



**Githinji v Ngugi & 2 others (Civil Appeal E698 of 2024)  
[2025] KEHC 14600 (KLR) (Civ) (15 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14600 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E698 OF 2024**

**WM MUSYOKA, J**

**OCTOBER 15, 2025**

**BETWEEN**

**JOSHUA MAINA GITHINJI ..... APPELLANT**

**AND**

**ESTHER MUTHONI NGUGI ..... 1<sup>ST</sup> RESPONDENT**

**PETER KAMAU GACHANJA (SUING ON BEHALF OF THE ESTATE OF EVANS  
KIBATHI GACHANJA) ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS NG'ANG'A MUNENE ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from the judgement and decree, of Hon. HM Ng'ang'a, Principal  
Magistrate (PM), of 2nd May 2024, in Nairobi CMCCC No. 265 of 2020)*

**JUDGMENT**

1. The suit, at the primary court, was initiated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, against the appellant and the 3<sup>rd</sup> respondent. It sought compensation, for an accident that happened on 1<sup>st</sup> June 2019, involving the deceased person, in respect of whose estate the 1<sup>st</sup> and 2<sup>nd</sup> respondents are the administrators, and the owner and driver of motor vehicle registration mark and number KCG 889M, along Mwiki-Kasarani Road, Nairobi. The 1<sup>st</sup> and 2<sup>nd</sup> respondents had attributed negligence on the appellant and the 3<sup>rd</sup> respondent.
2. The appellant and the 3<sup>rd</sup> respondent resisted the claim. They denied the allegations made in the plaint, but averred, in the alternative, that, if the 1<sup>st</sup> and 2<sup>nd</sup> respondents proved or established negligence on their part, then the court should find that the accident must have been caused by the deceased, solely or partially, by his own negligence.



3. A trial was conducted. The 1<sup>st</sup> and 2<sup>nd</sup> respondents called 2 witnesses. The appellant and the 3<sup>rd</sup> respondent did not call any. Judgement was delivered on 2<sup>nd</sup> May 2024. Liability was settled at 100%. For pain and suffering Kshs. 100,000.00 was awarded; for loss of expectation of life Kshs. 100,000.00; loss of dependency at Kshs. 3,683,304.00; and specials at Kshs. 159,100.00, making a total of Kshs. 4,042,404.00 plus costs and interests.
4. The appellant was aggrieved; hence this appeal. The grounds turn on liability being resolved at 100% without considering the authorities; resolving liability at 100% without the 1<sup>st</sup> and 2<sup>nd</sup> respondents not calling eye witnesses; overly relying on the testimony of PW2 who was not an investigating officer; relying solely on the testimony of the 1<sup>st</sup> respondent on the multiplicand, which had no supporting evidence; not appreciating that there was no evidence that the deceased was in employment; and not considering the submissions made by the appellant.
5. Directions were taken on 24<sup>th</sup> March 2025, for canvassing of the appeal, by way of written submissions. Both sides have complied.
6. The appellant submits principally on 2 issues, liability and the multiplicand. On liability, he submits that there was no evidence on negligence on his part. He submits that the 1<sup>st</sup> respondent was not a passenger in the accident vehicle, and was not an eyewitness to how the accident occurred. He also submits that her witness, the police officer, did not conduct investigations into the accident, and, therefore, he could not provide credible evidence on the aspect of negligence.
7. On the multiplicand, he submits that no documentary evidence was tendered to establish that the deceased worked as a matatu driver, and that there were no documents on what he earned. He submits that the trial court should have been guided by the minimum wage of guidelines, to work out a multiplicand, if at all, it was satisfied that he was a matatu driver.
8. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have submitted on 2 issues: liability and loss of dependency. On liability, it is submitted that the accident was not denied, and that the appellant appears to be complaining that liability was not established at 100%. They submit that proof, in civil cases, is on a balance of probability. On loss of dependency, it is submitted that the certificate of death indicated the occupation of the deceased to be that of driver, and as at the actual income could not be proved, the trial court resorted to minimum wage, of which the applicable Government Regulations were the Regulation of Wages (General)(Amendment) Order of 2018, which fixed the minimum monthly wages of a driver in Nairobi at Kshs. 23,039.40.
9. Although the appellant has listed multiple grounds of appeal, there are only 2 issues for determination; liability and the appropriate multiplicand for the income the respondent was earning.
10. On liability, it is not in dispute that an accident happened, in which the deceased lost his life. The issue was not the fact of the accident and the death, but on who was at fault. As the deceased was established to have been a passenger in the accident vehicle, liability, on account of negligence, could not be attributed on him. The real issue was whether the person who had control of the accident vehicle, at the material time, was responsible for the mishap.
11. Was there material to establish liability? The 1<sup>st</sup> and 2<sup>nd</sup> respondents attributed liability on the owners, and the persons in control, of the accident vehicle, at the material time, that was the appellant and the 3<sup>rd</sup> respondent. It was not disputed that the vehicle belonged to the appellant and was being driven and controlled by the and 2<sup>nd</sup> respondent. The police records, provided by the police witness, demonstrated as much. But was there negligence? The appellant contends that there was no proof of negligence, as the 1<sup>st</sup> respondent did not witness the accident, and the police officer, who testified, did not investigate it.



