



REPUBLIC OF KENYA



Njagi (Suing as the Administrator of the Estate of the Late Francis Kamotho Kathuri) v Machikine Holdings Ltd (Civil Appeal E094 of 2023) [2025] KEHC 7750 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEHC 7750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E094 OF 2023
JK NG'ARNG'AR, J
JUNE 5, 2025**

BETWEEN

ABINJA WAWIRA NJAGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE FRANCIS KAMOTHO KATHURI) APPELLANT

AND

MACHIKINE HOLDINGS LTD RESPONDENT

(Being an Appeal from the Judgment of Principal Magistrate, Mutuku F. at the Magistrate's Court at Wanguru, Civil Suit Number 132 of 2022)

JUDGMENT

1. The Appellant (then Plaintiff) as the Administrator of the estate of the late Francis Kamotho Kathuri sued the Respondent (then Defendant) for general and special damages that arose when the deceased who was riding motor cycle registration number KMCR 539K was allegedly fatally knocked down by motor vehicle registration number KBF 614U on 18th August 2020 along Mwea – Embu Road.
2. The trial court conducted a hearing where the Appellant called two witnesses and the Respondent closed their case without calling any witness.
3. In its Judgement delivered on 6th November 2023, the trial court dismissed the suit stating that the Appellant had failed to prove her case.
4. Being aggrieved with the said Judgment, the Appellant her Amended Memorandum of Appeal dated 15th March 2024 appealing against the whole Judgement.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions, but in doing so, to have in mind that I neither heard nor saw the witnesses testify.



6. I hereby proceed to summarise the case in the trial court and the parties' respective submissions in the present Appeal.

The Plaintiff's/Appellant's case.

7. Through her Complaint dated 11th August 2022, the Appellant stated that the deceased Francis Kamotho Kathuri while aboard a motorcycle was involved in a road traffic accident on 18th August 2020. That he was hit by motor vehicle registration number KBF 614U along Mwea-Embu Road. It was her further case that the Respondent was the registered owner of the said motor vehicle.
8. It was the Appellants' case that the Respondent was negligent in the accident. The particulars of the negligence were stated in paragraph 5 of the Complaint. That as a result of the accident, Francis Kamotho Kathuri suffered fatal injuries.
9. The Appellant prayed for special and general Damages against the Respondent under the *Fatal Accidents Act* and the *Law Reform Act*.
10. Through her written submissions dated 28th November 2024, the Appellant submitted that she proved her case to the required legal standard. That she called PW2 who produced a Police Abstract which confirmed that the accident occurred. The Appellant further submitted that PW1 confirmed that her husband, the deceased was riding the motor cycle registration number KMCR 539K when he was hit by motor vehicle registration number KBF 614U and died as a result. She relied on *Joyce Mumbi Mugi v Kenya Commercial Bank, Nyeri Branch & 3 Others* [2007] KEHC 2862 (KLR).
11. It was the Appellant's submission that the Respondent did not avail any witness and thus did not controvert her evidence on how the accident occurred. She relied on *Linus Ng'ang'a Kiongo & 3 others vs Town Council of Kikuyu* (2012) eKLR, *Caparo Industries PLC v Dickman* (1990) 1 ALL ER 568, *Berkley Steward v Waiyaki* Vol 1 KAR 1118 (1986-1989) et.al
12. The Appellant submitted that the Respondent was 100% to blame for causing the accident. On quantum, the Appellant submitted that the trial court did not assess damages as was the procedure and asked this court to allow the Appeal and remit the matter back to the trial court for the award of damages.

The Defendant's/Respondent's case.

13. Through its statement of defence dated 21st September 2022, the Respondent denied the occurrence of the accident on 18th August 2020 and further denied being the registered owner of motor vehicle registration number KBF 614U.
14. It was the Respondent's case that if the accident occurred then it was caused by the negligence and carelessness of the deceased. The particulars of negligence were contained in paragraph 7 of the Defence.
15. Through its written submissions dated 19th March 2025, the Respondent submitted that the Appellant did not prove that the Respondent was liable for causing the accident. That the deceased's wife (PW1) was not an eye witness and the information she relied upon was given to her by the police. The Respondent further submitted that the police officer (PW2) could not tell who caused the accident. That no more evidence was adduced by the Appellant.
16. It was the Respondent's submission that both the deceased and the Respondent as road users owed a duty of care to each other. That the Appellant failed to adduce evidence to indicate that the Respondent breached the duty of care. It was the Respondent's evidence that the Appellant's evidence



tendered in the trial court was not primary evidence. It relied on Charterhouse Bank Limited (under statutory management) vs Frank N. Kamau (2016) eKLR.

