



**Warutere & another (Suing as the legal representatives of the Estate of  
Mary Muthoni Kinyua - Deceased) v Thairu & another (Civil Appeal  
E647 of 2022) [2024] KEHC 15833 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15833 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL APPEAL E647 OF 2022  
RC RUTTO, J  
DECEMBER 13, 2024**

**BETWEEN**

**MOSES WARUTERE & KINYUA WARUTERE (SUING AS THE LEGAL  
REPRESENTATIVES OF THE ESTATE OF MARY MUTHONI KINYUA -  
DECEASED) ..... APPELLANT**

**AND**

**GILBERT THAIRU ..... 1<sup>ST</sup> RESPONDENT  
PETER MBUGUA KURIA ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi (G. Sogomo, PM.) delivered on 15th July 2022 in MCOMM Civil Case No. E2411 of 2021)*

**JUDGMENT**

1. This is an appeal against the dismissal of the appellant's plaint dated 23<sup>rd</sup> March 2021 which sought general damages under the Fatal Accidents Act and the Law Reform Act, special damages of Kshs. 72,650.00, costs of the suit and interest. In that plaint it was averred that the on 8<sup>th</sup> June 2019 the 1<sup>st</sup> respondent so carelessly and negligently drove motor vehicle registration number KCC 646M along racecourse road near Oilibya Nairobi that he caused it to hit the deceased who was a pedestrian on the said road. As at 5<sup>th</sup> July 2019 the 2<sup>nd</sup> respondent was the registered owner of the motor vehicle.
2. In a judgment dated 15<sup>th</sup> July 2022, the trial court found that the appellants had not proved their case on a balance of probabilities and proceeded to dismiss the suit.
3. The appellants being dissatisfied with the findings of the lower court filed their memorandum of appeal, dated 12<sup>th</sup> August 2022, raising seven grounds impugning the findings of the trial magistrate. The grounds of appeal are summarize as follows, that the learned magistrate erred in fact and law



by: disregarding the appellants' evidence; in holding that the appellants ought to have called an eye witness; dismissing the suit despite proving dependency; not finding that the appellants' evidence was uncontroverted and as such the appellants had proved their case on a balance of probabilities; failing to appreciate the concept of interlocutory judgment to the extent that the appellants did not need to prove liability. For those reasons, the appellants prayed that the appeal be allowed with costs. They further prayed for costs of the appeal.

4. The appeal was heard on the basis of the parties' written submissions. However, as at the time of writing this judgment, the respondents had not filed their submissions. In their submissions dated 25<sup>th</sup> June 2024, the appellants argued that the respondents ought to have been found 100% liable in negligence as interlocutory judgment had been entered in favor of the appellants. That the deceased was a lawful pedestrian along the racecourse road when she was knocked down by the 1<sup>st</sup> respondent, whereby he sustained fatal injuries and was pronounced dead at Kenyatta National Hospital. Furthermore, that the documents adduced in evidence confirmed that indeed the respondents were liable in negligence.
5. In their view therefore, it was improper for the trial court to dismiss the suit for failing to call an eye witness since the police abstract was conclusive proof that the respondents caused the accident and occasioned fatal wounds on the deceased person. They argued that a breach of a party's duty of care could be inferred from the facts and circumstances of this case. In any event, the general rule, they submitted was that uncontroverted evidence is weighty evidence. For those reasons, they urged this court to allow the appeal.
6. As a first appellate court my primary role is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and give reasons either way. [See Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR].
7. I have considered the memorandum of appeal and the appellants' written submissions, analysed the record of appeal and the law and the issue arising for determination is whether the learned magistrate erred in finding that the appellants had not proved their case on a balance of probabilities. Put differently, did the trial court err in finding that the appellants had not established that the respondents were liable in negligence? If answered in the affirmative, this court will then consider the aspect of damages.
8. In its judgment dated 15<sup>th</sup> July 2022, the trial court held in part:

“This court has anxiously had regard to the evidence thus far adduced and makes the following findings on the broad aspect of liability:

Standard and burden of proof

It cannot be gainsaid that in civil proceedings the standard of proof is one on a balance of probabilities as emphasized in the case of Kanyungu Njogu vs. Daniel Kimani Mwangi [2000] eKLR where it was held that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.

As regards the question of burden of proof section 107 (1) of the *Evidence Act* (Cap 80) is instructive providing thus:

“Whoever desires 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.”



Sub section 2 of the foregoing provision adds as follows:

“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

#### Formal proof

It is now well settled principle as established by the Court of Appeal in the case of Kirugi & Another vs. Kabiya & others [1987] eKLR that the burden of proof is always on the plaintiff to prove his case on a balance of probabilities as such burden is not lessened even if the case is heard by way of formal proof.

#### Ownership of the accident

The plaintiff, PW1 produced before court a copy of records from the National Transport and Safety Authority, PEX5 showing that the 2<sup>nd</sup> defendant was the registered owner of the accident vehicle. In this connection section 8 of the Traffic Act provides that:

“The person in whose name a vehicle is registered shall, unless the contrary be proved be deemed to be the owner of the vehicle.”

