Modern Coast Express Limited v Kiamba & another (Suing as the Administrators of the Estate of Taabu Kisuvi (DCD)) (Civil Appeal E054 of 2022) [2025] KEHC 10721 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10721 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E054 OF 2022

TM MATHEKA, J

JULY 11, 2025

BETWEEN

MODERN COAST EXPRESS LIMITED ..... APPELLANT

AND

MONICA KASELE KIAMBA ..... 1ST RESPONDENT

JUMAA KASUVI ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF TAABU KISUVI (DCD)

(Being an Appeal from the judgment of Hon. A. Ndung'u (SRM) in the Senior Resident Magistrate's Court at Makindu, Civil Case No.285 of 2019 delivered on 26th August 2022)

JUDGMENT

1. The Respondent Jumaa Kasuvi & Monica Kasele Kiamba suing as the administrators of the estate of Taabu Kisuvi (DCD) filed suit in the lower Court against Modern Coast Express LTD seeking general and special damages on behalf of the Estate of Taabu Kisuvi pursuant to a fatal road accident on 23/03/2019 (material day) along the Nairobi-Mombasa Road. They also prayed for costs of the suit and interest. They averred that on the material day, the deceased was a pillion passenger on motor bike registration No. KMDQ 884R along the said road at Manyanga area when the Appellant's driver/ servant/agent drove motor vehicle KBY 239U so negligently that it crushed onto the motor bike from the rear as a result of which the deceased sustained fatal injuries.

2. The Appellant filed a statement of defence where it denied each and every allegation of fact in the plaint and called for strict proof of the claim. It averred that if any accident occurred and if indeed the deceased sustained fatal injuries whilst a pillion passenger, then it was wholly/substantially contributed to by the deceased.

3. The Respondents replied to the defence where they reiterated the contents of the plaint as though they had been set out seriatim.

4. The matter went to hearing and judgment delivered where the learned trial magistrate apportioned liability at 100% against the Appellant and assessed damages as follows;

Special damages.....kshs 73,600/=

Pain & suffering.....kshs 100,000/=

Loss of expectation of life.....kshs 100,000/=

Loss of dependency.....kshs 1, 405,546.80/=

Total..... kshs 1,679,146.80/=

5. Aggrieved by the award, the Appellant filed this appeal and raised the following grounds;

a. The learned magistrate misdirected herself in law, principle and facts when she misapprehended and misunderstood the applicable principles and the law in assessing quantum thereby arriving at an award that is so manifestly and inordinately high as to constitute an entirely erroneous estimate of the damages in the circumstances of the case.

b. The learned magistrate erred in law and fact by arriving at a finding on liability which went against the weight of the evidence.

c. The learned magistrate erred in law and fact by making a finding in favor of the Respondent when they had not proved their case on a balance of probabilities

d. The learned magistrate erred in law and fact in awarding the Respondent kshs 1, 405, 546/= damages under the *Fatal Accidents Act* which award was too excessive in the circumstances.

e. The learned magistrate erred in law and fact in relying on the maximum number of productive years which was 12 years in the circumstances and failing to consider vicissitudes of life when awarding damages under the *Fatal Accidents Act*.

f. The learned magistrate erred in law in failing to deduct the damages awarded under the *Law Reform Act* from the total award.

g. The learned magistrate erred in law and fact in failing to accord due regard to the Appellant's submissions and authorities on quantum on applicable principles for assessment of damages.

h. The learned magistrate erred in law and fact by arriving at a decision that was not based on the evidence on record, descended into the arena of litigation and thus erroneously apportioned liability against the Appellant.

6. Directions were given that the appeal be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions.

The Appellant's Submissions

7. With regard to liability, reliance was placed on section 107 and 108 of the *Evidence Act* for the submission that the person who alleges is under a duty to prove the particulars of negligence on a

balance of probability. Reliance was placed onKirugi & Anor -vs- Kabiya & 3 Others (1987) KLR, 347 where the Court of Appeal stated;

> " The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard on formal proof...the proof that an accident took place is not enough. The plaintiff must establish a causal link between the negligence and injury."

