



**Wachira v Muta & another (suing on his own behalf and on behalf
of the Estate of Japhet Muisyo Morris - Deceased) (Civil Appeal
E045 of 2024) [2026] KEHC 1992 (KLR) (20 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 1992 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E045 OF 2024
M THANDE, J
FEBRUARY 20, 2026**

BETWEEN

MOSES MWANGI WACHIRA APPELLANT

AND

SARAH NDUNE MUTA 1ST RESPONDENT

MORRIS KUVENGWA MWISHO 2ND RESPONDENT

**SUING ON HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF
JAPHET MUISYO MORRIS - DECEASED**

JUDGMENT

1. The Respondents filed Kaloleni MCCC No. E094 of 2023 against the Appellant, as legal representatives of the estate of Japhet Muisyo Morris (the deceased) 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 7.5.23 at Kwa Kisaumbi area along the Mariakani-Kaloleni road between the Appellant's motor vehicle registration number KDE 381C and motor cycle registration number KMFH 166X, on which the deceased and his pillion rider, sustained fatal injuries.
2. Following hearing, the trial magistrate entered judgment on 4.4.24 in favour of the Respondent as follows:

Liability against the Appellant 70%

Pain & suffering Kshs. 50,000/=

Loss of expectation of life Kshs. 100,000/=

Loss of dependency Kshs. 1,300,000/=



Special damages Kshs. 1,000/=

Total Kshs. 1,451,000/=

Less 30% Kshs. 1,015,700/=

Costs and interest at court rates.

3. The Appellants contest the impugned judgment on both liability and quantum of damages awarded. Although the Appeal raises 8 grounds, the issues in the appeal are 2. First, whether the trial court erred in apportioning 70% liability on the Appellant. Second, the Appellant contends that the trial court erred in making an award on quantum when the Respondents' case was not proved to the required standard.
4. In dealing with the question whether and to what extent the Appellant was liable for the accident, which is a question of fact, the Court must be guided by the general principle governing a first appeal. The Court is required to re-evaluate the evidence and draw its own conclusions making due allowance with respect to the fact that it has neither seen nor heard the witnesses. This principle was set out in *Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123* by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect.
5. The Appellant faults the trial court for apportioning 70% liability on the Appellant as the accident occurred on the lawful lane of the Appellant's driver. The Respondents however submitted that the driver of the motor vehicle was to blame for the accident.
6. PW3 a cousin and colleague of the deceased in the boda boda business and who witnessed the accident stated that they were riding their respective motorcycles along the Mariakani-Kaloleni Road. At Kwa Kisaumbi, the vehicle, going downhill suddenly veered into their lane and knocked down the deceased's motorcycle and the deceased sustained fatal injuries and died on the spot. He blamed the driver of the motor vehicle.
7. PW4 Cpl David Marangu who was attached to Kaloleni Police station stated that he is not the investigating officer but was in charge. He stated that the matter is still pending under investigation. He did not visit the scene of the accident. He also did not have the police file or sketch drawings of the accident.
8. DW1, the investigating officer testified that the deceased hit a pothole, lost control and crossed to the other lane. The vehicle then hit the motorcycle and its 3 pillion passengers who died instantly. He stated that after conclusion of investigations, the deceased was blamed and the file was forwarded to the DPP. By a letter dated 21.6.23, the DPP directed that the file be closed with no further police action. Notably, DW1 did not produce the police file, investigation report, sketch map or the letter from the DPP.
9. DW2, the driver of the motor vehicle stated that he was driving uphill from Mariakani to Kaloleni. There were potholes on the road. 2 motorcycles which were racing collided and 1 motorcycle came onto his lane and hit his vehicle. DW3 the turn boy in the motor vehicle stated that 2 motorcycles were racing and collided. 1 motorcycle came onto their lane and caused the accident.



10. In its judgment, the trial court noted the conflicting accounts as to who was to blame for the accident. The trial court further observed that a simple sketch map from the police file would have settled the matter. The court was however swayed by the testimony of PW3 who it considered an independent witness and proceeded to apportion liability at the ratio of 70:30 against the Appellant. It is not clear why the trial Magistrate found PW3 to be an independent witness. He was a cousin to the deceased.
11. After considering the evidence on record, it is clear that the accounts as to how the accident happened is contested. The testimony of both PW3 and DW1 who are police officers, ought to have assisted in determining the issue of liability. However, they did not bring the police file, sketch plan or even the investigating report. The Court thus finds that their testimony was not very helpful.
12. 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.

The Court went on to state:

The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.

13. My analysis of the evidence on record leads me to conclude that it is not clear who was liable for the accident. Accordingly, I apportion liability to each party equally.
14. As regards the ground on quantum of damages, no submissions were made. In the premises, the Court will not dwell on the same.
15. The upshot is that the Appeal partly succeeds. The learned Magistrate's finding on liability is hereby set aside and, in its place, and the Court apportions liability between the parties at 50:50. The award on damages shall be construed accordingly.
16. Each party shall bear own costs.

DATED SIGNED AND DELIVERED IN MALINDI THIS 20TH DAY OF FEBRUARY 2026

M. THANDE

JUDGE

