



Musyoki & another (Suing as the next of kin and on behalf of the Estate of Boniface Musyoki Muinde (Deceased)) v Jitendrakumar & 2 others (Civil Appeal 151 of 2019) [2023] KEHC 822 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 151 OF 2019
MW MUIGAI, J
FEBRUARY 9, 2023**

BETWEEN

RICHARD MUINDE MUSYOKI 1ST APPELLANT

SUSAN NDUNGE MUSYOKI 2ND APPELLANT

**SUING AS THE NEXT OF KIN AND ON BEHALF OF THE ESTATE OF
BONIFACE MUSYOKI MUINDE (DECEASED)**

AND

PATEL JITENDRAKUMAR 1ST RESPONDENT

GODFREY MUMO 2ND RESPONDENT

BERNARD MUSYOKI MUNYAO 3RD RESPONDENT

*(Being An Appeal From The Judgment of The Hon C.A. Ocharo(PM)
Delivered on The 13Th Day of July 2017 In Machakos Cmcc No 24 of 2013)*

JUDGMENT

Trial Court Record

1. This suit was commenced by a Plaintiff dated December 6, 2012 filed on 18/1/2013 seeking the following orders;
 - a. Special damages in the sum of Kshs 49,300
 - b. General damages under the *Fatal Accidents Act*
 - c. General damages under the *Law Reform Act*
 - d. Costs of the suit



- e. Interest on a,b,c and d above.
2. The cause of action on or about July 20, 2010 when the deceased was lawfully walking off the road along Machakos-Kangundo road, near Golf club when the 3rd Defendant in his employment and/or agency to the 2nd Defendant drove, controlled and or managed motor vehicle registration number KAM 284L so negligently that he permitted the vehicle to veer off the road and hit the deceased, as a result whereof he sustained fatal injuries and died. The Plaintiff averred that the 1st Defendant was the registered owner of motor vehicle registration number KAM 284L Suzuki Van (hereinafter referred to as the motor vehicle).
3. The negligence of the driver was particularized as follows;
 - a. Driving at a speed that was excessive in the circumstances
 - b. Driving without any due care and/or sufficient attention
 - c. Failing to maintain any proper and/or effective control of the said motor vehicle so as to avoid the accident
 - d. Failing to stop, swerve, brake, slow down or in any other manner to steer the said motor vehicle so as to avoid the said accident.
 - e. Permitting the said motor vehicle to veer off the road and hit the deceased
 - f. Driving the motor vehicle carelessly and dangerously without any due rears to the safety of the other road users along the said road and in particular the deceased herein
 - g. Failing to exercise all due care and skill required of a driver
 - h. Failing to adhere to the road [Traffic Act](#) and the Highway Code
4. The Plaintiff averred that the deceased who was a healthy young man was 26 years and working as a caddie at Machakos Golf Club earning Kshs 10,000 per month and the dependents were listed as;
 - a. Richard Muinde Musyoki Father
 - b. Monicah Musyoki Grandmother
 - c. Mutunga Muinde Brother
 - d. Muthee Muinde Sister
5. Special damages were particularized as follows;
 - a. Funeral Expenses Kshs 18,800
 - b. Application for letters of administration Kshs 30,000
 - c. Search certificate for KAM 284L Kshs 500Total Kshs 49,300

2nd & 3rd Defendant's Defence

6. They filed a joint defense on February 11, 2013 in which they denied the contents of the Plaint and contended that if any accident occurred by motor vehicle Reg KAM 284 L then it was caused by the deceased negligence which was particularized as follows;



- a. Standing on a place not designated for pedestrians
 - b. Crossing on place not designated for pedestrians
 - c. Running towards the direction which the motor vehicle was being driven
 - d. Failing to take care while on the road
 - e. Contributing to the cause of the accident
 - f. Causing the accident.
7. The Plaintiff filed Reply to the Defense reiterating the contents of the Plaintiff and denying the particulars of negligence therein. The suit against the 1st Defendant was withdrawn.

