Huta v Lesanchore & another (Suing as the Legal Administrators of the Estate of the Late Kennedy Naomi Lekonirai – Deceased) (Civil Appeal E003 of 2025) [2026] KEHC 705 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KEHC 705 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARALAL

CIVIL APPEAL E003 OF 2025

AK NDUNG'U, J

JANUARY 30, 2026

BETWEEN

DAUDI DIMA HUTA .... APPELLANT

AND

LPARAYAN LESANCHORE .... 1ST RESPONDENT

HUSSEIN KYALO NAOMI .... 2ND RESPONDENT

SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE KENNEDY NAOMI LEKONIRAI – DECEASED

(Being an Appeal from the judgment of the Learned Magistrate HON VICTOR ASIYO (Senior Resident Magistrate, delivered on 17th June, 2025 in MARALAL CMCC E004 OF 2024,)

JUDGMENT

1. The Respondents herein Hussein Kyalo Naomi & Lparayan Lesanchore, being dissatisfied with the judgment delivered by the Honorable Victor Asiyo, Senior Resident Magistrate at the Chief Magistrate's Court at Maralal on 17th June, 2025 lodged this appeal against the said judgment on the following main ground;
    1. That the Learned Trial Magistrate erred in Law and in fact by failing to find that the deceased wholly contributed to the occurrence of the accident by hanging at the back of the lorry without knowledge of the driver .
    2. In a cross-appeal dated 19th September 2025, the Respondent raised the following grounds;
        a. The learned trial Magistrate erred in law and fact in failing to find the Defendant wholly liable for the accident.

b. Learned Trial Magistrate erred in Law and in fact in failing to award damages under the *fatal accidents Act* to the Plaintiff.

3. The Appeal was canvassed by way of written submissions.

In their submission, the Appellant maintains that the deceased was an unauthorized passenger in the subject vehicle and indeed the driver and turn boy were not even aware he was on the vehicle. That they did not know him and had not communicated with him.

4. It is submitted that PW2 who alleged to have been aboard the suit vehicle together with the deceased was unknown to DW1 and DW2. He too thus was not an authorized passenger if he was on the vehicle. It is submitted that the fact that the deceased fell off but the livestock remained safe in the vehicle would only mean that the deceased was hanging on the back of the lorry and he lost his grip and suffered fatal injuries in the process.

5. It is submitted that the doctrine of volenti non fit injuria is applicable and reliance was placed on the case of Edwin Chiroto Mandela v Mureithi Charles & Another 2019[eKLR) and Phyllis Wairimu Macharia v Kiru Tea Factory[2016]KLR

6. In rejoinder to the cross appeal, it is submitted that the Respondents were brothers to the deceased and do not meet the threshold for dependants/beneficiaries under Section 4 of the *Fatal accidents Act*. There was in any event no evidence that they were dependants.

7. For the Respondents, it is submitted that the evidence that would assist the Court to make an assessment on liability in a road accident is the testimony of an eye witness. That from the evidence placed before the Trial Court, it has been proved on a balance of probabilities that the deceased was lawfully in the vehicle, with the permission of the Appellant's driver, who assigned him and PW2 to load and guard the livestock while on transit.

8. It is submitted further that PW1 told the Court that in the circumstances and state of the road, the Appellant's driver was reckless and was speeding, thereby throwing off the deceased out of the vehicle. This was confirmed by the Appellant's driver, who indicated to court that in such a bad road, he was driving at 50Km/Hr.

9. It is urged that the court sets aside the award on liability and substitute the same with 100% against the Appellant.

10. Regarding the application of the *Fatal Accidents Act*, it is stated that the deceased in this case was an orphan who did casual work to support his younger brother. He was not married and was 36 years old. He made at least Kshs. 30,000.00 per month.

11. That the Trial Court failed to award damages under loss of dependency reasoning that the deceased had no dependants. Reliance was placed on the case of Wachira & another v Shikamili & another (Suing as the Personal Representatives and on behalf of the Estate of Wemsy Chakamali Mulwale- Deceased) (Civil Appeal E054 of 2023 [2025] KEHC 6040 (KLR) (7 May 2025) (Judgment).

12. As a first appellate court, this court is obligated to reconsider and re-evaluate the evidence and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify.Selle v Associated Motor Boat Co. Ltd [1968] EA 123).

(See

Issues for Determination

13. The appeal turns on the following issues:

    a. Who bore the burden of proof?

    b. Whether the deceased was an authorized passenger in the subject motor vehicle. If in the affirmative,

    c. Who was to blame for the accident (liability).

    d. Whether the respondents qualified as dependants under section 4 of the *Fatal Accidents Act*;

    e. What orders ought to issue.

