



4. However, the Appellants believe that the Plaintiff did not prove that it was the driver of the motor vehicle who caused the accident.
5. Although the Plaintiff's witness (**PW2**) testified that he was an eye-witness to the accident, and said that it was the vehicle which lost control and veered towards the motor cycle of the deceased, colliding with it from the rear, the Appellants noted that the said evidence was not corroborated by **PW3**.
6. **PW3** was a police officer. But he was not the investigating officer in that case.
7. It was the Appellants' submission that in the absence of the investigating officer, there was no evidence which would have assisted the court to ascertain the point of impact.
8. The Appellants said that the Plaintiff did not prove that the driver of the motor vehicle lost control of the said vehicle. In the opinion of the Appellants, the Plaintiff ought to have adduced evidence of sketch maps or sketch plans, which would have helped in showing the resting position of the vehicle, after the accident.
9. The Appellants considered the said evidence to be critical, especially because the Police Abstract indicated that the case was still pending under investigations.
10. In conclusion, the Appellants submitted that the Plaintiff failed to prove the alleged negligence attributable to the driver of the Defendants' motor vehicle. Therefore, the Appellants submitted that the trial court ought to have dismissed the suit.
11. When responding to the submissions on the issue of liability, the Respondent pointed out that the case against the Appellants had been proved, when it is considered that the Respondent's evidence was unchallenged.
12. The said submission is premised on the fact that the Appellants failed to call the driver of the motor vehicle, who could have given his version of how the accident happened.

#### **Quantum of Damages**

13. The Appellants submitted that the Respondent failed to lead evidence to prove the extent to which the Plaintiff's mother depended upon him during his lifetime.
14. In any event, submitted the Appellants; a mother is not one of the categories of persons designated as dependants pursuant to **Section 3 (1)** of the **Fatal Accidents Act**.
15. As far as the Appellants were concerned, the deceased did not have any family, because;

***“..... the deceased was not married, had no children of his own and had no parents.”***

16. In those circumstances, the Appellants submitted that the dependency ratio of 2/3 was misdirected. The Appellants urged this Court to set aside that dependency ratio, and to substitute it with a ratio of 1/3.

#### **Determination**

17. Being the first appellate court I am obliged to re-evaluate all the evidence on record, and to draw my own conclusions. Of course, I have to keep in mind the fact that, unlike the learned trial magistrate, I did not have the opportunity to observe the witnesses when they were testifying.
18. **PW1, WYCLIFFE ODHIAMBO ODONGO**, was a brother of the deceased. He instituted proceedings after obtaining a Limited Grant of Letters of Administration.
19. Although he did not witness the accident, he visited the scene and arranged to take the body of the deceased to the mortuary.
20. On the following day, **PW1** was issued with a Police Abstract at the Maseno Police Station. He produced the following exhibits at the trial;

***i. Limited Grant of Letters of Administration.***

***ii. Chief's Letter.***

***iii. Post Mortem Report.***

***iv. Receipt for Mortuary Fees.***

***v. Certificate of Search of motor vehicle KAT 391G.***

21. During cross-examination, **PW1** confirmed that the deceased did not have his own family.
22. **PW2, RASHID ONYANGO MODI**, testified that he was an eye-witness to the accident.
23. He saw the motor vehicle registration **KAT 391G** hit the motor cycle from behind. It was his evidence that the driver of the motor vehicle lost control of the vehicle, veered towards the motor-cyclist and knocked him down.
24. **PW2** testified that the driver of the motor vehicle was to blame for the accident because he was driving so fast that he could not even apply brakes on time.
25. **PW3, PC EDWARD AMBENGE**, was a police officer who was attached to the Maseno Police Station. He produced the Police Abstract in evidence.
26. **PW3** was not the Investigating Officer. He said that it was Sgt. Mwau who was the Investigating Officer. However, the said Sgt. Mwau could not be traced.
27. Secondly, **PW3** said that he did not have the police file, as it could not be traced at the police station.
28. After **PW3** testified, the Plaintiff closed his case.
29. The Defendants closed their case without calling any witness.
30. Having analyzed the evidence on record I find that on the material day, there was an accident between the motor vehicle Registration **KAT 391G** and the Motor Cycle Registration **KBD 288X**.
31. **PW2** was an eye-witness to the accident; and he testified that the driver of the motor vehicle lost control of the said motor vehicle and hit the motor cycle which the deceased was riding.
32. As a consequence of the collision, the deceased died on the spot.
33. As the deceased was wearing a helmet at the material time, yet the impact resulted in his death on the spot, I find that the assessment of **PW2**, regarding the speed at which the vehicle was being driven, was accurate.
34. The post-mortem report cites the cause of death as Severe Head Injury. The doctor who conducted the post-mortem examination also noted that the deceased sustained injuries to the spine.
35. In my considered opinion, the post-mortem report corroborates the evidence of **PW2**.
36. As regards the failure of the Investigating Officer to give evidence, I find that that did not weaken the evidence tendered by the eye-witness and through the post-mortem report.
37. I further find that because the Defendants made a choice to close their case without producing any evidence, there was no alternative evidence concerning how the accident occurred. In other words, the evidence tendered by the Plaintiff remained uncontroverted, consistent and corroborated.
38. Accordingly, the learned trial magistrate cannot be faulted for holding the Defendants 100% liable.
39. On the issue of the Quantum of damages, I find that the Appellants were not right to suggest that the deceased had no parents.
40. The correct position is that his mother, **MILLICENT ADHIAMBO ODONGO**, and his brother, **WYCLIFFE ODHIAMBO ODONGO**, were named in the letter from the Chief of Thurdibuoro Location.
41. The brother of the deceased said that the deceased did not have a wife or children.
42. Whereas it is the brother of the deceased who filed suit, the mother of the deceased is cited in the Amended Plaint as one of the dependants of the deceased. Thus, the fact that it was a brother who instituted the proceedings, (after being granted the Limited Grant of Administration), should not be confused with the persons who are dependants.
43. An administrator of the estate of a deceased person does not have to be a dependant. He derives the authority by virtue of law, after obtaining appropriate orders from the court.
44. **Section 4 (1)** stipulates that every action brought by virtue of the provisions of the **Fatal Accidents Act** shall be brought by and in the name of the executor or the administrator of the person deceased. Therefore, the proceedings were properly instituted.
45. The same said **Section 4 (1)** provides that such action shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused.

46. It is correct that pursuant to the provisions of the **Fatal Accidents Act**, the brother of the deceased would not be one of the persons for whose benefit the suit was filed.

47. However, as the deceased was survived by his mother, the Appellants are wrong to suggest that the trial court ought to have dismissed the case.

48. I find that the trial court did not expressly or otherwise assign some compensation to the brother of the deceased, under the **Fatal Accidents Act**. Therefore, there was no basis, in law, for dismissing the suit.

49. In the result, there is no merit in the appeal, and it is therefore dismissed, with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 14<sup>TH</sup> DAY OF JULY 2021**

**FRED A. OCHIENG**

**JUDGE**