

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

CIVIL DIVISION

CIVIL APPEAL CASE NO. E010 OF 2023

BETWEEN

ERNEST KIBET

**ROP:.....APP
ELLANT**

AND

**LUCY MANDAO KEBASO & VICTOR MUNDA NYAKUNDI
[Suing as the Administrators and Legal Representatives of
the Estate of JOHN KEBASO OBENE
[DCD]:.....RESPONDE
NT**

[Being an appeal from the judgment Delivered by the Hon. D.A. Ocharo Senior Principal Magistrate on the 31st May 2023 in CMCC No. 63 of 2020]

JUDGMENT

1. The Appellant, **Ernest Kibet Rop**, proffered the nine [9] grounds of appeal set out in the memorandum of appeal dated 23rd June 2023, against the decision and judgment of the Principal Magistrate in **Kapsabet CMCC No. 63 of 2020** involving the Appellant as the Defendant and the two Respondents, **Lucy Mandao Kebaso** and **Victor Monda**

Nyakundi as the legal representatives of the estate of the Late **John Kebaso Obene** [deceased].

2. Grounds one [1], two [2] and three [3] of the appeal revolve around the issue of liability while the rest of the grounds [i.e. No. 4, 5, 6, 7, 8, & 9] revolve mainly around the issue of quantum of damages.

In the plaint dated 29th June 2020, it was pleaded that the Plaintiff/ Respondents were the duly appointed representatives of the estate of the deceased while the Appellant/ Defendant was at the material time the Insured/ Registered or beneficial owner of the **Motor Vehicle Registration No. KBY 734T** Toyota Hiace Matatu in which the deceased was travelling as a lawful passenger on board the vehicle when it lost control and violently collided with a **Motor Cycle Registration No. KMEQ 447G** resulting in the deceased sustaining serious injuries to which he succumbed thereby causing loss and damage to his estate.

3. It was further pleaded that the accident was caused by the negligent/ careless or/and reckless manner in which the vehicle was driven. The Defendant/Appellant was therefore held solely accountable and liable for the accident, hence the present claim made under the **Fatal Accidents Act [Cap 32 Laws of Kenya]** and the **Law Report Act [Cap 26 Laws of Kenya]**.

The Plaintiff/ Respondent therefore prayed for general and special damages against the Defendant/ Appellant as well as damages for loss of consortium.

4. The claim was denied by the Defendant/ Appellant in the statement of defence dated 3rd August 2020 in which it contended that if the accident indeed occurred, then the same was caused by the reckless, negligent and/or careless act or omissions on the part of the deceased and the rider/owner of the **Motor Cycle Registration No. KMEQ 447G.**

The Defendant therefore prayed for the dismissal of the Plaintiff's suit with costs.

5. After a full trial of the case, the impugned judgment of the trial court was delivered on 31st May 2023 awarding damages in favour of the Plaintiffs against the Defendant as follows: -

i.	Loss of dependency	-	Kshs. 2,500,000/-
ii.	Special damages	-	Kshs. 189,000/-
	Total	-	<u>Kshs. 2,689,000/-</u>

Less the awards under Law Report Act:

iii.	Pain and Suffering	-	Kshs. 50,000/-
iv.	Loss of expectation of life	-	Kshs. 100,000/-
	Total	-	<u>Kshs. 150,000/-</u>

Grand total: - **Kshs. 2,539,000/-**

Together with costs of the suit and interest.

6. Being aggrieved by the decision, the Defendant preferred the present appeal which proceeded to hearing by way of written submissions filed herein by **Messrs KRK Advocates LLP** on behalf of the Appellant and **Messrs Omwenga & Company Advocates** on behalf of the Respondent.

The Appeal as anchored on the supporting grounds was accorded due consideration by this court in the light of the rival submissions.

7. The duty of this court was therefore to reconsider the evidence availed at the trial and draw its own conclusion's bearing in mind that the trial court had the advantage of seeing and hearing the witnesses **[See, Selle & Another Vs. Associated Motor Boat Company Limited and others [1968] E.A. 123].**

In the regard, the evidence by the Plaintiffs though **Lucy Mandao Kebaso [PW1], Daniel Nyakundi [PW2] and PC Peter Maina [PW3]** was considered against that of the Defendant through **Gilbert Kiprono Ngeno [DW1]**.

8. It was evident from the pleadings and the evidence that the basic issue which emerged for determination was whether the accident was as a result of the Defendant's negligence

and/or recklessness in the manner of driving of his motor vehicle and if so, whether the Defendant was liable to the Plaintiffs in damages for the loss of the deceased who was husband to the First Plaintiff and brother to the Second Plaintiff and if so, to what extent or degree were the Plaintiff's entitled to the damages.

9. The occurrence of the accident and the ownership of the ill-fated motor vehicle Registration No. KBY 734T Toyota Hiace were factors which remained undisputed or substantially undisputed.

On the question of liability, the trial court rendered itself thus: -

“According to DW1, the accident occurred because the motor vehicle’s brakes failed and he therefore lost control. He also blames the deceased person who he says jumped from the motor vehicle before it landed on him to the right

.....
.....
.....

