Muiruri & another v Nakuru County Government & another; Gathara (Interested Party) (Civil Appeal E044 of 2023) [2025] KEHC 14022 (KLR) (6 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14022 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CIVIL APPEAL E044 OF 2023

LN MUTENDE, J

OCTOBER 6, 2025

BETWEEN

DAVID IRUNGU MUIRURI ..... 1ST APPELLANT

RAHAB GATHONI IRUNGU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE RAHAB GATHONI IRUNGU) ..... 2ND APPELLANT

AND

NAKURU COUNTY GOVERNMENT ..... 1ST RESPONDENT

SAMWEL MUGUNYI WAITHAKA ..... 2ND RESPONDENT

AND

SAMMY NJAI GATHARA ..... INTERESTED PARTY

JUDGMENT

1. The Appellants herein instituted a suit in their capacity as legal representatives of the Estate of the late Rahab Gathoni Irungu (Deceased) against the 1st and 2nd Respondents, the registered and/or insured owner of the motor-vehicle registration number 32CG007A Ambulance; and, it's authorised driver, respectively.

2. It was averred that the deceased was travelling aboard motor-vehicle registration number KCS 309F as a fare paying passenger along Nyahururu-Nakuru Road when the 2nd Respondent recklessly controlled and/or managed motor-vehicle registration number 32CG007A Ambulance causing and/or permitting it to collide with motor-vehicle registration number KCS 309F hence occasioning fatal injuries to the deceased.

3. Initially, the Respondents did not comply with the timelines for entering appearance hence an interlocutory judgment was entered. However, by consent of parties, the interlocutory judgment was set aside. In their statement of defence, the Respondents denied the allegation that they were the owner

and authorized driver of the vehicle. In the alternative, and without prejudice, it was averred that the accident was wholly and/or substantially contributed to by the negligence of the deceased and /or the driver of motor-vehicle registration number KCS 309F matatu.

4. Following an application by the Respondents, the Interested Party was enjoined in the matter but no appearance was entered. He was stated to be the registered and/or insured owner of the motor-vehicle registration number KCS 309F.

5. In Its judgment, the trial court found that the plaintiff did not prove liability wholly against the defendant hence apportioned liability at 50:50 then proceeded to award special damages in the sum of Kshs.111,200/- and general damages of Kshs.1,800,000/- and, ordered each party to bear their costs. It was indicated that the net general damages was Kshs.1,011,200/-

6. The Appellants being dissatisfied with the decision thereof appeal against the entire judgment of the court, on grounds that: The trial magistrate erred in law and fact in finding the appellants 50 percent liable; In failing to consider the Appellants' submissions on quantum; In failing to demonstrate in his judgment how he arrived at the general damages; In failing to consider the Appellants' evidence on record; In finding that the Appellants did not prove liability against the Respondents; in failing to address the issue of pain and suffering and loss of expectation of life pleaded and addressed by the Appellants; and, that the special damages awarded were less than what was pleaded.

7. The appeal was canvassed by way of written submissions. The Appellants argue that the court erroneously shifted the burden of proof by relying on the defendants' assertion that the PSV driver was at fault. That following the Respondents' application, a 3rd Party was enjoined but no appearance was made hence the Respondents failed to rebut the Appellants' claim. In this regard the reliance was placed on the case of Mursal & Another v Manase [2022] KEHC 282(KLR) where the court emphasised that:

> "equal apportionment of liability requires substantive evidence, especially when the defendant fails to introduce evidence to rebut the plaintiff claims."

8. That the magistrate based the 50:50 liability on speculative remarks about lighting conditions despite the Appellants' clear evidence of the defendants' negligence.

9. That charges were preferred against the 2nd Respondent as evidenced in the police abstract and the 3rd Party having not entered appearance, the Appellants' evidence on liability remained unchallenged and uncontroverted.

10. On quantum, it is submitted that the court did not address itself on how it arrived at the general and special damages awarded and that costs should have followed the event pursuant to Section 27 of the *Civil Procedure Act*.

11. On their part, the Respondents submitted that the appeal herein is unmerited. That the learned magistrate accurately and precisely comprehended the facts of the case; critically analysed all the evidence that was presented and came up with the right findings hence was not at fault. That the Appellants were at fault by not suing the right party. That the accident was to a great extent if not 100 percent caused by the driver of motor-vehicle KCS 309 F. That the Appellant did not have a claim against the owner of the motor-vehicle hence the Respondents could not bear full responsibility. Arguing that the party who asserts must prove, they cited the case of Eugene Reeksting v Attorney General and Anor. [2021] eklr where the court relied on Rule 83 of the *Traffic Act* which provides:

> "Every driver shall, upon hearing the sound of any gong, bell (other than a bicycle bell) or siren, indicating the approach of a police vehicle, ambulance or fire engine, at once give such

vehicle right of way, and if necessary pull his vehicle to the near side of the road and stop until the police vehicle, ambulance or fire engine has passed."