8. Further reliance was placed on Statpack Industries -vs- James Mbithi Munyao (2005) eKLR where the court stated that;

> " 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 link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

9. It was submitted that the Appellant denied being the sole author of the accident and joined the owner of the motor cycle as a third party. That from the evidence tabled and the testimonies, it is clear that;

   a. Neither the police officer who testified on behalf of the plaintiffs nor the police abstract he produced and adopted as his evidence blamed the Appellant for the accident.

   b. PW2 who adduced evidence as the eye witness was unable to tell the trial court whether the motor cycle was travelling in between the bus and the lorry ahead.

   c. The witness could not tell the general direction of the motor vehicles and whether the lorry had overtaken the motor cycle.

   d. The police officer who testified was not the investigating officer.

   e. No sketch plan was produced in evidence.

   f. No one was charged for the accident.

10. Reliance was placed onPeter Kanithi Kimunya -vs- Aden Guyo Haro (2014) eKLR for the submission that a police abstract is proof that an accident was reported to a particular police station and that the evidence of the police officer should be disregarded where no sketch plans were produced. Further reliance was placed onPAS -vs- George Onyango Orodi (2020) eKLR where the court held that; the evidence of a police officer on who was to blame for the accident, based on an entry into the Occurrence Book, which book was not produced in court, was hearsay and therefore inadmissible.

11. It was submitted that the Respondents' witness did not establish on a balance of probability that the Appellant's motor vehicle was overtaking when it collided with the motor cycle. That failure to call any witness by the Appellant did not change this position. Reliance was placed onHussein Omar Farah -vs- Lento Agencies (2006) eKLR for the submission that where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable.

12. Further reliance was placed onJoseph Muthuri -vs -Nicholas Kinoti Kibera (2022) eKLR where the court stated;

> " I find that the respondent contributed to the occurrence of the accident because he was expected to exercise a duty of care to other road users including the deceased herein. The deceased ought to shoulder some bit of blame since he was also expected to exercise care and

caution when crossing the road. I am of the view that both the appellant and respondent were equally to blame for the occurrence of the accident and I hereby apportion liability in the ratio of 50:50."

13. It was submitted that the rider of the motor cycle contributed to the occurrence of the accident and liability should have been apportioned equally between him and the Appellant.

14. With regard to the award for loss of dependency, it was submitted that the multiplicand used was in order but the multiplier of 25 years was excessive and that 18 years would have sufficed in the circumstances. It was contended that the vicissitudes of life afflict the daily lives of humans and may shorten the working life prescribed under private contract or statute regulations. Reliance was placed onKenya Wildlife Services -vs- Geoffrey Gichuru Mwaura [2018] eKLR where the court stated;

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must, in the first instance, determine the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years of purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life for the deceased, the expectation of life and dependency of the dependents, and the chances of life for the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested, yield returns of an income nature."

15. As to whether the trial magistrate erred for failing to deduct the award under *Law Reform Act* from the total award, reliance was placed onKemfro -vs- A.M Lubia where the Court of Appeal stated;

> " The net benefit will be inherited by the same dependants under the *Law Reform Act* and must be taken into account in the damages under the latter Act must be offset by the gain from the estate under the former Act."

16. Reliance was also placed onHyder Nthenya Musili & Another –vs- China Wu Yi Limited & Another [2017] eKLR where the court stated;

> " As regards damages 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 acceptable 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."

17. It was submitted that the award of kshs 100,000/= should be deducted and that the awards for loss of dependency as well as pain and suffering should be disturbed.

Respondents' Submissions

18. With regard to liability, it was submitted that PW1, 2 and 3 confirmed the occurrence of the accident and that the driver of KBY 239U was to blame on a balance of probability as by law required. That, at the close of the plaintiff's case, the burden to controvert the plaintiff's evidence shifted to the defendant but the defendant did not call any witness. That, the defendant has not shown any misapplication of

the law by the trial court on the issue of liability or the failure by the court to consider any evidence availed to it by the defence. Reliance was placed onEmbu Public Road Services Ltd -vs- RIIMI (1968) E.A 22 where the court stated;

> " Where the circumstances of the accident give rise to the inference of negligence, then the defendant in order to escape liability has to show that there was a probable cause of action which does not connote negligence or that the explanation for the accident was consistent only with the absence of negligence."

19. With regard to quantum, it was submitted that the trial court's findings of fact should not be disturbed because the Appellant has not demonstrated that the trial court acted on any wrong legal principles in assessing damages.

