



Marboro Express Limited v Maragwa & another (Suing as the Legal Representatives of the Estate of Evans Nyambane Amoro (Deceased)) (Civil Appeal E031 of 2021) [2025] KEHC 10157 (KLR) (14 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E031 OF 2021
JK NG'ARNG'AR, J
JULY 14, 2025**

BETWEEN

MARBORO EXPRESS LIMITED APPELLANT

AND

JARED MARAGWA 1ST RESPONDENT

MARY NYABOKE AMORO 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF EVANS
NYAMBANE AMORO (DECEASED)**

*(Being an Appeal from the Judgment of Principal Magistrate, Muleka
E. at the Magistrate's Court at Sotik, Civil Suit Number 161 of 2017)*

JUDGMENT

1. The Respondents (then Plaintiffs) as the Legal Representative of the deceased Evans Nyambane Amoro, sued the Appellant (then Defendant) for general and special damages that arose from a road traffic accident on 10th May 2017 along Kisii-Sotik Road.
2. The trial court conducted a hearing where the Respondents called three witnesses before closing their case while the Appellants called two witnesses in aid of their defence.
3. In its Judgment delivered on 28th September 2021, the trial court awarded the Respondents a net award of Kshs 1,300,000/=.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed their Memorandum of Appeal dated 10th October 2021 appealing against the apportionment of liability and the award on damages which in its opinion was excessive. On the other hand, the Respondents filed their Cross Appeal dated



18th November 2021 appealing against the apportionment of liability and the award on damages which in their opinion was low.

5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify.
6. I hereby proceed to summarise the case in the trial court and the parties' respective submissions in the present Appeal.

The Plaintiffs'/Respondents' case.

7. Through their Amended Complaint dated 19th February 2018, the Respondents stated that the deceased Evans Nyambane Amoro was involved in a road traffic accident on 10th May 2017. That he was hit by motor vehicle registration number KBV xxxE while riding motorcycle registration number KMEA xxxT along Kisii-Sotik Road.
8. It was the Respondents' case that the Appellant was negligent in causing the accident. The particulars of the negligence were stated in paragraph 4 of the Complaint. That as a result of the accident, Evans Nyambane Amoro suffered fatal injuries.
9. The Respondents prayed for special and general damages against the Appellant under the *Fatal Accidents Act* and the *Law Reform Act*.
10. Through their written submissions dated 16th May 2025, the Respondents submitted that the trial court erred in apportioning liability in the ratio of 50:50. That they provided evidence to show that the Appellant's driver was to blame for causing the accident. They further submitted that the Appellant's driver was overtaking another vehicle and he encroached on the deceased's lane thereby causing a head on accident.
11. It was the Respondents' submission that the inquest proceedings that the Appellant relied on were not produced in the trial court as it was only marked for identification. They relied on *Kenneth Nyaga Mwigie v Austin Kiguta & 2 others* [2015] KECA 334 (KLR). That their evidence on the cause of the accident was uncontroverted. It was the Respondents' further submission that the Appellant's driver's testimony was uncorroborated and was self-serving. They relied on *David Kajogi M'mugaa v Francis Muthoni* (2012) eKLR et.al.
12. The Respondents submitted that the trial court's award on general damages was just and fair. That the award on pain and suffering and loss of expectation of life was fair. Regarding the loss of dependency, the Respondents submitted that the deceased died aged 29 years and left behind three children all of whom he comfortably sustained. The Respondents submitted that the trial court did not err when it adopted a multiplicand of Kshs 10,000/=, a multiplier of 29 years and a dependency ratio of 2/3.

The Appellant's/Defendant's case.

13. Through its statement of defence dated 9th February 2018, the Appellant denied the occurrence of the accident on 10th May 2017 and further denied being the registered owner of motor vehicle registration number KBV xxxE.
14. It was the Appellant's case that if the accident occurred then it was caused by the negligence and carelessness of the deceased. The particulars of negligence were contained in paragraph 10 of the Defence.



15. Through its written submissions dated 7th July 2023, the Appellant submitted that the deceased was to blame for causing the accident. That the driver of the vehicle (DW2) testified that the deceased was riding his motorcycle in a zig zag manner and encroached on his lane thereby causing the accident. It relied on *Karugi & another v Kabiya & 3 others* (1983) eKLR.
16. It was the Appellant's submission that the award of Kshs 2,320,000/= as loss of dependency was inordinately high. That the use of Kshs 10,000/= as the multiplicand was inflated and not factual. Reliance was placed on *Vincent Sululu & another v Rose Wanjiru* (2016) eKLR and *Beatrice W. Murage v Consumer Transport Ltd & another* (2014) eKLR. It was the Appellant's further submission that the deceased was not assured of a longer life had the accident not claimed his life. That the court did not consider the vagaries and vicissitudes of life.
17. The Appellant proposed a global sum award of Kshs 300,000/= and relied on *Dora Mwanandu Samuel (suing on her behalf and on behalf of the estate of Samuel Muweliani Jumamosi-Deceased) v Shabir M. Hassan* (2021) eKLR and *Moses Wetangula & another v Eunice Tikita Rengetiang* (2018) eKLR.
18. I have gone through and carefully considered the Record of Appeal, the supplementary Record of Appeal, the Cross Appeal dated 18th November 2021, the Appellants' written submissions dated 7th July 2023 and the Respondents' written submissions and List of Authorities and Digest all dated 16th May 2025. The only issue that I have sieved for my determination was whether the trial court erred in its findings on liability and quantum.

