

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO.E087 OF 2024

DANIEL LOKEMER.....APPELLANT

VERSUS

**JACKLYNE MACHUMA NALIANYA and KERESENT
WAPANG'ANA FWAMBA (Suing as the legal administrators
of the Estate of the late ROBERT NATEMBEYA)**

.....RESPONDENTS

JUDGMENT

1. This is an appeal against the judgment of Hon. Caroline N. Njalale delivered on 26th November 2024 in Kitale CMCC No.33 of 2020.
2. In that case the appellant was sued by the respondents who are personal representatives of the late Robert Natembeya (deceased). The suit arose out of a fatal road accident involving appellant's motor vehicle Reg No.KAT 861P, Toyota RAV 4 and a motorcycle Reg No.KMEN 973Y Make TVS on 17/8/2019 along Kitale-Webuye Road near St Joseph's Area. The deceased was riding on the ill-fated boda boda as a pillion passenger when the accident occurred.

3. The respondents laid blame on the appellant for the accident faulting him for negligence which they said caused the accident and listed the particulars of negligence attributed to him.
4. The appellant on the other hand defended himself and denied that he was negligent and blamed the deceased for negligence on his part.
5. This court will consider a summary of the evidence tendered before looking at the grounds of appeal and re-evaluation of the evidence and eventual disposal of this appeal.
6. Jackline Majuma Wanyonyi (**PW1**) the respondent herein testified that she was a widow to the deceased Robert Natembeya and that she had 9 children with the deceased. She stated that she did not witness the accident but was told that her late husband was involved in a road traffic accident along Kitale-Webuye road and died on the spot with one Benard Simiyu Masindano who was riding the motorcycle Reg No.KMEN 973Y. She stated that the 2 were coming from a burial of a relative at Matunda Area, Uasin Gishu County when they met the tragic accident.
7. She stated that the motor vehicle that hit the deceased was KAT 861P Toyota RAV 4 and that a motor vehicle search revealed that the appellant was the registered owner. She tendered a copy of Record from NTSA as **Pexhibit 3**.
8. She stated that her late husband was working as a Teacher aged 41 years old earning Kshs.25,096/- a month. She

tendered a pay slip as **Pexhibit 7**. That the deceased supported her and her children with all the needs stating that 3 of their children were in secondary school with the others in primary school.

9. She stated in cross-examination that she was issued with a Police Abstract and that 3 people were on the boda boda at the material time and only the pillion passenger who was seated at the back survived the accident.
10. Ernest Fwamba (**PW2**) the father to the deceased testified that he did not witness the accident. He stated that the deceased used to support him.
11. Shadrack Aaron Shidudu (**PW3**) stated that he witnessed the accident as he was also a pillion passenger riding on the boda boda at the material time and that he was coming from a funeral. He stated that they were on the main road near Woodland Resort when he saw a car parked 2 metres ahead.
12. He stated that the car was parked across the road and when they got to where it was, the car wanted to cross and hit them. That the rider tried to apply brakes but hit the door of the car and he was seated at the back of the motorcycle. That he was thrown into the air by impact and landed on the side of the road. That the deceased died on the spot on the tarmac and that the rider, Benard Simiyu also fell on the tarmac unconscious. He stated that he fractured his leg.

That the driver of the motor vehicle did not put any indicator.

13. When pressed to explain the contents of his statement about the presence of goats, he stated that the goats were inside the motor vehicle.
14. PC Vincent Nyakundi (**PW4**) testified and tendered a Police Abstract as **Pexhibit 2**. He however stated that he did not investigate the accident but blamed the driver of the motor vehicle for turning right without checking if the road was clear. He stated that he also did not visit the scene and the statements of witnesses were in the police file. That he could not produce sketch maps to demonstrate how the accident occurred because he was not the investigating officer. That the boda boda was carrying 2 pillion passengers at the time and the rider was not licensed. He however stated that overloading did not contribute to the occurrence of the accident.
15. Steve Erick Kombo (**DW1**), testified that he was a witness to the accident as his land stretches to the road which was the scene of the accident. That on 17.8.2021 there was a Harrier or RAV 4 which stopped on entering a feeder road and asked him for directions to his neighbour named Mose. That at the time there was a lorry carrying sugarcane coming from Kitale to Webuye with a motorcycle behind going towards the same direction. That the boda boda had 2 pillion passengers plus the rider. That the rider

attempted to overtake the lorry but there was another motor vehicle approaching fast from the opposite direction and the boda boda rider went off the road towards the culvert on the feeder road and in the process knocked on the motor vehicle parked on the feeder road and the pillion passenger rolled over the motor vehicle on the windscreen and fell on the other side of the road. That one of the pillion passenger fell on the middle of the road and that the pillion passenger who fell off the road was bleeding profusely. That with the help of his 'fundis' and a nurse they assisted him as he called for an ambulance and the police who arrived 35 minutes later.

