

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
CIVIL MISC APPLICATION NO. E415 OF 2025

**RONGAI WORKSHOP AND TRANSPORT
LTD.....APPELLANT**

-VERSUS-

**MARTHA CHERONO TOWETT.....1ST
RESPONDENT**

**KIPLANGAT KORIRI GEOFFREY 2ND
DEFENDANT**

JUDGMENT

1. This is an appeal from the lower Court with key issues being the award of quantum and apportionment of liability. The Respondent filed a cross appeal which relates to the same issue of liability and quantum and the parties proceeded to file submissions. This being a fatal road traffic accident, this court shall evaluate and reevaluate the proceedings of the lower court so as to determine if indeed there was fault in the finding of the lower court. The deceased who was riding a motorcycle died after allegedly being hit by a trailer which was being driven by the defendant and the lower court apportioned liability at 50:50 before proceeding to determine quantum. There is no dispute as to whether the accident

occurred or not nor the fate of the motorcycle rider (deceased). I shall also rely on submissions and authorities.

2. Liability

There are two key witnesses who are important in establishing apportionment of liability- the investigating officer and the driver of the motor vehicle. The investigating officer said that he recommended that the driver of the trailer be charged with causing death by dangerous driving. He said that upon investigation he established that the driver of the trailer was over speeding when it hit the rider. Both the motor cycle and the trailer were heading towards the same directions. The investigating officers at the same time during cross examination said that the matter was “still pending investigations” yet he had recommended that the driver of the trailer be charged, this perhaps, appears to be the norm for most investigators of traffic matters. He went ahead to say that that the impact was not consistent with what was in the OB although the OB was not produced as an exhibit. On the other hand, the, the driver of the trailer testified that the rider hit his left 5th rear wheel and fell off on his left side while they were heading to the same direction. These two explanations are different and it is upon this court to decide which is to be believed. The driver is the one who reported the accident to police causing the entry of

the OB that the investigating officer described as not consistent with the account of the accident. It is in very rare cases that a person would incriminate himself in cases like this because it would ultimately lead to instant arrest and being charged with a serious traffic offence of causing death by dangerous driving and so this court must subject the driver's evidence to a strong test of credibility. In his testimony the driver said that the motor cycle obstructed him while he was in lawful lane. Pressed on what he meant by obstruction, he admitted that he could not tell how it happened. This admission raises an alarm of credibility. The normal meaning of obstruction in traffic rules is an instant where motor vehicle blocks another from moving forward and if we are to interpret it in the context used by the DW1, the trailer driver, it would certainly mean that the motor cycle was in front of it. This will significantly change the earlier testimony that the motor cycle hit his left rear Tyres. Obstruction can only be seen in real time and it is difficult to imagine how DW1 could have seen the deceased coming to hit his left rear tyre because the accident was instantaneous. The body of the deceased was found in the outer lane meaning that it was thrown a distance from where the trailer was. The question therefore is; would the body of the deceased be thrown that distance if he is the one who rammed on the trailer or it is possible that the trailer rammed the deceased causing him to be thrown far away?

This question lingers and cannot be answered adequately. This Court takes judicial notice that the dead tell no tales. They can only speak through witnesses and it is a matter of fact that the said witnesses cannot match what the deceased would have said. The trial magistrate opted to apportion liability on 50:50 since there was no clear evidence of who was responsible for the accident. The investigation officer is generally supposed to be an independent witness but the defendant testimony must also be regarded because he was an eye witness. There is no reason given as to why the investigation officer would fabricate the evidence against the defendant, a person not known to him (at least taking into account the evidence on record) and at the same time the court cannot shun the evidence of an eye witness even though he was a party to the accident. The magistrate was correct in analyzing issues that ought to have been brought out so as to arrive to a proper determination. For example, the driver of the trailer who was involved in the accident did not produce inspection report of the trailer to ascertain if it did not have pre accident defects, photos to show that the trailer was hit from the rear left side and the motor cycle. He is the only eye witness who could have taken more evidence. On the other side the investigation officer who disregarded the report made by the driver in the OB did not produce sketch maps or call eye witnesses who made him form the opinion that the

defendant was liable. The discrepancy in the driver's testimony appears to be a silent voice of the deceased that has been one loud enough to tilt the balance. It appears that he fumbled in his evidence by giving contradictory account of the accident and this works against him. I shall reverse the award of liability and replace it with 70:30 in favor of the Plaintiff