14. The burden of proof in civil cases is governed by sections 107, 108 and 109 of the *Evidence Act* (Cap 80). Section 107(1) provides:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

15. The legal burden therefore lay on the Respondent to prove that the deceased was lawfully on board the vehicle; and that the driver owed him a duty of care which was breached.

16. The standard of proof in civil cases is on a balance of probabilities, as stated in Miller v Minister of Pensions [1947] 2 All ER 372. and consistently applied by Kenyan courts.

17. However, where two versions of events exist, the court must analyze the evidence in its totality alive to the fact that a plaintiff's burden to prove his case is constant even where no defence is filed or evidence adduced.

18. The central issue in this appeal is whether the Appellant proved that he was an authorised passenger.

19. The only evidence supporting authorisation was the oral testimony of the PW2, who stated that he was a passenger with the deceased and had permission to be on board. To the contrary, the driver's evidence was that the 2 were not authorized passengers and he was not aware they were in the vehicle.

20. This Court notes that the fact whether the deceased and PW2 were authorized to be in the subject vehicle is a matter of fact proof of which lay on the Respondents under section 107 of the *Evidence Act*. (See Statpack Industries v James Mbithi Munyao [2005] eKLR).

21. The court in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, emphasised that the mere presence of an injured person on a vehicle does not automatically establish lawful carriage or liability.

22. In the present case, no independent or objective evidence was tendered to support the claim of authorization. The testimony of PW2, being a companion of the Appellant, required corroboration, particularly in light of the driver's denial.

23. On a balance of probabilities, this Court finds the driver's version more probable, especially considering that the vehicle was loaded with animals which never fell off as did the deceased denoting that the deceased was most probably hanging on the back of the vehicle and was not inside it. It was upon the Respondent to offer evidence of authorization to corroborate the evidence of PW2 whose evidence on its own is not reliable based on the fact that he is also accused of being an unauthorized

passenger. Evidence obtained from the point of departure in the journey would have gone a long way in bolstering the Respondent's case.

24. No documentary evidence such as a turn-boy's testimony, loading records, or payment receipts was produced to corroborate the Appellant's claim of authorization. As it were, the Respondents fell short of proving that the deceased was an authorized passenger.

25. Where a person voluntarily and unlawfully places himself in a position of danger, the driver cannot be held liable unless it is shown that he knew or ought to have known of the person's presence and failed to act reasonably.

26. In Joseph Kariuki v Jackson Kinyua [2014] eKLR, the High Court held that an owner or driver of a vehicle does not owe a duty of care to a clandestine or unauthorized passenger of whose presence he is unaware.

27. In this case, no evidence was adduced to show that the driver knew or ought to have known that the Appellant was hanging onto the vehicle.

28. In the absence of such knowledge, no duty of care arose, and consequently, no breach was established. It is my finding that the trial court fell into error in shifting the burden of proof to the Respondent and in imposing liability without proof of authorization or negligence.

29. Had the converse been true, the question begging answers in so far as the cross-appeal is concerned is whether the trial court erred by failing to make an award under the *Fatal Accidents Act*.

30. Section 4(1) of the *Fatal Accidents Act* (Cap 32 Laws of Kenya) is explicit on who qualifies as a dependant. It provides that an action may be brought for the benefit of:

> " the wife, husband, parent and child of the deceased person."

31. The statute does not include siblings among the listed dependants.

32. The Court of Appeal has consistently held that dependency under the Act is statutory and restrictive, and courts cannot enlarge it by judicial craft.

33. In Kenya Breweries Ltd v Saro [1991] KLR 408, the Court held that only those persons expressly mentioned in the Act can benefit from a claim for loss of dependency.

34. Similarly, in Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another [2014] eKLR, the Court of Appeal stated:

> " A claim for loss of dependency is a creature of statute and the beneficiaries must fall within the strict confines of section 4 of the *Fatal Accidents Act*."

35. The 2nd Respondent is said to be a guardian of the deceased while the 1st Respondent is a brother to the deceased. They surely bore grave loss following the death of the deceased. Such loss, painful as it could be, is, however, not subject to compensation under Section 4 of the *Fatal Accidents Act*. In Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another [2016] eKLR, the High Court held:

> " Siblings do not qualify as dependants under section 4 of the *Fatal Accidents Act* unless the claim is brought on behalf of a parent or child of the deceased."

36. The law is explicit on the matter. No evidence was tendered to show that the suit was brought for the benefit of any parent of the deceased, nor was any dependency proved as a matter of fact. The trial court was spot on in declining the invite to award damages under this head.

37. From the foregoing and for reasons above stated, the appeal herein is wholly successful and is allowed. The judgement and orders of the trial court are set aside and substituted with an order dismissing the suit with costs to the Appellant. The Cross-Appeal has no merit and is dismissed. The Appellant is to have the costs of this appeal.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JANUARY 2026

A.K. NDUNG'U

JUDGE