



**Githinji (Suing as the legal representative of the Estate of Martin Kirimi  
Mwongera Alias Mwongera Martin Kirimi (Deceased) v Kiambi & 2 others (Civil  
Appeal E015 of 2022) [2023] KEHC 18067 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E015 OF 2022  
EM MURIITHI, J  
MAY 18, 2023**

**BETWEEN**

**GREGORY KIRIMI GITHINJI (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF MARTIN KIRIMI MWONGERA ALIAS MWONGERA  
MARTIN KIRIMI (DECEASED) ..... APPELLANT**

**AND**

**ALEX MUGAMBI KIAMBI ..... 1<sup>ST</sup> RESPONDENT  
JACOB MURUGU ..... 2<sup>ND</sup> RESPONDENT  
WILSON MWENDA M'ABURI ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal from the Judgment and Decree of Hon. E. W Ndegwa  
(R.M) in Githongo SPMCC No.E001 of 2021 delivered on 5/1/2022)*

**JUDGMENT**

1. Before the trial court was a claim commenced by a Plaintiff dated January 20, 2021, in which the Appellant sued the Respondents seeking general damages, special damages and costs of the suit. The gist of the claim was that on August 1, 2020 at about 8.30 pm, the deceased was lawfully travelling as a pillion passenger on Motorcycle Registration No xxxx along Meru-Chaaria Road when the 1<sup>st</sup> Respondent so carelessly and negligently drove motor vehicle registration number xxxx Isuzu Lorry that it caused an accident to which the deceased sustained fatal injuries. At the time of the accident, the deceased, who was aged 24 years had no known health complications and was a qualified plant operator by profession whose average earnings stood at Kshs 17,000. Following his demise, his estate has suffered both special and general damages for which the Respondents are held jointly and severally liable.
2. Respondents denied the claim by their statement of defence dated on April 1, 2021 and prayed for the Appellant's suit to be dismissed. Upon full trial, the trial court apportioned liability at 50:50, and



awarded the Appellant Kshs 20,000 for pain and suffering, Kshs 100,000 for loss of expectation of life, Kshs 1,700,000 for loss of dependency and special damages of Kshs 20,550 together with costs and interest.

### **The Appeal**

3. On appeal, the Appellant filed his Memorandum of Appeal on January 21, 2022 listing 4 grounds as follows:
  1. The learned trial magistrate erred in law and fact in apportioning liability at 50:50 while evidence on record from eye witnesses pointed to total liability on the part of the Respondents.
  2. The learned trial magistrate erred in law and fact in failing to properly evaluate the evidence of the Appellant, PW2 and PW3 vis-a vis the evidence tendered by the Respondents and their witnesses.
  3. Despite acknowledging the fact that the deceased was expected to support his parents in some way, the learned trial magistrate nevertheless proceeded to disregard this acknowledgement and found a dependency ration of 1/3 appropriate.
  4. The finding of the learned trial magistrate is against the weight of evidence on record.

### **Duty of the court**

4. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the court must bear in mind that it did not have the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co & others [1968] EA 123*). It is also an established principle of law that an appellate court should be slow to interfere or reverse the findings made by the trial court unless it is satisfied that the court acted on no evidence or on a misapprehension of the evidence or applied the wrong legal principles in reaching its decision. (See *Sumaria & Anor v Allied Industrial Limited [2007] 2 KLR 1*).

### **The Evidence**

5. PW1 Gregory Kirimi Githinji, the Appellant herein, adopted his witness statement recorded on January 20, 2021 as part of his evidence in chief. He went on to testify that, 'I have sued 3 people (Alex Mugambi, Jacob Murugu and Wilson Mwenda. Alex Mugambi is the driver. Jacob Murugu and Wilson Mwenda are the owners of the motor vehicle. On August 2, 2020 at around 9.00 am, my neighbour Murangiri Ngondoki came to my homestead and told me he called my son Martin Mwongera on phone but did not pick up the call. He told me that there was an accident that occurred on 1<sup>st</sup> at around 5.00 pm along Charia Gaitu road at Nkumbo. Two young men had died in that accident. Pne Felix Murianki and the other was unknown. I got shocked because Felix is a close friend of Martin and both were plant operators. He told me that we needed to report at Gaitu police station. I went and reported. The OCS told me that Felix Murianki had been identified and the other was unknown. The OCS asked me to go and confirm if my son was at Meru Level 5 hospital. I went and confirmed that it was my son deceased. I knew it was him from his clothes and a mark on his right hand. I was told that they were hit by a motor vehicle. I saw the motor vehicle0 xxxx at Kariene police station. I received a report from John Murianki father to Felix that the vehicle had been found at Kiirua where it was being repaired. Felix and Martin died. I received a police abstract, death certificate and



