filed the suit in her capacity as the Legal representative of the deceased's Estate.

2. The appellant filed his defence denying the claim. The matter to proceeded to full hearing after which a Judgment was delivered and awards made on 28th September 2023 in favour of the 1st respondent and against the appellant and 2nd respondent jointly and severally.



3. The appellant being aggrieved by the judgment filed this appeal dated 18th October 2023 on the following grounds
- i. That the learned trial magistrate grossly misdirected himself in apportioning liability on the part of the appellant in the absence of any evidence to suggest that he was either the driver, the insured and/or registered owner.
 - ii. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits and thereby arrived at a decision unstained in law.
 - iii. That the learned trial magistrate grossly misdirected herself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions presented filed by the Appellant
 - iv. That the learned trial magistrate proceeded on wrong principles when assessing damages to be awarded to the respondent if any and failed to apply precedents and tenets of the law applicable.
 - v. That the learned trial magistrate erred in awarding a sum in respect of damages which was inordinately high in the circumstance was excessive in the circumstances occasioning miscarriage of Justice.

A supplementary memorandum of appeal was filed on 21st November 2023 citing the following grounds:

- i. That the learned trial court misdirected itself in calculating multiplicand by failing to factor statutory deductions, and thus arrived at an erroneous high finding in quantum in computing net income at Kshs.58,300/=.
 - ii. That the learned magistrate erred in apportioning liability of 100% against the defendants yet the deceased equally owed other road users road sense, whereas evidence was given that the deceased was also overtaking and driving at an excess speed when the accident occurred.
 - iii. That the learned magistrate erred in basing the finding on liability on the fact that the police abstract apportioned blame and that the driver was charged, without evidence of the proceedings and outcome on any such criminal charge.
 - iv. That the Honourable Magistrate erred in law and in fact in adopting a multiplier of 26 years and failed to take into account the vicissitudes of life thereby awarding inordinately high damages for loss of dependency and ultimately inordinately high general damages.
4. The facts of the case are that the accident was fatal. The deceased who was husband to PW1-Judith Chepchirchir, was the driver to motor vehicle registration No. KAT 666E, which collided with motor vehicle registration No. KBQ001C. He was aged 33 years, a lecturer at Catholic University and ran a law firm. His payslips were produced by PW1.
5. In cross examination she said the couple did not have any children and she had her own income. No Traffic case proceedings were produced.
6. Raymond Kiiru (PW2) testified that the driver of motor vehicle KQB 001 C was the 2nd respondent. It's the said vehicle that collided with the deceased's vehicle. The said 2nd respondent was overtaking without due care, hence the head on collision.



Investigations were conducted and the driver of KQB 001C was charged with causing death by dangerous driving. PW2 was not the investigating officer.

7. In cross examination he said there was no evidence showing that anyone was charged, as paragraph 5 of the Police abstract was blank. He did not witness the accident and the OB was not produced. He had no sketch map, with him.
8. The appellant testified as DW1. He relied on his statement and denied being the driver but said he was in the motor vehicle that caused the accident. That his driver encroached to the oncoming lane, where the accident occurred. He did not know if his driver was blamed by the police, and he had no sketch map.
9. In re-examination he said he was the co-driver in KBQ 001C. He said it's the Mercedes Benz which was overtaking. Upon closure of the defence case, both counsel filed submissions after which the Judgment was delivered on 28th September 2023, in favour of the 1st respondent and the following awards, made:
 - i. Defendants held liable at 100% for the accident
 - ii. Pain and suffering -Kshs.50,000/=
 - iii. Loss of expectation of life -Kshs 100,000/=
 - iv. Loss of dependency-Kshs 6,063,200/=
 - v. Special damages-Kshs 585,000/=
 - vi. Costs and interest
10. The Appeal was canvassed by way of written submissions.

