



REPUBLIC OF KENYA



**KENYA LAW**  
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**Charles v Wari (Suing as the Administrator of the Estate of the Late Evan Ogendo Morebu)  
(Civil Appeal E170 of 2022) [2025] KEHC 8355 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E170 OF 2022**

**A MSHILA, J  
JUNE 13, 2025**

**BETWEEN**

**RIUNGU NJERU CHARLES ..... APPELLANT**

**AND**

**LILIAN BOSIBORI NYAB WARI ..... RESPONDENT**

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE EVAN  
OGENDO MOREBU**

*(Being an appeal from the Judgment issued by Hon. S. Motari (RM)  
on 1/07/2022 at Kiambu Law Courts in CMCC No. 408 Of 2017)*

**JUDGMENT**

**Background**

1. By a Complaint filed on 24<sup>th</sup> August, 2017, the Plaintiff hereinafter the Respondent being the Administratrix of the estate of Evan Ogendo Morebu (Deceased) sued the Defendant hereinafter the Appellant claiming compensation for the fatal injuries sustained by the deceased on or about the 22<sup>nd</sup> day of October, 2016 when the deceased was lawfully riding his motor cycle registration number KMCZ 572H make Tv along Gachie Karura Road in Kiambu when the Appellant and/or his agent so negligently drove motor vehicle registration number KBK 284E along the said road causing the same to seriously hit and fatally injured the deceased causing fatal injuries.
2. The Appellant filed their statement of Defence denying any liability. He averred that he was a good Samaritan who took the deceased to the hospital.
3. The matter proceeded to a full hearing. The trial court found that the Respondent had proved her case on a balance of probabilities and apportioned liability at 100% in favour of the Respondent against the Appellant.



4. On quantum, the Honourable Trial Magistrate entered judgment as follows:  
Pain and suffering Kshs. 50,000.00  
Loss of expectation of life Kshs. 100,000.00  
Loss of dependency Kshs. 1,000,000.00  
Special damages Kshs. 12,500.00  
Total Kshs. 1,162,500.00
5. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present Appeal. In his Memorandum of Appeal, he has listed five grounds of appeal namely:-
  - a. That the Learned Trial Magistrate erred in law and fact by finding that the defendant was to blame for the accident.
  - b. That the Learned Trial Magistrate erred in law and fact by holding that the plaintiff had proved her case on a balance of probabilities.
  - c. That the Learned Trial Magistrate erred in law and fact in failing to appreciate and consider the evidence given by the defendant in support of his case.
  - d. That the Learned Magistrate misdirected herself on the assessment of quantum on general damages.
  - e. That the Learned Magistrate erred in awarding the plaintiff the claim with costs.
6. The court directed the parties to canvass the appeal by way of written submissions.

### **Appellant's Submissions**

7. The Appellant submits that the Respondent has not adduced enough evidence in this matter and therefore urges this Honorable Court to set aside the Trial Court's Judgement and allow this appeal. Reliance was placed on the case of Alfred Kioko Muteti v Timothy Miheso & Another [2015] and the long principle of law, that, "he who alleges must prove". Further, he submitted that the Trial Magistrate failed to consider the evidence given by the Appellant in support of his case. He stated that the Respondent's witnesses' evidence is based on hearsay because neither PW1 nor PW2 were present when the accident occurred. PW1 or PW2 did not provide any evidence from any eyewitness, sketches, drawings or photographs from the accident scene. He claims that no report was made of the accident and that there was no report of inspection at the station. PW1 did not produce into court the police file that contained the investigation report. He stated that the Trial Magistrate failed to consider the evidence given by the Appellant in support of his case. In this instance, the Appellant's witness DW1 testified that at the time of the accident he was alone in the motor vehicle. He did not run over the deceased, the deceased was coming from the opposite direction at a high speed, hit a bump, rolled over and finally landed next to the rear of his vehicle. He stated that his vehicle didnt have any accident-related dents. He stated that the Trial Magistrate misdirected herself on the assessment of quantum on general damages and awarding the Respondent the claim with costs because the income of the deceased was not proved. There was no proof of dependency. At the time of death, the deceased was riding a motorcycle with no proof of driving license or insurance of the said motorcycle. He submitted that Ksh. 500,000/- would be adequate compensation. Reliance was placed on the cases of Moses Koome Mithika & another v Doreen Gatwiri & another (Suing as the legal representative and Administrator of the Estate of Phineas Murithi (deceased) [2020] eKLR.