post mortem form I filed a list of documents. The death certificate shows that my son was 24 years old. He was a qualified plant operator. I have produced his documents as proof. I do not know his average monthly income. He was unmarried and had no children. Hellen Karimi listed in paragraph 8 of the plaint is my wife. The deceased was assisting us. He would give us some money for shopping. There was a traffic case where the driver Alex Mugambi was charged in Githongo law courts. I do not recall the traffic case number. The traffic case is still pending. I blame the driver for the accident and for causing the death of Martin Kirimi. I later went to the scene. I saw traces of blood on the left side of the road facing Kaguma from Chaaria. Martin Kirimi and Felix were from Chaaria towards Kaguma. They were riding on a bodaboda. I pray for general damages, special damages and costs of the suit. There were 2 witnesses who have also recorded their statements.'

6. On cross examination, he stated that, 'Martin Kirimi is my son. He was a qualified plant operator. He was employed by a private person. I do not know the name of the employer. I have no documents to prove that he was employed. He was not given any documentation as proof of payment. I do not know if the 2 were wearing a helmet and reflector jackets. I do not know if they fell on the left side of the road after the accident. Hence the blood stains since I did not witness the accident. I was living with the deceased in my home at Gaitu Kaguma. The deceased was coming from Chaaria to Kaguma. I and my wife were depending on the deceased for daily upkeep and was paying school fees. He was earning a salary even though I have no proof.'
7. PW2 Samson Mawira, adopted his witness statement dated January 20, 2021 as part of his evidence in chief. He went on to state that, 'On August 1, 2020, there was an accident. On August 1, 2020 at around 8.30 pm I was at Chaaria market with Anthony Bundi who had his motor cycle. Felix Muthuri carried Martin Mwongera on his motor cycle. I was Anthony's pillion passengers. We met at the petrol station where we were fueling since we knew each other. We asked them to wait for us. We accompany each other. They were the first to be fuelled and they left. After we fuelled ours we followed them. They were about 30 to 50 meters ahead of us. We were from Chaaria direction heading to Gaitu market. When we got to Nkumbo market, we met with one Kinyua slowly heading to Chaaria direction from Gaitu. The lorry was overtaking a canter that was in front of it, we then heard a loud bang and saw the Isuzu lorry zigzagging on the road. We no longer saw the motorcycle that was in front of us. We tried to stop the lorry as we had seen it hit something but the driver did not stop since there was light near the number plate. We took advantage and read the number plate as xxxx. When we got where the lorry had hit something, we found Felix Muthuri and Martin Mwongera having been hit. We saw the motorcycle flying onto the left since facing Kaguma market. We found one of the men flying on top of the culvert, the hands of Felix Martin had been completely amputated and his body was 2 meters from the hands. We checked and saw it is people we knew. We called Geoffry Mutwiri and informed him since he is a friend to John Murianki father to Felix. Police Officer then came to the scene. I blame the driver of the lorry xxxx for causing the accident. He encroached on the other lane as he was overtaking. I did not manage to take the number plate of the Canter lorry since it had no lights on the rear. The lorry xxxx never stopped. It was traced in a homestead at Kiirua where the mudgrand was being repaired.'
8. On cross examination, he stated that, 'The accident took place at 8.30 pm. I was not wearing a helmet at the time when the motorcycle was on motion. It was not dark at the time because there was moonlight from the lights of the motor vehicles and motor cycle. I was able to witness the accident. Both lorries, KBN and Canter had their headlight on and the two motorcycles had their headlight on. I did not see the number plate of the canter. I was 30 to 50 meters away. There was a water drainage on the extreme left where the accident took place. Extreme left on the lane of motor cycle. They died on the spot. We found the vehicle being repaired on the drivers side on the mudguard. The two were wearing helmets. Had been completely damaged and was at the scene. I only saw one helmet at the scene.'



