

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CIVIL APPEAL NO. E046 OF 2024
NYAYO TEA ZONE DEVELOPMENT
CORPORATION.....APPELLANT

-VERSUS-

ROSEMARY MUTHONI WANGARI.....1ST
RESPONDENT

NANCY WAMBUI THUMI.....2ND
RESPONDENT

JUDGEMENT

Background of the Appeal

1. Before this Court is an appeal arising from the judgment and decree of the Chief Magistrate’s Court at Naivasha in Civil Case No. E259 of 2019, delivered by Honorable E. Cherop on the 23rd of April 2024. The genesis of this dispute is a fatal road traffic accident that occurred on the 03/09/2018, at approximately 9:30 a.m. at the Marula area along the Naivasha-Nakuru Highway. The accident involved a motor vehicle of the Isuzu D-Max make, registration number KCK 978U, which at the material time was being driven by Sylvia Chepkemoi, an employee of the Appellant. The collision also involved a motorcycle of the Ranger make, registration number KMDJ 322N, which was being ridden by the deceased, Joseph Mwaniki.
2. At the time of the collision, the deceased was transporting two pillion passengers: Moses Mwangi Kiahura (PW2) and another individual who, tragically, also succumbed to injuries sustained in the accident. The Respondents acting as the legal representatives of the estate of the late

Joseph Mwaniki, initiated proceedings in the trial court seeking various heads of damages under the Fatal Accidents Act and the Law Reform Act alongside special damages for funeral and legal expenses.

3. At the trial court, the Appellant initially failed to enter an appearance or file a defense within the stipulated timelines, leading to the entry of an interlocutory judgment on the 12th of June 2019. However, by consent of the parties dated the 26th of June 2019, the interlocutory judgment was set aside, and the Appellant was permitted to file a Statement of Defense, which it did on the 20th of June 2019. In their defense, the Appellant generally denied negligence and ownership of the vehicle, asserting that the accident, if it occurred, was caused by the sole or contributory negligence of the deceased rider.
4. Following a full trial, the learned trial magistrate delivered a judgment finding the Appellant 90% liable for the accident and apportioning 10% contributory liability to the deceased for speeding. The court awarded various sums for pain and suffering, loss of expectation of life, and loss of dependency, totalling a net award of Kshs. 3,061,191.80.

The Appeal

5. The Appellant was dissatisfied with both the finding of liability and the quantum of damages and lodged this appeal vide Memorandum of Appeal dated the 2nd of May 2024, challenging the entirety of the judgment.
6. The primary contention is that the trial magistrate erred in law and fact by holding the Appellant 90% liable for the accident, which the Appellant argues is against the weight of the evidence on record. The Appellant maintains that the Respondents failed to prove their case on a balance of probabilities, particularly regarding the particulars of negligence attributed to the driver. The Appellant further faults the court for failing to dismiss the case entirely, given that the deceased was found to have been speeding. The trial court's award on quantum is also faulted.

7. On the issue of quantum, the Appellant raises several grievances. It challenges the award of Kshs. 30,000 for pain and suffering on the grounds that the deceased died instantly on the spot, precluding any claim for prolonged suffering. The Appellant also contests the award of special damages, arguing they were neither specifically pleaded nor strictly proved as required by law. Perhaps most significantly, the Appellant disputes the mathematical basis of the loss of dependency award, specifically the use of a multiplicand of Kshs. 13,005.75 without proof of income and the adoption of a 2/3 dependency ratio without proof of actual dependency.

Summary of the Respondent's case

8. The Respondents' case was predicated on the assertion that the Appellant's driver, Sylvia Chepkemoi, was the sole architect of the tragedy. They alleged in their Pleint that the driver was speeding and driving without due care and attention. Specifically, they claimed that the Isuzu D-Max attempted to overtake another vehicle and in the process swerved into the lane of the oncoming motorcycle, causing a head-on collision.
9. To support this claim, the Respondents called Moses Mwangi Kiahura (PW2), a surviving pillion passenger who was on the motorcycle at the time of the impact. The witness testified that they were traveling from Naivasha toward Nakuru when the Appellant's vehicle, coming from the opposite direction, Nakuru toward Naivasha, suddenly emerged from its lane while overtaking and struck them. The Respondents also relied on the testimony of PC Rodgers Wafula (PW3), who, while not the investigating officer, provided the police abstract and confirmed that the official police investigation blamed the Appellant's driver for negligent overtaking.
10. Regarding quantum, the Respondents presented evidence through PW1, the deceased's widow who testified that her husband was a 28-year-

