

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL APPEAL NO. E051 OF 2024

NATIONAL IRRIGATION BOARD.....APPELLANT

VERSUS

**THERCISSE RENZAHO (Suing as the legal representative
of the estate of BIGIRIMANA THERCISSE.....1ST RESPONDENT**

DICOM ENGINEERING LIMITED.....2ND RESPONDENT

JUDGMENT

1. The 1st Respondent as legal representative of the estate of Bigirimana Thercisse (the deceased) filed Kilifi CMCC No. E259 of 2022 against the Appellant and 2nd Respondent, under the Fatal Accidents Act and the Law Reform Act. He claimed both general and special damages arising from a road traffic accident that occurred on 26.6.21 at Chumani along the Kilifi – Malindi Road between the motor vehicle registration number KBU 522 N and an unregistered motor cycle on which the deceased being a pillion rider, sustained fatal injuries.

2. The matter proceeded to hearing and at the conclusion, the trial Magistrate entered judgment dated 26.4.24 for 1st Respondent against the Appellant and the 2nd Respondent jointly and severally in the following terms:

Liability	100%
Pain and suffering	Kshs. 100,000.00
Loss of expectation of life	Kshs. 100,000.00
Lost dependency	Kshs. 1,531,582.80
Special damages	Kshs. 190,550.00
Total	Kshs. 1,922,132.80

Costs of the suit and interest subject to 50%.

3. Being aggrieved, the Appellant filed the Appeal herein against the trial court’s finding on liability and quantum. The summarized grounds are that the trial Magistrate erred in:

1. Apportioning liability against the Appellant yet liability was not proven.
2. Giving exorbitant awards on quantum.
3. Giving an award for loss of dependency even after acknowledging that the deceased had no dependents.

4. The Court has re-evaluated and analyzed the evidence on record as required in any first appeal, 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 Sohold, 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.”

5. The facts herein are that the deceased was a pillion rider on an unregistered motorcycle along the Kilifi-Malindi Road. At Chumani, the motorcycle was hit by the motor vehicle which was driven by the Appellant’s driver, Jackson Kinywa Karunda, DW1. The deceased sustained fatal injuries. In his testimony, the Plaintiff stated that the deceased was 29 years old at the time of his demise. He was a bread supplier and earned Kshs. 30,000/= per month. Both he and the deceased’s brother depended on the deceased.
6. PW2 PC Hassan Pomino produced the police abstract. he stated that the vehicle hit the motor cycle which was going in the same direction. The deceased a Rwandese national died at the hospital. He stated that the driver of the motor vehicle was not charged yet the abstract stated that he was to be charged. He did not know the reason for this and further stated that he was not the investigating officer and did not visit the scene of the accident.
7. DW1 stated that the accident occurred at about 9.30 pm. He was dazzled by the lights of oncoming vehicles and he suddenly saw a motorbike heading towards the centre of the road towards his lane. He applied the brakes but it was too late. He stated that none of the victims of wore a helmet or reflective jacket. He blamed the rider of the motor cycle for recklessness.
8. Parties filed their written submissions which the Court has duly considered.
9. The Appellant faulted the trial court for finding the Appellant 100% liable for the accident. The Appellant contends that the allegation of negligence was not proved against the Appellant. Further that the trial court overlooked the fact that the motorcycle was unregistered and uninsured.