9. On re-examination, he stated that, 'KBN was overtaking and had to go to the left side from Chaaria facing Gaitu. Accident took place on the left side facing Chaaria. The rider of the motorcycle could not have evaded the accident because there was a water drainage off the road. The Isuzu lorry did not stop.'
10. PW3 Anthony Bundi Mutwiri, adopted his witness statement dated January 20, 2021 as part of his evidence in chief. He stated that, 'I witnessed the accident that occurred at Nkumbo from Chaaria towards Kaguma market. At the material time I was around 30 to 50 meters from the scene of accident where I was riding my motorcycle to Kaguma market. Samson Mawira was my pillion passenger. We saw Felix and Martin being hit by a vehicle before the accident we had met at fuel station since they were also fueling at the same place. Felix was the rider and Martin the pillion passengers. We were all heading to Kaguma. When we got to Nkumbo, there was a lorry headed loaded with stones that was over speeding and was coming from the opposite direction. I tried to overtake a canter that was in front of it. I did not see the registration number. The lorry with stones encroached on our lane and met with Felix hitting them both. They were thrown on the left hand side off the road but the hands and other body parts were still on the road. I managed to identify the number plate xxxx. I later knew the owner of the vehicle. We tried to stop the vehicle and it failed to stop. I knew the owner who was known to me before. We managed to trace the vehicle at Kiirua in a homestead where it was being repaired. I was present when it was traced. It had damage on the front side. The bumper had been replaced. Roy Kithara, John Murianki father to Felix, Kiambi and police officers came after we received the vehicle. The vehicle was taken to the station. The 2 had suffered greatly. Felix had both of his hands amputated. His head had been hit badly and his brain were out. I did not know if they were alive. I blame the driver of the lorry for overtaking carelessly. He had not indicated that he was overtaking when the road is not clear. A stone fell down after the accident since it hadn't been covered completely.'
11. On cross examination, he stated that, 'I would not tell if the two were dead but I could tell the brains from its colour. According to me he was dead. I was wearing an helmet at that material time. The encroaching vehicles had headlights and my motorcycle had headlights on. It was a head on collision. The two deceased persons Felix and Martin are my friends prior to meeting at the petrol station. We had not met. The rider of the motor cycle was wearing a helmet. I didn't see if his pillion passenger had a helmet. When we were at the police station, the pillion passenger had a helmet. I do not recall the colour. Felix the rider had a helmet at the time of the station. Felix did not have a reflector jacket. We traced the vehicle at Kiirua as citizens. We traced it the following day on 2<sup>nd</sup>.'
12. PW4 PC Vincent Juma, of Kariene Police Station performing general duties testified that, 'On August 1, 2020, an accident occurred. I have the police file regarding that accident. I am the investigating officer in that case. I recall it was on Saturday, August 1, 2020 at around 2130 hours. I was in the office together with PC Mwaura when we received a case of a fatal Lorry traffic accident from OCS Gaitu. We proceeded to the scene and concluded it involved a Lorry registration No xxxx Isuzu Lorry and Motor cycle registration No xxxx make boxer. We got two dead bodies. The rider was one Felix Mutharimi. We went to the scene at Nkumbo area at Gaitu along Meru Chaaria roads. We found 2 bodies with broken parts scattered all over the scene. One body was identified as Felix Mutharimi the rider by his father John Murianki. The other was an unknown pillion passenger who was later identified as Martin Mwongera Kirimi by his parent. The two bodies were off road side on the right as one faces Chaaria from Meru direction. The pieces were also off road on the same side of the road. We also found a number plate of the Isuzu Lorry which was left behind. The driver escaped to an unknown destination. We talked to the members of public who had gathered at the scene and told them to assist us in tracing the motor vehicle even us we do the same. We escorted the 2 bodies to Meru teaching and Referral Mortuary. The wreckage of the motor cycle was taken to Kariene police station for necessary action. The following day at about 1500 hours to 1600 hours, I received a call from the base commander.'