Liability

19. Mary Nyaboke Amoro (PW1) testified that her husband, Evans Nyambane Amoro (deceased) was fatally hit by motor vehicle registration number KBV xxxE while riding motor cycle registration number KMEA xxxT along Kisii-Sotik Road. PW1 blamed the driver of the motor vehicle for causing the accident. When she was cross examined, she testified that she did not witness the accident.
20. David Sinema (PW2) testified that he was an eye witness to the accident. PW2 testified that on the material day as he was waiting for his mechanic by the road side, he saw motor vehicle registration number KBV xxxE overtaking at high speed and it lost control then hit the deceased, who was on the opposite lane, head on. PW2 blamed the driver of the motor vehicle for causing the accident. PW2's evidence was uncontroverted after cross examination.
21. No. 43X03 PC Daniel Mutai (PW3) testified that the accident occurred between the deceased who was riding a motor cycle and the motor vehicle. PW2 produced a Police Abstract as P. Exh 3. I have looked at the Police Abstract and it indicated that the matter was still being investigated. When PW2 was cross examined, he testified that he was not the investigating officer.
22. On the other hand, No. 10XX69 PC Gladys Kerubo (DW1) testified that the deceased was riding his motorcycle in a zig zag manner and he encroached on the opposite lane where the motor vehicle was being driven. DW1 further testified that the deceased was hit by the motor vehicle and he died on the spot. DW1 blamed the deceased for causing the accident. When DW1 was cross examined, she testified that she was neither the investigating officer neither did she witness the accident.
23. Richard Aggrey Momanyi (DW2) testified that he was the driver of motor vehicle registration number KBV xxxE and that on the material day, he met a motorcycle coming towards him in a zig zag manner. DW2 further testified that he was driving the motor vehicle on the left side of the road and when the motor cycle approached, he swerved on the right to allow him to pass and when the motorcycle came back, the accident occurred. DW2 blamed the deceased for causing the accident. When DW2 was cross



examined, he testified that he was not overtaking as there was another vehicle in front of him and he reiterated that the deceased was riding his motorcycle in a zig zag manner.

24. In analyzing the above evidence, the only people who could describe the circumstances of the accident was the investigating officer, eye witness (PW2) or the driver (DW2). It is clear that the Respondent (PW1), No. 43X03 PC Daniel Mutai (PW3) and No. 10XX69 PC Gladys Kerubo (DW1) did not witness the accident. The only eye witnesses to the accident were Davis Sinama (PW2) and the driver (DW2). Both PW2 and DW2 gave contrasting testimonies as to the circumstances that led to the accident. PW2 blamed the driver (DW2) for causing the accident while the driver blamed the deceased for causing the accident.
25. From the above, it is difficult for this court to determine the circumstances of the accident. In the circumstances thereof, this court is at a loss on whom to blame for causing the accident. In such circumstances, the Court of Appeal in *Hussein Omar Farah v Lento Agencies* [2006] KECA 388 (KLR), observed that: -
- “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 jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.....”
26. Flowing from the above, it is my finding that the deceased and the Appellants were equally to blame for the accident. I do not find fault with the trial court’s apportionment of liability in the ratio of 50:50.

Quantum

27. With regard to the award on damages, the trial court awarded the Respondent a net award of Kshs 1,300,000/=.
28. In regard to the pain and suffering and loss of expectation of life, the court in *Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi)* [2019] KEHC 9014 (KLR), stated: -
- “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 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”.
29. The awards under this head were not challenged by either party. Upon considering the trial court’s awards on the same and being persuaded by the above authority, it is my finding that the trial court’s award of Kshs 10,000/= for pain and suffering and Kshs 150,000/= for loss of expectation of life were just and fair. I therefore uphold the awards.
30. Under the head of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows: -
- Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall , subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively



for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.

31. The trial court awarded the Respondents Kshs 2,320,000/= by using a monthly wage of Kshs 10,000/=, a multiplier of 29 years and a ratio of 2/3.
32. I have considered the evidence and it was stated by the deceased's wife, Mary Nyamboke Amoro (PW1) that the deceased was a boda boda rider who used to earn Kshs 15,000/= per month.
33. I have gone through the record and I have note that there was no proof of income from the exhibits that the Respondents produced in court. With respect to the trial court, I find that the safest way to make an award under this head where there is no ascertainable proof of income would be to go the global sum way. In *Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased)* [2020] KEHC 5897 (KLR), the court stated: -

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

34. The Appellant proposed an award of Kshs 300,000/= under this head while the Respondents submitted that the trial court did not fall into error when it awarded Kshs 2,320,000/= as loss of dependency.
35. In determining an award under this head, I have considered the parties' proposals under this head, the fact that the deceased died aged 29 years old and the fact that the deceased was survived by a widow and three children. Having considered the above, it is my finding that the award of Kshs 2,320,000/= was excessive. I will therefore be guided by the global award approach and make an award of Kshs 1,500,000/=.
36. With regard to special damages, the trial court awarded Kshs 120,000/=. This award was neither challenged in the Appeal nor in the Cross Appeal. I therefore uphold the award on special damages.
37. In the final analysis, it is my finding that there is a reason for this court to interfere with the trial court's award on general damages. This then translated the final award as: -

Pain and suffering Kshs 10,000/=

Loss of expectation of life Kshs 150,000/=

Loss of dependency Kshs 1,500,000/=

Add special damages Kshs 120,000/=

Kshs 1,780,000/=

Less 50% Contribution Kshs 890,000/=



Total Kshs 890,000/=

38. In the end, the Appeal dated 10th October 2021 is allowed and the Cross Appeal dated 18th November 2021 is disallowed and dismissed. Each party shall bear their costs in the Appeal and Cross Appeal while the costs of the main suit shall remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 14TH DAY OF JULY, 2025.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of Oremo for the respondent, No appearance for the Appellant. Siele/
Susan (Court Assistants)