Thus stated the court finds that the 2<sup>nd</sup> defendant was indeed the legal and/or equitable owner of the accident vehicle the subject hereof.

#### Culpability

At the trial hereof no eye witness was ever lined up by the plaintiff to ventilated (sic) as to how the subject accident occurred thus leaving the issue to conjecture and heresay (sic).

To the extent foregoing the court finds that the plaintiffs have woefully failed to discharge their (sic) burden of proving liability on a balance of probabilities as against the defendants either principally or vicariously to any degree. In so reasoning the court is counselled by the decision in the case of Nandwa vs. Kenya Kazi Ltd (1988) KLR 488 it was observed that:

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligent (sic) of the defendant...”

9. From the record it is noted that, by a Notice of Motion dated 18<sup>th</sup> February 2022, the appellants prayed for orders that the defendants’ statement of defence be struck out and an interlocutory judgment be entered against them. Thereafter, the appellants urged that the suit be set down for formal hearing. That application was allowed on 21<sup>st</sup> March 2022 and the matter was set down for formal proof hearing on 28<sup>th</sup> April 2022.
10. During the hearing, PW1 Moses Warutere, the deceased’s brother and co-administrator of her estate, adopted his witness statement as his evidence in chief. He was the only witness in the case. His evidence was that on 8<sup>th</sup> June 2019, while at his home in Karatina he received information from his mother who had been informed that the deceased was involved in an accident along racecourse road near Oilibya. PW1 together with his other family members proceeded to Kenyatta National Hospital and upon their arrival, they were informed that the deceased had passed on a few hours prior.
11. PW1 further testified that, on 11<sup>th</sup> June 2019 a post mortem was conducted. It confirmed that the deceased died due to multiple injuries sustained due to blunt force injury/trauma from a road traffic accident. The deceased’s body was then transferred to Jamii Hospital Mortuary for preservation and preparation of the funeral. She was laid to rest a week later.



12. PW1 later proceeded to Kamukunji police station and obtained a police abstract dated 26<sup>th</sup> June 2019. He later filed a petition for letters of administration ad litem together with his father. He recounted that during her lifetime, the deceased earned Kshs. 20,000.00 per month which was used to support their parents. He urged this court to grant the reliefs as sought.
13. The appellants stated that judgment ought to have been entered in their favor because of the interlocutory judgment on record. The appellant's case is that the court ought to have automatically entered judgment in its favour without even the need for formal proof.
14. In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J observed thus;“....

“I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, paragraph, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

15. Once interlocutory judgment has been entered in favor of a party where a claim is unliquidated, it is trite law and practice that the matter must proceed for formal proof where a party to a suit has to adduce evidence sufficient to sustain the suit. In the case of Kamau v Matunda (Fruits) Bus Services (Civil Appeal E316 of 2022) [2024] KEHC 4829 (KLR) (Civ) (24 April 2024) the court observed that;

“...at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

It is clear therefore that in a formal proof, the plaintiff still bears the burden of proving its case in accordance with the normal rules of evidence.”

16. Drawing reference from the above it then follows that the rules of evidence demand that on a balance of probabilities, the plaintiff must establish a certain fact as couched in section 107 of the [Evidence Act](#). It is therefore incumbent upon the plaintiff to lay credence and establish that the facts espoused in the plaint are true.
17. Turning to the evidence before the trial court, it is not gainsaid that PW1 was the sole witness in the case. However, PW1 was neither an eye witness nor the investigating officer. PW1's evidence was therefore hearsay insofar as the accident is concerned since he did not witness the accident and was not at the accident scene.
18. Further, according to the police abstract, an accident occurred on 8<sup>th</sup> June 2019 at 1510 hours along racecourse road near Oilibya involving motor vehicle registration number KCC 646M. It was recorded that the same was driven by the 1<sup>st</sup> respondent and that the deceased was Mary Muthoni. Also, this court notes that while the evidence of PW1 was that the post mortem was conducted on 11<sup>th</sup> June 2019 the autopsy report is dated 10<sup>th</sup> June 2019 a day before the postmortem, It is well settled in our jurisdiction that a police abstract is not evidence of liability but only confirms that indeed an accident



occurred. In this case however, while PW1 informed the court that he reported the accident, how the accident occurred remains a mirage since he was not present at the accident scene? In addition, the particulars giving rise to the accident remain unclear. I am not persuaded from the scanty evidence before me that it was the respondents to blame and not the deceased person. It is not outright in our jurisdiction that in a fatal accident, the driver is always to blame, without any iota of evidence as to his/her negligence. In the absence of an eye witness or an account of the investigations conducted, the trial court was right in assessing the evidence laid before it. It was proper to find that the appellants had failed to discharge their burden of proof.

19. In view of the circumstances, I am not satisfied by the appellants that this court ought to interfere with the findings of the learned magistrate. Having failed to establish liability, I do not need to make an assessment for damages. Consequently, I do find that the appeal herein lacks merit and is dismissed with no orders as to costs.

It is so ordered.

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 13<sup>TH</sup> DAY OF DECEMBER 2024**

For Appellant:

For Respondent:

Court Assistant:

