

AREPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. E306 OF 2024

CHRISTOPHER MURUABE RONGAE &

ALICE MORAA MORWABE (Suing as the legal representative of the deceased

RICHARD OTARA).....APPELLANTS

VERSUS

BASHAEB BROTHERS LTD.....RESPONDENT

(Being an appeal against the Judgment and decree of Hon. Nyariki (SRM) delivered on 10th September 2024 in Mombasa Chief Magistrate’s Court Civil Suit No. 265 of 2022, Christopher Muruabe Rongae & Alice Moraa Morwabe (Suing as the legal representative of the deceased Richard Otara Morwabe) v Bashaeb Brothers Limited)

JUDGMENT

1. The background of the appeal is a suit filed in the trial court through the Plaintiff dated 9th February 2022 where the Plaintiffs averred that at all material times to the suit, the Defendant was the registered and/or beneficial owner of motor

vehicle registration number KBS 931A/ZD 8730 Mercedes Benz Axor which was being driven by their driver, employee, agent or person authorized by them.

2. The Plaintiffs averred that on 28th July 2020, Richard Otara Morwabe (deceased) was a rider onboard motor cycle registration number KMDK 639S along old Mombasa – Nairobi road when the motor vehicle registration number KBS 931A/ZD 8730 Mercedes Benz Axor lost control and hit the deceased from behind and as a consequence, the said Richard Otara Morwabe (deceased) died on the spot.
3. The Plaintiffs averred that the deceased prior to his death was aged 44 years earning approximately Kshs. 25,000 per month and that as a result of his death, he left behind his father, mother, son, and daughter.
4. The Plaintiffs prayed for judgment against the Defendant for: -
 - (a) *General damages under the Fatal Accidents Act and the Law Reform Act*
 - (b) *Special damages of Kshs. 95,000*
 - (c) *Costs of the suit*
 - (d) *Interest on (a), (b) and (c) at court rates.*
5. The Defendant entered appearance and filed a Statement of Defence dated 24th August 2022 where they denied allegations in the Plaint save for what was expressly admitted.

6. The suit was heard in the trial court where the Plaintiffs' two witnesses tendered their evidence. The Defendant did not call any witnesses and they closed their case. The court indicated that since the Plaintiffs were not present in court to prosecute their case, it was consequently closed. The court gave directions for parties to file their submissions. Judgment was entered on 10th September 2024 where the court dismissed the suit with no costs.
7. Being dissatisfied, the Appellants appealed the Judgment and decree through the Memorandum of Appeal dated 16th September 2024 on the following grounds: -
 - i. *That the learned magistrate erred in law and in fact in failing to analyse the evidence on record and hold that the plaintiffs had proved their case on liability and causation of the accident on a balance of probabilities as required by the law.*
 - ii. *That the learned magistrate erred in law and in fact in basing his determination of liability on the contents of the police OB report whereas the matter was pending under investigations.*
 - iii. *That the learned magistrate erred in law and in fact in placing a higher standard of proof on the plaintiff than the standard required on a balance of probabilities.*

iv. That the learned magistrate erred in law and in fact in holding that the deceased joined the highway from the feeder road when there was no direct eye witness evidence to that effect.

8. The Appellants prayed for orders that the appeal be allowed, that this court do set aside the decree dismissing the Plaintiffs' suit and enter judgment for the Plaintiffs with costs and interest, that this court do assess damages payable to the Plaintiffs, and award costs of the appeal herein and the suit in the subordinate court.
9. The appeal was canvassed by way of written submissions. The Appellants in their submissions dated 23rd April 2025 argued that liability was wrongly determined by the trial court. Relying on Section 63 of the Evidence Act, they contended that only direct evidence should be considered, and that PW3 was the sole eyewitness who testified that the motorcycle was ahead of the lorry and swerved while avoiding an oncoming vehicle, leading to the accident. They maintained that evidence from PW1 and PW4 supported that the accident occurred ahead of a junction, and that the motorcycle and trailer were moving in the same direction, which was not contradicted.
10. The Appellants further argued that DW1's testimony was unreliable since he only saw the deceased after the accident and could not confirm where the deceased came from, making his claim that the deceased emerged from a feeder road

speculative. They also challenged reliance on the Occurrence Book (OB), noting that it was based on the driver's report, yet the driver admitted he did not see the deceased before the collision.

