



REPUBLIC OF KENYA



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**Kabugua & another (Suing as Representative of the Estate of Justus Amukhale Musumba - Deceased) v Kimuri (Civil Appeal 158 of 2023)
[2025] KEHC 12877 (KLR) (17 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 158 OF 2023
JM NANG'EA, J
SEPTEMBER 17, 2025**

BETWEEN

MERCY WANGARI KABUGUA 1ST APPELLANT

BERNARD MUSUMBA OKUTO 2ND APPELLANT

**SUING AS REPRESENTATIVE OF THE ESTATE OF JUSTUS AMUKHALE
MUSUMBA - DECEASED**

AND

BEATRICE WARUARE KIMURI RESPONDENT

(Being an Appeal from the Judgement of Honourable N. Ndege (Senior Principal Magistrate) delivered at Nakuru on 4th day of July, 2023 in NAKURU CMCC NO. 1153 OF 2019 between MERCY WANGARI KABUGUA and BENARD MUSUMBA OKUTO (Suing as representative of the Estate of JUSTUS AMUKHALE MUSUMBA (Deceased) vs BEATRICE WARUARE KIMURI)

JUDGMENT

1. The Appeal challenges the lower court's judgement by which the Appellants' suit against the Respondent was dismissed with costs. The Grounds of Appeal as per Memorandum of Appeal dated 10th July 2023 may be condensed into two as hereunder;-
 - a. That the Learned Trial Magistrate erred in law and fact by failing to find that the Appellants proved the Respondent's liability on a balance of probability.
and
 - b. That the Learned Trial Magistrate erred in law and fact by relying on wrong legal principles thus arriving at an erroneous decision on liability for the claim.



2. The Appellants accordingly propose to urge the court that;-
 - a. The Appeal be allowed with costs.
 - b. The Judgement of the Trial Court be set aside and the Respondent be found 100% liable.
3. A brief background to the appeal is necessary. The Appellants sued the Respondent in the lower court for general damages special damages costs and interest over fatal injuries occasioned to Justus Amukhale Musumba (deceased) on behalf of whose Estate the suit was instituted. The Appellants contended that the Respondent's motor vehicle registration number KCD 773 Toyota Hiace was at the material time negligently driven as a result of which it rolled and the deceased who was a lawful passenger therein sustained fatal injuries.
4. The Respondent filed defence traversing all the material allegations in the suit including the negligence attributed to her and/or her driver. In the alternative, she averred that any such accident as might be proven to have occurred was solely caused by the deceased owing to his own negligence conduct. The Respondent therefore urged the court to dismiss the suit with costs.
5. Only the Appellants tendered evidence in the lower court through one of the Appellants (Mercy Wangari Kabugua) a Police Officer (IP Peter Wepukhulu) and a civil servant based at the Nakuru Civil Service Registry (Stephen Relly. There was no eye witness account of the circumstances leading to occurrence of the accident. Based on records in Subukia Police Station's Occurrence Book relating to the accident, IP Wepukhulu learnt that the accident was reportedly caused by a tyre burst. The officer did not investigate the accident but exhibited a police abstract report of the accident issued by the station.
6. The third witness for the Appellants produced birth certificates of the deceased's children he sired with one of the Appellants Mercy Wangari Kabugua. This evidence has no bearing on the issue of liability herein.
7. The Respondent did not offer evidence.
8. Learned Counsel for the parties were invited to put in Written Submissions on the Appeal. The Appellants think that the Respondent is liable having failed to tender evidence showing how the accident occurred. Reference is made to various decisions in support of this submission including *Nandwa vs Kenya Kazi Limited* (1988) KLR 488; *Embu Public Road Services Limited vs Riimi* (1968) EA22 and *Devshi vs Kuldips Touring Co.* (1969) EA 189. These decisions in nutshell hold that where prima facie evidence of negligence is shown by the Plaintiff the Defendant assumes responsibility to explain why he was not blameworthy for occurrence of an accident. In the *Embu Public Road Services Limited* case supra it was observed;-

“Where an accident occurred and no explanation is given by the defendant which would exonerate him from liability, then the court would be at liberty to apply the doctrine of *res ipsa loquitur* and hold the defendant liable in negligence.”
9. The Appellants therefore fault the lower court's Judgement on liability for the accident.
10. The Respondent has not put in submissions.
11. This being a first appeal I am required to reconsider the evidence adduced, evaluate it and draw my own conclusions bearing in mind that I did not hear and see the witnesses who testified{ (see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123 }. The Court of Appeal for



East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

12. The doctrine of *res ipsa loquitur* was explained as follows in the *Embu Public Road Services Limited Case supra*.

“The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The Plaintiff in those circumstances, does not have to show any specific negligence, he merely show that an accident of that nature should not have occurred in the circumstances, which leads to the inference, the only reasonable inference, that the only reason for the accident must therefore be negligence of the defendant....”

13. In the instant case the Appellants pleaded that the accident vehicle rolled as a result of negligent driving thereby causing him bodily injury. The Respondent did not tender evidence to explain the circumstances in which the vehicle rolled or its tyre burst as per the report made to the police.

14. The trial court found that the Appellants had failed to discharge their burden of proving negligence on the part of the Respondent, adding that it was not sufficient to say that the Respondent did not testify. The Learned Trial Magistrate concurred with the Respondent’s Submissions that the accident having been caused by a tyre burst it;

“cannot be purely blamed on the defendant or her driver...”

15. The lower court then proceeded to dismiss the claim with costs for want of proof of the Respondent’s liability. I do not agree with this opinion. The Appellants had no capacity to tell how the vehicle rolled or its tyre burst if that was indeed what happened. These were matters within the knowledge of the vehicle owner and/or driver. Owing to the operation of the doctrine of *res ipsa loquitur*, the burden shifted to the Respondent to explain occurrence of the accident but she chose not to offer evidence. In the circumstances of the case, therefore, the Appellants proved the Respondent’s liability on a balance of probability.

16. The appeal accordingly succeeds. The lower court’s judgement on liability for the claim is set aside and substituted with this court’s order adjudging the Respondent wholly liable. The Appellants are granted the costs of the appeal and the suit before the lower court.

JUDGEMENT DELIVERED VIRTUALLY AT NAKURU THIS 17TH DAY SEPTEMBER, 2025.

J. M. NANG’EA, JUDGE.



In the presence of:-

Appellant's Advocate, Mr. Ngure

Respondent's Advocate, Absent

Court Assistant (Jeniffer)

J. M. NANG'EA, JUDGE.

