



Capture Transport Limited v Ombori & another (Suing as the Legal Representative in the Estate of David Gacheche Ebuli) & another (Civil Appeal 73 of 2020) [2025] KEHC 11809 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11809 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 73 OF 2020
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

CAPTURE TRANSPORT LIMITED APPELLANT

AND

TERESA KERUBO OMBORI & JAMES NYAKUOYO OMBORI (SUING AS THE LEGAL REPRESENTATIVE IN THE ESTATE OF DAVID GACHECHE EBULI 1ST RESPONDENT

PEARL MATRIX & LOGISTICS LIMITED 2ND RESPONDENT

*(An appeal from the Judgment of Hon. Y. I. Khatambi (PM)
delivered in Naivasha CMCC No. 904 of 2018, on 7th June, 2024)*

JUDGMENT

1. The 1st respondent sued the appellant and 2nd respondent following an accident that occurred on 11th March, 2018 along Mai-Mahiu road at Maili Mbili area. The accident involved a motorbike registration No. KMDY 814 S ridden by the deceased David Gacheche Ubuki and motor vehicle registration No. KBY 833T/ZD 5596 which belonged to the appellant and 2nd respondent respectively. As a result of the accident the rider of the motor bike lost his life.
2. The 1st respondent blamed the appellant and 2nd respondent for the accident due to over speeding and careless driving. The suit was filed by the 1st respondent on behalf of the deceased's estate. The deceased who was aged 22 years left behind a son, brother, mother and brother. They claimed a total of shs 166,650/= as special damages, damages under the [Fatal Accidents Act](#), and [Law Reform Act](#) plus costs and interest.



3. The appellant filed a defence denying the claim blaming the deceased for the accident. The matter was heard and judgment dated 7th June 2024 was entered in favour of the 1st respondent. The court found the appellant to be 100% liable, and awarded him Ksh 2,195,588/=. The appellant being dissatisfied and filed this appeal dated 5th July 2024 on the following grounds:
 - a. That the learned Magistrate erred in law and in fact by failing to give concise statement of the case, points of determination, decision thereon and reasons for his judgment.
 - b. That the learned Magistrate erred in law and in fact in failing to appreciate and consider the evidence adduced in court by the Appellant and in only relying on the Respondent's account of the accident.
 - c. That the learned Magistrate erred in law and in fact in finding the defendants 100% liable in view of the evidence produced before the trial court especially the fact that the plaintiff failed to prove his case on liability.
 - d. That the learned magistrate erred in law and fact in holding the defendant liable for negligence yet the evidence of PW 1 —Police Officer was not conclusive on whether the defendant was to blame for the occurrence of the accident.
 - e. That the learned magistrate erred in law and fact by failing to note the discrepancies in evidence between., PW1 the police officer and PW2, the eye witness.
 - f. That the learned trial magistrate erred in law and in fact by overly relying on the respondent's submissions which were not relevant to the circumstances of the case.
 - g. That the learned trial magistrate erred .in law and fact in failing to consider the Appellant's submissions on quantum and liability as well as the legal authorities relied upon in support thereof.
 - h. That the learned trial magistrate erred in law and in fact by applying a multiplier of 2/3 yet the deceased was not married at the time of the accident.
 - i. That the learned Magistrate erred in law and in fact by awarding Kshs 200,000/= for loss of expectation of life which was inordinately high in the circumstances.
 - j. That the learned Magistrate erred in law and in fact by awarding Ksh 100,000/=for pain and suffering which was inordinately high in the circumstances given that the deceased died on the spot.
4. A summary of the evidence was a follows: PW3 James Nyakuoyo Ombori, an uncle to the deceased stated that the deceased had a wife and son and was doing bodaboda business earning almost Ksh 45,000/= per month. That he had a brother, mother and son depending on him. He produced receipts showing they had spent Ksh 35,000/= (PEXB 2) in court for letters of administration (PEXB 1). He also produced the death certificate (PEXB 3) police abstract and others (PEXB 1-10, 12, 13 & 14). He did not produce any proof of the earnings.
5. PW1- No. 73676934 an officer based at Naivasha police station confirmed the occurrence of the accident. He said the motor vehicle KBY 833T/ZD 5569 was driven by Samuel Omwenga while the deceased drove the motor bike Registration No. KMDY 814 S Kingbird. The motor vehicle was from Naivasha towards Mai-Mahiu and overtook an unknown motor vehicle and hit the handle of the motor bike whose rider fell off the road and was run over by the said motor vehicle. The rider died on the spot.