Inspector Kilonzo informing me that the motor vehicle had been found in a homestead in Kirua area. He had communicated to the OCS Kiirua. I and PC Mwenda proceeded to Kiirua police station and the OCS told us he had sent some officers to the ground and gave our officers for reinforcement. In the homestead, we found the driver Alex Mugambi Kiambi offloading and I enquired from him and he told me he was the driver and asked him why he never reported the matter within 24 hours to the state. He told me he was advised by his employer to escape which he did. At the scene, we found some mechanic repairing the lorry. I do not recall the name of their employer. The front side of the motor vehicle had damages. There was a large dent on the left front side of the Lorry. We arrested the driver. The owner of the homestead was a pastor who was very sorry. We escorted the driver and Lorry being driven by Alex Mugambi Kiambi to Kariene police station. He was put in custody, finger prints taken. A motor vehicle inspector from Meru, inspected the motor vehicle. I recorded witness statement. Body of deceased was identified. Post mortem was done at Meru Teaching and Referral Hospital. I then charged the driver with causing death by dangerous driving. Traffic case file No. is not indicated in my file CR 9/12/20 Contrary to section 46 (1) of CAP 403. The deceased in the particulars are Martin Mwongera Kimathi and Felix Muthuri (rider) preferred charges before this court. The case is still pending. I blamed the driver for the accident. The motor cycle was in front of the lorry. They were heading the same direction. The Lorry was on high speed and was trying to overtake the motorcycle. He failed to control the vehicle and knocked the motor cycle. They were heading to Chaaria from Meru direction. I have the copy of the inspection report. The motor vehicle inspection indicated no pre-accident defects were noted. The witnesses who recorded statements were Silas Muthee M'Matari, Frankline Murinaki, John Murianki, Gregory Kirimi Githinji, Joseph Kimathi. I do not blame the motor cycle rider for the accident.'

13. On cross examination, he stated that, 'I did not witness the accident. I went to the scene of the accident after the accident. I found the motor vehicle in a homestead where harvested sand was being offloaded. The motor vehicle was being hidden because no accident had been reported within 24 hours. The driver stated that the employer ordered him to hide the motor vehicle I do not have his recorded statement. There is a pending traffic case. I do not know the traffic case numbers because it is not there.'
14. On re-examination, he stated that, 'The traffic case number is not indicated in the police file. I found mechanics repairing the motor vehicle.'
15. DW1 Jacob Murugu, after adopting his witness statement dated September 8, 2020 as his evidence in chief, stated that he was in court because his Lorry was involved in an accident.
16. On cross examination, he stated that, 'I received a report that on August 1, 2020 my Lorry xxxx was involved in an accident. It is not 810 V and 810 N as it is an error in my statement. Alex Mugambi Kiambi was the driver at the material time. I was not present when the accident occurred. The accident occurred at around 8.00 pm to 8.30 pm. My driver Alex is the one who informed me about the accident. He also told me that the accident also involved a motor cycle that was carrying two people. My vehicle was headed with stones at the material time. After the accident, the driver proceeded to Tharaka where he was set to offload the consignment. The driver and his conductor did not report the accident on the material date. My vehicle was impounded from Meru town to Gitimbine and was escorted to Kariene. I was not present when it was impounded. I would not be surprised to learn that it was impounded at Kiirua in a person's resident where it was being repaired. I did not go to the scene of the accident since it was at night. I went to the scene 3 days later. I know the point of impact which is 1 KM from Kaguma. The motor cycle was going to Kaguma from Chaaria. Lorry was going to Chaaria from Kaguma. The motor cycle was overtaking and encroached on the lorry's lane. The point of impact was on the right side facing Meru direction from Chaaria. The motor cycle was trying to overtake on vehicle in front of him. He did not know the number plate of the vehicle since it was at night. Prior to the accident, the vehicle was serviceable. I do not recall the last service but it had lapsed one week. I do not have any



evidence to prove that the vehicle had been serviced. I took it to a garage in Meru town to a mechanic called Kamau. I know that my driver was charged with causing death of two people following the accident. I do not know the names of the two people who died. On August 2, 2020 at around 5.00 pm the following day. I reported the matter to Kariene police station and the vehicle was impounded on the same day. I had not reported to the police prior to the vehicle being impounded. The vehicle was impounded first. I was told that an accident took place but did not know it was my vehicle that was involved. He told me it was vehicle Registration No KBX. I recorded my statement. Last paragraph 4 of my statement is what I stated. I did not understand the question. I confirm that my driver told me that my vehicle was involved in the accident and he told me he was delivering the consignment at Tharaka. I told him to report the matter to the police which he did not do. I did not give him instructions to hide the vehicle at Kiirua neither was I sported purchasing spare parts. Alex Mugambi is still my driver and is driving the subject vehicle. I have not done any repairs on the vehicle. From Tharaka, the driver went and loaded sand. He was arrested as he was delivering sand. I went to the station after I was informed that it was impounded. I had insured my vehicle with MUA insurance.'