Appellant's Submissions

11. They were filed by Wairimu Gathii advocate LLP and are dated 5th March 2024. Counsel did a summary of the evidence and submitted that the trial court did not explain the reason behind the 100% liability when the deceased was also the driver of KAT 666E Mercedes Benz present on the road at the time of the accident. He submitted that the 2nd respondent's evidence on what transpired was not taken into account by the trial court.
12. She further argued that the evidence of the 1st respondent and her witness did not assist the court in any way to understand how the accident occurred. Reference was made to the case of Violet Kamwenya Odiara and Another (suing as the administratrix of the Estate of the late Timothy Odiara Ndege) V Kiprono and Chemwono (2019) eKLR, where it was held:

“The appellant submitted that PW2 who was a police officer confirmed that the accident occurred and involved the defendant's motor vehicle and the deceased's motorcycle. He however was not the investigating officer and did not have sketch plans for the accident.

He therefore lacked the basis to point out that the respondent was to blame for the accident. He never witnessed the accident or visit the scene.
13. Counsel also submitted that the appellant was the only eye witness who testified while the 1st respondent did not call any eye witness yet there had been a passenger in the deceased's vehicle. That



there was no evidence that the 2nd respondent was ever charged. She cited the case of Chemwolo and Another V Kubende {1986} KLR 492 [1986-1989] E. A 74 in which Platt JA. explained as follows:

“It was not for the Judge to read the proceedings in the Traffic case if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even prima facie case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case.....But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party’s conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages.”

14. It was argued that the police abstract which was relied on by the court was heavily contested, as there was a second abstract.

Counsel referred to the case of Peter Kamithi Kimunya V Aden Guyo Haro {2014} Eklr Where it was held:

“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”

.....Liability can also not even be derived from the police abstract produced in evidence because the remark indicated in the police abstract is that the case is still pending under investigations and even if there were remarks that one of the party’s driver was charged with careless driving, which was not the case here, different aspects emerge in civil cases such that the parties to an accident might have driven carelessly and each could be convicted for careless driving.....”

Also see: Hussein Omari Farah V Lento Agencies Civil Appeal No.34 of 2005 (2006) eKLR.

15. On quantum Counsel submitted that the sum of Kshs.50,000 for pain and suffering was high. Reference was made to the case of Elizabeth Nancy Wairimu Kibandi V Kisumu Banco Manufactures Limited and another (HCCC No.1565/1999). It was contended that Kshs.100,000 for loss of expectation of life was manifestly high. In support was the case of West Kenya Sugar company Limited Versus Phillip Sumba Julaya(Suing as the Administrator and personal representative of the estate of James Julaya Sumba {2019} eKLR where the court observed that:

“The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”



16. On dependency counsel relied on what was held in the case of Leornard Ekisa V K.Birgen (HCC NO.2 of 2003) and Grace Kanini V Kenya Bus Services Nairobi HCCC NO.4708 of 1989, where it was held:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings.

.....and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact the award will be received in a lump sum and if otherwise invested, good returns can be expected.”

17. It was counsel’s submission that the trial court should have considered the uncertainties of life before adopting a multiplier.

On this she relied on the Court of Appeal case of Comply industries Limited V Daniel Kiprotich Buisienei (HCC O.142 OF 2019) and Lochab Transporters Limited V Caroline Nduta Mwamburi [2020] eKLR. She argued that the deceased was a frequent road user and was exposed to danger /risk in the circumstances. Thus, there was no guarantee that he would have worked to the retirement age of 60 years.

18. On special damages counsel submitted that the same totaled up to Kshs 555,000 and not Kshs.585,000. Counsel urged the court to find the appeal to be merited and allow it with costs.

