



**Orina & another v Mwangi (Suing as the Legal Representative of the Estate of Francis Kingori Mwangi - Deceased) (Civil Appeal 45 of 2023) [2024] KEHC 11332 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11332 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYANDARUA  
CIVIL  
CIVIL APPEAL 45 OF 2023  
CM KARIUKI, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**MAUREEN KEMUNTO ORINA ..... 1<sup>ST</sup> APPELLANT**

**JARED OMWANDO MOSE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANASTACIA NYAWIRA MWANGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS KINGORI MWANGI - DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. The Appellants herein, vide the memorandum of appeal dated 5<sup>th</sup> March 2022, appealed against the judgment delivered by Hon. C. Obulutsa (CM) on 17<sup>th</sup> February 2022 in Nyahururu CMCC No. 123 of 2017 on the grounds stated below: -(The instant appeal heard along with HCA 47 of 2023: Maureen Kemunto & Jared Omwando Mose vs Benjamin Gichuki; thus at end noted how result to apply to it)
  - i. That the learned trial magistrate erred in fact and law by holding that the defendant was 50% liable for the accident in view of the lack of evidence tendered.
  - ii. That the learned trial magistrate erred in fact and law by awarding the plaintiff an excessive and unjustified amount of Kshs. 438,952/- as a quantum for general and special damages in view of the lack of evidence tendered.
  - iii. The learned trial magistrate erred in fact and law by awarding Kshs 7,850 as special damages, which was excessive and erroneous in view of the lack of evidence tendered.



- iv. The learned trial magistrate erred in fact and law in failing to consider the Appellant's submissions plus evidence tendered on damages awardable.
2. The parties were directed to canvass appeals via submissions, but only respondent submissions were available. As for the Appellants' Submissions, they were not available at the time of drafting this judgment.

### **Respondent's Submissions**

3. The Respondent pointed out that they wrote their submissions without the benefit of reading and perusing the Appellant's submissions and that the record of appeal filed by the Appellants is not complete and should be struck out at first instance.
4. On liability, it was stated that it is not in dispute that an accident occurred on 12<sup>th</sup> February 2016, and the motorcycle KMCT 090U was hit. It was stated that there were two police abstracts, one that was reported immediately and one produced as PMF1. Further, according to the testimony of PW2, the rider of the motorcycle indicated to turn right. During cross-examination, he confirmed that there was an oncoming vehicle; however, the driver of the KCE 952S never kept a safe distance between the matatu and the motorcycle. According to the police abstract produced by the Respondent as PMF1, the driver of KCE 952S was clearly blamed after investigations were conducted and concluded.
5. The Respondent answered that there were many questions about how the driver could not remember the lodging and even produced receipts to affirm that he had slept in a lodging. One might conclude that the driver was exhausted. It was further stated that the driver confirmed that it was not dark, not raining, and the rider was 50 meters away from him. If he was driving at 60km/h, how could he not break? Why did the driver hit the rider if the visibility was good and was keeping a safe distance?
6. In the circumstances, they submitted that the 2<sup>nd</sup> Appellant is to blame and the 1<sup>st</sup> Appellant is vicariously liable. Reliance was placed on *Multiple Hauliers (E.A) Ltd vs. Ustus Mutual Malundu & 2 Others [2017] eKLR*
7. Additionally, it was asserted that per the charge sheet produced by the Appellant, the driver is to be blamed for the accident. However, in view of the fact that the rider joined the left side of the road after there was an oncoming vehicle, they submitted that the learned trial magistrate applied his mind to the correct principles and facts to arrive at the conclusion he did.
8. On quantum, both under the Fatal Injuries Act and *Law Reform Act*, it was stated that the learned trial magistrate took into account the trend of previous, recent, and comparable awards while awarding the Appellants damages under the following heads:-

### **Pain and suffering**

9. The fact that the deceased died on the spot was not disputed, and therefore, in the circumstances, the conventional sum awarded is sufficient. Reliance was placed on *Titus Ndungu Njuguna & Another vs. Hannah Waruguru Gichuhi & Another [2019] eKLR*

### **Loss of expectation of life**

10. It was contended that taking into account that the deceased was still in his prime age at the time of his death and as per PW1 testimony that she used to rely on him, they urged the trial court to find and hold that the conventional sum awarded by the learned trial magistrate as sufficient.



11. In the Fatal Accident Act, it was asserted that the multiplicand and ratio dependency used and adopted by the learned trial magistrate is fair. Additionally, they submitted that the Respondent produced receipts to prove the special damages and urged this Court to uphold the conventional sum awarded herein.
12. In conclusion, the Respondent stated that she had proved her case on a balance of probability and urged the Court to uphold the lower Court's judgment. They also prayed for costs to be awarded pursuant to Section 27 of the [Civil Procedure Act](#).