The Hearing

8. The Plaintiff called three witnesses. PW1 was PC Daniel Chacha, stationed at Machakos Police Station performing traffic duties. He said he had a police file number Athi River Fatal 174/2010 for an accident that occurred on 20.7.2010 involving motor vehicle registration number KAM 284L Suzuki Maruti and pedestrian Boniface Musyoki Muinde along Machakos Kangundo road near Golf club. The report was made at the police station by members of the public. He and other police officers found motor vehicle registration number KAM 284L stationed near the front of Machakos Golf Club. Boniface Musyoki Muinde was at the scene of the accident and the owner of the motor vehicle was Godfrey Mumo Matemba. Bernard Musyoki Munyao was the driver of the motor vehicle. He said the vehicle was driving towards Machakos town and the driver said he was avoiding to hit some cattle that were crossing the road, he swerved to the right as a result of which he knocked down the pedestrian Boniface Musyoki. The pedestrian was on his way to hospital.
9. It was his testimony that the driver was charged with causing death by dangerous driving, found guilty and convicted to 2 years imprisonment on 2.3.2011 in Traffic Case 13 of 2010. He produced the police abstract as Exhibit 1.
10. In cross-examination, he stated that he went to the scene of the accident and found other vehicles at the scene while the pedestrian had been taken to hospital. He said the vehicle was a public service vehicle, it was carrying passengers. It has a capacity of seven passengers. He confirmed that there was a corner at the scene of the accident. He said the driver was avoiding ramming into cattle that were crossing the road. They found the motor vehicle of the road on the right side facing Machakos town and the driver was charged with causing death by dangerous driving. He said the eye witnesses were Henry Mutua David and Joseph Mutisya. They all recorded statements. He did not have a copy of the judgement in the traffic case and the result was entered into the police file. He said the owner of the vehicle was indicated in the certificate of insurance.

There was no re-examination.

11. PW2, Richard Muinde Musyoki, a cobbler stated that Susan Ndunge Musyoki is his sister and Boniface Musyoki Muinde, deceased was his son. He said that on 20/7/2010 he was at home when he received a report from Erick Mutua that the deceased had been hit by a vehicle near Machakos Sports Club. He passed by the scene of the accident and found the deceased had been taken to hospital, he went to Machakos General Hospital and found him dead. He said the accident vehicle was KAM 284L, he reported the accident at Machakos Police station and they obtained grant of letters of administration which he produced.



12. It was his testimony that Boniface was 26 years at the time he died, working at Machakos Golf club as a Caddy earning Kshs 500 per day. About Kshs 10,000 to 15,000 per month and he would assist with provisions at home. He would supply food for lunch while he would cater for supper. He was not married and had a younger brother and sister, Mutunga and Mutheu. They buried the body and obtained a death certificate. He produced burial receipts and letters of administration, totaling to Kshs 4,800. He also produced a demand letter and a statutory notice.
13. Upon cross- examination, he stated that he arrived at the scene of the accident at 10.30am. He went to hospital and found he had died on the way to hospital. He contended that caddies are not issued with employment cards, they are paid by the golfers upon carrying bags for them. He indicated that he used to tell him how much he was being paid and it is not true that golf is not played every day. He opined that he used to work there as a caddy when he was young and used to get work every day. During competitions they would be paid Kshs 1,000 per day. He denied that there was any day he would miss work. He produced a photocopy of the death certificate and said the original was at home. He said they paid Kshs 25,000 as burial expenses and did not remember how much he paid the advocate for grant of letters of administration.
14. Upon re- examination, he said he has the receipts for grant of letters of administration.
15. PW3, Henry Mutua David who works as a Caddy at Machakos Golf Club stated that he knew the deceased and was working with him at Golf as caddies. He contended that on 20.7.2010, he and Boniface were on their way home from work and were walking along Machakos- Kangundo road on the right side of the road. He was on the right and Boniface on the left. All of a sudden, they saw a vehicle ahead of them and he saw Boniface had been hit by the said vehicle. The vehicle was heading to Machakos from Kangundo side. He did not know why the vehicle left the road and came to where they were. He opined that after hitting Boniface, the vehicle stopped about 10m ahead. He said he did not hear the vehicle hooting. Boniface fell ahead of him, he picked him and they took him to the hospital. On reaching the hospital, they were told that he had died. They reported the accident to Machakos Police station.
16. The accident vehicle was registration KAM 284L Maruti, the driver was charged with careless driving and he was a witness in the traffic case. He did not know the outcome of the case.
17. Upon cross-examination, he stated that Caddies earn Kshs 500 per day and they were working all days including Sunday. They were employed by the golf club which was paying them not the golfers. They were not signing anywhere for payment except for reporting time to work and the records were there. He said on the fateful day, they were walking together, he was on the right and Boniface on the left. The vehicle left the road and hit him, he was about 2m from the tarmac. The vehicle stopped about 6-7 meters ahead of them. He said he was not at the scene when the police went to it. He did not know how many people were in the vehicle, he did not see any cattle on the road and did not have information that the driver was avoiding hitting cattle. He also indicated that he did not know why the driver left the road.