20. On pain and suffering, it was submitted that the defendant did not call any evidence to controvert the evidence of PW2 to the effect that the deceased died about 30 minutes after the accident as they looked for transport because it was at night and vehicles were fearing to stop. That the authority relied on by the Appellant was for death on the spot hence not relevant.

21. On loss of expectation of life, it was submitted that the deceased was 35 years old at the time of death and was in good health with a full life expectancy. That the court awarded kshs 100,000/= as proposed by the defendant in their submissions and it has not been shown that the trial court relied on a wrong principle of law in making the award.

22. On loss of dependency, it was submitted that the trial court went into great length to analyze the evidence placed before it since the deceased did not have a pay slip from her work as a waiter. That the trial court adopted the minimum wage as submitted by both sides hence it should not be disturbed. Further, it was submitted that there is no valid reason offered by the Appellant for this court to disturb the trial court's adoption of 21 years as a multiplier.

23. On the dependency ratio, it was submitted that the deceased had a husband and three children and a parent as per the chief's letter and birth certificates. That the defendant did not controvert this evidence hence the ratio of 2/3 was very reasonable.

24. It was submitted that the trial court kept referring to the defendant's submissions all through the judgment hence there is no basis for the complain that the submissions were not considered.

25. In conclusion, it was submitted that the Respondents are entitled to costs of the appeal and interest from the date of judgment until payment in full.

Duty of Court

26. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. (Selle & another –vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123)

27. I have carefully considered the record, the grounds of appeal, and the rival submissions and the issues for determination are:

    a. Whether the finding on liability should be disturbed.

    b. Whether the quantum of damages should be disturbed.

Evidence on liability

28. PW1 was Cpl Wesley Karani of Makindu Traffic Base. He made reference to OB No. 5/23/03/2019 and testified that according to their record, the RTA was on 23/03/2019 at around 12.30 hours at Manyanga area, Kibwezi along Mombasa-Nairobi Highway involving motor vehicle KBY 239U make scania and motor cycle KMDQ 884R make Skygo. That, the pillion passenger, Taabu Kisuvi, was fatally injured as a result of the accident. That, according to the OB, the motor cycle was ahead of the motor vehicle and they were heading to Mombasa general direction. That the motor vehicle was trying to overtake when it encountered an oncoming vehicle and had to go back to its lane whereby it knocked the motor cycle. Two pillion passengers succumbed on the spot while the rider succumbed in the hospital. He produced the abstract as exhibit 1(a) and petty cash voucher as 1(b).

29. On cross-examination, he conceded that he was not the investigating officer and didn't know the time of accident. He conceded that he had not produced the OB but said that he had it in court. He conceded that he had not produced the sketch plans. The accident was reported by members of the public and the traffic officers visited the scene. He didn't know the people who had reported. The names in the OB were for pillion passengers but one was not in the abstract. The motor cycle was ridden by Julius Musyoka according to the OB and it was not insured. He had no information whether the rider was licensed. The motor cycle was carrying 2 passengers but should carry one. The matter was pending under investigations according to the abstract. He didn't know whether anyone was charged. He didn't know whether the pillion passengers were wearing reflection jackets. The abstract stated 12.30hours which was an error. The incident was between a motor cycle and a motor vehicle and he had no details of a lorry overtaking. The motor cycle and motor vehicle were examined after the accident but he didn't have the inspection report.

30. PW2 was Mwanaidi Salim Nguli. He adopted his statement dated 28/04/2022 in which he stated that he was a businessman at Kibwezi and on the morning of 23/3/2019 at about 00:30am, he boarded bus registration No. KBY 239U at Kibwezi junction stage to go to Mombasa. He sat at the front area and put on the safety belt. The driver seemed to be in a hurry for he was saying that they were boarding very slowly and that he wanted to reach Voi before another bus which had overtaken him.

31. When they reached Manyanga area, there was a lorry ahead of them which overtook motor cycle KMDQ 884R and the bus driver followed the lorry blindly in overtaking the motor cycle. There was an oncoming lorry from Mombasa which hooted loudly to warn the bus driver of the danger and the driver suddenly braked and tried to go back to his left lane but ended up crushing onto the motor cycle rear. The rider and pillion passengers fell down and were passed over by the bus.