11. Citing the holdings in *PAS v George Onyango Orodi* [2020] KEHC 5546 (KLR), *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 and *Multiple Hauliers (E.A) Ltd v Justus Mutua Malundu and 2 others* (2017) eKLR, the Appellants submitted that the trial court failed to properly evaluate the evidence, particularly the eyewitness account, and misapplied the standard of proof on a balance of probabilities. They emphasized that drivers have a duty to remain vigilant to avoid harm to other road users.
12. On the issue of quantum, the Appellants submitted on pain and suffering by proposing an award of Kshs. 50,000 by relying on the case of Eldoret HCCA No. 19 of 2004, *Barnabas Bwambok v Vitalis Odiwuor* where Kshs. 50,000 was awarded and the case of *Sukari Industries Limited v Clyde Machimbo Juma* (2016) eKLR.
13. On loss of expectation of life, the Appellants submitted that the deceased was aged 44 years and at the prime of his life but his life was cut short by the accident. The Appellants proposed an award of Kshs. 200,000 by relying on the holding in Nakuru HCCC No. 438 of 1996, *Joseph Waithangi v Peter Gitau Chege* where an award of Kshs. 120,000 was made, and *Zachary Achachi Nyakundi v Kimilili*

Hauliers Limited & another (2013) eKLR where the court awarded Kshs. 150,000. An award of Kshs. 150,000 is reasonable.

14. On loss of dependency, the Appellants argued that the deceased was aged 44 years at the time of the accident, and was employed by Security Group Africa (SGS) as confirmed by PW4 who provided his June 2019 payslip. That the deceased's gross salary was Kshs. 36,467.30 from which Kshs. 27,498 was deducted leaving a net salary of Kshs. 8,967.19.
15. That most of the deductions were in the nature of savings and advances which were part of his actual income. That the only deduction on the gross salary ought to be PAYE of Kshs. 4,076.07 and NHIF of Kshs. 950, which position was supported by the holding of the court in *Grace Wairimu Kariuki v AG*, Nakuru HCCC 244 of 2005. The Appellants proposed that this court works with an actual income of Kshs. 31,441.23.
16. The Appellants submitted that with regard to the multiplier, the deceased would have worked up to the age of 60 years. Therefore, a multiplier of 16 would be appropriate. That the deceased also had young children and a dependency ratio of 2/3 would be reasonable.
17. The Appellants supported their position by citing the cases of *Grace Wairimu Kariuki v AG*, Nakuru HCCC 244 of 2005 where the court awarded a multiplier of 18 for the deceased aged 42 years and a dependency ratio of 2/3, and *Mr.*

Sarvjit Kaur Rayet v M. R. Construction (K) Limited & another, Mombasa HCCC 80 of 1997 where the court awarded a multiplier of 10 and a dependency ratio of 2/3 where the deceased was aged 52.

18. The Appellants submitted that the award under loss of dependency therefore translates to Kshs. $31,441.30 \times \frac{2}{3} \times 12 \times 16 =$ Kshs. 4,024,486.40.
19. The Appellants further prayed for a sum of Kshs. 70,000 for funeral expenses though no receipts were produced. They relied on the case of Kisumu Civil Appeal No. 167 of 2002, *Jacob Ayiga Maruja & another v Simeon Obayo* where the Court of Appeal upheld an award of Kshs. 60,000 as reasonable funeral expenses.
20. In conclusion, the Appellants urged the court to award as follows: -

Pain & suffering Kshs. 50,000

Loss of expectation of life Kshs. 200,000

Loss of dependency Kshs. 4,024,486.40

Funeral expenses Kshs. 70,000

TOTAL **Kshs. 4,024,486.40**

21. The Respondent in their submissions dated 23rd June 2025 argued that liability was not proved against its driver. They contended that PW1, a police officer, was not the investigating officer and merely relayed findings without producing the police file or OB, thus weakening his testimony. The only document produced,

the police abstract, did not assign blame, and no criminal charges were brought against the driver.

22. The Respondent maintained that the deceased, who was emerging from a feeder road while riding a motorcycle, bore a higher duty of care to stop and ensure the road was clear. They argued that the driver attempted to avoid the accident, and that it was the deceased who rode into the trailer. Relying on *Franke Ray v Paul M. Kalama & 3 others*, Mombasa HCCC No. 579 of 1989 and *Shariff Salim & Simbarite Limited v Malundu Kikava*, Mombasa Civil Appeal No. 15 of 1989, they emphasized that a person joining a main road from a feeder road is generally more blameworthy in such circumstances.
23. The Respondent argued that the alleged eyewitness was unreliable, as he was not present at the scene and never recorded a statement with the police. They further contended that although the Plaintiff filed an additional witness statement, it contradicted the police version of events. The absence of key evidence, such as a sketch plan, was said to weaken the Plaintiff's case, as it would have clarified the positions of the vehicles. The Respondent maintained that no prima facie case of negligence was established and that the burden of proof should not shift to them.
24. Citing the case of *Fatuma Katwa Martin v Shamash Brothers Limited*, Mombasa HCCC No. 536 of 1996, they emphasized that not every road accident is attributable to a driver's fault. They also questioned the Plaintiff's account by

arguing that if the motorcycle had been ahead of the trailer, the point of impact and the deceased's final position would have been different, suggesting instead that the deceased collided with the rear of the vehicle.