6. An officer from Naivasha attended the scene and the body was moved to Naivasha District Mortuary for post-mortem. The vehicle was towed from the scene. After investigations were conducted, the motor vehicle driver was found to blame for the accident as per the OB (PEXB 20). He could not tell if the motor vehicle driver was charged since he did not have the police file.
7. In cross examination he said he visited the scene though he was not the investigating officer. What he told the court was as per the O.B noted by the investigating officer. He said the road has two lanes. It was not indicated if there were any motorcycles on the road. The O.B showed the matter was pending investigations.
8. PW2-Boniface Guto was riding a motor bike on the date of accident and the deceased was riding ahead of him. He said they were moving in the same direction with the motor vehicle. At maili mbili a motor vehicle overtook him at high speed and in the process knocked the deceased from the rear end and the deceased sustained severe injuries. He died on the spot. The deceased had a reflector jacket and helmet. He stressed that the deceased was hit from behind.
9. DW1 Samuel Omwenga Mufia is a truck driver with over 18 years' experience. He said he was driving the motor vehicle from Mombasa headed to Kampala. He was doing 50-60 km/hr. He checked on the left side of the mirror and saw a reflective jacket. He was then told by a passer-by that a motorcyclist had fallen.
10. He proceeded to the police station to report. He said the motor cyclist hit himself at the rear of his vehicle. He could not speed as his vehicle was full of cargo and there were police officers ahead. He said that he had been charged with careless driving and was acquitted at no case to answer stage.
11. In cross examination he said he did not have his driving licence. There were no vehicles ahead and traffic officers were 100 meters from the scene. He saw the reflective jacket on the left side near the axle. As he headed to Naivasha, he saw bodaboda riders competing. He never saw the deceased before the accident. He had no proof of his acquittal before the court.
12. In re-examination, he denied overtaking any vehicle.
13. The appeal was heard by way of written submissions

Appellant's Submissions

14. The same were filed by E.M. Juma Ombui advocate and are dated 10th April 2025. Counsel submitted that there were discrepancies between the evidence of the 1st respondent and his witnesses. That PW1 referred to a statement but he did not say who recorded the statement saying DW1 was overtaking, when he hit the bike's handle while PW2 said the deceased was hit from behind. He challenged the trial court's finding that the driver was 100% to blame yet there was no production of the police file, sketch map, photographs of the accident scene, to corroborate PW2's evidence.
15. He relied on *Nickson Muthoka Mutai vs Kenya Agricultural Research Institute* [2016] eKLR where the court stated as follows:

“The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, maintain the action, and must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established”

Also see: *Postal Corporation of Kenya vs Dickens Munayi* (2014) eKLR.



16. Counsel referred to DW1's evidence on what exactly happened which was not challenged. Further that the witness was acquitted of the traffic case as there was no sufficient evidence to find him guilty. Counsel while referring to Order 20 Rule 4 of the [Civil Procedure Rules](#) submitted that the judgment did not have any points for determination nor a concise statement of the case.
17. He further submitted that in view of all the discrepancies the best trial court would have done was to apportion liability in the ratio of 50:50 under the principle of contributory negligence as the deceased chose to hit himself on the body of the appellant's vehicle.
18. On quantum, he maintained their lower court submissions where they submitted a proposal for pain and suffering, were never considered. He contended that their submissions on loss of expectation of life and loss of expectancy were not considered by the trial court. He urged this court to allow the appeal, set aside the trial court's judgment and substitute it with its own judgment.