32. They shouted at the driver that he had hit a motor bike but he said that he did not see or hit any motor bike. He stopped and realized that he had hit a motor cycle and injured three people and he was very remorseful. They tried to assist the victims who had been badly injured and were screaming for help. They pulled them from the tarmac to avoid them being passed over by other vehicles but they died in about 30 minutes before they could get transport to take them to hospital for it was at night and motorists were afraid to stop at the area.

33. On cross-examination, he said that he had an ID but had not carried it with him. He was alone when he boarded the bus at Kibwezi junction. The driver hurried them since there was a bus ahead of them. He paid cash but had no fare ticket. There was a motor cycle ahead of the bus. The bus went to overtake and came across an oncoming lorry and had to go back to its lane. The bus was overtaking the motor cycle and lorry. The bus followed the lorry that was overtaking. PW2 saw the motor cycle ahead of them. The bus hit the motor cycle as it was getting back and the motor cycle went under the bus.

34. PW2 said that he was not related to the plaintiff in the case and was not taken witness at the police station. After the accident, a lady whose husband had died in the accident arrived and PW2 informed her.

35. In re-examination, he said that the bus, lorry and motor cycle were heading to the same direction i.e. Mombasa general direction. The lorry was in front of the bus and the motor cycle was in front of the lorry. The lorry didn't manage to overtake the motor cycle. The bus was overtaking the lorry and motor cycle when it encountered an oncoming lorry. When referred to paragraph 3 of his statement (which stated '...there was a lorry ahead of us which overtook a motor cycle ..that was ahead of it...'), he clarified that it didn't mean that the lorry had already overtaken the motor cycle.

Whether the finding on liability should be disturbed.

Analysis

36. The Appellant's ground of appeal is that the finding on liability was against the weight of the evidence and in the submissions, the Appellant stated that PW2 could not tell whether the motor cycle was traveling between the bus and lorry, could not tell the general direction of the vehicles and could not tell whether the lorry had overtaken the motor cycle.

37. The fact that the deceased died as a result of a road traffic accident at Manyanga area along the Nairobi-Mombasa highway is not in dispute. The police abstract shows that the accident involved motor vehicle KBY 239U (the bus) and motor cycle KMDQ 584R.

38. PW2 was the eye witness who boarded the bus at Kibwezi Junction and his testimony was that he was going to Mombasa to collect some business wares. That shows that the bus was moving towards the Mombasa direction. His evidence in chief was that there was a lorry in front of the bus which tried to overtake a motor cycle that was in front of it and the bus followed the lorry blindly. That, the bus saw an on coming lorry and as it tried to go back to its lane, it hit the motor cycle on the rear. In cross examination, PW2's evidence remained consistent that it was the bus which followed the lorry that was trying to overtake the motor cycle. In re-examination, he said that the bus, lorry and motor cycle were heading towards the Mombasa general direction.

39. After looking at PW2's evidence keenly, it is clear that there was a lorry ahead of the bus and a motor cycle ahead of the lorry. The lorry started to overtake the motor cycle but did not manage and so it went back to its lane. The bus which had followed the lorry in overtaking saw an oncoming lorry and as it attempted to go back to its lane, it crashed the motor cycle in the rear and that is why PW2's evidence was that the bus was overtaking both the lorry and motor cycle. I did not see any ambiguity or inconsistency in the evidence of PW2 as alleged by the Appellant. Further, the Appellant did not produce any evidence to show that PW2 was not a passenger in the bus. It is therefore my view that despite the failure to produce sketch maps and call the I.O, the eyewitness account of PW2 was clear on how the accident occurred.

40. PW1 could not tell the time of the accident but PW2 said that he boarded the bus at around 00.30am which was obviously night time. It was therefore negligent for the bus driver to overtake blindly at night when visibility is not good. It shows that he had no regard for other road users and there is no evidence to show that the rider and pillion passengers contributed to the accident in any way. The finding on liability was supported by evidence.

Whether the quantum of damages should be disturbed.

41. Awarding damages is an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In Butt –vs Khan (1977)1KAR it was held that;

> "An appellate Court will not disturb an award for damages unless it is 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.

Award under *Law Reform Act*

42. In its submissions before the trial court, the Appellant proposed an award of kshs 20,000/= for pain and suffering and relied onSimon Bogonko -vs- Alfred Mongare Mecha & Anor (2019) eKLR where the deceased died on the spot.