3. Quantum.

Both the Appellant and the respondent have raised concern on the lower Court's award under this limb and so I shall consider each award with a view to determining whether there was fault at the lower court or not.

a) Pain and suffering;

The deceased died instantly. The award of Ksh 50000 by the trial court was reasonable

b) Loss of expectation of life;

The award of Ksh 100000 is generally accepted and so I will not interfere

c) Loss of dependency;

- 4.** The Respondent produced a letter from Jubilee Hardware showing that the deceased was employed as a sales executive with a salary of Ksh 38,000. The letterhead has details of jubilee hardware such as the address and the telephone number and has been signed. This letter was

produced as an exhibit and was not subjected to cross examination. The Appellant did not apply to have the maker of the letter called for purposes of cross examination or production as an exhibit during pretrial and even during hearing. This therefore means that the contents of the letter were not in dispute. The Court is bound to rely on this letter unless for exceptional circumstances that may compel it to disregard it. There is no standard required of further prove but the courts are left with discretion to either rely on it or to reject it and if the court chooses to reject it, there must be a cogent reason since the letter is an exhibit that has been admitted by both parties by the very reason that it was produced unchallenged. This discretion must be exercised cautiously because the decision of a court to reject such a letter is tantamount to expunging a duly produced exhibit.

- 5.** The contention that the accident occurred on a Friday at 430Pm while the deceased was riding a Boda boda yet he was expected to work does not hold much weight because employees are not always at work because of many reasons such as being send to perform work related duties, taking off to attend to pressing issues and so on and so forth, and besides the deceased's job description was that of a sales executives and part of his duties was marketing. The deceased was the only one riding the motorcycle. If there was a passenger, a strong case that the deceased was a boda boda operator might have gained some weight albeit

small. A pillion passenger would then have confirmed (if he had survived the accident) that he was indeed a passenger. However, this may not have been fully the case because boda boda riders cannot have passengers at all times. The death certificate indicate that the deceased was boda boda rider. Death certificate serve the purpose of confirming death and circumstances of death and not employment. The information that the deceased was a boda boda rider is based on what a third party said and so it is treated as secondary or descriptive evidence. The said third party has not been called to testify. PW1 is the mother of the deceased. She said that the deceased was a boda boda rider after producing a letter of employment. The fact that the deceased was employed does not preclude him from riding a boda boda and besides the accident occurred while he was riding boda boda alone.

- 6.** This Court takes judicial notice that most employees in Kenya today ride boda boda to and from their workplace and others supplement their pay by riding boda boda. The onset of the above is that there was no reason to disregard a duly produced letter of employment which was not subject to cross examination and the Court was not correct in shunning a documentary evidence.
- 7.** It is therefore my finding that the trial magistrate ought to have used the letter in computing loss of income. The court

as a neutral entity must confine itself to the evidence on record and should not deviate from this rule unless there are exceptional circumstances. The amount that the deceased is said to have earned cannot be said to be excessive to warrant suspicion by the Court. There was no reason for the trial magistrate to doubt whether the deceased was still employed by Jubilee hardware unless there was a doubt raised by the defense which is not the case here. If the Court had doubts, there is a discretion of summoning the author of the letter that could be exercised suo moto. The correct multiplicand would have been Ksh 38,000.

8. The deceased was 21 years old at the time of his death and was supporting his mother since he was unmarried. The normal retirement age is around 60 years for an employment of this caliber because it does not entail rigorous work. Due to vicissitudes of life, I shall award the deceased a multiplier of 39 years and a dependency ration of 1/3 as he would have used a large portion of his earnings for himself. This therefore means;

d) Loss of dependency is Ksh; 5,320,000

e) On specials

The trial magistrate was correct in the award as it is based on the receipts produced. The rest of the finding by the magistrate on costs, interest shall remain

undisturbed. The Respondent shall have costs of this appeal

DATED DELIVERED VIRTUALLY, AND SIGNED ON THIS 13TH DAY OF APRIL 2026.

**L. P. KASSAN
JUDGE**

ORIGINAL