Respondent's submissions

19. These were filed by Gekonga & Co. advocates and are dated 21st May 2025. On liability, counsel referred to the evidence by PW1, PW2 and DW1 and the judgment at page 127 of the record of appeal. He agreed with the trial court that DW1 contradicted himself on the issue of motorist or no motorist on the road. That the trial court was right in holding the appellant 100% liable based on the evidence availed.
20. On quantum, counsel addressed grounds 7, 8, 9, 10 & 11 together. He referred to the case of [Kemfro Africa Limited t/a Meru Express Services & another V A.M. Lubia & another \(No. 2\)](#) (1982-1988) L KAR 272 where the court said:

“The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

The above were reiterated by LAW JA - in [Butt V Khan](#) [1981] KLR 349:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived (sic) a figure which was either inordinately high or low”.

21. On pain and suffering, they submitted on a sum of Ksh 250,000/= based on the cases of: [Beatrice Mukulu Kang'uta & another vs Silverstone Quarry Limited & another](#) [2016] eKLR where Ksh 200,000/= was awarded. (ii) [Benedeta Wanjiku Kimani vs Changwon Kemboi and another](#) [2013] eKLR. He urged that with the passing of time, the figure of Ksh 10,000/= rose to Ksh 100,000/=.
22. Counsel submitted that the deceased was aged 22 years at the time of death. On loss of expectation of life, he submitted for an award of Ksh 200,000/=. Reliance was placed on the case of [Videt Jeptum Rabedi vs Albert Kubai Mbogori](#) [2013] eKLR where the deceased was awarded Ksh 150,000/= and [Citi Hopper Bus Ltd and another vs Maria Clara Rota](#) [2021] eKLR where an award of Ksh 200,000/= was made.
23. Under the [Fatal Accidents Act](#) and on loss of dependency, counsel referred to the evidence of the 1st respondent who said the deceased earned a monthly income of Ksh 45,000/= from the bodaboda



business. He argued that the trial court used the minimum wage under the [Regulation of Wages \(General\) \(Amendment\) Order 2018](#) for Municipalities which was Ksh 7,240/95 thus coming to this calculation:

$7,240.95 \times 2/3 \times 30 \times 12 = 1,729,188/=$. He then submitted that this figure was not inordinately high in the circumstances.

24. Counsel referred to a number of authorities in respect to the calculations. He thus urged the court to dismiss the appeal.
25. This court has further gone through the appellant's submissions before the trial court dated 27th February 2024 where they suggested liability 50:50 plus Ksh 20,000/= for pain and suffering, Ksh 25,000/= for loss of expectation of life. For loss of dependency, counsel submitted that the monthly income of Ksh 45,000/= had not been proved and so he proposed a global sum of Ksh 300,000/= while relying on Theta Tea Company Ltd & another V Florence Njau Njambi [2002] eKLR and Albert Odawa V Gichumu Githenji Nakuru HCCA No. 15 of 2003 (2007) KLR.

Analysis and Determination

26. This being a first appellate court, this court is called upon to re-evaluate and re-assess the evidence that was adduced before the trial court and arrive at its own independent conclusion. It must also bear in mind that unlike the trial court, it did not have the opportunity to hear nor see the witnesses testifying and should give an allowance for that. See Section 78 of the [Civil Procedure Act](#) and *Selle vs Associated Motor Boat Co. Ltd* [1968] E.A. 123; *Peters V Sunday Post Ltd* [1958] E.A. 424. A first appeal court has the jurisdiction to reverse or affirm the finding of the trial court.
27. Bearing the above in mind, I have carefully considered the record of appeal, grounds of appeal, both submissions, cited cases and the law. The main issues for determination are on:
 - i. Liability: Who was to blame for the accident?
 - ii. Quantum: What awards will be reasonable?