old mason earning approximately Kshs. 30,000 per month, providing support for her, their two children, and the deceased's mother. They provided receipts for funeral expenses, which were ultimately used by the trial court to assess special damages.

The Appellant's Case

11. The Appellant's case was built on the defense that the deceased rider was negligent and the driver of the motor vehicle was entirely blameless. The Appellant denied negligence and contended that the motorcycle was being driven at a high speed and suddenly turned into the driver's lane while attempting to cross the highway or join a feeder road.
12. The Appellant's driver, Sylvia Chepkemoi (DW2), testified that visibility was clear and she was maintaining a speed of 60 km/h in her correct lane. She stated that the motorcycle suddenly turned from the right to the left side and struck her vehicle on the front left side. The Appellant further emphasized that the motorcycle was overloaded with three people, which compromised the rider's ability to control the vehicle, especially given the alleged worn-out state of the tires.
13. The Appellant also relied on procedural and criminal outcomes. They produced evidence from the traffic case (Traffic Case No. 3143 of 2018) where the driver was acquitted of all charges related to the accident. The Appellant argued that this acquittal should be given weight in the civil suit. Furthermore, the Appellant challenged the proof of the deceased's earnings, arguing that as a mason in the informal sector, his income was speculative and had not been demonstrated through any documentary evidence.

Summary of the Appellant's Submissions

14. The Appellant's submissions are structured around two main pillars: the failure of the trial court to correctly identify the cause of the accident and the excessive nature of the damages awarded.
15. On Liability, the Appellant contends that the burden of proof, as stipulated under Sections 107 to 109 of the Evidence Act, rested solely on the Respondents to prove negligence. They argue that the Respondents failed to discharge this burden because their version of events was contradicted by the physical evidence and the findings of the traffic court. The Appellant cites the case **Kiema Mutuku vs. Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258**, emphasizing that liability in Kenya requires a clear finding of fault.
16. Central to the Appellant's argument is the conduct of the deceased. They assert that the deceased was in direct contravention of Section 60 of the Traffic Act by carrying two pillion passengers. This overloading, they argue, made the motorcycle unstable and unmanageable, especially since the motor vehicle inspector's report from the traffic file indicated that the motorcycle had worn-out tires and was unroadworthy. The Appellant argues that the trial magistrate ignored these critical factors, which proved that the deceased was the author of his own misfortune.
17. Furthermore, the Appellant challenges the overtaking narrative. They submit that if the driver had indeed been overtaking, the point of impact and the final resting position of the vehicles would have been different. They point out that the vehicle landed on its left side facing Naivasha, which suggests it was in its correct lane and the motorcycle had encroached upon it. They argue that the trial magistrate relied too heavily on the hearsay evidence of PC Rodgers Wafula (PW3) while ignoring the specific exonerating details in the traffic file.
18. Regarding damages, the Appellant submits that the trial court's award was manifestly excessive and calculated using wrong principles. They argue that an award for pain and suffering is only appropriate where the deceased lived for some time and endured suffering; since the evidence

showed the deceased died on the spot, the award of Kshs. 30,000 was legally unsound.

19. On loss of dependency, the Appellant takes issue with both the multiplier and the multiplicand. They argue that in the absence of documentary proof of the deceased's Kshs. 30,000 monthly income, the court should have used the minimum wage applicable at the time, which they identify as Kshs. 7,240.95 according to the 2018 Wages Order. They further argue that a 30-year multiplier is too high for a mason, whose work is physically demanding and subject to the uncertainties of the informal sector. They propose a multiplier of 20 years instead. Finally, they challenge the 2/3 dependency ratio, arguing that the Respondents did not produce sufficient evidence to prove the extent of dependency of the mother or the children.

