

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL APPEAL NO. E038 OF 2024

CAROLINE NEEMA MATHIAS & BRIAN NAIBU
(Suing as the legal representatives of the estate of JUMA
HASSAN.....APPELLANTS

VERSUS

RENSON KAKUCHA
CENTER FOR URBAN & REGIONAL PLANNING LTD.....
RESPONDENTS

JUDGMENT

1. The Appellant as legal representatives of the estate of Juma Hassan (the deceased) filed Kilifi SPMCC No. E467 of 2022 against the Respondents, under the Fatal Accidents Act and the Law Reform Act on their own behalf and on behalf of the estate of the deceased. They claimed both general and special damages arising from a road traffic accident that occurred on 27.7.22 at Tezo area along the Kilifi – Malindi Road between the Appellants’ motor vehicle registration number KCY 877C and motor cycle registration number KMBA 955X, in which the deceased the rider of the said motorcycle, sustained fatal injuries.
2. The Respondents filed statements of defence both dated 1.2.23. The 1st Respondent denied all the allegations in the Appellants’ amended plaint. On its part, the 2nd Respondent denied the Appellant’s allegations and averred that the accident was caused wholly by the negligence of the deceased.
3. The matter proceeded to hearing and at the conclusion, the trial Magistrate entered judgment dated 25.3.24 for Appellants against the Respondents in the following terms:

Liability	50%
Pain and suffering	Kshs. 50,000.00
Loss of expectation of life	Kshs. 100,000.00
Lost dependency	Kshs. 1,874,060.00
Special damages	Kshs. 130,000.00
Sub-total	Kshs. 2,154,060.00
Less 50% contribution	Kshs. 1,077,030.00
Total	Kshs. 1,077,030.00

Costs of the suit and interest subject to 50%.

4. Being aggrieved, the Appellants filed the Appeal herein against the trial court’s finding on liability and seeks that the same be set aside.

5. Being a first appeal, this Court is called upon to re-evaluate and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (**See Selle v Associated Motor Boat Co. [1968] EA 123**). The Court is also guided by the Court of Appeal decision in **Samuel Mwanasokoni v Kenya Bus Services Ltd [1985] eKLR**, where it stated:

Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sotiros Shipping v Sauviet Sohoid, The Times, March 16, 1983:

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said.”

6. I have considered the record and the parties’ respective submissions. Liability and apportionment thereof are questions of fact. The Court’s duty therefore is to appraise and evaluate the evidence on record and draw its own conclusions.
7. In her testimony, PW1 stated that she did not witness the accident. PW2 PC Venant Mwadime from Kilifi Police Station stated that the abstract was for the road traffic accident on 27.7.22 at 16.30 hours at Tezo area along Kilifi Malindi Road. He stated that the deceased was the rider of the motorcycle with 2 pillion passengers, namely Evans Owino and Charles Osoro. The trial court noted that the police abstract had been produced without objection from the defence.
8. The evidence adduced by DW1 in PMCC No. E389/22 relating to the same accident was adopted in the case before the trial court. He stated that the police abstract indicated that the driver of the motor vehicle was to blame for the accident. He further stated that he had no contrary evidence to the abstract.
9. In the impugned judgment, the trial court had this to say on liability:

In my analysis of the evidence, although there was no eye witness to the accident to testify in court, one thing emerged clear: that the deceased rider was crossing the road when he was hit by the motor vehicle. While the motor vehicle driver had a duty

to confirm that the oncoming lane was clear of any oncoming traffic before he could overtake the unknown matatu, equally the deceased rider was under duty to ensure that the road was clear before crossing it. I hold each of them 50% liable for the accident.

10. The trial court found both the deceased and the driver of the motor vehicle were liable for the accident in equal measure as both were under a duty to ensure the road was clear before crossing the road and overtaking respectively.
11. The circumstances herein are that no eyewitness evidence was adduced before the trial court. PW2, the investigating officer stated that he blamed the driver of the motor vehicle. This is also indicated in the abstract. PW2 did not however explain why he did so. He did not produce the sketch map to show the point of impact or skid marks. He did not state whether the road was level or straight. He did not also state whether the vehicle was inspected and if it had any dents. He did not record statements from the driver of the motor vehicle nor from other occupants thereof. The Court thus finds that the evidence of PW2 which would have assisted it in determination of the causation of the accident, to be wanting.
12. Additionally, the only eyewitness to the accident was the driver of the motor vehicle. It is not clear to the court why he was not called to testify as his evidence would have shed light on what actually transpired.
13. From the evidence on record, it is not possible to determine who was to blame for the accident. Suffice it to say that both the driver of the motor vehicle and the rider of the motorcycle were duty bound to keep a proper lookout. I am fortified in this regard by the decision in **Isabella Wanjiru Karanja v Washington Malele [1983] KECA 72 (KLR)** where Potter JA, stated:

There are two elements in the assessment of liability, namely causation and blameworthiness. See Baker v Willoughby [1970] AC 467. In my opinion there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car.

14. The fact of the accident occurring as a result of which the deceased lost his life is not disputed. As to who was responsible for the accident, cannot be determined from the evidence on record. Our courts have held that in a case where liability is not clear, both parties are to bear liability equally. In this regard I am duly guided by the holding in the case of **Hussein Omar Farah v Lento Agencies [2006] eKLR**, where the Court of Appeal stated:

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.

15. Having found that it is impossible from the evidence on record to determine who was liable for the accident, the Court cannot fault the trial court for apportioning liability equally between the parties.
16. Consequently, this appeal has no merit and the same is dismissed with costs to the Respondents.

DATED SIGNED and DELIVERED in Malindi this 31st day of October 2025

M. THANDE
JUDGE