16. He stated that he recorded his statement with the police but he has not been called to testify in a traffic case. He further stated that only one person had a helmet among the 3 persons riding on the boda boda. He however did not say who among them had a helmet but was sure that none wore a reflective jacket. He stated that the rider of the boda boda smelled alcohol and that the accident occurred off the tarmac. That there was a goat hit by the rider on the road but the goat was not his.

17. He stated under cross-examination that he came to know that the driver was charged with the offence of causing death by dangerous driving but insisted that the motorcycle came off the tarmac to the feeder road and hit the stationary motor vehicle at the middle of the car.

18. Daniel Katul Lokomer (**DW2**) the appellant herein testified that he was a nursing officer at Kapenguria Referral Hospital and recalled that on 17/8/2019 at around 3pm, he was driving a motor vehicle Reg No.KAT 861P from Kitale towards Webuye. That at St Joseph's Area, he turned right towards Woodlands and stopped to ask directions and suddenly as he was talking to a man herding his animals, he heard bleating of a sheep and as he checked he heard a bang on his driver's door and realized that a motorcycle had hit his car after hitting the sheep. That he tried opening the driver's door but could not due to impact and went to the passenger's side. That he then saw a person groaning in pain on the side of the driver's side of the car. That he moved to the driver's side and saw a motorcycle and 2 people injured. He stated that the road was clear at the time and the accident occurred off the road.
19. He stated that people started gathering and the police and an ambulance were called. He stated he ran away from the scene for his safety as boda boda people are known to be rowdy. That he appeared at the police station the following day.
20. He conceded that he was charged with causing death by dangerous driving but he was acquitted. He further stated that the survivor was compensated but judgment was issued in his absence but did not apply to set it aside.

21. Samwel Orenge Ongore (**DW3**) a Government Motor Vehicle Inspector testified that he carried out the inspection on 17/9/2019 and found that the motor vehicle Reg No.KAT 861P was in good serviceable condition before the accident. He tendered the inspection report as **Pexhibit 3** and certified copy of the report as **Pexhibit 4**.
22. James Aggrey Owino (**DW4**) a private investigator working for Explico Insurance Company stated that he was assigned the duty to investigate the circumstances of the accident involving the insured motor vehicle by his employer in June 2020. That the motor vehicle involved in the accident was KAT 861P and the motorcycle involved was Reg No.KMEN 973Y.
23. He stated that he travelled to Kitale and met the appellant who took him to the scene and explained how the accident occurred. That he drew a sketch of the road and where the motor vehicle was parked when the accident occurred. He tendered the sketch map as **Pexhibit 4** (it should be **Pexhibit 5**). He stated that the accident happened at a feeder road and explained that he showed the movement of the motorcycle from the dotted marks.
24. He conceded under cross-examination that he visited the scene 10 months after the accident and drew the sketch as per information given by the appellant.
25. The trial court evaluated the evidence tendered and relied on the evidence of **PW3** and **PW4** and found that the

appellant was to blame because he was charged with a traffic offence of causing death. The trial magistrate found that the appellant did not tender any evidence to show that he was acquitted. The trial court further discounted the evidence of **DW4** who produced a sketch map on how the accident occurred because he visited the scene 10 months after the accident and that **DW4** did not witness the accident. The trial court found the appellant liable and awarded the respondents general damages as follows;

(i) Pain and suffering Kshs.20,000/-

**(ii) Loss of dependency $24,096.85 \times 12 \times 15 \times \frac{1}{2}$
=2,258,716.50/-**

(iii) Loss of expectation of life - Kshs.100,000/-

(iv) Costs and interests.

26. The appellant felt aggrieved and filed this appeal raising the following grounds namely;

(i) That the trial magistrate erred in law and fact by failing to consider his submissions and evidence adduced.

(ii) That the learned trial magistrate erred in law and fact by awarding excessive damages.