Summary of the Respondent's Submissions

20. The Respondents' submissions focus on the consistency of their evidence and the discretionary powers of the trial court in assessing both liability and damages. On Liability, the Respondents argue that the trial court's decision was based on a sound evaluation of the evidence from eye witnesses and the investigating officer's findings. They emphasize that PW2, a direct witness, remained consistent in his testimony that the Appellant's vehicle swerved into their lane while overtaking. This version, they argue, was corroborated by the Investigating Officer in the traffic case, who testified that shattered glass and the point of impact were found on the right side of the road facing Naivasha, which was the motorcycle's correct lane.
21. The Respondents dismiss the Appellant's reliance on the traffic case acquittal. They submit that criminal and civil cases are judged on different scales of proof, and an acquittal in a traffic case does not absolve a party of negligence in a civil suit where the standard is a balance of probabilities. They cite **Constantine Peter Abola Ochieng v Alfred**

Obudho Ayieko [1985] KEHC 13 (KLR) to support the principle that the court is entitled to make its own independent evaluation of the evidence regardless of the criminal outcome.

22. Regarding the allegations of overloading and speeding, the Respondents argue that these were not the proximate causes of the accident. They submit that the mode of driving by the Appellant's driver of negligent overtaking was the singular cause of the collision. They support the 10% apportionment of liability to the deceased as a fair recognition of the speeding allegation mentioned in the traffic proceedings, but argue that the Appellant's 90% liability is justified by the driver's reckless manoeuvres.
23. The Respondents contend that the damages awarded were reasonable and within the limits set by comparable cases. On the issue of earnings, they argue that while documentary evidence is preferable, it is not the only way to prove the income of an informal worker like a mason. They cite **Jacob Ayiga Maruja & another v Simeon Obayo [2005] KECA 202 (KLR)**, where it was held that strict documentary proof of earnings for illiterate or informal workers could lead to injustice. They submit that the trial court was correct to adopt the minimum wage for a stone cutter under the 2018 Regulation of Wages Order, which was Kshs. 13,005.70.
24. Regarding the dependency ratio and multiplier, the Respondents argue that a 2/3 ratio is the standard for a married man with children and a dependent mother. They also support the 30-year multiplier, noting that the deceased was a young, healthy man of 28 with a long working life ahead of him. They submit that an appellate court should only interfere with an award of damages if it is inordinately high or low, which they argue is not the case here. With such arguments, it is urged that the appeal be found to be bereft of merits and be dismissed with costs.

Issues, Analysis and Determination

25. This Court, as a first appellate court, is tasked with the duty to re-evaluate, re-assess, and re-analyse the record to determine if the trial court's findings are sustainable. Based on the Memorandum of Appeal and the submissions of the parties, the court identifies two issues for determination of this appeal being whether the trial court arrived at the correct finding on apportionment of liability and quantum.
26. The gist of the appeal lies on the determination of the issue of liability. The trial magistrate found the Appellant 90% liable on the basis that the driver was overtaking and swerved into the oncoming motorcycle's lane. This finding was heavily influenced by the testimony of PW2 and the Investigating Officer's report in the traffic file.
27. As a first appellate court, the court must scrutinize the credibility of the witnesses. The trial court correctly identified a significant contradiction in the evidence of the Appellant's driver, DW2. In the civil proceedings, she claimed the motorcycle was approaching from the opposite direction and suddenly turned into her lane. However, in the criminal proceedings (Traffic Case No. 3143 of 2018), she testified that the motorcycle *emerged* from a feeder road on the left side to join the highway. This inconsistency is not a minor detail; it speaks to the core of how the accident occurred. As held in **Joachim Gitonga v Elijah Mugwanja Chege & another [2015] KEHC 7580 (KLR)**, true evidence is consistent, and a witness who provides conflicting versions to suit the forum cannot be deemed truthful.
28. Furthermore, the physical evidence supports the Respondents' version. The Investigating Officer, PW7 in the traffic case testified that shattered glass and the point of impact were on the right side of the road from the vehicle's perspective, which would be the motorcycle's correct lane. This finding strongly corroborates the eye-witness account of PW2 that the Isuzu D-Max was overtaking and entered the motorcycle's lane.
29. However, the Appellant raises a valid point regarding the deceased's contributory negligence. Section 60(1) of the Traffic Act prohibits carrying