12. On quantum, it was urged that determination of quantum is based on established principles as laid down in Jabane v Olenja (1986) KLR where the court stated that:

> " In assessment of general damages, it must be borne in mind that each case depends on its own facts, awards should not be excessive, comparable injuries should attract comparable awards and inflation should be taken into account"

13. This being a first appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well founded. In Selle and Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."

14. The gravamen herein is the question of the trial court having misdirected itself by reaching an erroneous decision. In its decision the trial court stated thus:

> " ...The burden of proof lies on the Plaintiff, the time the accident occurred was at 1800hrs depending on the lighting but in most areas, there is still natural light if the weather was good and not raining.
>
> Liability at 50:50 per cent
>
> Special damages .....KSHS11,200/=
>
> General damages.....Ksh. 1,800,000/=
>
> Less50/= .....=Kshs 900,000/=
>
> Net general damages.....kshs.1,011,200/=
>
> Given the circumstances of the case, I order each party to bear their own costs."

15. Apportioning liability among the vehicles and including the passenger like the deceased would depend on the circumstances of the case. In the matter none of the witnesses called by the plaintiff were eye witnesses. In Kiema Mutuku v Kenya Cargo Hauling Services Ltd (1991) 2 KAR 258 the Court of Appeal held that there is no liability without fault in the Kenyan legal system and a plaintiff is under a duty to prove his allegations of negligence on the defendant's driver, and as specifically pleaded in the statement of claim.

16. Investigations conducted culminated into the 2nd Respondent, the driver of the Ambulance being charged in court with the offence of causing death by dangerous driving. At the time this matter was proceeding the case was in the process of being heard hence there was no verdict. For that reason, there was no proof with certainty of who was at fault and to what degree. It therefore behoved the plaintiff to establish the proof in the circumstances.

17. Looking at the pleadings, it was alleged that the 2nd Respondent who was in control of the Ambulance drove it without due care, diligence and attention which resulted into it veering off the road hence colliding with motor-vehicle KCS 309F. In its defence the Respondents speculated that either the deceased or the Public Service Vehicle, KCS 309F contributed to the accident. In the particulars of negligence, it is alleged that it was the PSV, KCS 309F that was to blame. At no time was the deceased blamed.

18. In his testimony the 2nd Respondent admitted being the authorized driver of the Ambulance that was owned by the 1st Respondent which confirmed evidence of the copy of records from the National Transport Safety Authority (NTSC). He blamed the driver of the M/V KCS 309F for having been overtaking a lorry at a close range and hence not giving way to the ambulance.

19. Evidence adduced indicate the fact of both drivers having contributed to the accident. The deceased, a passenger was not in control of the vehicle. No fault could be attributed to her case. The 3rd Party was enjoined and duly served but no appearance was made. The fact of the 2nd defendant having been charged with a traffic offence of causing death by dangerous driving is evidence that he shoulders a higher degree of fault than the driver of the 3rd Party.

20. From the foregoing it is clear that the finding on liability was erroneous. Therefore, I quash and set it aside, then substitute it with a finding on Liability against the Respondent at 80 percent and the 3rd Party, 20 percent

21. On the issue of damages, this court is mindful that assessment of damages is a matter of discretion and that an appellate court ought not to interfere with the decision of the trial court just because it would have itself made a different award. This fact was acknowledged in the case of H. West and Son Ltd v Shephard (1964) AC 326 where it was stated that:

> " In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

22. In the case of Jane Chelagat Bor v Andrew Otieno Onuu (1988-92) 2 KAR 288; (1990-1994) EA 47 the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

23. Notably, the pleadings were clear. The plaintiff sought General Damages under various heads: Loss of expectation for life; loss of dependency; pain and suffering and special damages. In the premises as provided by Section 78 (c) of the *Civil Procedure Act* the matter is referred back to the trial court for determination on the question of quantum of damages as pleaded pursuant to pleadings and evidence adduced.

24. In the upshot, the appeal succeeds with costs to the Appellant, both at the lower court and on appeal.

25. It is so ordered.

DATED AND DELIVERED VIRTUALLY THIS 6TH DAY OF OCTOBER,2025.

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L.N. MUTENDE

JUDGE