(iii) That the trial court failed to consider the testimonies of appellant's witnesses.

(iv) That the trial magistrate erred on all points of law and fact in finding that the appellant was 100% liable for the accident.

- (v) That the trial court erred to hold that there was no dispute that an accident occurred involving motor vehicle Reg No.KAT 861P Toyota RAV 4 and motorcycle KMEN 973Y.**
- (vi) That the learned magistrate erred on liability.**
- (vii) That the learned magistrate did not appreciate appellant's written submissions and legal authorities cited.**
- (viii) In his written submissions done through learned counsel Arusei, Chepchumba & Co Advocates dated 21/1/2026 the appellant submits that the respondents' case on liability did not prove that the appellant was 100% to blame for the accident. He points out that the Police Abstract produced by PC Vincent Nyakundi (PW4) did not blame the appellant. That the police officer was not the investigating officer in the case and did not produce a sketch map to indicate the point of impact.**

27. He submits that the production of the Police Abstract merely proved that an accident did occur and was reported but did not impute negligence on the appellant.

28. The appellant contends that the evidence of **PW3** was hearsay and inconsistent because he did not give the correct registration number of the motorcycle.
29. He faults the trial court for shifting the burden of proof to him by finding that he should have tendered evidence showing that he was acquitted in the traffic case yet it is the same court that declined leave that had been sought to introduce the same evidence of acquittal.
30. The appellants further submit that the deceased rider caused the accident by veering off the road and hitting the appellant's motor vehicle parked in a feeder road.
31. Finally the appellant urges this court to apportion liability between the respondents and the appellant at the ratio of 50:50 but gives no explanation for the same.
32. On quantum the appellant contends that the award of Kshs.20,000/- on pain and suffering was on the high side because the deceased died on the spot.
33. On the multiplier of 15 years, (the lost years) the appellant submits that a multiplier of 10 years was justified because he contends that the deceased was sickly.
34. The respondents have opposed this appeal vide written submission by their learned counsel M's Okile & Co Advocate dated 20/1/2026.
35. The respondents on liability supports the finding of the trial court that the appellant was 100% to blame for the accident. They contend that **PW3** who was an eye witness

gave an account of what transpired and was their star witness and that he had since been compensated for the same accident.

36. They submit that the evidence of **PW3** was corroborated by the evidence of **PW4** who also blamed the appellant for the accident.

37. It is their contention that the evidence tendered at the trial court indicates that the appellant was solely to blame for causing the accident.

38. On quantum, the respondents support the trial court's finding. They contend that the deceased was 41 years old at the time, earning a salary of Kshs.25,096.85 as per the pay slip exhibited. They submit that the trial magistrate applied the correct principles and calculations to arrive at Kshs.2,358,716.50 for loss of dependency.

39. They submit that the amount of Kshs.20,000/- for pain and suffering as well as Kshs.100,00/- for loss of expectation of life was reasonable.

40. This court has set out the appellant's case as well as the opposition by the respondents. This appeal is on both liability and quantum. This being a first appeal the role of this court is to re-evaluate the evidence tendered during trial with a view to making own conclusions and findings giving room to the fact that the trial court had the advantage of observing the witnesses first hand as they testified.

41. This appeal as I have observed above arose from a decision of the trial court in a running down case. The issues raised in this appeal are basically 2 which are;

(i) Whether the trial court reached a correct decision in finding the appellant 100% liable for causing the accident and

(ii) If the trial court applied the correct principles in quantification of quantum payable.

42. (i) Liability

I have already highlighted the evidence tendered by both sides in this appeal during trial. What is apparent from the record of proceedings is that the respondents on the issue of liability relied mainly on the evidence of **PW3**. The evidence of **PW1** and **PW2** was of no material value with regard to determination on liability because they did not witness the accident. To a large extent, the same can be said of PC Vincent Nyakundi (**PW4**).