more than one pillion passenger on a motorcycle. The deceased was carrying two at the time of the accident, a statutory violation. While a statutory breach does not automatically establish civil negligence, it is a factor that must be weighed. Carrying two pillion passengers inherently reduces the rider's ability to swerve or brake effectively in an emergency. Additionally, the motor vehicle inspector found the motorcycle to be unroadworthy due to worn-out tires.

30. Recent court decisions such as in **Munene v Ashur Ahmed Transporters Limited & another (Civil Appeal E104 of 2024) [2025] KEHC 11309 (KLR)**, has emphasized that while a passenger or pillion passenger often has no control over the vehicle, the *rider* who engages in illegal conduct like overloading must share a portion of the blame. Therein, the court apportioned 60% liability to a rider who was overloaded. Here, while the driver's negligent overtaking was the primary cause of the collision, the deceased's choice to ride an unroadworthy, overloaded bike at high speed as admitted by PW2 in the traffic case contributed to his inability to avoid the impact.
31. The court does finds that the trial court's apportionment of 90:10 was slightly too weighted against the Appellant. While the driver was primarily negligent for overtaking when the road was not clear, the deceased's multiple statutory violations of overloading and unroadworthy vehicle warrant a higher degree of contributory negligence. In the **High Plateau Limited v Namalwa & 2 others (Suing as the Administrators of the Estae of Alex Mafura (Deceased)) (Civil Appeal E146 of 2023) [2025] KEHC 10311 (KLR)**, where a driver was found 100% liable for a head-on collision, there were no similar statutory breaches by the victim. Given the facts here, the court finds it just to adjust the apportionment to 80% against the Appellant and 20% against the deceased.
32. On quantum, the trial court awarded Kshs. 30,000 for pain and suffering. The Appellant argues this should be set aside as the deceased died on the spot. The principle as seen in **Thomas Martin Kibisu v**

James Mukolo Elisha & another [2015] KEHC 5222 (KLR), is that damages for pain and suffering are only recoverable if the deceased endured pain for a period before death.

33. However, instant death is rarely instantaneous in the biological sense. Even a few moments of realization and trauma constitute pain and suffering. In **West Kenya Sugar Co. Limited -vs- Philip Sumba Julaya (2019) eKLR**, the court affirmed an award of Kshs. 30,000 for a deceased who died immediately. The court hereby find the award of Kshs. 30,000 to be a nominal and conventional figure that does not represent an erroneous estimate. I therefore uphold it.
34. On Loss of Expectation of Life, the trial court awarded Kshs. 100,000. The Appellant proposed Kshs. 80,000 without citing authorities. For a 28-year-old, Kshs. 100,000 is the standard conventional award in current Kenyan jurisprudence, as seen in **Violet Jeptum Rahedi vs Albert Kubai Mbogori eKLR** and **Mohamed v Kazungu & another (Suing as the administrator and/or legal representative of the Estate of the Late Cosmas Iha Thoya (Deceased) (Civil Appeal E117 of 2023) [2024] KEHC 8649 (KLR)**. The court finds no reason to disturb this award.
35. On Loss of Dependency, the trial court used a multiplicand of Kshs. 13,005.70, derived from the 2018 Regulation of Wages (General) Order for a stone cutter in former municipalities. The Appellant argues for Kshs. 7,240.95, which is the general minimum wage for unskilled laborers. The deceased herein was a mason and the court is cognizant to the fact that masonry is a semi-skilled trade. In **Muthike Muciimi Nyaga (Suing as. Administrator of the Estate of James Githinji Muthike (Deceased) v Dubai Superhardware [2021] eKLR**, the court held that where there is no proof of earnings, the court should apply the government wage guidelines for the specific trade. A *stone cutter* or *farm artisan* in the 2018 Order is a more accurate proxy for a mason than an unskilled general

laborer. The court therefore finds the trial court was correct in adopting the figure of Kshs. 13,005.70 as a reasonable multiplicand.

