



Mbugua v Express Shipping & Logistics EA Limited (Civil Appeal E016 of 2023) [2025] KEHC 6018 (KLR) (2 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E016 OF 2023**

HM NYAGA, J

MAY 2, 2025

BETWEEN

LUCY KAGWIRIA MBUGUA APPELLANT

AND

EXPRESS SHIPPING & LOGISTICS EA LIMITED RESPONDENT

JUDGMENT

Background

1. The appellant commenced suit in the lower court seeking genera and special damages in respect of the death of Samuel Mwenda Muthui, who was involved in a road traffic accident which occurred o 12/12/2021 at Maritati, along Meru- Nanyuki Road. As a result, the deceased suffered fatal injuries.
2. At the conclusion of the trial the trial court dismissed the appellants suit with costs.
3. Aggrieved by the judgment, the appellant filed the present appeal.

The Appeal.

4. The memorandum of appeal dated 11th February, 2023 set out the following grounds:
 1. The learned Senior Principal Magistrate erred in law and in fact in dismissing the appellant's case when the same was proved on required standard.
 2. The learned Senior Principal Magistrate erred in law and in fact in not considering at all the evidence of the appellant and her witnesses and considering only the evidence of the defendant hence arrived at a wrong decision.
 3. The learned Senior Principal Magistrate failed to consider that DW1 owed a duty of care pedestrians and in not holding that he was negligent.



4. The learned Senior Principal Magistrate erred in not properly analyzing the evidence of the viz a viz the evidence of the respondent.
 5. The Learned magistrate judgment is against the weight of law and evidence.
 6. The learned Senior Principal Magistrate failed to apportion liability as between the appellant and the respondent.
 7. That the award proposed by the Senior Principal Magistrate is so low and against the legal principles.
 8. The learned Senior Principal Magistrate failed to appreciate that the appellant had filed the suit on behalf of the dependants of the deceased.
5. The appellant prays that the appeal be allowed on both liability and quantum, together with costs. The appeal was canvassed through written submissions. For the appellant it was submitted that the trial court erred in dismissing the claim by ignoring the evidence of eye witnesses who blamed the respondent's driver for interfering with the scene of the accident. That the deceased was found lying one noted off the road, their PW2 attempt t blame the deceased was intended to mess up the case. It is further submitted that the trial court erred when it failed to find that the respondent's driver owed a duty of care and could have at least apportioned liability against him. That the respondent driver admitted to hitting the deceased but failed to call witnesses to support his case.
 6. For the respondent, it is submitted that their court should be resistant to disturb he decision of the trial court unless it is demonstrated the same was arrived at erroneously. To butter, this point , the respondent cited the case of Ephantus Mwangi Versus Duncan Mwangi Wambugu (1984)eKLR, Nairobi Bus Union Vs. Dexter Ileri Imanene (1993) eKLR and Catholic Diocese of Kisumu Vs. Tete (2004)eKLR.
 7. It is further submitted that even where a defendant has not denied a claim by filing a defence the claimant must tender evidence to prove its case and if it falls short of the standard of proof, then the claim must be dismissed. That in their case the trial court was right to dismiss the claim. Cited was the case of Hon. Daniel Toroitich Arap Mi Versus Stephen Murithi (2018) eKLR on the standard of proof to be applied, the respondent cited William Kabogo Gitau Versus George Thuo and 2 others (2010) eKLR.
 8. The respondent further submitted that the appellant called Inspector Kennedy Salaka, who did not investigate the case, but only produced the police Abstract Form. That from the testimony of the said witness, the deceased was to blame for the accident thus contradicting the appellants evidence. The respondent thus urged the court to find that the appellants own evidence failed to establish any liability on the part of the respondent. To buttress this point the respondent cited the case of Cassman Dhahir Mohammed and another Vs Saluno Mohammed which cited Vyatu Vs Caleb Onyango Vyogo (2015) eKLR of Florence Rebecca Kaluma Vs. Coastline Safaris and Another (1996) eKLR.
 9. It is further assigned that the evidence before the trial court was insufficient to prove negligence as pleaded as prove caused nexus between the respondent, alleged negligence and the accident.

Analysis and Determination

10. Being a first appeal, the duty of this court is as set out in Selle Vs. Associated Motor Board Limited where it was held that;
11. It is with the above in mind that I will look at the evidence adduced.