12. I agree, that the 1<sup>st</sup> respondent was not an eyewitness to the accident. She did not provide evidence on how it happened, and her testimony cannot be used to gauge whether the accident was caused by negligence on the part of the driver of the vehicle. That leaves us with the testimony of the police witness. He conceded that he did not investigate the accident, for the investigations were conducted by another officer, who had been transferred, as at the date he testified. He did not testify on how the accident happened. He did not dwell on the findings and conclusions of the officer who investigated the accident. He did not state whether any conclusions were drawn, by that other officer, on liability or blameworthiness. He merely said that the driver was released on cash bail and disappeared, and that was why he was not prosecuted. He said that he blamed the driver of the accident vehicle.
13. Was the testimony of the police witness adequate, on the matter of liability? I do not think so. The utility of his evidence was that an accident happened, as evidenced by the police abstract that he produced, based on material that he had. However, he did not go beyond that. He did not disclose to the court, from the material on record, what the outcome of the investigations, carried out by his colleague, were. He did not table that outcome. He produced no sketches nor drawings of the accident scene. There was, therefore, no opinion on how the accident occurred, to provide a basis for evaluating liability or negligence. All he had was that an accident happened, the driver disappeared after he was admitted to bond, and that he blamed the said driver. Yet, he did not lead any evidence on why he blamed the driver.
14. The fact of an accident alone, without more, is not proof of negligence or liability. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not plead *res ipsa loquitur*. Even if they had, they did not adduce evidence which would have assisted the court to conclude that the events, surrounding the occurrence of the accident, spoke for themselves, or explained themselves, or were obvious proof of negligence. Neither the 1<sup>st</sup> respondent, nor the police officer, painted a picture of how the accident happened, to lay the groundwork, for concluding that the accident was *res ipsa loquitur*, or spoke for itself.
15. The trial court laid blame on the appellant and the 3<sup>rd</sup> respondent, only on the basis that the police abstract, produced, was testimony that an accident happened, and that the appellant and the 3<sup>rd</sup> respondent did not adduce rebuttal evidence. With respect, liability does not attach on account of the mere occurrence of the accident, but on negligence. The burden, on the 1<sup>st</sup> and 2<sup>nd</sup> respondents, was not to merely establish that an accident happened, but that it occurred on account of negligence on the part of the appellant and the 3<sup>rd</sup> respondent. That was not done. The 1<sup>st</sup> and 2<sup>nd</sup> respondents established only 1 aspect of their case on liability, proof that an accident actually happened. They did not prove the other aspect, that the accident happened because the driver of the subject vehicle was negligent. The duty was on them, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, to establish that fact; it was not on the appellant and his driver, to establish that they were not negligent.
16. Burden of proof in civil cases, such as the instant one, is always on the preponderance of the evidence, or on balance of probability. The mantra is that he who alleges must prove. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents who came to court, claiming that the accident happened, due to negligence on the part of the driver of the accident vehicle. They were burdened with proving that negligence, to obtain a judgement in their favour. Both the legal and evidential burdens, to rebut that, if proven, would have shifted to the appellant and his driver, upon the 1<sup>st</sup> and 2<sup>nd</sup> respondents discharging that burden in the first place. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not discharge that burden, as they did not prove negligence, and the burden to adduce rebuttal or counterevidence did not shift. On liability, the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not establish negligence on the part of the appellant and the 3<sup>rd</sup> respondent, for them, the appellant and the 3<sup>rd</sup> respondent, to be held 100% liable, in negligence, for the accident, and the injuries suffered by the deceased.



17. On the loss of dependency, the contention is around what the deceased did for a living, and his income from what he did. The 1<sup>st</sup> respondent was the widow of the deceased. She would have known what he did for a living. Her statement, that he was a driver, sufficed. It was corroborated by the certificate of death, which indicated his occupation. However, about what he earned from his employment was a totally different thing. It was something that the 1<sup>st</sup> and 2<sup>nd</sup> respondents could not establish without documentary proof. There was no proof that the deceased and the 1<sup>st</sup> respondent worked together, or side by side, for her to get a firsthand view of what he earned from his driving hustles. She provided no proof of his income, and she could not possibly provide the same, hence the need to resort to the Government Regulations on the minimum wage. There is no evidence, from the face of the judgement, that the trial court resorted to the said regulations. There is reference to a minimum wage, but the particular regulations relied on are not indicated. It is as if the court plucked figures, on the minimum wage, from the air. There was no proper foundation for the assessment of the multiplicand, in the circumstances.
18. In view of what I have concluded above, on liability, the trial court ought not have found in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, for no proof of fault was established, to warrant the court concluding that the appellant was 100% liable for the accident, or even liable to any degree at all. The fact that an accident happened, and it was self-involving, would not be adequate. Some evidence of negligence must be adduced. None was.
19. The appeal herein has merit. I allow it. The consequence shall be that the orders, made in the judgement of the trial court, delivered on 2<sup>nd</sup> May 2024, are hereby set aside or vacated, and substituted with an order dismissing the suit. Each party shall bear its own costs.

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 15<sup>TH</sup> DAY OF OCTOBER 2025.**

**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Michael Onyango, Court Assistant, Milimani, Nairobi.

Advocates

Mr. Chimei, instructed by Chimei & Malenya, Advocates for the appellant.

Mr. Kung'u, instructed by Patrick Kung'u & Company, Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