The Defendants opted not call any witness.

Trial Court Judgment

18. The Trial Court made its determination based on three issues. Firstly, on who was the owner of motor vehicle, it was found that PW1 could not explain where he got the details to have entered them in the abstract. That his explanation was that he got them from the certificate of insurance which was not produced in court. It was found that the Plaintiff withdrew the case against the 1st Defendant whom



it was pleaded was the registered owner and the fact that his name was on the police abstract did not bear any weight. The Trial Court found that the ownership of the motor vehicle had not been proven against the 2nd Defendant and was dismissed with costs.

19. Further, it was found that the only link to the 3rd Defendant was based on the police abstract and without the criminal proceedings and noting the denial in the defence, it was impossible to conclude that the person named as the 3rd Defendant was the driver of the accident motor vehicle on the day in question.
20. On negligence, the Trial Court found that an accident occurred as a result of which the deceased lost his life from the injuries sustained and apportioned liability at 50:50 but found that since ownership had not been proved, judgment could not attach against the defendants.
21. The Trial Court indicated that it would have awarded the following damages under various headings, for pain and suffering, the Trial Court said it would award Kshs 10,000 and Kshs 100,000 for loss of expectancy of life. For loss of dependency, it was found that there was no evidence that the deceased earned Kshs 10,000 per month nor that he was a caddy at the time of his death. Further that since the deceased was not married, it was not automatic that his father, grandmother and siblings would receive assistance from him. There was no proof that he provided lunch at home and applying a ration of 1/3, a multiplier of 20 years, The court indicated that it would award Kshs 800,000.
22. On special damages, the court found that they had been proven by production of receipts for Kshs 49,300.

The Appeal

23. Dissatisfied by the judgment, the Appellants filed this Appeal vide a memorandum of Appeal dated November 21, 2019 seeking to have the following orders;
 - a. Spent
 - b. The judgment of the trial court on liability set aside/reversed.
 - c. The judgment of the trial court on quantum be upheld
 - d. Costs of this Appeal be borne by the Respondents.
24. The Appeal is founded on the following grounds;
 - a. The learned Trial Magistrate erred in law and in fact by dismissing the Plaintiff's suit.
 - b. The Learned Trial Magistrate erred in law and in fact in finding that the Plaintiff's had not proved the ownership of the motor vehicle.
 - c. The Learned Trial Magistrate erred in law and in fact in failing to find the Defendants herein liable for the accident at the ratio of 50:50
 - d. The Learned Trial Magistrate erred in law and in fact by disregarding the Plaintiff's testimony in totality especially evidence by the Police officer.
 - e. The Learned Trial Magistrate erred in law and in fact by applying wrong principles and failing to consider relevant ones in reaching her decision.



- f. The Learned Trial Magistrate erred in law and in fact by failing to consider police abstract as sufficient proof of ownership of motor vehicle.
 - g. The Learned Trial Magistrate erred in law and in fact by failing to find that the Plaintiffs had proven their case on a balance of probability.
25. The Appeal was canvassed by way of written submissions.
26. At the time of writing this judgment, only the Appellants submissions were on record. The Court record confirms that on 8/11/2021 and 19/9/2022, the Appellants' Counsel confirmed service to the Respondents to file written submissions to the appeal.