17. On re-examination, he stated that, 'I recorded my witness statement one week after the incident.'
18. DW2 Kenneth Muriungi Mungiria, adopted his witness statement dated September 8, 2020 as his evidence in chief. He testified that, 'I know why I am in court. There was an accident involving motor vehicle xxxx that took place on August 1, 2020.'
19. On cross examination, he stated that, 'I recorded my witness statement with an advocate at Gaitu. I do not know the name of the advocate. The Advocate has no office at Gaitu. It is not true that that is my witness statement. I recorded at the police station. I did not append the signature on my statement. The statement was read out to me. The statement was not typed. It is the same statement in court. I did not sign on the typed statement. On August 1, 2020 an accident took place. Prior to August 1, 2020, I had been a conductor in that vehicle for 2 weeks. The driver was known to me by his nickname Mbini. His name is Alex Mugambi Kiambi. He was driving the vehicle at around 7.30 pm. The vehicle was loaded with machine cut stones. We were ferrying the consignment from Gaitu to Tharaka via Meru Chaaria road. The motor vehicle rider was trying to overtake a Lorry and was in between the vehicle. I would not know the registration number of the Lorry that the rider was attempting to overtake. The Lorry collided with the motor cycle on the right side of the Lorry. I do not know if to the right front right side or right back of the lorry. I do not know if the motor cycle fell after the collision. I did not know that there was collision between the Lorry and motor cycle. To date I do not know if there was a collision. I knew that the rider was overtaking since I saw some light. In my statement, I have mentioned about an accident. We went and stopped a few meters because we heard the lorry drop something. People started gathering and we left for fear. At that time we did not know that there had been an accident. Paragraph 2 of my statement is correct. There was an accident involving the motor cycle. We did not know there was an accident when we took the consignment to the destination. We spent the night in the vehicle loading sand not because we were afraid of meeting people. I did not hear the driver Mini calling Jacob Murugu informing him about the accident. I was asleep and I did not know if Mbini called Jacob Murugu. We did not make any report there was an accident. We loaded sand on the Lorry and delivered it to a homestead at Kiirua. I know the owner of xxxx. He lives at Kiamakoro in Imenti central sub-county. He is called Jacob Murugu. I do not know what Jacob Murugu was doing in Kiirua the following day after the accident. I did not see him at Kiirua. It is not true that the vehicle was taken to a homestead in Kiirua for repairs and that it was being repaired in presence of Jacob Murugu. To date, I do not know the motor vehicle that the rider was overtaking. I do not know if Alex Mugambi was charged with causing death by dangerous driving. I left the employment upon purchasing my motor vehicle. I was sitting on the left side of the driver's cabin. I was seeing a far distance depending on the headlight. I saw the motor cycle while it was about one meter away and that not when we heard a bang.



It is not true that it is our driver who was overtaking and that he left his lane from Chaaria heading to Meru. I do not know if that is the reason that the motor cycle was knocked and went to the right side of the road from Chaaria facing Meru direction.'