10. For the 1st Respondent, it was submitted that the trial court found that the motorcycle had been hit from behind by the driver who had been blinded by lights from oncoming traffic. It was asserted that the trial court's finding on liability was well founded and supported by evidence.
11. To begin with, it is necessary to state that nothing turns on the Appellant's assertion that the motorcycle on which the deceased was a pillion rider was unregistered and uninsured. This does not absolve a driver from liability for negligent driving as the cause of any accident remains the driver's conduct.
12. In the plaint, it was averred that DW1 negligently drove the motor vehicle that he caused it to hit the rear of the motorcycle. In his testimony, PW2 stated that DW1 hit the motorcycle which was ahead of him going towards the same direction. This was not controverted by the DW1 in his testimony. He however stated that he was dazzled by the lights of oncoming traffic and could not see properly and did not see the motorcycle enter the road as it entered suddenly. Further that neither the rider of the motorcycle nor the deceased wore helmets or reflector jackets.
13. It has been stated in a number of authorities that a passenger in a motor vehicle or motorcycle cannot be held liable when the vehicle or motor cycle, as the case may be, is involved in an accident. (see **West Kenya Sugar Co Limited vs Lilian Auma Saya (2020) eKLR**). Further, there is a general presumption that he who hits another from behind is *ipso facto* negligent (see **Multiple Hauliers (E.A) Ltd v Justus Mutua Malundu & 2 others [2017] eKLR**). However, that presumption could not mean that such a person is wholly to blame.
14. Regulation 7 of the National Transport and Safety Authority (Operation of Motorcycles) Regulations under the National Transport and Safety Authority Act stipulates the Responsibilities of a Passenger of a motorcycle as follows:
 - (1) **Every passenger in a motorcycle shall —**
 - (a) **properly wear a helmet and reflective jacket whenever being carried on a motorcycle;**
 - (b) ...
15. A pillion passenger on a motorcycle is required by law to wear a helmet and a reflective jacket. The evidence on record herein shows that the deceased wore no helmet or reflective jacket. Had he complied with the law, the accident could perhaps have been averted or he would have survived the accident. As such, although the Appellant's driver was largely to

blame for the accident, the trial court ought to have apportioned some liability against him, which from the facts should in my view be 10%.

16. I now turn to the issue of quantum of damages. The Appellant faulted the trial court for awarding damages for loss of dependency in respect of the deceased who was survived by an uncle and a brother.

17. A claim for loss of dependency is brought under the Fatal Accidents Act. Section 4(1) provides:

Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct: (emphasis)

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

18. As can be seen, the only persons eligible to bring a claim for compensation under the Fatal Accidents Act are a deceased person's spouses, parents and children.

19. In Mwangi & another (Suing as the Legal Representatives of the Estate of the Late Richard Mwangi Gathoni Deceased) v Ngure & another (Civil Appeal 57 of 2020) [2023] KECA 448 (KLR) (14 April 2023) (Judgment), the Court of Appeal considered an appeal where the 2nd appellant, a brother of the deceased therein claimed damages for loss of dependency under the Fatal Accidents Act and stated:

It is therefore clear that it is only in respect of claims brought for the benefit of the wife, husband, parent and child of a deceased under the Fatal Accident Act that ought to be brought in the name of the executor or administrator of the person deceased. Loss of dependency falls under Fatal Accident Act. Accordingly, the 2nd Appellant could not make a claim under the said Act for loss of dependency as he was not a dependant.

20. In its judgment, the trial court noted that the deceased ***“was survived by a brother and uncle, both of who are not dependants under Section 4(1) of the Fatal Accidents Act, Cap 32.”*** In spite of this, the trial court nevertheless went ahead and made an award for loss of dependency.
21. By dint of Section 4 of the Fatal Accidents Act the deceased’s uncle and brother are not recognized as dependents under the Act. In light of these clear provisions of the law, I find and hold that the trial court misdirected itself in making the award for loss of dependency.
22. No submissions were made in respect of the other awards. In the premises, the Court will not dwell on the same.
23. The upshot is that the Appeal partly succeeds and I make the following orders:
 - i) The award on loss of dependency is set aside.
 - ii) The finding on liability is set aside and in its place the Court apportions liability between the parties at 90:10 against the Appellant.
 - iii) All other awards remain the same and shall be construed accordingly.
 - iv) Each party shall bear own costs.

DATED SIGNED and DELIVERED in MALINDI this 20th day of February 2026

M. THANDE
JUDGE

