



Ruto v Berin & another (Suing as the Legal Administrators of the Estate of Peter Ole Muntet - Deceased); Ndungu (Third party) (Civil Appeal E043 of 2024) [2025] KEHC 11941 (KLR) (6 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E043 OF 2024
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

PETER KIPNGENO ARAP RUTO APPELLANT

AND

MARIM ENE BERIN 1ST RESPONDENT

NAILANTEI RERIN MUNTET 2ND RESPONDENT

SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF PETER OLE MUNTET - DECEASED

AND

ELIJAH KABARA NDUNGU THIRD PARTY

(Being an appeal from the Judgment of the Hon. Y. M. Barasa (PM) delivered on 18th April 2024 in Naivasha CMCC No. MCCC E122 of 2021)

JUDGMENT

1. The respondent who was the plaintiff sued the appellant who enjoined the third party in the suit before the lower court. The claim was filed in February 2021 under the *Fatal Accidents Act* and the *Law Reform Act* following an accident involving the appellant's motor vehicle registration number KBP 704H and the deceased's (rider) motor bike registration number KMET 939N. The appellant denied the claim by filing a defence. After the full hearing of the case judgment was delivered on 18th April 2023, whereby the appellant was found to be 100% liable and awards made in favour of the respondents in the sum of Kshs. 1,561,488/= plus costs and interest.
2. Being aggrieved with the judgment the appellant filed this appeal dated 9th April 2024 on the following grounds:-



- i. That the Honourable learned trial court erred in law and fact by holding the appellant liable at all and/or 100% liable despite weighty, uncontroverted and admitted evidence placed before the learned Honourable Court on gross negligence on the part of the deceased.
 - ii. That the Honourable learned trial court erred in law and fact in relying on the investigating officer's oral testimony on why the appellant was to blame which not only contradicts the Plaintiff's particulars of negligence as pleaded in their Complaint but also which testimony was wholly unpleaded and unsubstantiated/uncollaborated.
 - iii. That the Honourable learned trial court erred in law and fact by conducting a trial by ambush in allowing the Investigating officer to testify and refer to documents not on record nor served upon the Appellant prior to the trial.
 - iv. That the Honourable learned trial court erred in law and fact by relying on an ongoing/active criminal charge from the accident as indicative of negligence on part of the appellant despite the charge being at plea taking stage.
 - v. That the Honourable learned trial court erred in law and fact by adopting Kshs. 13,572/= reserved only for cities as listed, as the decretal income (the deceased had no proof of income) in contravention of the Regulation of wages (General Amendment) Order 2018 (Legal notice number 2 of 2019) which sets the minimum monthly wage of general labourers "in all other areas" at Kshs. 7,240.95/= therefore awarding excessive general damages if any are due at all.
 - vi. That the Honourable learned trial court erred in law and fact by awarding unproved and unsubstantiated special damages if any are due at all.
 - vii. That the Honourable learned trial court erred in law and fact by failing to make a proper determination on liability between the appellant and the 3rd party as enjoined.
 - viii. That the judgment of the learned Honourable court departed from Law and practice.
3. A summary of the evidence is that on 5th July 2020, an accident occurred at Pipeline area along Maai-Mahiu-Narok road involving the deceased's motorcycle registration number KMET 939N and the appellant's motor vehicle registration number KBP 704H. The deceased was injured and later died on 4th September 2020.
 4. PW1, who is one of the widows of the deceased testified that the deceased was a boda boda rider and business man who earned an average of Kshs. 50,000/= per month. He left behind twenty children. The family incurred special damages of Kshs. 870,547/=. She did not visit the scene of accident.
 5. PW2, Cpl Vincent Obare confirmed the occurrence of the accident and the charging of the appellant with causing death by dangerous driving. The appellant was blamed for overtaking a fleet of cars at a curve. Upon cross examination he said the vehicle was on the left side of the road, and at the point of impact the yellow line was broken meaning it was safe to overtake.
 6. The appellant testified as DW1. He is the owner of the vehicle and was the one driving the motor vehicle from Narok to Nairobi along Maai-Mahiu road doing 50 – 60km/hr. He said the road was clear, but when he inched near to the middle of the road, there was a broken kerb and that is when he noticed an oncoming motor cycle positioned in the middle of the road and close to the lorry. That the rider tried to swerve but in the process hit the lorry and lost control and hit the back of his vehicle. He added that him and his passengers wore safety belts and were unhurt, but the deceased was not wearing any protective gear.