20. On re-examination, he stated that, 'I recorded my witness statement in the presence of my advocate and other people. I confirm the statement belongs to me. I do not know the exact right side portion of the Lorry of the collision. What I know is in my statement and I stick to it.'
21. DW3 Alex Mugambi Kiambi, adopted his witness statement recorded on September 8, 2020 as his evidence in chief. He stated that, 'I know why I am in court. On August 1, 2020. I was driving motor vehicle xxxx.'
22. On cross examination, he stated that, 'On October 6, 2021, I recall that this case was in court. I came to court but I did not refuse to give evidence. My advocate told me that I and my turn boy have to be both present in court. I did not say that I was waiting for a judgment in the other court. I had another traffic case. I do not know the case number. I was charged with causing death by dangerous driving. I was not fined Kshs 150,000/=. The case is yet to be concluded. I recorded my witness statement at Kaguma through the assistance of the insurance advocate at the homestead of Jacob Murugu my employer. I did not sign on my statement. I was employed by Jacob Murugu as a driver driving motor vehicle xxxx. On August 1, 2020 was delivering stones through Meru-Chaaria at Giaki. I confirm that an accident occurred on the material date involving my Lorry and a Motor cycle with 2 passengers. I was on the left side from Meru facing Chaaria direction. There was an oncoming vehicle from the opposite direction. The motor cycle was behind the Lorry that was oncoming. The rider tried to overtake the oncoming lorry and it came and rammed on my vehicle. I do not know the registration number of the other lorry. Todate, I do not know the number. The motor cycle rammed onto my lorry on the bumper right side of the lorry. I stopped about 50 meters away and checked the bumper. That's when I confirmed the damage on my lorry. I did not know what happened to the motor cycle after the collision. I did not know if it fell or it proceeded with the journey. I have been a driver since 2013. I know that one should stop after an accident and report the same. Kenneth DW2 was my conductor on that day and was a passenger in my lorry. I did not tell him that an accident took place. He knew about it because he was a passenger. He did not asked me reason. I stopped when I stopped people wanted to beat us because they knew that an accident had occurred concerning our vehicle. We proceeded to Giaki to deliver the consignment. We, my conductor and I spent the night in the lorry because of the curfew. Its that we loaded sand on the lorry and delivered it the following day. We did not go through Nkubu Mitunguu road. I did not report the accident to any station. We went to Kiirua in a homestead to deliver the sand. Jacob Murugu came when we were off loading the sand. He does not live there. I do not know why he went to that homestead since I met him there. Police officers came and found us at Kiirua together with members of public. The lorry was impounded and taken to Kiirua police station. It is not true that we went to report the matter at Kariene police station as indicated in my statement which is a lie. On the day of the accident, I called the owner of the lorry and told him about the accident. I did not tell him about the damage on the lorry. My employee did not buy spare parts and take them to Kiirua where the vehicle was being repaired. DW2 Kenneth was not present when sand was being offloaded. He alighted in Meru town and went to church. I hired another conductor to offload stones. I did not report to the police because I was confirmed because I have never seen such an incidence. We did not conspire with my employer to conceal the mistakes.'

## Submissions

23. The Appellant faults the trial court for heavily relying on the testimony of PW4 who did not witness the accident while disregarding that of the 2 eye witnesses, and feels that liability ought to have been wholly



attributed to the Respondents at 100%. He faults the trial court for adopting a dependency ratio of  $\frac{1}{3}$  instead of  $\frac{1}{2}$  and a multiplicand of Kshs 17,000 instead of Kshs 18,845.55 which is the minimum wage for a skilled artisan. He urges the court to find that the parents of the deceased actually depended on him although there were no records maintained to indicate as such and relies on [\*Joseph Ndirangu Thuo & Another v Kamau Ngugi \(Suing as the legal representative and administrator of the estate of Peter Waweru\) \[2019\] eKLR\*](#), [\*Mary Kerubo Mabuka v Newton Mucheke Iburu & 3 Others \[2006\] eKLR\*](#) and [\*Crown Bus Services Ltd & 2 Others v Jamilla Nyongesa & Another \[2020\] eKLR\*](#). He urges that the trial court's failure to consider his submissions which were on record somewhat disadvantaged him.

24. The Respondents submit the trial court's finding of 50:50 was in tandem with the preponderance of evidence tendered hence the court ought to uphold that finding and dismiss the appeal with costs. They urge that no sketch map was tendered by the Appellant or his witnesses to dispute their version of evidence, and rely on [\*Lilian Birir & Anor v Ambrose Leamon \[2016\] eKLR\*](#). They urge that there was no evidence tendered to prove that the parents of the deceased used to substantially depend on him to warrant the court to enhance the dependency ratio.