43. Vincent Nyakundi (**PW4**) simply told the trial court that he was attached to Kitale police station and he had come to court to tender an OB extract and Police Abstract. He told the trial court that he was not the investigating officer in the traffic case and that he did not visit the scene of the accident and had no sketch map. He did not tender the OB extract to assist the trial court at least with regard to the nature of the initial report booked in the OB. When pressed

in cross-examination, he stated that the investigating officer was transferred to Nakuru but did not state whether either it was not possible to procure the attendance of the investigating officer without unnecessary expenditure or whether the investigating officer on being transferred handed over the file to a new investigating officer as is the usual practice with the police. The provisions of Section 33 of the Evidence Act is clear that when an expert witness is coming to testify on behalf of a colleague who cannot be found or who cannot be procured without incurring expenses deemed unnecessary or unreasonable by court, he must lay basis before stepping on the shoes of the author of a document which in this case was the Police Abstract. Failure to comply with this important provision renders the evidence tendered hearsay and of little or probative value.

44. In this instance, PC Vincent Nyakundi (**PW4**) failed to lay sufficient basis on reasons why he was stepping in for the investigating officer. He simply stated that he was a police officer attached to Kitale police station. He did not give information on whether he was a traffic officer or whether he had been assigned investigation duties of the traffic incident after the traffic officer handling the matter was transferred. He also crucially did not give details on how the accident occurred. He did not have witness statements. This is what he stated in cross-examination;

“I did not witness the accident. I did not visit the scene.....I have not produced any sketch map to show the scene. The rider did not have a licence.....I am not the investigating officer.....I do not have the inspection report.....”

45. The evidence given by PC Nyakundi (**PW4**), with regard to who was to blame for the accident was unreliable given that he was not the investigating officer and there was noncompliance with Section 33 of the Evidence Act which rendered his evidence hearsay and of no or little value to the respondent’s case in regard to the issue of liability. The respondents’ case in light of the above only rested on the evidence of **PW3**. That is what the trial court missed in the evaluation of the evidence tendered.

46. The evidence of **PW3** indicates that he was aboard the ill-fated boda boda as a pillion passenger. He states that the appellant’s motor vehicle was parked on the left side of the main road and that they were on the highway. That he saw the motor vehicle parked at 2 metres which means it was very close. It is also an indication that either the rider was at high speed or that perhaps his attention was elsewhere. It is difficult to tell. But what is clear is that the appellant’s motor vehicle was parked and according to his narrative, the motor vehicle moved across without indicating and hence the accident.

47. The account given by the appellant (**DW2**) is different. He says he had branched from the main road and parked on a feeder road to ask for directions. That as he was asking for directions, he heard bleating of sheep and a bang, his car was hit on the driver's side. That a pillion passenger was thrown up and landed on his windscreen and then fell on the side of the road while the rider and the deceased herein fell on the tarmac.
48. The evidence of the appellant was well corroborated by Steve Erick Kombo (**DW1**) who said he witnessed the accident. That the rider of the ill-fated boda boda was attempting to overtake a lorry but because of an on-coming motor vehicle, the rider veered off the road perhaps in an attempt to avoid head on collision and hit the culvert on the feeder road before hitting a sheep and a car parked on the feeder road.
49. The trial court in evaluation of the evidence tendered by the appellant in my view fell into error by failing to consider the evidence of **DW1** in determining the question of liability particularly when weighing the weight of the respondent's case on liability as opposed to the appellant. Had the trial court done so, perhaps her conclusion on liability would have been different.
50. The appellant's grievance that his evidence was not considered therefore is well grounded. I have looked at the evidence of **DW3** Samwel Orenge Ongore and in contrast to

the evidence of PC Nyakundi (**PW4**), he laid basis why he was testifying on behalf of Government Motor Vehicle Inspector Mr Nipher Ruto. He stated that the said officer was on transfer to Voi but he had worked with him and knew his handwriting well. He applied to be allowed to testify on his behalf and the respondent's counsel stated that he had no objection. He was an expert stepping on the shoes of his colleague who was an expert in motor vehicle inspection whose handwriting he was familiar with and his testimony was given by consent. That compliance of the law was not replicated with regard to the testimony of **PW4** and hence my finding that his evidence was of no probative value because of rule against hearsay evidence. Enough said in that regard.

51. Now turning to the evidence of motor vehicle inspector, he stated that the windscreen was shattered which collaborated the evidence of **DW1** and **DW2**.

52. The evidence of James Aggrey Owino (**DW4**) was discounted by the trial court on grounds that he visited the scene after 10 months and only drew the sketch map on instructions or reports of the appellant but that again was erroneous in my view because this was a private investigator who was sent by the appellant's insurers to establish the cause or circumstances of the accident. For good measure, he tendered a sketch map of the scene and gave glimpses on how the accident occurred by his own account. The trial

court should have used that evidence in addition to the evidence tendered by the other witnesses to unravel how the accident could have possibly occurred. But the trial court dismissed the evidence and laid blame on the appellant for not tendering evidence showing that he was acquitted for the offence he faced of causing death by dangerous driving yet the same trial court blocked the very evidence when the appellant's counsel tried to introduce the evidence.