17. I have gone through and carefully considered the Record of Appeal dated 9th February 2023, the Appellants' written submissions dated 28th November 2024 and the Respondent's written submissions dated 19th March 2025. The only issue for my determination was whether the trial court erred in dismissing the Appellants' suit.
18. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Section 107 of the Evidence Act provide as follows: -
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
19. The Halsbury's Laws of England, 4th Edition, Volume 17, describes such burden of proof as: -

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?
20. The present case is pegged on negligence. In Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] KEHC 341 (KLR), Ibrahim J. (as he was then) stated: -

“In an action for negligence, as in every other action, the burden of proof falls upon the Plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior (sic!) and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.” (Emphasis mine)
21. In her Complaint dated 11th August 2022, the Appellant averred that the Respondent was negligent in causing the road traffic accident that claimed the life of her husband. In essence, the Appellant bore the burden of proving that the Respondent was negligent and caused the said accident.
22. The Appellant testified as PW1 and stated that her husband died as a result of being hit by the Respondent's motor vehicle. The Appellant blamed the Respondent for causing the accident. When



- PW1 was cross examined, she stated that she was informed by a police officer that the Respondent's motor vehicle was speeding.
23. No. 118586 PC Dennis Mwingi testified as PW2. He testified that the accident occurred on 18th August 2020 and as a result there were two fatalities, the deceased as the rider and Kennedy Mukirao as the pillion passenger. He produced a Police Abstract as P. Exh 3. When PW2 was cross examined, he testified that he was not the investigating officer and did not visit the scene of the accident.
24. From the above evidence, it is clear that the Appellant proved that an accident occurred between motor vehicle registration number KBF 614U and the deceased. PW1 also produced the deceased's Death Certificate and Post Mortem Report as P. Exh 1 and P. Exh 7 respectively. This was conclusive proof that Francis Kamotho Kathuri died as a result of injuries sustained from the accident.
25. The next step was for the Appellant to prove that the Respondent was responsible for causing the accident so as to establish liability. From the evidence tendered by the Appellant, there was no evidence that showed that the Respondent caused the accident. The Appellant and her witness simply proved that the accident occurred and Francis Kamotho Kathuri died as a result. The Appellant was not an eye witness and the police officer (PW3) admitted that he was not the investigating officer. In sum, there was no evidence as to the circumstances of the accident.
26. I must note that a Police Abstract does not confer liability. Liability can only be established through production of sufficient evidence which in the present case, the evidence adduced to establish liability was insufficient. As such it would be wrong for a court to apportion liability on account of insufficient evidence.
27. As earlier noted, the legal burden of proof always lay with the Appellant in this case. The Respondent would only have an evidential burden depending on the evidence adduced by the Appellant and the failure of the Respondent to adduce evidence did not mean that the Appellant had proved her case to the required legal standards. I agree with Mativo J. (as he then was) in *Bwire v Wayo & Sailoki* [2022] KEHC 7 (KLR), where he stated: -
- “The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant. In fact, the Magistrate other than saying the appellant never adduced evidence, he never explained whether the evidence before him discharged the evidential burden of prove. Had the trial Magistrate appreciated that the initial evidential burden rests upon the Plaintiff, and had he carefully applied his mind to the law, he would have held that there was nothing for the appellant to rebut since the Respondent had not discharged the legal burden of prove. However, he was blinded by the mere fact that the appellant never called evidence and overlooked binding decisions cited by the appellant before him. At that point it was irrelevant that the appellant never adduced evidence at all because there was nothing to rebut.....”
28. Flowing from the above, it is my finding that the Appellant did not provide sufficient evidence to support her claim of negligence against the Respondent. The Appellant did not discharge her burden of proof. In the circumstances, I agree with the trial court that the Appellant did not prove her case to the required legal standard which was on a balance of probabilities.



29. In the end, the Appeal dated 15th March 2024 has no merit and is dismissed with costs to the Respondent. The costs in the main suit shall remain as awarded by the trial court.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 5TH DAY OF JUNE, 2025 IN THE PRESENCE OF:

Ogowe for the Appellant

Odiyo for the Respondent

Siele/Mark (Court Assistants)

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J.K. NG'ARNG'AR

JUDGE