Appellants Submissions

27. The Appellant filed submissions on 5th November 2021 in which he contended that there were two issues for determination. As to who the owner of motor vehicle registration number KAM 284L, It was submitted that the police abstract was conclusive enough to prove that the 2nd Respondent was the beneficial owner and the 3rd Respondent the driver. While relying on the case of *APA Insurance Co. Limited v George Masele* [2014] eKLR, *Joel Muga Opija v East African Sea food Limited* [2013] eKLR and *Superform Limited & Another v Gladys Nchororo Mbero* [2014] eKLR it was submitted that the Respondents did not produce any evidence to rebut the contents of the police abstract .the police recorded the details of the motor vehicle from the certificate of insurance and it was not mandatory that the certificate be produced in the ordinary course of business. Further, that on a balance of probability, the 2nd Respondent was the beneficial owner of the accident motor vehicle and the 3rd Respondent was a driver. He opined that there was an agency relationship between the 2nd Respondent and the 3rd Respondent who was vicariously liable.
28. On negligence, it was submitted that according to PW3'S evidence, on the day of the accident, they were walking together with the deceased when the motor vehicle veered off the road, hit and knocked the deceased down and that the Respondents did not call any evidence to controvert the Appellant's testimony on record. While making reference to the case of *Board of Trustee Meru Diocese Kirimara Parish v Dores Wanja Bore* (2020) eKLR, the court was urged to find the Respondents 100% liable for the accident. The Appellant also prayed for costs of the Appeal.

Determination

29. I have considered the Appeal, the Trial Court record and the Appellant's submissions.
30. This being a first appellate court, this court must reiterate what was held in the case of *Selle v Associated Motor Boat Co Ltd* [1968] EA 123 that:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the HCCA 18 of



2020 impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

Liability

31. At the outset this Court notes that the Trial Court that took evidence and conducted the hearing left the matter and went on transfer and the incoming Court took over the matter and completed the matter.
32. Secondly, from the Trial Court record the Defense opted not to provide /adduce any evidence and closed its case.
33. The thrust of the Appellants’ appeal is that the Trial Court erred in law and in fact by dismissing the Plaintiff’s suit, in finding that the Plaintiff’s had not proved the ownership of the motor vehicle, in failing to find the Defendants herein liable for the accident, disregarding the Plaintiff’s testimony in totality especially evidence by the Police officer, applying wrong principles, failing to consider Police Abstract as sufficient proof of ownership of motor vehicle and failing to find that the Plaintiffs had proved their case on a balance of probability.
34. In civil matters, the Court considers liability, whether the cause of action pleaded is proved to the required legal standard on a balance of probability and who is/are held liable for the action commission and/or misconduct that caused loss, injury and/or damage to the Claimant.
35. In the instant appeal, this Court is to consider and reevaluate the evidence on record of the Trial Court analyze and arrive to its own independent conclusion. Of course, considering this Court unlike the Trial Court, did not see and/or hear the direct evidence and consider the demeanor of witnesses.
36. In the case of *Anne Wambui Nderitu v Joseph Kiprono Ropkoi & Anor* Civil Appeal 335 of 2000 Nyeri [2005] 1 EA 334, the Court of Appeal found;

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:

“107. (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.”

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

The two sections carry forward the often-repeated evidential adage:

“he who asserts must prove.”



Police Abstract as Proof of Liability

37. The Appellant contends that a police abstract is sufficient proof of ownership of a motor vehicle in the absence of contradictory evidence and has produced authorities to that effect. That is the first issue, is it sufficient proof of ownership of the motor vehicle?

38. In the case quoted by the Appellant herein, *Joel Muga Opija v East African Sea Foods Ltd* [2013] eKLR the court stated on police abstracts:

“in our view an exhibit is evidence and in this case the appellant’s evidence that the police recorded the respondent as the owner of the vehicle and Ouma’s evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect that the learned Judge in failing to consider in depth the legal position of what is required to prove ownership erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

39. In the case of *Lake Flowers v Cila Franklyn Onyango Ngonga (suing as the personal legal representative of the estate of Florence Agwingi Ogam (deceased) and Josephine Mumbi Ngugi* [2008] eKLR which was also on the same issue, it was held:-

“Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or (sic) attempt to partly or wholly blame the 2nd respondent for the accident on this appeal. Neither can it deny the ownership of the Mitsubishi Canter without any evidence to counter the Police Abstract produced by the 1st respondent which shows it to be the owner of that motor vehicle.”

40. However, in the case of *Fredrick Odongo Otieno v Al-Husnain Motors Limited* [2020] eKLR, Aburili LJ had this to say on the same issue;

“In the instant case, in my humble view, appellant was bound by his pleadings and indeed prove that the respondent was the owner of the motor-vehicle and since the respondent had denied such ownership claim and put the appellant to strict proof, nothing would have been easier than to call evidence from the Registrar of Motor-vehicles showing that the respondent was the registered or beneficial owner of the motor-vehicle at the time of the material accident. This was not done and therefore in my humble view, the appellant’s case was not proved on a balance of probabilities.”