The Plaintiff aver that the accident which resulted to the death of the deceased for whose estate they have brought this action, was as a result of the negligence of motor

vehicle Registration No. KBY 734T[sic], in which the deceased was travelling. The driver of the said motor vehicle blamed brake failure. It is the duty of every motor vehicle or vessel to keep their motor vehicles or vessels in good mechanical condition so as to avoid seen and unforeseen danger. The failure by the owner and/ or driver of a motor vehicle to maintain their motor vehicle is in itself negligent conduct. Brakes do not just fail. They fail because the motor vehicle has not been properly maintained. I find that the Defendant was 100% for the occurrence of the accident whether or not the deceased jumped the brakes failed anyway and DW1 as a result lost control of the motor vehicle.”

- 10.** Considering the evidence in its totality and the Appellant’s/ Defendant’s admission through his driver **[DW1]** that the primary cause of the accident was brake failure which led to loss of control of the vehicle, its collision with a motor cycle and eventually overturning and causing fatal injury to the deceased, this court would have no sound reason to interfere with the foregoing finding of the trial court on liability.

11. The condition of the Appellant's vehicle was among the element of negligence specified in the Plaint. The failure to maintain or properly maintain a motor vehicle in order to keep it in good condition so as to avoid any peril on the road which may arise due to its usage thereon is a clear attribute of negligence by omission.

The fact that the vehicle's brakes failed and led to the accident was a clear pointer to the Appellant's negligent omission to maintain his vehicle and keep it in good condition for safe usage on the road, more so considering that the vehicle was for usage as a public service vehicle [matatu].

12. The fact that the deceased jumped out of the vehicle during the accident and subjected himself to aggravated injuries which proved fatal was not a contributing factor to the accident. He was a mere passenger and was not in any way in control of the ill-fated vehicle. If he indeed jumped out of the vehicle impliedly contributing to his injuries, that that could be treated as an impulsive action to save himself from the imminent danger and had nothing to do with causation of the accident.

13. In any event, the evidence that the deceased jumped out of the vehicle came from the Appellant's driver **[DW1]**

only. It was not corroborated by any independent evidence, hence insufficient and unreliable to be acted upon to hold that the deceased jumped out of the vehicle and contributed to his injuries when the vehicle overturned and landed on him. This court must also find and hold that the Defendant was fully liable to the Plaintiffs for the consequences of his negligent acts and/ or omissions through his driver.

14. In the circumstances, the Plaintiffs were entitled to damages from the Defendant under both the Law Reform Act and Fatal Accidents Act in addition to the special damages incurred by the estate of the deceased after the fatal accident.

With regard to damages under the Law Reform Act, the evidence credibly showed that the deceased died a day after the accident while undergoing treatment in the hospital and was in great pain before his demise. The death certificate showed that he was aged forty two [42] years at the time of his death.

15. The trial court awarded general damages in the sum of Kshs. 50,000/- for pain and suffering and Kshs. 100,000/- for loss of expectation of life. This was in the opinion of this court reasonable and adequate compensation in terms of general damages.

With regard to loss of dependency, the trial court rightly applied the global rather than the multiplier approach in

assessing damages under the head for reason that the Plaintiffs failed to provide credible and sufficient evidence to prove the deceased's earning prior to his demise although there was indication that he was a tea farmer cum businessman earning a monthly income of Kshs. 100,000/-.

16. Accordingly, the trial court made an award of Kshs. 2.5 million for loss of dependency which amount cannot be described as having been unreasonable and excessive considering that the evidence showed that the deceased was survived by his widow [First Plaintiff], one son and four daughters who solely depended on him for their welfare and fees for the education of the children. The Second Plaintiff, brother to the deceased, was also depicted as a dependant, but he was not. He did not suffer any monetary loss due to the deceased demise. He was his own man and stated in evidence the loss of his brother denied him a close friend and advisor.

17. At the trial, the Plaintiffs agitated for the application of the multiplier approach based on a dependency ratio of $\frac{2}{3}^{\text{rd}}$, a multiplicand of Kshs. 100,000/- and a multiplier of 18 years and urged the court to award a sum of Kshs. 14,400,000/- for loss of dependency.

The Defendant on his part also agitated for the multiplier approach and suggested a dependency ratio of $\frac{2}{3}^{\text{rd}}$ against

a multiplier of seven years and a multiplicand of Kshs. 6,736/30 being the minimum wage for an unskilled labourer.

18. In this appeal, the Appellant does not seem to disagree with the global approach applied by the trial court, but submitted that the sum of Kshs. 2,500,000/- was excessive. The Respondent, reiterated the position they had taken in the trial court with regard to loss of dependency and urged this court to uphold that position in their favour. Nonetheless, they were of the view that if this court agrees with the trial court with regard to the global approach in the assessment of loss dependency, then the amount of 2,500,000/- ought to be upheld as it is inordinately low [little] to be disturbed.

19. As noted herein above, this court considers the amount of Kshs. 2,500,000/- awarded to the Plaintiffs to be fair, reasonable and adequate. It is neither inordinately low nor excessive and is hereby upheld.

In sum, this appeal is devoid of merit and is hereby dismissed in its entirety.

The impugned judgment of the trial court is hereby affirmed in its totality. The Appellant shall meet the Respondent's costs of the appeal.

Dated and delivered this 11th day of March 2026

**HON. J. R. KARANJAH,
JUDGE**