12. PW1 did not witness the accident merely stated how she learnt of the accident and the steps that one took, including filing this suit.
13. PW2, Kennedy Balaka was the officer in-charge, Timau Police Station. He confirmed that the accident was reported to the station by one Martin Kiara, one hour and 40 minutes after the occurrence. He stated that the failure of the driver to stop amounted to interference with the scene and thus they recommended that an inquest be held. That it was difficult to apportion liability for the accident since there was no eye witnesses.
14. On Cross-examination, the witness stated from where they found traces of blood and the place where the deceased body was lying together with consideration of where the deceased was to blame. No toxicity results were tendered in court in respect to the deceased.
15. PW3, was Mary Nkatha Kaburia. Her evidence was that she witnessed the accident. She stated that the deceased was crossing the road from the right to the left facing Nanyuki direction. The vehicle which hit the deceased was coming from Meru direction, headed to Nanyuki. She claimed that the vehicle was at a high speed and was overtaking a lorry dangerously. That the driver did not brake nor swerve to avoid the deceased.
16. PW4 was Joseph Mugambi. He stated that he was with the deceased just before the accident. That the deceased started to cross the road from the right to the left facing Nanyuki direction. He crossed the yellow line and then he was hit by a vehicle that headed to Nanyuki from Meru direction. That the vehicle was at a high speed and hit the deceased off the road.
17. DW1 was the said Martin Karani Ikiara. HE admitted that he was the one driving the motor vehicle in question at the material time. That he saw the deceased when eh was too close to him. That the deceased had not finished crossing when he hit him. That he did not swerve as he would have collided with oncoming vehicles. He stated that he stopped about 100 metres from the scene, not because he was speeding but due to shock. He stated that he did not attended the inquest.
18. From the evidence adduced, there one two eye witnesses. PW3 and PW4. Both blamed the driver of the vehicle for the accident.
19. PW2 who went to the same confirmed that he only went there on the following day. Evidently, he never got a chance to speak to PW3 and PW4, it is thus not clear why he was convinced that the deceased was to blame for the accident. In my view, the evidence of PW2 as to how the accident occurred is hearsay. Since he was not the one who investigated the same.
20. There is no doubt that the deceased was crossing the road from the right to left, facing Nanyuki. The respondent's driver was driving from Meru towards Nanyuki. The impact was on the left side, facing Nanyuki.
21. I my view, both the deceased and the driver bore some blame. For the deceased it is not clear why he crossed the road, yet Mugambi who was with him did not. He ought to have waited for the road to be clear.
22. The deceased died on the spot. That is a clear indication that the impact was forceful. It is thus clear that the driver was at a high speed. It is apparent that this was a built-up area and there is a speed limit set by law of 50KPH. Evidently the driver was at a speed much higher than what is set, that's why he could not brake in time and avoid the deceased. It is also the reason he stopped 100 metres from the spot that he hit the deceased. He cannot blame it on shock. This must be due to the speed he was at.



23. In my view, the trial court erred in ignoring the evidence of PW3 and PW4 in law the accident occurred. The court dwelt so much on the evidence of PW2, who as have stated, is not the investigating officer and only went to the scene a day later.
24. I also find that reliance on the findings in the inquest file, which did not proceed to hearing was erroneous. The trial court had a duty to look at the evidence before it independently and analyse the same accordingly.
25. Having considered the materials, I am of the finding that the trial court erred in dismissing the appellant's claim on liability and I set aside. In its place, I apportion liability at 50% : 50%.
26. The trial court was right to assess damages even after dismissing the suit. It is noted that that there has been no appeal and submission on the issue or quantum. It is thus not for this court to interfere with the direction of the trial court, unless it is shown that it proceeded on the wrong principles on assessed damages that either manifestly too low or too high. No such submission has been made.
27. Therefore, I will not disturb the award proposed by the trial court and adopt the same.
28. In summary, the following orders do issue:-
 - a. The order dismissing the appellants suit is set aside and substituted with an order that liability be apportioned between the appellant and the respondent at 50%:50%.
 - b. On quantum judgment is entered as per the assessment of he lower court as follows:-
 - i. Pain and suffering - Ksh. 20,000/=
 - ii. Loss of expectation of life - Ksh. 100,000/=
 - iii. Loss of dependency - Ksh. 600,000/=.
 - c. The appellant shall have costs of the appeal and those of the lower court, plus interest at court rates.

DATED, SIGNED & DELIVERED AT MERU THIS 2ND DAY OF MAY, 2025.

H.M. NYAGA

JUDGE