7. In cross examination he confirmed that he had not produced his driving licence. He is the owner of the vehicle and was the one driving it. He confirmed having been overtaking and he escaped towards the motorcycle's lane. He confirmed he was charged.
8. The appeal was canvassed by way of written submissions.

Appellant's submissions

9. These were filed by Isavi & Company Advocates and are dated 30th December 2024. Counsel identified two issues for determination. The first issue is the award on loss of dependency. He submitted that since the deceased resided in Suswa the income ought to have been Kshs. 7,240/95 and not Kshs. 13,572/= in line with the Regulations of wages order for the period. That no evidence was produced to show the deceased made Kshs. 50,000/= per month and his death certificate showed he was a farmer. On this counsel relied on the cases of;-

i. Philip Musyoka Mulwa vs Veronica Mbula Mutiso [2013] eKLR where the court stated;-

“In the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate set is usually like for a wage of an unskilled employee which by then stood at approximately 6,000/= in the circumstances I would set aside the multiplicand of Kshs. 10,000/= adopted by the trial court and substitute it with Kshs. 6,000/=.”

ii. Midland Media Ltd. & Another vs Pauline Naukot Aule (suing as legal representative of the estate of the late Esinyon Esoko Ekai) [2020] eKLR where the court held;-

“In the absence of strict proof of a deceased's earnings/income, it is prudent that the Court recertes to the basic wages of the Regulations of Wages (General) (Amendment) Order for the relevant period...In the case Nyamira Tea Farmers Sacco Vs Wilfred Nyambati Kiraita (2011) eKLR, this Court rendered that in the absence of proof of income, the trial magistrate ought to have reverted in the Regulations of Wages for the period... the trial magistrate adopted and used the above sum... as the deceased income. I find it to have been in oder. I uphold the same.”

Also see: Philip Wanjera & Another vs Ahmed Liban & Shukri Ahmed Liban (suing for & on behalf of the Estate of Habiba Liban [2016] eKLR.

10. It was therefore counsel's submission that the loss of dependency ought to have been calculated as below;-

$$2/3 \times (8 \text{ yrs} \times 12 \text{ months}) \times 7,240/95$$

$$\text{Income} = 463,360/=$$

That even if the calculation was in the number of years used by the trial court the figure would be thus;-

$$2/3 \times 13 \times 12 \times 7,240/95$$

$$= 752,960/=$$

11. On liability he referred to the report from NTSA dated 9th December 2021 and the deceased's driving licence which showed that the deceased was not trained to engage in boda boda business. That



- PW2 told the court that he had not seen the deceased's licence. It was thus his contention that the respondents should have produced the licence if it existed. On this he referred to the case of Masinga Ndonga Ndonge vs Kualani Ltd. [2016] eKLR among others. He blamed the deceased for the accident.
12. Counsel further submitted that from PW2's evidence there was no mention of a curve at the scene. That PW2 instead talked of a middle broken line signaling liberty to overtake at the point of impact. He thus submitted that there were contradictions in PW2's evidence which were not addressed by the court. Further that the trial court relied on a pending traffic case, which had not been concluded.
 13. Counsel raised issue with PW2's reliance on the deceased's witness statement yet it was not placed before the court for purposes of cross-examination. He blamed the trial court for not making a proper determination on liability between the Appellant and the 3rd party as enjoined. He singled out receipts at page 21, 28 as not being connected to the issue at hand.

Respondent's submissions

14. These were filed by P. Kiiru Kamau & Company Advocates and are dated 9th December 2024. Counsel cited the case of Ken Odoni & 2 Others vs James Okoth Omburah t/a Okoth Ombura & Company Advocates [2013] eKLR on the principles upon which this court can interfere with a judgment of a lower court. The said decision by the Court of Appeal provides as follows:-

“The principles upon which this court can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that a result there has been injustice.”

15. Counsel gave brief facts of the case and proceeded to submit on the issue of liability. Referring to PW2's testimony he contended that there was clear evidence that the appellant's driver was overtaking other vehicles when he hit the oncoming motorcycle. He thus supported the trial court's finding that the appellant was 100% liable for the accident. Further that no 3rd party was responsible for the accident. On the issue of the pleaded particulars in the plaint counsel submitted that the said particulars resonated well with PW1's and DW1's evidence.
16. Counsel further submitted that PW2 produced the police abstract (P. Exhibit 2) whose material he got from the OB and investigation file. This witness he said had visited the scene of the accident and had interviewed eye witnesses before concluding investigations. Moreover that the appellants claim that PW2 should not have been allowed to refer to the OB extract and investigation file are frivolous.
17. It was counsel's submission that reference to the Traffic case by the trial court was not an error, since the truth was that the appellant had been charged with the offence of causing death by dangerous driving after investigations had been completed. On the minimum wage document placed in the record of appeal it was never produced in the lower court and its not in the index. He argued that the deceased died in the year 2020 two years after the legal notice was published in the Kenya Gazette. Thus the same was not applicable to the deceased. He urged the court to disregard the said notice and uphold the lower court's determination, on the applicable minimum wage.
18. On proof of earnings Counsel relied on the Court of Appeal decision in Jacob Ayiga Maruja & Another vs Simeon Obayo CA No. 167/2002 [2005] eKLR which held thus:-

“We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally



the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

Finally he submitted that special damages were proved by way of receipts and as pleaded and as evidenced on page 18 of the record of appeal. He thus urged the court to dismiss the appeal.

Analysis and Determination

19. This being a first appeal this court is called upon to re-evaluate and assess the evidence to arrive at its own independent conclusion. It should also bear in mind that unlike the trial court this court has not had the opportunity to hear or see the witnesses testify and so give an allowance for it. See *Selle vs Associated Motor Boat Co. Ltd.* (1968) EA 123; *Peters vs The Sunday Post Ltd.* [1958] E.A. 424.
20. I have carefully considered the record of appeal, grounds of appeal, submissions and the authorities relied on by both parties, and the law.
21. The issues I find falling for determination are:-
 - a. Whether the appellant was wholly to blame for the accident.
 - b. Whether the awards made should be interfered with.
 - c. Were special damages proved?
 - d. Who should bear costs?

Issue no. (a) – Whether the appellant was wholly to blame for the accident

22. There is no dispute that an accident involving motor vehicle registration number KBP 704H and motor cycle registration number KMET 939N occurred on 5th July 2020. It is also a fact that no eye witness to the accident testified. PW2 - Cpl Vincent Obare was not the investigating officer but he visited the scene soon after the accident. He confirmed that the motor vehicle and motor cycle were from opposite directions of the road. It is also not disputed that the rider of the motor cycle did not die on the spot. He died two (2) months after the accident but had recorded a statement with the police. The other 2 adult passengers in the appellant’s vehicle refused to record statements. Why? Was there something they were hiding? It is further not disputed that investigations were completed and the appellant was charged with causing death by dangerous driving. This is something that the trial magistrate mentioned in his Judgment but never made any finding on it. So counsel for the appellant cannot be heard to insinuate that the court found the appellant liable because of the Traffic case.
23. In his evidence in chief the appellant (DW1) stated that before he started overtaking, the road was very clear. However, somewhere in the middle he noticed the rider approaching and he was right in the middle of the road. He also said there was a lorry 70m ahead of him. This means the lorry was also overtaking if indeed that was the position, how come the rider did not collide with the said lorry and only tried to avoid the appellant?
24. Secondly if indeed he was not overtaking a fleet of vehicles why could he not move back into his lane on the left? The point of impact from the investigations was on the left side of the road as one faces Narok. The rider was headed to Narok, and so he was on the left side, which was his side.



25. The point of impact was not in the middle of the road as claimed by the 2nd respondent. That is clear from the sketch map at page 82 of the record of appeal and in line with the evidence of PW2 who visited the scene. The trial court who saw the appellant was not convinced with his evidence.
26. Similarly this court is equally not convinced with the appellant's evidence. The truth is that he just overtook a fleet of vehicles before ensuring that it was safe to do so, hence the accident.
27. Furthermore even if the rider had no licence that in itself would not make the court find him liable for causing the accident without proof. The failure to have a licence would have been treated separately had the deceased survived the accident. Infact PW2 told the court that had he confirmed the deceased had no licence he would have charged him for that.
28. Elijah Kibarbar Ndungu was the 3rd party in the lower court having been brought on board by the appellant. He was said to be the registered owner of the motor cycle registration number KMET 939N. No evidence was adduced against him by the appellant or any other witness. After analyzing the evidence before court my finding is that the appellant was wholly to blame for the accident that occurred on 5th July 2020. I find no reason to make me interfere with the finding by the trial magistrate, on liability.

Issue no. (b) – Whether the awards made should be interfered with

29. It was stated by the Court of Appeal in the case of Ken Odondi & 2 Others (supra) that this court can only interfere with the decision of the lower court on damages if the court misdirected itself in some matter as a result of which a wrong decision was arrived at, as the court exercised its discretion. Counsel for the appellant pointed out the issue of the multiplier and the multiplicand in the assessment which were vexing him.
30. There is no dispute that the deceased died at the age of 47. It is also not disputed that there was no proof of his income despite him having been said to have been a rider and a farmer. The trial court adopted the minimum wage of Kshs. 13,572/= for a general worker. It is not clear how he arrived at that figure as the minimum wage.
31. Counsel for the appellant has referred to Kenya Subsidiary Legislation 2018 – which placed the general workers salary at Kshs. 7,240/95 and urged the court to use that as the multiplicand. The respondent's counsel did not make a specific response to this.
32. I have perused the various Gazette Notices on this and note that the one for 2018 remained in force until the amendment of 2022 vide Kenya Gazette Supplement No. 114 (Legislative Supplement No. 52) vide Legal Notice No. 125 of 1st July 2022. In the 2022 Gazette the wages for a general worker was Kshs. 8,109/90. The deceased died on 4th September 2020. Since the wages gazette in July 2022 were not backdated the wages applicable to the deceased is Kshs. 7,240/95.
33. As for the multiplier, the deceased died at age 47 years and the official retirement age is 60 years. He would therefore have worked for 13 years or more before attaining the retirement age. Thus 13 will be the multiplier. There is no issue about the dependency since the deceased left behind two wives and twenty children. The calculation will be thus:-

$$7,240.95 \times 13 \times 12 \times 2/3$$

$$= 753,058/80.$$



34. On special damages the law is clear that the same must be pleaded and proved. The various receipts are found at pages, 21-23, 28-30, 34-39, 42, 66,71 Totalling Kshs. 881,017/=. The pleaded sum is Kshs. 870,547/= which was awarded by the trial court.

Issue no. (c) - Were special damages proved?

35. There was no contest on the awards on loss of expectation of life.

36. The judgment shows that the deceased died on the spot which is not correct. Incident occurred on 5th July 2020 and he died on 4th September 2020 which was after two (2) months. He must have undergone a lot of pain and trauma. I will however not interfere with it as there was no cross appeal.

37. The upshot is that the appeal partially succeeds. I therefore set aside the judgment by the lower court and enter judgement in favour of the Respondents in the following terms:-

- a. Liability at 100% against the appellant.
- b. Loss of dependency – Kshs. 753,058/80.
- c. Loss of expectation of life – Kshs. 100,000/=
- d. Pain and suffering – Kshs.50,000/=
- e. Special damages – Kshs.870, 547/=
- f. Interest to the respondents from date of judgment in the lower court.
- g. Costs in the lower court to the respondents.
- h. The appellant to get 1//3 of the costs in the High Court.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