### **Analysis And Determination**

13. The instant appeal is both on liability and quantum. This being a first Appeal, and as stated in *Selle & Another v. Associated Motor Boat Co. Ltd & Others* (1968) EA 123, this Court is duty bound to re-evaluate the facts afresh and come to its independent findings and conclusions while bearing in mind that, unlike the trial court, this Court neither saw nor heard the witnesses when they testified.

### **Preliminary issue**

14. First and foremost, the Respondent stated that the record of appeal filed by the Appellants is not complete and should be struck out in the first instance. In my considered view, although the record of appeal may be incomplete, it has not been shown what prejudice the Respondent will suffer as a consequence, and in any case, I do not discern any such prejudice that they may suffer. Additionally, the current constitutional dispensation and the overriding objective, as captured in Sections 1A and 1B of the [Civil Procedure Act](#), call upon courts to aim for substantive justice as opposed to focusing on technicalities. I, therefore, find that the Appellant's failure to file a complete record of appeal cannot be a basis for striking out the appeal herein.
15. That being the case, I will proceed to determine the substantive issues in the appeal herein.
16. From my perusal of the trial record, PW1 testified that she was informed that her son had gotten into an accident at Gwa Kungu while heading home. She confirmed that she was not at the scene. It was asserted that he was born in 1990 and was a boda operator. He was the sole breadwinner in her family since her other children were not working and her husband had passed away. The accident was reported at the police station, and an abstract was issued. PW1 testified that she instructed her advocate to petition for a grant of letters of administration ad litem and that they incurred many expenses during the burial.
17. PW2 No. 81473 PC Geoffrey Kahiga from Nyahururu Police Station testified that they received a report about a road traffic accident that had occurred on 12/2/2016 at Gwa Kungu along Nyeri-Nyahururu road at 1830hrs between KCE 952S Toyota matatu and motorcycle registration no. KMCY 097U. It was stated that the motorcycle was coming from Nyeri's direction, heading towards Nyahururu, and was being followed closely by the matatu when the rider indicated to turn right. He was then hit by the matatu from the left, leading to the rider and a pillion passenger, Lucy Wangu Maina, being seriously injured, and they later succumbed to their injuries.
18. He stated that police visited the scene, sketch plans were drawn, and the point of impact was on the left side towards the edge of the road facing Nyahururu's direction. That was the correct lane for the motorcycle. It was PW2's testimony that Jared Omwano was charged in Nyahururu Law Courts Vide Traffic Case No. 364/2016 with causing death by dangerous driving, but the matter was yet to be concluded. The findings in the police file were a recommendation that the driver be charged since he did not keep a safe distance as required.



19. During cross-examination, PW2 stated that the investigating officer was Bernard Mosoti, who had been transferred to Ngong Police Station. He also averred that the police file did not recommend that the driver be charged. He stated that it was indicated that the rider suddenly swerved, but the driver was still supposed to keep a safe distance. It was indicated that the rider was the cause of the accident. When referring to the O.B. extract. He stated that it was indicated that the rider decided to join the right side of the road, and he suddenly saw a motor vehicle registration number KBW 646E, which was approaching from the opposite side, meaning he could not turn to the right immediately. Thus, he swerved to the right, lost control, and was hit by KCE 925S.
20. He asserted that the scene was visited by the police, who found eyewitnesses, including one Peter Mureru, who recorded a statement blaming the driver of KCE 925S for the accident.
21. Upon re-examination, PW2 stated that after the file was compiled, it was forwarded to the ODPP for advice, and the ODPP recommended that the driver of KCE 952S be charged. He stated that vehicles are supposed to keep a safe distance, and it, therefore, does not matter that the cyclist made a sudden turn. He stated that the investigating officer recommended that an inquest file be opened, although it was never opened.
22. During the defense hearing, DW1 Jared Omwando, the matatu driver, testified that on 12.2.2016, he was traveling from Kiganjo when he met a motorbike rider at Gwa Kungu. They were both on the left side of the road when he turned right without indicating. He stated that there was an oncoming vehicle that made the rider come back to the left lane, where he met his vehicle, hence causing the accident. He tried to avoid the accident by applying his brakes and swerving off, but it was too late.
23. He stated that they stayed at the scene for 2 hours before the police came. The accident occurred at around 7 pm, and he was the one who took the injured persons to hospital and then reported the accident at Nyahururu Police Station. He stated that Paul Waithaka did not come to the scene and that it was not true that he was overtaking the motorbike. He averred that there were slow bumps on the road, and he could not exceed a speed of 60km/h. He stated that there was an ongoing traffic case, blamed the motorbike rider for turning without indicating, and reiterated that he had kept a safe distance from the rider.
24. Upon cross-examination, he stated that he was the driver of the matatu, which Maureen Kemunto Orina owned. One of the persons in the motorbike accident died on the spot, and the other died later. He asserted that he left Kisii at 4.00 am with 14 passengers and arrived at Kiganjo at 8 am. They left Kiganjo at 4 pm, and he had spent the whole day sleeping there, although he could not remember the name of the lodging. He stated that the route to Kiganjo was new for him and that the accident took place at a flat place with no corners or valleys. He was driving at 60km/h, and it was not dark, and he had not switched on the lights.
25. He pointed out that the first time he saw the rider, he was about 50 meters away from him, and on the right, there was a feeder road, which the rider suddenly turned so as to join. He continued driving, and then he saw the rider coming back to the left side; at that time, he had already covered the distance of 50 meters that had been separating them. He applied his brakes, but the accident happened, and the motorbike was hit on its right center side. The point of impact on the road was on the left side facing Nyahururu.
26. He blamed the rider for turning right without indicating, and he failed to state that the driver did not indicate when he recorded his statement. He stated that he was charged with causing death by dangerous driving, but the case was still ongoing.



27. DW2 No. 234508 IP Geoffrey Mogire, traffic base commander, testified that the accident was reported at the station. He confirmed that he was not the investigating officer. He stated that the motor vehicle was headed to Nyahururu; the motorcycle joined the road and indicated to him from the right, then switched off when an oncoming motor vehicle passed. The driver overtook the rider to his right, which led to the accident. He stated that the driver was at fault for driving without due care.
28. He confirmed that the investigating officer recommended an inquest be made and that Paul Mwathi Waithaka had not recorded any statement at the station. It was Peter John who recorded a statement. The motorcycle was found to have no insurance, and the rider did not have a license. He also produced the police file.
29. On cross-examination, he stated that the investigating officer was IP Moseti and that the abstract was issued to the rider and passenger, that the one for Francis indicated that the driver of the motor vehicle was to blame, and the other one indicated that investigations were pending.
30. On the issue of liability, the Respondent stated that it is not in dispute that an accident occurred on 12<sup>th</sup> February 2016 and the motorcycle KMCT 090U was hit. It was stated that there were two police abstracts, one that was reported immediately and one produced as PMF1. Further, according to the testimony of PW2, the rider of the motorcycle indicated to turn right. During cross-examination, he confirmed that there was an oncoming vehicle; however, the driver of the KCE 952S never kept a safe distance between the matatu and the motorcycle. According to the police abstract produced by the Respondent as PMF1, the driver of KCE 952S was clearly blamed after investigations were conducted and concluded. In the circumstances, they submitted that the 2<sup>nd</sup> Appellant is to blame and the 1<sup>st</sup> Appellant is vicariously liable.
31. Consequently, it is not in dispute that the deceased herein was riding the motorcycle KMCT 090U, carrying a pillion passenger, and that the 2<sup>nd</sup> Appellant was driving motor vehicle KCE 952S owned by the 1<sup>st</sup> Appellant. It is also not in dispute that they were heading in the same direction when the fatal accident occurred.
32. From the trial record, it appears that the deceased's motorbike was ahead of the 2<sup>nd</sup> Appellant's matatu when the collision happened. The Appellant's account was that the deceased indicated that he was turning right, and before he could turn, the 2<sup>nd</sup> Appellant, who was driving close behind him, hit him, causing the collision. They blamed the 2<sup>nd</sup> Appellant for the accident. The same was disputed by the 2<sup>nd</sup> Appellant, who stated that the deceased had not even indicated that he was turning right, but as he was about to turn, he saw another vehicle coming from that direction, which prompted him to go back to the left lane, causing the matatu to hit him. He asserted that the deceased was to blame for the accident.
33. From PW2's testimony, it is clear that he blamed the 2<sup>nd</sup> Appellant for causing the accident. He stated that the motorcycle was coming from Nyeri's direction, heading towards Nyahururu, and was being followed closely by the matatu when the rider indicated to turn right. He was then hit by the matatu from the left, leading to the rider and a pillion passenger, Lucy Wangu Maina, being seriously injured, and they later succumbed to their injuries. Further, he asserted that the police visited the scene, sketch plans were drawn, and the point of impact was on the left side, towards the edge of the road, facing Nyahururu's direction.
34. Moreover, he testified that the 2<sup>nd</sup> Appellant was charged in Nyahururu Law Courts Vide Traffic Case No. 364/2016 with causing death by dangerous driving, but the matter was yet to be concluded. The findings in the police file were a recommendation that the driver be charged since he did not keep a safe distance as required.



35. Although he stated that he was not the investigating officer and that the police file did not have a recommendation that the driver was to be charged, he reiterated that the rider suddenly swerved, but still, the driver was supposed to keep a safe distance. He also stated that it was indicated that the rider was the cause of the accident.
36. DW2's account of how the accident occurred was significantly similar to PW2's. He also stated that the driver was at fault for driving without due care. He confirmed that the investigating officer recommended an inquest be made, although one was never undertaken. He produced the police file, which recommended that the rider for being the author of his death and that an inquest be undertaken.
37. It appears that there are conflicting accounts on who was to blame for the accident despite the fact that both PW2 and DW2 had similar testimonies as to how the accident occurred. There were also two police abstracts, one issued to the rider's family and one to the passenger's family. The rider indicated that the matter was pending under investigation, and the passenger stated that the driver was at fault. Additionally, the driver was charged with causing death by dangerous driving, but the same had not been concluded.
38. Based on the foregoing and my careful analysis, I agree with the trial magistrate's analysis of how the accident occurred. It is my view that the motor vehicle and motorcycle were both headed in the Nyahururu direction. The rider indicated that he was turning towards the right, but since there was an oncoming vehicle, he swerved back to the left, and the motor vehicle, which was closely following the rider, hit him, causing the fatal accident. I am convinced on a balance of probabilities that the rider had duly indicated that he intended to turn right, contrary to the 2<sup>nd</sup> Appellant's assertion that he did not indicate. I am also convinced that the driver was driving closely behind the rider, which is why he was unable to avert the collision when the rider swerved back to the left to avoid the oncoming motor vehicle.

### **On liability**

39. I agree with the trial magistrate that both parties were to blame for the accident. From the trial record, it appears that the driver failed to keep a safe distance, and the rider started to overtake before ascertaining that it was safe to do so. Accordingly, I find that the trial magistrate did not err by apportioning 50:50 liability between both parties.
40. The appeal also challenged the quantum of damages awarded by the trial court. As a general rule, an appellate court should be slow to interfere with an award of damages made by the trial court basically because such awards are at large and they depend on the trial court's discretion, which must be exercised judiciously, taking into account the facts of each case and the law.
41. The principles that set out the parameters within which an appellate court can interfere with awards made by the lower Court have been enumerated in many authorities. In *Mariga V Musila* [1984] KLR 251, the Court of Appeal expressed itself as follows:-
  - a. "The assessment of damages is more like an exercise of discretion, and an appellate court is slow to reverse a lower court on the question of the amount of damages unless it is satisfied that the judge acted on a wrong principle of law or has for these or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate Court would award but whether the lower court judge acted on the wrong principle..."



42. Moreover, in *Bashir Ahmed Butt V. Uwais Ahmed Khan* [1978] eKLR, the Court stated that:-
- “.... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”
43. (See also: *Kemfro Africa ltd t/a“Meru Express Services[1976]” & Another V. Lubia & Another* [1987] KLR 30)
44. Consequently, under pain and suffering, the trial court awarded the deceased Kshs. 50,000/-. In his judgment, the trial magistrate noted that the deceased passed away on the spot. He held that in the plaintiff's authority, 30,000/- was granted in 2015, and for the defendant, 20,000/- in 2018. Taking into account inflation, the proposal by the defendant is on the lower side. The Court will take the plaintiff's proposal of 50,000/-
45. In the case of *Hyder Nthenya Musili & Another vs. China Wu Yi Limited & Another* [2017] eKLR, the Court stated as follows:-
- “As regards damages awarded under the *Law Reform Act*, 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.... The generally accepted principle, therefore, is that very nominal damages will be awarded on these two heads of damages if the death follows immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering, the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death....”
46. Accordingly, considering the fact that no submissions were advanced as to why the quantum of damages was excessive and the fact that the acceptable range where there is no prolonged pain and suffering is between Kshs. 10,000/- and Kshs.100,000/-. Considering the fact that the deceased died on the spot and, therefore, did not suffer for a protracted period, as considered against the need not to interfere unnecessarily with the trial Court's exercise of discretion, I do not see a reason to disturb the trial court's findings; therefore, the award of Kshs. 50,000/- is upheld.
47. Furthermore, I uphold the award granted for the loss of expectation of life, i.e., Kshs. 150,000/- as well as for loss of dependency, seeing as the same was granted considering the Appellant's proposal. Further, special damages having been specifically pleaded and proved, I uphold the award of Kshs. 15,700/-.
48. On the premises, makes the orders;
- a. This appeal fails and is dismissed in its entirety, with costs awarded to the Respondent.
  - b. The judgment of the trial magistrate on liability and quantum is also upheld in HCA 47 of 2023: *Maureen Kemunto & Jared Omwando Mose vs Benjamin Gichuki*; the appeal, therefore, fails with costs to the Respondent.

**JUDGMENT DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

.....  
**CHARLES KARIUKI**



**JUDGE**