1st respondent’s submissions

19. The same were filed by C.J. Chirchir and Associates and are dated 2nd April 2024. On whether the trial court erred in holding the appellant 100% liable for the accident. Counsel submitted that PW1 and PW2 adduced sufficient evidence on the negligence of the appellant and 2nd respondent. That PW2 confirmed that the 2nd respondent had been charged with causing the deceased’s death. He also referred to a police abstract produced by PW2 showing that the driver of KBQ 001C was to blame.
20. Referring to the appellant’s statement in court he submitted that he admitted that his driver was to blame for the accident. This was in cross examination. He thus contended that Liability at 100% had been established.
21. Secondly on whether the court erred and applied the wrong principles when assessing damages, counsel argued that the figure used to do calculations was Kshs.58,300 (multiplicand) which was the net and not gross to pay. Reliance was placed on the cases of;
- i. Matunda (Fruits)Bus services Limited V Phoebe Achieng Owino and another {2023} KEHC 2179[KLR] and



ii. Grace Karimi V Kenya Bus services Nairobi HCCC No..4708 of 1989 where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earning but the net earnings”

22. He submitted that the use of a multiplier is at the discretion of the court. Reliance was placed on the cases of:

(i) Board of Governors of Kangubiri Girls High School and another V Jane Wanjiku Muriithi and another Nyeri Court of Appeal- Civil Appeal No.35 of 20014 [2014] eKLR and

(ii) Roger Dainty V Mwinyi and another Mombasa Court of Appeal Civil Appeal No.59 of 2004 [2004] eKLR where the court of Appeal observed that:

“To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.”

23. Counsel submitted that the deceased was an advocate, lecturer at the Catholic University and had a Law firm. He was aged 34 years at the time of his demise. That he would have retired at age 70years. He thus submitted that the multiplier of 26 years was very realistic in the circumstances.

24. On when an appellate court can interfere with an award of damages, counsel submitted that this is firmly established and the principles laid down in the case of *Gitobu/Manyara and 2 others Versus Attorney General* [2016] eKLR where the court of Appeal stated thus

“.....it is firmly established that this court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

Also see: (i) *Rahma and another V Anna Mary Kiraru* [1987-88]1 KAR 90 (ii)*Hassan V Nathan Mwangi Kamau Transporters* {1985} eKLR

25. He contended that the appellant had not established any basis to warrant interference with the award of damages nor even the liability as found by the trial court. He urged the court to dismiss the appeal.

Analysis and Determination

26. This being a first appeal, it is this court's duty under section 78 of the *Civil Procedure Act* to re-evaluate and assess the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing or hearing the witness as they testified.



This principle of law was well settled in the case of *Selle V Associated Motor Boat Company Limited* {1968} EA 123 where Sir Clement De Lestang (V.P) stated that:

“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 conclusion 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 on 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.”

Also see: *Peters V Sunday Post Limited* {1958} EA 424; *Kiruga V Kiruga* and another 1988 KLR 384

27. I have carefully considered the record of appeal, the grounds of appeal, both parties submissions, the cited authorities and the Law. What I find falling for determination is as follows:
- (i) Whether the trial court erred in finding the appellant and 2nd respondent 100% liable for the accident
 - (ii) Whether this court should interfere with the award made
 - (iii) Issue of costs being whether the trial court erred in condemning the appellant and 2nd respondent to pay costs

Issue No.(i) whether the trial court erred in finding the appellant and 2nd respondent 100% liable for the accident

28. The evidence on record confirms that neither PW1 nor PW2 witnessed the accident. However, PW2 appeared to have so much information on what transpired. He did not inform the court how he got this information because he did not visit the scene and he was not the investigating officer. He produced the Police abstract (PEXB2) which is dated 1st April 2015. Despite PW2’s claim that the 2nd respondent had been charged for causing death by dangerous driving nothing was produced by him to show that. Even the PEXB2 does not have the particulars of the Traffic case number.
29. The hearing of this case commenced on 12th April 2023. If indeed anybody had been charged with a Traffic offence would there not be any evidence to confirm that, eight (8) years down the line?
- The 1st respondent never requested the court for time to call the investigating officer to produce the sketch map and even explain what was the outcome of the investigations.
30. In his Judgment the trial court stated this at page 5 of the record of appeal;
- “It appears that both sides are blaming each other. The only way to find out the truth is by looking at the documents. I have looked at the Police abstract which indicates that motor vehicle number KBQ 001C was blamed and the driver was charged with causing death by dangerous driving. In view of the foregoing I will hold the defendants 100% liable for the accident”
31. This shows that he relied wholly the on police abstract PEXB2 to conclude that the defendants were 100% liable for the accident.