### **Analysis and Determination**

25. The court wishes to preliminarily address the fault on the trial court for failing to consider the Appellant's submissions and authorities. The trial court indeed did not consider the Appellant's submissions as it noted that the same had not been filed. The court has taken the liberty to go through the record and found that the Appellant did not file any submissions, and the copy attached to the record of appeal does not bear the registry stamp. How then can the Appellant accuse the trial court of failing to consider something that was not on record?
26. After considering the grounds of appeal as listed, the issues for determination are whether the apportionment of liability at 50:50 was supported by the evidence on record and whether the adoption of a dependency ratio of  $\frac{1}{3}$  was justified.

### **Liability**

27. The Appellant faults the trial court for erroneously apportioning liability at 50:50. In arriving at that finding, the trial court observed that, 'As an independent witness, PW4's evidence did not help shed light on the circumstances that led to the occurrence of the accident. While all the other witnesses PW2, 3 and DW2 and 3 alluded that it was a head on collision as the lorry and the rider collided since they were travelling in opposite directions, PW4 stated that the motor cycle was hit by the lorry from behind as they were both headed the same direction. It is only fair and just to have the rider of the motorcycle (deceased) and the driver of the motor vehicle share blame in equal measure.'
28. In order to find out who was to blame for the accident, the court will focus on the testimonies of the 2 eye witnesses, PW2 and PW3. PW2 and PW3 met with the 2 deceased persons at a petrol station as they were fuelling their motor cycles, and thereafter, they rode behind the 2 deceased persons. PW2 stated that, 'They were about 30 to 50 meters ahead of us. We were from Chaaria direction heading to Gaitu market. When we got to Nkumbo market, we met with one Kinyua slowly heading to Chaaria direction from Gaitu. The lorry was overtaking a canter that was in front of it, we then heard a loud bang and saw the Isuzu lorry zigzagging on the road. We no longer saw the motorcycle that was in front of us. We tried to stop the lorry as we had seen it hit something but the driver did not stop since there was light near the number plate. We took advantage and read the number plate as xxxx. When we got where the lorry had hit something, we found Felix Muthuri and Martin Mwongera having been hit. We saw the motorcycle flying onto the left since facing Kaguma market. I blame the driver of the lorry xxxx for causing the accident. He encroached on the other lane as he was overtaking. The lorry



xxxx never stopped.' On cross examination, PW2 stated that, 'The accident took place at 8.30 pm. I was not wearing a helmet at the time when the motorcycle was on motion. It was not dark at the time because there was moonlight from the lights of the motor vehicles and motor cycle. I was able to witness the accident. Both lorries, KBN and Canter had their headlight on and the two motorcycles had their headlight on. I was 30 to 50 meters away. The two were wearing helmets.' On re-examination, he stated that, 'The rider of the motorcycle could not have evaded the accident because there was a water drainage off the road. The Isuzu lorry did not stop.'

29. The testimony of PW2 was corroborated by PW3 who testified that, 'I witnessed the accident that occurred at Nkumbo from Chaaria towards Kaguma market. At the material time I was around 30 to 50 meters from the scene of accident where I was riding my motorcycle to Kaguma market. Samson Mawira was my pillion passenger. We were all heading to Kaguma. When we got to Nkombo, there was a lorry headed loaded with stones that was over speeding and was coming from the opposite direction. I tried to overtake a canter that was in front of it. The lorry with stones encroached on our lane and met with Felix hitting them both. We tried to stop the vehicle and it failed to stop. I blame the driver of the lorry for overtaking carelessly. He had not indicated that he was overtaking when the road is not clear. A stone fell down after the accident since it hadn't been covered completely.' On cross examination, PW3 stated that, 'The encroaching vehicles had headlights and my motorcycle had headlights on. It was a head on collision. The rider of the motor cycle was wearing a helmet. I didn't see if his pillion passenger had a helmet.'
30. When PW4 and the investigating officer herein got to the scene, he found 2 bodies with broken parts scattered all over the scene. The two bodies were off the road side on the right as one faces Chaaria from Meru direction. He blamed the driver for causing the accident and subsequently charged him with causing death by dangerous driving. According to him, the rider and the driver were heading in the same direction from Meru to Chaaria. 'The motor cycle was in front of the lorry. The Lorry was on high speed and was trying to overtake the motorcycle. He failed to control the vehicle and knocked the motor cycle. I do not blame the motor cycle rider for the accident.'
31. PW1 and the Appellant herein also visited the scene later and saw traces of blood on the left side of the road facing Kaguma from Chaaria. He stated that the 2 deceased persons were from Chaaria towards Kaguma.
32. Although DW1 acknowledged that the rider and the driver were headed in opposite directions, he stated that the rider was the one who was trying to overtake a vehicle in front of him. DW2 testified that they were travelling with DW3 from Gaitu to Tharaka via Meru Chaaria road, when the rider tried to overtake a lorry, hence a collision. DW3 and the driver of the accident motor vehicle stated that, 'I was on the left side from Meru facing Chaaria direction. There was an oncoming vehicle from the opposite direction. The motor cycle was behind the Lorry that was oncoming. The rider tried to overtake the oncoming lorry and it came and rammed on my vehicle.'
33. DW3 admitted that he neither stopped after the accident nor reported the same to any police station. In fact, he hid the accident motor vehicle in a homestead in Kiirua where it was being repaired in secrecy.
34. From the testimonies of the 2 eye witnesses, PW2 and PW3, this court is satisfied that the driver of the accident motor vehicle was wholly to blame for the accident, for carelessly overtaking while over speeding. PW2 was categorical that the deceased rider could not have evaded the accident as there was a water drainage off the road.
35. It must be remembered that the burden of proof in civil cases is on a balance of probabilities, and not higher. This court finds that the Appellant proved, by corroborated and consistent evidence that the