41. The same Court while analysed the Court of Appeal decisions concluded that ;

“The question is whether the police abstract is sufficient to proof ownership.

32. The Court of Appeal in the case of; Joel Muga Opinja v East African Sea food limited [2013] eKLR quoted in the case of Ignatius Makau Mutisya v Reuben Musyoki Muli stated that ‘we agree that the best way to proof ownership would be to produce to the court a document from the Registrar of Motor-



vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot later be denied.”

33. It would seem in view of this authority that the appellant found solace in the above decision. However, in the *Thuranira Karauri v Agnes Mocheche* [1997] eKLR (*supra*) case, the Court of Appeal stated that: where ownership is denied it was incumbent upon the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor-vehicles showing the registered owner of the lorry.

The Court of Appeal in these binding decisions is clearly stating:

- (i) That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.
- (ii) Where there exists other compelling evidence to prove otherwise then the court can make a finding of ownership that is different from that contained in the logbook.
- (iii) Each case must however be considered in its own peculiar facts.

42. In the case of *Nancy Ayemba Ngaira v Abdi Ali* [2010] eKLR the court made the following observation:-

“...There is no doubt that the registered certificate obtained from the registrar of motor vehicle will show the name of the registered owner of the motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is fully recognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have risen to describe such alternative forms of ownership. A person who enjoys any of such other categories of ownership; actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the police abstract, showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question.”

43. The Court of Appeal in the case of *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & another* [2010] eKLR held as follows:-

“Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”



44. From the above cited law and authorities; in the instant case, the court record shows as follows;
- a) Annexed to the Plaintiff filed on 18/1/2013 is the Customer Copy of Records from Registrar of Motor Vehicles dated 20/7/2010 that confirms Mr Patel Jitendra Kumar as the registered owner of motor vehicle Suzuki Van Blue Reg KAM 284L. He was sued as 1st Defendant in the Trial Court.
 - b) However, the 2nd Defendant Mr Godfrey Mumo Malenge, the owner as indicated on the Certificate of Insurance and 3rd Defendant Bernard Musyoki Munyao, the driver of the said motor-vehicle on the fateful day, 20/7/2010 filed Joint Defense on 11/2/2013.
 - c) The 1st Defendant by letter dated 8/7/2013 wrote to the Appellants advocate, Messrs LM Wambua and annexed Sale Agreement of motor vehicle Reg KAM 284L Insurance Copy and Transfer of Ownership document that confirmed at the time of the accident he was not the registered owner of the motor vehicle. Hence, the suit against the 1st Defendant was withdrawn.
45. From the above chronology of events, where the Trial Court considered as follows at Pg 7 of the judgment;
- Secondly, the Plaintiffs' withdrew the case against the 1st Defendant whom they pleaded as the registered owner so who is the 2nd Defendant in these proceedings?
46. If as the above authorities indicate that A copy of the Registrar of Motor Vehicles Records is sufficient evidence and in this instant case such a copy was availed but showed the 1st Defendant who at the time of the accident sold the vehicle, what other tangible and cogent evidence would suffice in the circumstances other than the details on the Certificate of Insurance on the windscreen of the vehicle Reg KAM 241 Suzuki Maruti at the scene right after the accident occurred?
47. In this case, the Appellant/Plaintiffs' case called PW1 PC No 66495 Daniel Chacha who testified that on 20/7/2010 after a report was made by members of the public to the Police of an accident, he and other Police Officers went to the scene of the accident. He saw and found motor vehicle Reg KAM 284 L, saw and talked with the driver 3rd Defendant, Bernard Musyoki Munyao. He saw from the Certificate of Insurance n the motor vehicle the owner was/is 2nd Defendant Godfrey Mumo Matemba.
48. PW1 with other Police Officers who conducted the investigations and PW3 an eye witness who testified were at the scene of the accident and confirmed the registration number of the motor vehicle Reg KAM 284 L Suzuki Maruti.
49. The Police Abstract dated August 23, 2010 indicates that an accident occurred, particulars of the reported accident; the owner of the subject motor vehicle involved, the injured person being the deceased, the insurance company and particulars thereto. It also indicated that the driver was charged with causing death by dangerous driving. According to PW1 he was convicted for causing death by dangerous driving and sentenced to 2 years imprisonment in Traffic Case No 13 of 2010.
50. The Respondents had put the Appellant to strict proof but did not testify not produce any evidence to controvert that of the Appellant. PW1 & PW3 gave direct evidence as to what they saw heard touched spoke and did at the scene of the accident by motor vehicle Reg KAM 284 L. The evidence of the Police Abstract was also not challenged during cross- examination except PW1 being cross examined on where the contents of the Police Abstract were filled from. By virtue of section 35 & 63 of the [Evidence Act](#), the evidence adduced by PW1 was direct evidence and the Police Abstract content is valid as it was from the Certificate of Insurance of motor-vehicle Reg KAM 284 L which was at the scene of the accident when PW1 was there.