## **Respondent's Written Submission**

8. The Respondent submitted that on 22<sup>nd</sup> October 2016, the Appellant negligently and carelessly drove his vehicle along Gachie Karura Road in Kiambu that he occasioned fatal injuries to the deceased. She averred that the Appellant has failed to adduce any tangible and relevant evidence to assert his claim that he was not to blame for the accident. The Appellant did not provide a plausible explanation on how the deceased ended up at the rear of his vehicle since he had stated in his testimony that he was about 10 meters away from him. The Respondent submitted that the Appellant's statement, that the motorcyclist somersaulted from the motorcycle but at no time did the motorcycle come to his lane is contradicted by the post-mortem report. Which report clearly indicates that most of the deceased injuries from the accident are on the right side of his body consistent with it being the first point of contact with the Appellant's vehicle. She stated that the police report of the incident was made by the Deceased's wife vide OB No. 16/22/10/2016. The Appellant has not adduced the police report to prove his assertion that he reported this accident at Kihara Police Post. She averred that the Appellant has not produced any evidence to corroborate that his vehicle was inspected and it did not have any accident-related dents. Reliance was placed on the case of *Kimotho v KCB* [2003]/ EA/ 08. She submitted that she has produced both oral and documentary evidence showing that there is a casual link between the Deceased injuries and subsequent death and the Appellant's conduct. Whereas, the Appellant has failed to do so. She stated that the Respondent had met the required threshold of proving her case on a balance of probabilities and the appeal had no basis. Reliance was placed on the case of *William Kabogo Gitau v George Thuo & 2 others* (2010)/ KLR 526. She stated that the evidence on record validates the Respondent's case. She stated that the death of the deceased has had a profound effect on the lives of the Respondent, given that the deceased was the sole bread winner to his wife and kids and urges the court to uphold the decision of the trial court.

## **Trial Court's Evidence**

9. NO. 79017 Corporal Charles Mwaura(PW1) based at Karuri Police Traffic duties produced the abstract. The accident occurred on the evening of 22/10/2016 and the deceased was rushed to Kihara Hospital. The accident was reported by the Respondent. He stated that the Investigating Officer informed him that he was unable to trace the owner of the accident motor vehicle but the said owner later appeared but it was difficult to relate the vehicle with the accident. The owner reported that he was a Good Samaritan who had taken the deceased to hospital.
10. In cross examination, he stated that the Occurrence Book indicated that the motor cyclist slipped and fell on the road and the motor vehicle ran over him.
11. Lilian Bosibori Nyabwari(PW2) adopted her witness statement as her evidence in chief. She stated that the deceased was her husband and that they have four children aged between 13 to 5 years. The deceased was taken to hospital at 6.30 pm and died at 9.30 pm. The deceased was said to be a supplier under Jet Fly where he earned a commission. She sought for compensation. In cross examination she stated that she has the birth certificate for her children. The deceased used to earn Kshs. 63,000/= per month as commission.
12. Charles Riungu(DW1) wished to adopt his witness statement. In cross exam he indicated that he took the victim to hospital but first reported at Kihara Police Post. He stated that it was at 6.30 pm, that it was raining but visibility was not poor. He denied hitting the deceased. The deceased was coming from the opposite direction at a high speed where he hit a bump and rolled over. He was later called by an officer from Karuri Police Station who indicated that it was a hit and run.



13. Franklin Muchemi(DW2) adopted his witness statement. In cross exam he stated that he was present during the accident but accompanied the Respondent to the police station for inspection of the motor vehicle.

### **Issues For Determination**

14. Having read and considered the trial court record and the submissions by both parties, this Court has framed the following issues for determination;
  - i. Whether the trial court erred in finding that the Appellant was to blame for the accident.
  - ii. Whether the trial court erred in the assessment of quantum
  - iii. Whether the trial court erred in awarding costs to the Respondent

### **Analysis**

15. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

16. In the case of *Butler v Butler* [1982] KLR 277 it was observed that a Court is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion.

### **Whether the trial court erred in blaming the Appellant for the accident**

17. On the issue of liability, the trial court blamed the Appellant for the accident holding that the police abstract as well as the testimony by the police supported the Respondent’s claim while the Appellant was said to have failed to produce any exhibit in support of his case.
18. The Appellant alleges that the trial court failed to consider his evidence citing that the Respondents’ witnesses’ testimony was hearsay.
19. The Respondent submits that the Appellant has not produced any documentary evidence to support his claim. The Appellant failed to produce the alleged OB and the abstract from his report at Kihara Police Post.
20. In the case of *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that;-

“an apportionment of liability made by a Trial Court will not be interfered with on appeal save in exceptional cases as where there is some error of principle or the apportionment is manifestly erroneous.”



21. The trial court analysed the evidence before it noting that the Respondent called the police officer who produced the abstract. The police officer also stated how the accident occurred as per the Occurrence Book.
22. This court finds that without any other plausible explanation of how the accident occurred from the Appellant supported by evidence and not mere allegations and/or denial, the Respondent's version of events remains uncontroverted.
23. Having carefully analysed the trial court record, this court is satisfied with the trial courts finding on liability and finds no good reason to interfere with its decision.
24. This ground of appeal is disallowed.

### **Whether the trial court erred in the assessment of quantum**

25. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* [1988]1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -
 

“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 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 so inordinately high that it must be a wholly erroneous estimate of the damage.”
26. The trial court awarded Kshs. 100,000/= for loss of expectation of life. Which the Appellant submits that this resulted in double compensation.
27. In regard to double compensation this court finds that there is no legal requirement for the court to deduct the amount awarded under the [Law Reform Act](#) from the award made under the Fatal Accident Act. In the circumstances, this court finds that the trial court did not err in failing to deduct Kshs. 100,000/= from the deceased's award under the Fatal Accident's Act.
28. Refer to the case of *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR.
29. With respect to the award under loss of dependency, the trial court held that the deceased's earning had not been proved as such the multiplier approach is not suitable. The trial court adopted the global sum approach and awarded Kshs. 1,000,000/= based on the deceased's nature of work which was through commission.
30. The Appellant submits that the amount is inordinately high given that the deceased was aged 29 years and had no proof of earnings or dependency. An award of Kshs. 500,000/= was submitted to be adequate compensation.
31. To this end, this court has not found reasons as to say that the trial court took into consideration irrelevant factors and awarded an amount that is inordinately high making it an erroneous estimate of the damages.
32. In the case of *Murang'a HCCA No. 225 of 2013; Put Sarajevo General Engineering Co. Ltd v Esther Njeri & others* the court awarded Kshs 1,000,000/= for loss of dependency, where the deceased was 29 years old and supported his wife, brother and two children aged 4 and 2 years. There was no proof



of earnings for the deceased in this case. The Court therefore, reduced an award of Kshs 1,280,000/= which had been arrived at using the multiplier approach and gave a global award of Kshs 1,000,000/=.

### **Costs**

33. Lastly, the trial court is being faulted by the Appellant for awarding costs to the Respondent
34. It is trite law that costs follow the event. The Respondent then being the successful party was entitled to costs of the suit as awarded as such the trial court did not err in its award of costs to the Respondent.
35. Refer the case of Orix ( K) Limited v Paul Kabeu & 2 others [2014] eKLR where the court held inter alia that:-

“...the court should have been guided by the law that costs follow the event, and the plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. None of the deviant factors are present in this case and the court would still have awarded costs to the plaintiff, which I do.”

### **Findings And Determinations**

36. For the forgoing reasons this Court finds that the appeal to be devoid of merit and it is hereby dismissed with costs.
37. The trial courts determination is hereby upheld.

Orders Accordingly

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 13<sup>TH</sup> DAY OF JUNE, 2025.**

**A. MSHILA**

**JUDGE**

In the presence of;

Sanja – Court Assistant

Macharia - For the Appellant

Nkatha - For the Respondent