Respondents were wholly to blame for the accident. It is therefore this court's finding that the trial court fell into error when it apportioned liability at 50:50.

### Dependency Ratio

36. The trial court stated that, 'The deceased was 24 years old at the time of his death. He had no children or wife. PW1, his father stated that he was a plant operator and that he and his wife depended on him. In an African setting, it is expected that a child once grown up should support their parents in some way. In my view, a ratio of 1/3 is appropriate.'
37. The Appellant admitted in his testimony that the deceased, a qualified plant operator was unmarried, with no children and aged 24 years. He testified that, 'Hellen Karimi listed in paragraph 8 of the plaint is my wife. The deceased was assisting us. He would give us some money for shopping.' On cross examination, he reaffirmed that, 'I and my wife were depending on the deceased for daily upkeep and was paying school fees. He was earning a salary even though I have no proof.'
38. It is not shown that the deceased had siblings who he supported and thus it can be firmly said that the only dependants of the deceased were his parents. Although the court finds that the deceased supported his parents, it concurs with the trial court that the said support was minimal as the Appellant worked as a driver and he was able to also support himself and his wife. This court finds that the adoption of a dependency ratio of  $\frac{1}{3}$  for a deceased who was unmarried with no children, and whose father was gainfully engaged was fair.
39. See *Nyota Tissue Products v Benjamin Obonyo Mukati & 4 Others [2020] eKLR* where this court held as follows:
  - ' 27. In this case, the child was not so young as to make his prospects of successful completion of his education and his employment even at the minimum wage level speculation as to call only for a conventional award and this court accepts following *Asal v Muge and Saro v Kenya Breweries*, supra, that, in accordance with our Kenyan Society and especially African customs, the 18 year old student had on maturity and upon gainful employment or engagement a duty to provide for his parents and the parents were in turn entitled, to expect such provision and, therefore, to a recompense for loss of dependency by the early death of their child.
  28. The court, however, failed to discount the claimant's living expenses, which courts have assessed at  $\frac{1}{3}$  of the earnings in cases of a male spouse with children, [I consider that for a child spending on his parents the position ought to be the reverse, spending  $\frac{2}{3}$  on himself and  $\frac{1}{3}$  on his parents].'
40. The court does not disturb the finding of the trial court on quantum.

### Orders

41. Accordingly, for the reasons set out above, the appeal on liability is allowed. The trial court's apportionment of liability at 50:50 is set aside and substituted with a finding that the Respondents were 100% liable for the accident.
42. The appellant shall have the costs of the appeal.  
Order accordingly.



**DATED AND DELIVERED THIS 18TH DAY OF MAY, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

**APPEARANCES:**

M/S Basilio Gitonga, Muriithi & Co. Advocates for Appellant.

M/S Wangari Muchemi & Co. Advocates for Respondents.