Liability

28. There is no dispute that the accident in issue took place but exactly what happened in this case? PW2 said he was an eye witness and he saw the driver DW1 knock the deceased from the rear. That the deceased was hit from behind as DW1 overtook him. In his defense, DW1 denied knocking down the deceased. He said if anything, the deceased must have rammmed at the body of his trailer.
29. There is no dispute that DW1 was charged with a Traffic offence. According to him he was charged with careless driving & was acquitted of the charge yet someone had died! There was nothing placed before the court to confirm his charge and acquittal.
30. In his evidence DW1 further stated that there were other bodaboda riders on the road before the accident. He maintained that he never saw the deceased and his motorbike before being alerted of his having fallen down. DW1 told the court that there were Traffic police officers 100m from the accident scene. Apparently, none of these officers came to the scene. He did not report the accident to the officers but instead went to the police station. Can that be true?
31. The evidence before this trial court swung between who to believe between PW2 and DW1. The police officer PW1 who testified did not witness the accident and neither did he investigate the incident.



32. A perusal of the death certificate No. 0752687 showed the cause of death as “severe internal hemorrhage pelvic and left femur fractures due to road traffic accident”. These were not injuries that would have resulted from a person knocking himself/herself on the rear of a truck that he was facing. It is most likely that he was knocked by the vehicle.
33. The court was however not told at what part of the road the accident occurred. Was it on the road, middle of the road or off the road? Had the investigating officer testified whether on behalf of PW3 or DW1 the court would have answered this question.
34. The deceased may have contributed to the causation of this accident but in a very small way. I will therefore apportion liability in the ratio of 90:10 in favour of the 1st respondent.

Quantum

35. I now look at the various heads:

a. Pain and suffering:

It is not disputed that the deceased died on the spot. It was painful but it was for a short time. In *Beatrice Mukule Kang’uta* (supra) the deceased who had died on the same day of accident was awarded Ksh 200,000/=, unlike the deceased herein who died on the spot. The trial court awarded him Ksh 100,000/= which I do not find to be highly excessive.

b. Loss of expectation of life

The deceased was 22 years of age and had a long way to live. The appellant proposed Ksh 25,000/= which after considering the several cited authorities, I find that to be too low. The deceased had high expectations of living. Two cases were cited on this: *M’rarama M’ntbieri V Luke Kiumbe Murith* [2015] eKLR where Kshs 25,000/= was awarded and *Beatrice Mukulu Kang’uta* (supra) where an award of Ksh 200,000/= was made where the deceased passed away after 5 hours and 40 minutes. In this case the deceased died on the spot. Balancing all the circumstances I set aside the Ksh 200,000/= and substitute it with Ksh 100,000/=.

c. Loss of dependency

It is clear that the 1st respondent did not avail any evidence on the deceased’s earnings and this was equally noted by the trial Magistrate. The trial court then placed aside the proposed Ksh 45,000/= per month and applied the figure of Ksh 7,240/95 under the *Regulations of Wages Order*. The deceased was not a general employee as he was not employed. The correct approach would have been to assess the deceased’s income by the Global Award approach, which I hereby do. I therefore set aside the award of Ksh 1,729,188/= as loss of dependency, and substitute it with Ksh 1,100,000/=.

d. The pleaded special damages of Kshs 166,400/= were proved.

36. The upshot is that the appeal partially succeeds and I hereby set aside the judgment delivered on 7th June, 2024 and substitute it with this court’s Judgment in the following terms:

- i. Liability apportioned at 90:10 in favour of the 1st Respondent.
- ii. Pain and suffering – Ksh 100,000/=
- iii. Loss of expectation of life – Kshs 100,000/=



- iv. Loss of dependency - Kshs 1,200,000/= Less 10% contribution (Kshs 120,000/= = Kshs 1,080,000/=.
- v. Special damages 166,400/=
- vi. Costs in the lower court to the 1st respondent
- vii. Interest to run from 7th June, 2024 in favour of the 1st respondent.
- viii. Each party to bear its own costs of the appeal.

37. Orders accordingly

DELIVERED, VIRTUALLY THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE

