

REPUBLIC OF KENYA
IN HIGH COURT OF KENYA AT ITEN
CIVIL APPEAL NO. E001 OF 2025

BARNABAS

KIMWATAN

.....**APPELLANT**
VERSUS

JACKSON ODONGO OMUTAMWA

(Suing for and in behalf of the dependants and the estate of)

VICTOR

ODIOLI

ODONGO

(Deceased)

.....**RESPONDENT**

(Being an appeal from the judgement and decree of Hon. Charles Kutwa, Senior Principal Magistrate in Iten Senior Magistrate’s Court Civil Suit No. E033 of 2023 delivered on 31/07/2024)

JUDGMENT

1. This appeal is on both quantum and liability. By a plaint dated 10th June 2019, the Respondents sued the Appellants seeking general damages under both the Law Reform Act and the Fatal Accidents Act, Special damages of Kshs. 69,000/= and costs of the suit plus interest for injuries sustained in a fatal accident.
2. The accident was stated to have occurred on 19th October 2022. It was alleged that the deceased was lawfully a pillion passenger on board of motor cycle registration number KMFB 311X, Boxer, when the Appellant’s driver while in the management and/or control of motor vehicle registration number KCX 069A, Tata Tipper, drove the said motor vehicle so negligently, recklessly and/or carelessly that he caused it to lose control and rammed it onto motor cycle registration number KMFB 311X, Boxer,

thereby causing an accident whereby the deceased was fatally injured and the beneficiaries of his estate wholly blame the Appellant for the accident thereof.

3. The Appellant filed his Statement of Defence dated 19th April 2023, denying the occurrence of the accident. Alternatively, he blamed the deceased and the driver of motor cycle KMFB 311X Boxer for causing and or contributing to the said accident.

4. After trial Judgment was delivered on 31st July 2024 as follows;

Liability.....50:50

Pain and suffering.....Kshs. 10,000/=

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

Loss of dependency.....Kshs. 6,681,408/=

Special damages.....Kshs. 95,000/=

Total award.....Kshs. 6,886,408/=

Plus, costs and interest

5. Aggrieved by the Judgment, the appellant filed a Memorandum of appeal dated 27/08/2024. The appeal raises (5) grounds as follows: -

- 1) That the learned trial Magistrate erred in law and in fact in apportioning 50% liability against the Appellant without considering the circumstances of the case.**
 - 2) That the learned trial Magistrate erred in law and in fact in apportioning liability in the ratio 50%:50% in light of the evidence placed before the Court by both the Appellant and the Respondent which did not prove on a balance of probability negligence against the Appellant herein.**
 - 3) The learned trial Magistrate erred in law in fact by failing to consider the evidence of the Appellant as well as submission thereby arriving at an erroneous finding.**
 - 4) That the learned trial Magistrate erred in law and in fact by relying on extraneous evidence not before the Court thereby arriving an erroneous finding.**
 - 5) That the learned trial Magistrate erred in law and fact by awarding the Respondent an excessive and exorbitant amount for general damages for pain and suffering, loss of expectation of life and loss of dependency in total disregard of the submissions by the parties herein.**
- 6.** The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 15th September 2025 while the Respondent filed submissions dated 11th September 2025.

The Appellant's Submissions

7. Counsel for the Appellant gave a brief background of the case and recounted witness testimonies. On liability, Counsel submitted that in his judgment the trial Magistrate observed that it was not in dispute that an accident occurred between motor vehicle KCX 069A and the deceased who died as a result of the accident. That in apportioning liability the trial Magistrate noted the following; that there was no eye witness present at the scene of the accident save for DW1 who was the investigator and that his evidence was not of much help because in his evidence in chief he stated that the driver of the lorry was to blame and in cross-examination he now defused the blame by stating that he was not the investigation officer and he had no police file from which he could support his claims.
8. Counsel faulted the trial Magistrate for apportioning liability between the Appellant and the Respondent and urged that the facts on record are that the police officer had the police file in Court and he read the circumstances of the accident as per the police file and the OB extract which were that both the motor vehicle and motor cycle were ascending uphill and the rider of the motor cycle lost control and rammed into the rear tyres of the motor vehicle and that the deceased landed on the tarmac and sustained fatal injuries. Counsel argued that there is nothing to show that the Appellant's motor vehicle ran over the deceased with its tyres. Counsel added that the police officer's evidence is corroborated that of DW1.
9. Counsel further faulted the trial Magistrate for relying on extraneous circumstances in apportioning liability between the Appellant and the Respondents. Counsel urged that there was no proof of negligence against

the Appellant and that the trial Magistrate ought to have dismissed the case alleged against him. Counsel argued that the Respondent alleged that the Appellant's motor vehicle lost control and rammed into the motor cycle causing the deceased fatal injuries but no evidence was adduced to support this claim. Counsel added that (PW5), the police officer and DW1 testified to the effect that the rider of the motor cycle was the one who rammed into the rear tyres of the motor vehicle. It was Counsel's contention that the trial Court ought to have taken that into consideration and dismissed the suit for lack of proof. Counsel submitted that it is trite law that he who alleges must prove. Counsel added that the weight of the evidence before the Magistrate's Court was not sufficient to prove negligence against the Appellant and that the suit ought to be dismissed.

10. Relying on the doctrine of *res ipsa loquitor*, Counsel submitted that from the facts and the evidence before this Court, the accident could not have occurred in the manner it did but for the negligence of the rider of the motor cycle who was over speeding and as a result of which he lost control and rammed in to the rear tyres of the motor vehicle and as result of the impact the passenger sustained fatal injuries. Counsel relied on the case of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** in regard to the doctrine of *res ipsa loquitor*.

11. Counsel urged that the Respondents did not prove their claim of negligence on a balance of probability. Counsel submitted that the circumstances of the accident as per the police abstract, Occurrence Book extract and DW infer negligence on the part of the motor cycle. Counsel maintained that the Appellant's driver was not negligent in any way and that the Appellant was

thus wrongfully sued/ enjoined to thus suit. Counsel thus urged the Court to find that the rider of the motor cycle 100% for the accident.

12. On loss of dependency, Counsel submitted that the Respondent pleaded that the deceased was 35 years old at the time of the accident and that he was a secondary teacher with a monthly salary of Kshs. 76,424/=. Counsel further submitted that the deceased was survived by his two parents and prayed that the Court adopts the dependency ration of 1/3. Counsel urged the Court to adopt a multiplier of 17 years, he cited the case of **Elizabeth Musondi and Another vs. Easy Coach Ltd and Another [2013] eKLR**. Counsel thus submitted that an award of Kshs. 5,196,832/= would be sufficient under this heading computed as below:

$$76,424 \times 12 \times 17 \times 1/3 = \text{Kshs. } 5,196,832/=$$

Respondent's Submissions

13. In support of the trial Court's finding on liability, Counsel for the Respondent submitted that the trial Court's findings on a 50:50 liability was fair considering the circumstances that surrounded the occurrence of the accident and the same leading to the death of the Plaintiff as a result of the accident that occurred on 19th October 2022. Counsel maintained that the Respondent proved negligence and liability on the part of the Appellant.

14. Counsel maintained that moreover, there was no sufficient evidence produced in Court by the Appellant to rebut the evidence adduced in court by the Respondent herein and therefore the finding by the trial Court on the issue of liability. Counsel relied on the holding in the case of **Kennedy Muteti Musyoka vs. Abednego Mbole [2021] eKLR**. Counsel argued that

the deceased died as a result of high impact collision. Counsel argued that the Appellant did not take any steps to prevent the collision and did not have due regard to other road users and therefore knocked the Respondent.

15. Counsel also relied on the holding in the case of **Khambi and another vs. Mahithi and another [1968] EA 70**. Counsel thus urged in the instant case, the trial Magistrate properly considered the circumstances giving rise to the material accident in determining the issue of liability to warrant 50:50 contributory negligence between the Appellant and the Respondent because each one of them was not careful to prevent the occurrence of the accident in which the deceased sustained fatal injuries.

16. In regard to general damages for pain and suffering, loss of expectation of life and loss of dependency, Counsel submitted that the trial Court was fair and reasonable and thus urged the Court to maintain the holding by the trial Court. He cited the case of **Njeru (Suing as the personal representative of the Estate of Kennedy Mukundi Njiru) v Machikine Holdings Limited [2023] KEHC 585 (KLR)**

17. As regard, pain and suffering, Counsel submitted that the Appellant challenged the quantum awarded by the trial Court. Counsel observed that the Appellant submitted that the award of Kshs. 10,000/= under this heading was excessive but did not submit under this head and maintained that the award of Kshs. 10,000/= is fair and reasonable. He relied on the case of **Harjeet Singh Pandal v Hellen Aketch Okudho [2018] eKLR**.

18. On loss of expectation of life, Counsel submitted that the deceased was 35 years and was in good health. Counsel observed that the Appellant submitted

Kshs. 50,000/= under this heading but the Court referred to a number of authorities where under the same circumstances the Court awarded Kshs. 100,000/=. Counsel urged Kshs. 100,000 for loss of expectation of life was fair and just. Counsel relied on the case of **Ruto vs. Chelagat & Another (Civil Appeal No. E101 of 2021)**

19. On the issue of loss of dependency, Counsel submitted that the Plaintiff died at the age of 35 as a secondary teacher and was earning a salary of Kshs. 76,424/= and would have retired at the age of 65 years. He cited the case of **James Njiiri & 2 Other vs. FPU & another [2019] eKLR**. Counsel observed that the Appellant had submitted an award of Kshs. 5,196,832/= under this heading whereas the trial Court had used a multiplier of 17 years and the ratio of 1/3 as follows:

$$72,424 \times 12 \times 23 \times 1/3 = 6,681,408/=.$$

20. Counsel maintained that the award on loss of dependency as Kshs. 6,681,408/= was fair and just. He cited the case of **Kioko Peter vs. Beatrice Keli Mbuvi [136/2019], Civil Appeal No.136/2019**.