The Police abstract by itself was not sufficient proof in the absence of any other evidence to confirm the causation of the said accident. The evidence is that the two-vehicles collided. At what point of the road was the collision? On whose lane was the collision? Who between the two had a right of way? All these questions could not be answered in the absence of the investigating officer plus the sketch maps showing the scene, and the O.B and proceedings of the alleged Traffic case.

32. PW2 said the O.B showed that the 2nd respondent was to blame.

Where was that O.B since it's not in the court file? Owing to the fact that there was indeed no evidence of a Traffic case having been filed against the 2nd respondent and for justice to be seen to have been done the trial court ought to have summoned the investigating officer to testify, and offer clarity to the court. That was never done.

33. This was a matter where both parties are blaming each for the cause of the accident. The deceased was not there to speak for himself and that is why the evidence of the police officers who investigated the case was very important. What did the drivers do to avoid the accident? No independent witness was availed to assist the court, and neither did PW2 do the same. It is only the appellants who testified on this issue, though he was not the driver of motor vehicle KBQ 001 C.

34. It is unfortunate that the driver of motor vehicle registration number KAT 66E Maecedez Benz passed away. In this case the court finds itself in a position where it is not able to determine who is to wholly blame and has to apportion liability.

35. The Court of Appeal in the case of Hussein Omar Fairar V Lento Agencies C.A Nairobi, civil Appeal No.34/2025 {2006} eKLR observed this:

“In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other Jurisdiction that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”

36. On my part I have come to the conclusion that following the collision the drivers must share culpability in the absence of any other evidence exonerating either party.

37. I therefore set aside the finding by the learned trial Magistrate on liability and hold that the 1st respondent's husband (deceased) and the 2nd respondent both contributed to the collision and will share liability in the ratio of 60:40 in favour of the 1st respondent.

Issue No (ii) Whether this court should interfere with the award made

38. It is an established principle of Law that an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate or where the assessment is not based on any evidence.

See: Mkube V Nyamuro {1983} KLR 403-415; Peter M. Kariuki V Attorney General C.A Civil appeal No.79 of 2012 [2014]eKLR

39. The trial court in its Judgment considered the age of the deceased, his basic pay, retirement age and the ratio of dependency. The 1st respondent and the deceased did not have any children. He was aged 33 years old and had a bright future being a Lawyer running a Law firm and also teaching at Catholic University. Infact his income from the Law firm was not considered in the calculation for dependency.



Considering all the above factors and the referred to authorities I do not see any reason that would make this court interfere with the multiplier of 26 years. The deceased's basic pay from the payslips produced is Kshs.58,300/= and that is what the trial court used as a multiplier.

40. The deceased died on the spot and I hereby reduce the award of Kshs.50,000/= to Kshs.25,000/=.

Paragraph 10 of the amended plaint enumerates 3 items as special damages which add upto Ksh.555,000/= and not Kshs.585,000/=. The appeal succeeds on the issue of liability. Costs shall follow the event. The upshot is that the Appeal succeeds and the Judgment of the lower court is hereby set aside and substituted with Judgment in the following terms:

- (1) Liability is apportioned in the ratio of 60:40 in favour of the 1st respondent
 - (2) Pain and suffering-Kshs 25,000/=
 - (3) Loss of expectation of life -Kshs.100,000/=
 - (4) Loss of dependency-Kshs.6,063,200/=less 40% liability (Kshs.2,425,280/=) =Kshs.3637,920/
=
 - (5) Special damages-Kshs.555,000/=
- Total award=Kshs.4,317,920/=
- (6) Costs plus interest from date of Judgment in the Lower Court.
 - (7) The appellant will have half of the costs of the appeal.

Orders accordingly.

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

H. I. ONG'UDI
JUDGE