53. While this court agrees that parties in a case should not be ambushed with introduction of documents not filed and served, a party should not be blocked unnecessarily because all that the trial court was required to do was to give a chance to the respondents to go through the traffic proceedings or judgment and if need be give them a chance to reopen their case or cross-examine the witness tendering the evidence after been given sufficient time to go through the document. But blocking the crucial evidence from a litigant is tantamount to denying a party a fair chance to present his case and be heard.

54. The trial court certainly fell into error by declining to grant leave to the appellant to file further documents particularly given that the traffic proceedings ended when the civil matter was in progress.

55. The trial court further fell into error by finding that the appellant ought to have filed a copy of the charge sheet of

the traffic case. The burden of proof of negligence actually fell on the respondents. The law required them to tender evidence proving that the appellant was to blame for the accident because they bore the burden of proof as clearly stipulated in Section 107 of the Evidence Act.

56. The respondents have submitted that the evidence of **PW3** was reliable on 2 aspects. One is that he was an eye witness and secondly that he was himself compensated. But this court finds no evidence tendered to show that **PW3** filed a suit and was compensated or that he was compensated through out of court settlement. The issue of being an eye witness was countered by the evidence of **DW1** and **DW2** who were also eye witnesses. The evidence of appellant was corroborated by other independent witnesses to wit; the evidence of **DW1, DW3** and **DW4**. The evidence of these witnesses pointed to the fact that the rider of the boda boda was to blame because he was speeding, lost control and hit a stationary vehicle parked off the road on a feeder road.

57. This court finds that the trial court fell into error by finding that the appellant was solely or 100% liable for the accident. That finding was against the weight of evidence adduced by the appellant and the respondents with regard to liability.

58. The only contribution which the appellant could have done to cause the accident is the decision to park his car close to a junction of a feeder road. He should have moved

a few metres and then parked his car to ask for directions. The contribution however is minimal. The biggest contributor was the rider of the motorcycle who unfortunately perished in the accident.

59. This court finds that though the evidence tendered indicates that the appellant bore little liability, he has conceded to 50% liability in his written submissions made through counsel. It is only on that concession which is on record, that I will hold him 50% liable and it is not on the basis of the evidence tendered before the trial court and which evidence I have re-evaluated. I therefore find the issue of liability is shared between the plaintiff and the respondents at the ratio of 50:50 as conceded by the appellant.

60. On quantum, this court finds that the trial court applied the correct principles in assessing and calculating the quantum payable. The deceased was aged 41 years as per the Death Certificate tendered as **Pexhibit 4**. He earned a salary of Kshs.25,096/- as per **Pexhibit 6** (pay slip) and the multiplier used by the trial court is the correct one. I do not find merit in the appellant's contention that the deceased was sickly and could not have reached retirement age. There is no evidence tendered to prove that proposition. On the award of pain and suffering, I find that the trial court awarded Kshs.20,000/- but the evidence tendered showed that the deceased died on the spot. The conventional award

is usually Kshs.10,000/- for such cases but Kshs.20,000/- cannot be said to be so excessive to call for an intervention of this court. The same is therefore upheld.

61. In summary this appeal is allowed for the aforesaid reasons. The decision on liability by the trial court is set aside. In its place liability is entered against the appellant at 50% as conceded. The award on quantum is upheld. Therefore judgment is entered against the appellant as follows;

(a) Liability 50%

(b) Pain and suffering Kshs.20,000/-

(c) Loss of dependency

Kshs.2,258,716/-

(d) Loss of expectation of life

Kshs.100,000/-

Total

Kshs.1,358,716.50

Less 50%

Kshs.1,179,358.25

The respondents will have costs of that amount in the lower court but the appellant will have costs of this appeal.

DELIVERED, DATED and SIGNED at KITALE this12th day ofMAY....., 2026.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgment delivered in open court

In the presence of

Nyakundi holding brief for Okile for Respondent

M/s Wanyonyi holding brief for Ruto for Appellant

Duke/Chemosop - Court assistants