36. The trial court then adopted a 30-year multiplier for the 28-year-old deceased. The Appellant argues for 20 years, citing the vicissitudes of life. The multiplier is intended to represent the remaining working life of the deceased, discounted for the vicissitudes of life such as illness or unemployment. For a 28-year-old, a multiplier of 30 years assumes a working life until 58. While some courts have used 30 or even 35 years for young professionals, for informal sector workers like masons, whose work is physically demanding, a slightly lower multiplier is often more appropriate. In **Bash Hauliers v Dama Kalume Karisa (2020) eKLR**, a 20-year multiplier was used for a 32-year-old. In **Julian Njeri Muriithi vs Veronicah Njeri Karanis (2019) eKLR**, a 30-year multiplier was used for a 38-year-old businessman.
37. Given that the deceased was 28, a 30-year multiplier is somewhat optimistic but not inordinately high enough to warrant interference under the principles of **Butt v Khan [1978] KECA 24 (KLR)**. The court will maintain the multiplier of 30 years.
38. On the applied dependency ratio of 2/3 by the trial court, the Appellant argues for 1/2, noting the mother did not testify. However, the chief's letter and the Grant of Letters of Administration confirmed the mother as a dependent. A 2/3 ratio is the standard for a nuclear family with multiple dependents. The court uphold the 2/3 ratio.
39. The Respondents were awarded Kshs. 150,550 for special damages. The Appellant argues the receipts were not properly stamped and included legal fees that should not be part of special damages. The trial magistrate found that the receipts were duly stamped. Regarding legal fees of Kshs. 35,000 to M/s Gekonga & Co., the Appellant correctly notes that legal fees incurred in the suit are generally costs and not special damages. However, in fatal claims, expenses related to obtaining the Grant of Letters of Administration are recoverable as special damages.

The receipt for Kshs. 35,000 was for Application for Grant. While high, it was presented as an expense of the estate. The other items including coffin (60k), cross (10k), and hearse (20k) are standard funeral expenses. Given the verification by the trial court, this court will not disturb this award.

40. The Appellant points out that beneficiaries should not benefit twice from the same accident. The principle, as confirmed in **Acceler Global Logistics v Gladys Nasambu Waswa**, is that the award for Loss of Expectation of Life under the Law Reform Act should be deducted from the Loss of Dependency award under the Fatal Accidents Act to avoid duplication of capital value. The trial court failed to perform this deduction. This is an error of principle that this Court must correct.
41. Based on the analysis above, the appeal is partially successful. The judgment of the trial court is modified as follows; liability is apportioned at the ratio 80:20 for the Appellant against the Respondent. Quantum of damages is assessed and hereby awarded as follows;

- | | | |
|---|--|--------------------|
| a. Pain | and | Suffering: |
| Kshs. 30,000/= | | |
| b. Loss of Expectation of Life: | Kshs. 100,000/= | |
| Gross Loss of Dependency: | 13,005.70 x 12 x 30 x 2/3 =Kshs | |
| 3,121,368.00/= | | |
| (Less Award for Loss of Expectation of Life: | | |
| (Kshs. 100,000/=) | | |
| c. Net | Loss | of |
| Kshs. 3,021,368/= | | Dependency: |
| d. Special | | Damages |
| Kshs. 150,550/= | | |
| e. Gross Total | (A + B + C+D): | |
| Kshs. 3,301,918/= | | |
| Less 20% Contributory Negligence: | | (Kshs. |
| 660,383.60) | | |

**Net Award to Respondents:
2,641,534.40/=**

Kshs.

42. In the upshot, the court finds and holds that the appeal is merited to the extent of the adjustment in liability and the correction of the double recovery error. The trial court's award of Kshs. 3,061,191.80 is hereby set aside and substituted with an award of Kshs. 2,641,534.40/=.
43. Because of the very limited extent of the success, each party shall bear its own costs of the appeal.

Dated, signed and delivered virtually this 27 day of March, 2026



Patrick J O Otieno
Judge