43. In our case, the eyewitness, PW2, testified that they tried to assist the victims who were badly injured but they died after about 30 minutes before they could get transport to take them to the hospital. I find relevance in the words of Majanja J. in Sukari Industries Limited –vs- Clyde Machimbo Juma; Homa Bay HCCA NO. 68 of 2015 [2016] eKLR where he stated that;

> "(5) 5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years....."

44. Accordingly, I am of the view that the award of kshs 100,000/= is within an acceptable range as the deceased must have suffered a lot of pain for 30 minutes.

45. The award for loss of expectation of life is conventional and I find no reason to interfere with it. We have a myriad of cases where ksh 100,000/= has been awarded as a conventional figure. In Hyder Nthenya Musili & Another (supra), the learned Judge observed that 'The conventional award for loss of expectation of life is Kshs. 100,000/='

46. Similarly, in Melbrimo Investment Company Limited –Vs- Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR the court upheld an award of Kshs 100,000/=.

Award under the *Fatal Accidents Act*

47. The Appellant has not contested the multiplicand of kshs 8,366.35/= but has submitted that the multiplier of 25 years should be reduced to 18 years in order to take into account the vicissitudes of life which afflict the daily lives of humans. The multiplier used by the trial court was 21 years and not 25 years.

48. The deceased's husband, PW3, produced a birth certificate showing that the deceased was 35 years old at the time of her death. It was pleaded that the deceased was survived by four minor children and PW3 testified that indeed they were blessed with four children. The proceedings show that he also produced

the childrens' birth certificates but I have not seen them in the record of appeal and the trial court file was not availed. Be that as it may, I will conclude that the fact of the children being minor was established as there is no contest about it. Considering that dependency is a question of fact, the minor children were going to be dependent on their mother for quite a long time and it was possible for the deceased to work gainfully for another 21 years. Further and contrary to the Appellant's submissions, the trial court took into account the vicissitudes of life in awarding the multiplier thus;

> " I am of the opinion that 21 years would be reasonable as the multiplier considering the work she did and risk involved, the probable duration of her earning capacity and the possibility of her earning capacity being decreased in future."

49. The ratio of 2/3 has been used in numerous authorities where a deceased person was survived by a spouse and young children. In John Simon Ashers & another -vs- Nelson Okello Onjao [2020] eKLR the court opined that;

> " The dependency ratio of 2/3 is normally applied in a case where the deceased has dependents such as the deceased in this case and I find that the same was correctly applied."

50. Consequently, I am of the view that the award on loss of dependency is justified.

51. It was also the Appellant's argument that the award of loss of expectation of life should have been deducted from the total award as it goes to the same beneficiaries. Section 2(5) of the *Law Reform Act* provides that;

> "(5) the right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependants by the *Fatal Accidents Act* or the *Carriage by Air Act* 1932 of the United Kingdom."

52. The provision was discussed in Richard Omeyo Omino -vs- Christine A. Onyango: Kisumu Civil Appeal No. 61 of 2007 as follows;

> " The *Law Reform Act* Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
>
> The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

53. While there are cases where a deduction has been made I agree with the above reasoning to the effect that a court is only required to 'take into account' and not to engage in mathematical deduction. The learned magistrate herein stated that; 'On loss of expectation of life, I will award a global sum of kshs 100,000/= and note that the same will not be deducted from an award to same beneficiaries as held in Hellen Waruguru Waweru -vs- Kiarie Shoe Store Ltd (2015) eKLR'.

54. The special damages proved were kshs 13,600/= and the trial magistrate awarded kshs 60,000/= for funeral expenses which is modest and acceptable in my view. In JNK (Suing as the Legal representative of the Estate of MMM (Deceased) -vs- Chairman Board of Governors [...] Boys High School [2018] eKLR, the court stated;

> In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased."

Conclusion

From the foregoing it is evident that the appeal is not merited.

The Judgment of the subordinate court is upheld. The appellant will have costs plus interest at court rates from the date of the Judgment of the subordinate court.

The upshot is that the appeal is dismissed.

DATED, SIGNED AND DELIVERED VIA CTS ON 11TH JULY 2025

MUMBUA T MATHEKA

JUDGE

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