



**Muriuki v Kambu (Sued and Suing as Legal Representatives of the Estate of Dennis Mugendi Muriithi (DCD)) (Civil Appeal E018 of 2024) [2025] KEHC 7823 (KLR) (4 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7823 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E018 OF 2024  
RM MWONGO, J  
JUNE 4, 2025**

**BETWEEN**

**GEORGE MURIUKI ..... APPELLANT**

**AND**

**BEDAN MURIITHI KAMBU ..... RESPONDENT**

**SUED AND SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF DENNIS MUGENDI MURIITHI (DCD)**

*(Appeal arising from the decision of Hon. D. Endoo, RM in Embu MCCC No. E025 of 2021 delivered on 20th February 2024)*

**JUDGMENT**

**The Appeal**

1. The appeal herein was filed vide a memorandum of appeal dated 26<sup>th</sup> February 2024. It seeks that the appeal be allowed with costs to the appellant/respondent. The appeal is premised on the grounds that:
  1. That the trial court's finding that negligence was proved against the appellant was not only wrong but was based on a wrong apprehension or misapprehension of the law;
  2. That the trial Magistrate erred in disregarding Section 107 of the *Evidence Act*;
  3. That the trial Magistrate erred in finding that the blame could be apportioned on the appellant without the evidence of an eye witness;
  4. That the Magistrate erred in disregarding the provisions of the *Law Reform Act* and the *Fatal Accidents Act*; and



5. That the Honourable learned trial Magistrate erred in law and fact for considering irrelevant matters and against the weight of the evidence on record in arriving at the said decision in favour of the respondent as against the Appellant.

### **The Cross-Appeal**

2. The respondent/appellant filed a cross-appeal dated 19<sup>th</sup> September 2024 seeking the following orders:
  - 1) The Cross Appeal be allowed with costs in the following terms: -
    - a) Costs of the Lower Court be awarded to the Respondent.
    - b) Costs of this Appeal be awarded to the Respondent.
    - c) Any other further relief that this Honourable Court may deem fit and just to grant.
3. The cross-appeal is premised on grounds that:
  1. The Learned Tribunal erred in fact and in law in applying a standard of proof higher in civil cases; that is on a balance of probability;
  2. That the learned magistrate erred in law and in fact by apportioning liability in the ratio of 70:30 yet the Respondent's testimony through a Police Officer was unchallenged and uncontroverted;
  3. The Learned Tribunal erred in law and in fact in failing to hold that the Respondent's Case was unchallenged and uncontroverted;
  4. The Learned Tribunal erred in law and in fact in failing to award costs of the suit to the Respondent yet the Respondent had proved his case on a balance of probability; and
  5. That the learned magistrate erred in law and in fact in failing to give a legal justification as to why each party should bear its own costs yet the Respondent had proved his case on the balance of probabilities.

### **Background**

4. Through a further amended plaint dated 03<sup>rd</sup> August 2023, the respondent/cross-appellant sought judgment against the appellant/respondent for special damages of Kshs.119,750/- general damages under the Fatal Accidents and Law Reform Acts, costs of the suit and interests. The respondent/cross-appellant's case was that on or about the 4<sup>th</sup> August 2020, the deceased was a lawful passenger in motor vehicle registration number KCR 981J travelling along Embu-Meru Road. Whilst near Kairungu, the Defendants/or their driver and/or agent drove motor vehicle registration number KCR 981J so negligently and carelessly that it hit the plaintiff occasioning him fatal injuries.
5. The appellant/respondent filed a further amended statement of defense in which he denied the allegations made in the plaint and stated that the deceased died as a result of his own negligence.
6. At the hearing, PW1 was PC Winnie Sembeyu who produced the police abstract. She stated that she was testifying on behalf of the investigating officer. It had been reported that the deceased was pushed out of a moving vehicle, causing him to sustain fatal injuries. In cross-examination the witness did not know whether the investigations were completed but she stated that the motor vehicle registration number was captured in the police abstract. She was aware that the case was forwarded to the DCI for investigation on dangerous driving but wasn't sure whether the investigations were completed. She did not know whether the deceased was in the vehicle or he was walking.



7. The appellant/respondent did not tender any evidence to controvert the evidence adduced.

### **Findings of the Trial Court**

8. In her judgment, the trial Magistrate apportioned liability at 70:30 against the appellant/respondent. She stated that the accident occurred when the deceased was alighting from the motor vehicle which kept moving. That following the accident, the appellant/respondent/s driver called the respondent/cross-appellant and informed him of the incident.
9. On quantum, the trial court noted that the deceased died 4 days after the accident while receiving treatment at the hospital. General damages for pain and suffering were assessed at Kshs.200,000/=, loss of expectation of life was assessed at Kshs.100,000/= and loss of dependency was assessed at Kshs.1,080,000/= using a multiplicand of 28 years, a multiplier of Kshs.30,000/= and  $\frac{2}{3}$  ratio.

### **Parties' Submissions**

10. The court directed that the appeal and cross-appeal be canvassed by way of written submissions. The Court has considered the submissions filed.

### **Issue for Determination**

11. The core issue is whether the appeal and cross-appeal can be heard in view of the fact that the copies of trial court proceedings appearing in the record of appeal are substantially incomplete.

### **Analysis and Determination**

12. The record of appeal available in this appeal contains typed proceedings of the trial court. The typed proceedings appear to be incomplete. The judgment of the trial court refers to the testimony of the plaintiff but neither the typed proceedings nor the original proceedings contain any such testimony. A perusal of the parties' submissions before the trial court also indicates that there was evidence tendered by PW1, a police officer and PW2, the plaintiff who is the father of the deceased.
13. Liability and quantum were assessed based on the proceedings at the trial. However, in as much as the findings of the trial court are now impugned, this court cannot review the testimony adduced at trial or go into the merits of the case because it appears, from the record of appeal, that the judgment of the trial court is based on a non-existent record. For purposes of appeal and cross-appeal, the court has also carefully perused the original handwritten proceedings of the trial court and it is noted that the recorded testimony of PW1 appears to be incomplete while that of PW2 is completely missing.
14. For these reasons, it would be irresponsible of this court to consider the merits of the appeal and cross-appeal without the full record of evidence adduced at trial. Needless to say, all evidence recorded at the trial is very important and forms the basis for any appeal since the first appellate court is required to re-examine the evidence. See the cases of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Gitobu Imanyara & 2 others v Attorney General* [2016] KECA 557 (KLR).
15. In the circumstances, this being a recent trial of 2024, the judgment of the trial court is hereby set aside and the matter is remitted back to the trial court for retrial, by a Magistrate other than Hon. D. Endoo at which all the evidence adduced will be properly placed on record.
16. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 4<sup>TH</sup> DAY OF JUNE, 2025.**



**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Mwiha for Respondent/Cross Appellant
2. Muthoni holding brief for Mwaura for Appellant
3. Francis Munyao - Court Assistant