51. This Court takes judicial notice that when a road traffic accident is reported to the Police, the Scene visiting Police Officer(s) visit the scene observe and interrogate the victims, drivers and members of the public and record/take notes and details of the those involved, details of the vehicle(s) person(s) involved, witness(s) and details of Road and Driving Licences and Insurance details of vehicles and persons involved in the accident. These details are then subjected to further investigations.
52. It is therefore reasonable and logical in the circumstances that the details in the Police Abstract are from the information gathered at the scene as PW1 among other Police Officers were at the scene after the accident was reported.
53. Applying Section 107 - 112 of *Evidence Act*; he who alleges must prove. This Court finds on a balance of probabilities the Plaintiff proved its case against the 2nd Defendant the beneficial owner of motor vehicle Reg KAM 284 L and the 3rd Defendant the driver of the vehicle who was found at the scene of the accident by PW1 & PW3 respectively. The fact that the Registrar of Motor Vehicles Copy of Records ought to be availed, it was availed and it showed 1st Defendant as registered owner and he subsequently proved that at the time of the accident he sold the vehicle.
54. This Court has also considered the fact that the Plaintiff/Appellant could not follow up the vehicle and/or the certificate of insurance on the vehicle, as the details were taken by Police Officers who came to the scene of the accident. The vehicle belonged to the Defendants, they would not reasonably allow the Claimants to take the certificate of Insurance in light of a pending claim.
55. This Court also considered the fact that PW1& PW3 gave direct evidence on the scene of the accident and how the accident occurred and resulted with Boniface Musyoki Muinde's (the deceased's) death. Their evidence was subjected to cross-examination by the Défense and tested its veracity and the witnesses' demeanour and credibility. There was no evidence adduced to controvert their evidence except denials. This Court finds the Certificate of Insurance details on the windscreen of motor vehicle Reg KAM 284 L were the details that informed what was/is contained in the Police Abstract. The 2nd & 3rd Defendants were rightly sued as owner and driver of motor vehicle Reg KAM 284 L respectively.

Liability

56. The Trial Court on liability found as follows at bottom of Pg 7 of the Judgment;

Be that as it may, I am persuaded that an accident did occur and that the deceased lost his life from the injuries he sustained after being hit by motor vehicle Reg KAM 284L. Considering the circumstances as they were then, I would apportion liability in terms of negligence at 50:50.
57. It is not in contention that on July 20, 2010 the deceased was walking as a pedestrian lawfully along Machakos-Kangundo road, near Machakos Golf Club and PW3 Henry Mutua David was with Boniface Musyoki Muinde (deceased) when the 3rd Defendant/Respondent, the driver drove, controlled and or managed motor vehicle registration number KAM 284L that veered off the road hitting the deceased, causing injuries that lead to his death while on his way to hospital. It is also not in contention that the only eye witness that was called was PW3 who gave an account of what occurred on the fateful day, the deceased was walking off the road and the vehicle veered off the vehicle. The 2nd& 3rd Defendants/Respondents did not call any witness during the hearing nor produce any evidence other than filing of the defence statement denying any and all parts of the Appellants claim.
58. Sections 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya, the person who alleges is under a duty to prove all allegations as contained in his claim against the Respondent, on a balance of probabilities.



In this case the Defendants/Respondents did not controvert the Appellants case as they opted not to adduce any evidence for the Court to consider.