Analysis

25. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in ***Selle v Associated Motor Boat Co. (1968) E.A 123*** as follows: -

“... 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 ...”

26. I have considered the Record of Appeal dated 14th October 2024 and submissions by the parties. The issues for determination are: -

(a) Whether the trial court erred in its finding on liability

(b) Whether the trial court misapprehended the standard of proof

(c) Whether the Appellants proved their case on a balance of probabilities

(d) Whether this court should assess and award damages

27. It is not disputed that the accident occurred and that the deceased died as a result. The only issue is who was to blame.

28. The trial court placed heavy reliance on the contents of the Occurrence Book (OB) and concluded that the deceased emerged from a feeder road and was solely to blame. However, a careful re-evaluation of the evidence reveals otherwise. PW3, who testified as an eye witness, stated that the deceased was ahead of the lorry, the lorry was being driven at high speed and that in attempting to avoid an oncoming vehicle, the lorry veered and hit the deceased.

29. This evidence constituted direct evidence within the meaning of **Section 63** of the **Evidence Act** which provides:

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, “direct evidence”

means: -

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

30. In contrast, the Respondent's driver (DW1) admitted that he only became aware of the accident after hearing a sound and did not see how the accident occurred. His evidence as to how the deceased joined the road was therefore speculative. Further, the reliance by the trial court on the OB extract without calling the investigating officer or producing a sketch plan was erroneous. Such evidence is secondary and cannot override direct testimony.

31. The Court of Appeal in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLR 526 reiterated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party

who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

32. On the one hand, a driver has a duty at all times to keep a proper lookout and exercise reasonable care to avoid causing harm to other road users. Even assuming that the deceased was joining the road, the Respondent’s driver still owed a duty of care to avoid the collision. The evidence of speeding and loss of control points to negligence on the part of the driver. On the other hand, a person joining a main road must exercise caution.
33. In *Stapley v Gypsum Mines Ltd* [1953] AC 663, the court held that: -

“Negligence depends on the failure to take reasonable care, and where both parties fail in that regard, damages must be apportioned accordingly.”
34. Upon re-evaluation, I find that both the deceased and the Respondent’s driver contributed to the occurrence of the accident. This court therefore apportions liability at the ratio of 50:50.
35. Having found liability, this court is obligated to assess damages.

36. For pain and suffering, the deceased died on the spot. Courts have consistently awarded modest sums in such circumstances. In *Sukari Industries Limited v Clyde Machimbo Juma* [2016] KEHC 8728 (KLR), the court held that: -

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”

37. In the circumstances, an award of Kshs. 50,000 would be sufficient.

38. On loss of expectation of life, conventional awards range between Kshs. 100,000 to Kshs. 200,000. In *Muita v Njoroge & another (Suing as the Administrators of the Estate of George Njoroge Mumbi - Deceased)* [2024] KEHC 6305 (KLR), the court affirmed Kshs 100,000 as a conventional sum, while in *Agnes Mutinda Ndolo & another v Mboya Wambua & 2 others* [2017] KEHC 2990 (KLR), Kshs 150,000 was awarded for a similar claim. This court awards Kshs. 150,000.

39. On loss of dependency, the multiplicand, multiplier and dependency ratio must be established;

Monthly income – Kshs. 31,441.23

Multiplier – 16 years

Dependency ratio – 2/3

Calculation: 31,441.23 x 12 x 16 x 2/3 =4,024,486.40

40. On funeral expenses, even in the absence of receipts, courts may award reasonable sums. In *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] KECA 202 (KLR), the Court of Appeal upheld such an award. This court therefore awards Kshs. 50,000.

41. The total damages are as follows:

<i>Funeral expenses</i>	<i>Kshs. 50,000</i>
<i>Pain and suffering</i>	<i>Kshs. 50,000</i>
<i>Loss of expectation of life</i>	<i>Kshs. 150,000</i>
<i>Loss of dependency</i>	<i><u>Kshs. 4,024,486.40</u></i>
<i>Total</i>	<i>Kshs. 4,274,486.4</i>

Less 50% contribution = Kshs. 2,137,243.2

Determination

42. Accordingly, this court makes the following orders: -

(a) The appeal is merited and allowed on the following terms;

- i. Liability on 50:50 basis***
- ii. The judgment of the trial court dismissing the suit is hereby set aside and substituted with Judgment in favour of the Appellants as paragraph 41 above, for a total sum of Kshs.4,274,486.40 subject to 50% liability.***
- iii. The sums shall attract interest at court rates from the date of judgment of the lower court***

(b) Each party to bear its own costs.

Dated and delivered virtually at Mombasa this 19th day of March, 2026

.....

HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Mr. Nyabena Advocate for the Appellants

Mr. Shikely Advocate for the Respondents

Ms. Getrude, Court Assistant