Determination

21. I have considered the Memorandum of Appeal and the grounds therein raised, the trial court record, the impugned judgment and the submissions by Counsel.

22. Since this is a 1st Appeal, the guidance given by the decision of the court in the case **Selle & Another vs. Associated Motor Boat Co Ltd & Others [1968] EA 123** is relevant. It was therein held that the duty of the 1st

Appellate court is to evaluate and/or assess the evidence on record as follows: -

...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 make due allowance in this respect..."

23. On the issue of liability that the trial court apportioned at the ratio of 50:50. The facts speak for themselves. It is not in dispute that an accident did occur on 19th October 2022 involving the Appellant's motor vehicle registration number KCX 069A, Tata Tipper, driven by the Appellant's driver and a motor cycle registration number KMFB 311X, Boxer, upon which the deceased was riding as a pillion passenger. It is also not in dispute that the deceased sustained fatal injuries as a result of this accident.
24. In re-evaluating the evidence, the first thing of note is that neither the said driver of the lorry, nor the driver of the motorcycle testified in court in a bid to give their version of how the accident occurred. Further, none of the witnesses who testified, not on behalf of the Appellant, nor on behalf of the Respondent witnessed the accident occur.

25. Even the Police Officer who testified as PW5 and who produced the OB and the Police Abstract on behalf of the investigating Officer did not witness the occurrence of the accident. Indeed, even as he told the court that the investigations into how the accident occurred is yet to be concluded, the record reflects that he blamed the motorcycle driver in his evidence in chief and then changed his mind in cross examination.

26. DW1 who was hired by the Appellant as a Private Investigator testified that he went to the scene one month after the accident had already happened and he got the information that he used to prepare the Report from the driver of the lorry, who would naturally of course give him the version of how the accident occurred that would favor him, and from the very same police officers who did not witness the occurrence of the accident.

27. The above being the case then, by dint of the fact that the circumstances surrounding the occurrence of the accident are as herein summarized, I find that the Learned Trial Magistrate did not at all err and/or misdirect himself in arriving at the apportionment on liability that he did. This is because this was the fairest way in reaching a determination where there is no clear, coherent and credible explanation at all on how the accident occurred, so as to assist the court in determining who bears the greater responsibility for causing an accident which it is common ground occurred. For this reason, I uphold the apportionment of liability at 50:50 as held by the trial court

28. On assessment of damages, this is the discretion of the trial Court and this Court cannot interfere with the exercise of the discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages.

See Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another as follows: -

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

29. From the submissions made on behalf of the Appellant, I note that the only award that Counsel has submitted on is on loss of dependency by seeking that the multiplier be reduced to 17 years. In this regard, the court will presume that the damages under Pain and Suffering and under Loss of Expectation of life are not contested and the same as awarded by the trial court are accordingly upheld.
30. On the Loss of Dependency, I also note that the dependency ratio of 1/3 and the salary applied by the trial court are not contested. I note however that the trial court placed the retirement age of a teacher which he then used to calculate the multiplier based on the age of the deceased at the time of death at 65 years. The question then is whether this court should interfere with this award and if so why.
31. The answer is in the affirmative and the reason is simple. The retirement age of all public servants in Kenya including teachers is 60 and not 65 years. This being the case, I find that the court misdirected itself in that regard. For

this reason, this court then can and will proceed to interfere with the award under this head but only with respect to the multiplier which now comes down to 25 the deceased having died at the age of 35 years.

32. Accordingly, therefore, the court now hereby calculates the award under Loss of Dependency as follows: -

Kshs. 76,424/= x 12months x 25 years' x 1/3 = Kshs.7, 642,400/=

33. Lastly, the court notes that the award for Special Damages at Kshs. 95,000/= was not challenged.

34. In the end, the Appellant's Appeal is partly allowed on the trial court's award of damages under Loss of Dependency and judgment is now hereby entered as follows;

- (i) Liability 50:50**
- (ii) Pain and Suffering Kshs. 10, 000/=**
- (iii) Loss of Expectation of Life Kshs. 100, 000/=**
- (iv) Loss of Dependency Ks. 7, 642, 400/=**
- (v) Total Kshs. 7,752400/=**
- (vi) Less 50% liability Kshs. 3 876,200/=**
- (vii) Special damages Kshs. 95,000/=**
- (viii) Costs of the Appeal are to be borne by the Appellant**

Read dated and Signed at ELDORET on 26th February 2026

E. OMINDE

JUDGE