59. PW1 stated that the driver stated that he veered off the road to avoid hitting some cattle that were crossing the road and veered off to the right as a result hit the deceased. This is hearsay evidence with no probative value as the driver himself failed to testify before the Trial Court and no explanation was provided for the Trial Court to consider.
60. PW1 testified that the driver 3rd Defendant was charged with causing death by dangerous driving and he was convicted in Traffic Case No 13 of 2010. The Trial Court observed that evidence of such trial and conviction was not produced and hence determined liability during trial.
61. There is no evidence on record to confirm that the deceased contributed to the accident, Pw3 stated he was off the road on the right side, 3rd Defendant veered off the road. In the absence of any inculpatory evidence against the deceased Liability cannot be apportioned in the absence of fault, negligence on the deceased's part.
62. In the case of *Masembe v Sugar Corporation and another* [2002] 2 EA 434, it was held that:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently...”

63. From the evidence of PW1, he was convicted to 2 years imprisonment on 2.3.2011. According to PW3, the 3rd Respondent did not hoot or warn them. There is no evidence of anything that the Deceased would have done to prevent the accident from occurring since he was lawfully walking on his lane and it is the vehicle that veered off the road and hit him. I therefore find that the 3rd Defendant/ Respondent the driver was 100% liable for the accident. The 2nd Defendant/Respondent beneficial owner of the vehicle KAM 284L is vicariously liable at 100% as the 3rd Defendant was his agent and he the principal.

Quantum

- 64.. On the issue of damages, the Appellant has asked this Court to uphold the Trial Court's judgment on quantum but there was no such judgment entered in the Appellants' favor in fact the suit was dismissed which is the subject of the instant appeal. Trial Court correctly and legally gave a breakdown of what the quantum would have accrued had the Defendants been found liable in the circumstances.

Loss Of Dependency

65. Section 8 of *Fatal Accidents Act* provides for Plaintiff to deliver full particulars of the persons for whom damages claimed;

In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his



advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

66. The Court record confirms that the Plaintiff made full disclosure and particulars of dependency vide paragraph 5, of the Plaint that, the late Boniface Musyoki Muinde (deceased) sustained fatal injuries and by reason of his death the Plaintiff and the estate of the deceased have suffered loss and damage.
67. That the suit was/is brought by the Plaintiff as the father of the deceased and legal representative of the estate of the deceased. The other Dependants are grandmother Monicah Musyoki, brother, Mutunga Muinde & sister, Mutheu Muinde The deceased was prior to the accident aged 26 years old in good health and at the time was working as Caddie at Machakos Golf Club earning Kshs 10,000/-per month and his estate suffered loss and damage.
68. In the case of *Leonard O Ekisa & another v Major K Birgen* [2005] eKLR the Court stated as follows:
- “Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country...”

Section 4(1) of the *Fatal Accidents Act* provides as follows:-

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused...”

Section 2 (1) of the same *Act* provides:-

“child” means a son, daughter, grandson, granddaughter, stepson or stepdaughter;

“parent” means a father, mother, grandfather, grandmother, stepfather or stepmother.

69. The claim for loss of dependency was well granted and reasonable in the circumstances at Kshs 800,000/-

Loss Of Expectation Of Life

70. The Court of Appeal in *Hellen Waruguru Waweru* in Nyeri Civil Appeal No 22 of 2014 [2015] eKLR stated that;
- “ An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things.
71. The Appellant is satisfied with Loss of expectation of life at Kshs 100,000/- and was not subject to appeal.



72. This court finds the trial court applied relevant legal principles in assessment of general damages under the *Fatal Accidents Act* & *Law Reform Act* award and this Court shall uphold the same. In the premises I issue the following award;

- a. Pain and suffering Kshs 10,000
 - b. Loss of Expectation of life Kshs 100,000
 - c. Special Damages Kshs 49,300
 - d. Loss of Dependency Kshs 800,000
- Total Kshs 959,300

Disposition

1. The appeal partly succeeds on liability and partly fails on quantum Kshs 959,300/-which is hereby upheld with interest and costs in favour of the Appellants.
2. The trial court's judgment dismissing the appellants suit is set aside and instead liability is entered in favour of the appellants against 2nd & 3rd defendants/respondents at 100%.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 9TH FEBRUARY, 2023
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE - FOR THE APPELLANTS

NO APPEARANCE - FOR THE RESPONDENTS

GEOFFREY/PATRICK - COURT ASSISTANT(S)

