



Murabwa & another (Suing as the Personal Representatives of the Estate of Gabriel Wekesa Kundu (Deceased)) v Njambi t/a Kagumo Driving School & another (Civil Appeal E036 of 2023) [2025] KEHC 15968 (KLR) (31 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15968 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL E036 OF 2023
PJO OTIENO, J
OCTOBER 31, 2025**

BETWEEN

BENSON NDEGE MURABWA 1ST APPELLANT

PAMELA NALIAKA NDEGE 2ND APPELLANT

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
GABRIEL WEKESA KUNDU (DECEASED)**

AND

SARAH NJAMBI T/A KAGUMO DRIVING SCHOOL 1ST RESPONDENT

GEOFFREY ETALANYA 2ND RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon.S.N. Makila
(PM) in Kitale CMCC No. 290 of 2020 delivered on 10th May, 2023)*

JUDGMENT

Background of the Appeal

1. By a plaint dated 5th November 2020, the appellants instituted a suit against the respondents seeking general damages under the [Fatal Accidents Act](#) and the [Law Reform Act](#), special damages in the sum of Kshs. 231,975/=as well costs of the suit and interest on damages and costs.
2. The appellants' case was that on or about 3rd January 2020, at around 8:45 A.M., one Gabriel Wekesa Kundu ("the deceased") was lawfully riding motorcycle registration number KMEF 602B (Honda) on his rightful side of the road near Kitale Airstrip, heading from Webuye towards Kitale, when the respondents and/or their authorized agents negligently drove motor vehicle registration number KBM 756B (Isuzu bus), causing it to veer off the road and knock down the motorcycle deceased was riding



thus visiting upon him fatal injuries. The appellant founded his cause on the tort of negligence and set forth the particulars of negligence, particulars of dependents and those of special damages.

3. In their statement of defense dated 6th November 2021, the respondents denied ownership of motor vehicle registration number KBM 756B and all allegations of negligence contained in the plaint. They further averred, in the alternative, that, if any accident did occur, it was caused or substantially contributed to by the negligence of the deceased. The respondents also challenged the appellants' locus standi to institute the suit as legal representatives of the deceased's estate.
4. By a judgment delivered on 10th May 2023, the learned trial magistrate apportioned liability equally between the deceased and the respondents in the ratio of 50:50. The court awarded general damages for Loss of expectation of life at Kshs. 100,000/=; Loss of dependency at Kshs. 3,600,000/= and Pain and suffering of Kshs. 30,000/=.
5. It further awarded special damages in the sum of Kshs. 231,975/=, bringing the total award to Kshs. 3,961,975/=. It subjected the award to the apportioned 50% contributory negligence and calculated the due award at Kshs. 1,980,987.50/=. There was equally an award of half the costs of the suit plus interest at court rates from the date of judgment until payment in full.
6. Aggrieved by that decision, the appellants lodged the present appeal by a Memorandum of Appeal dated 8th June 2023, seeking to have the judgment and decree of the learned magistrate set aside and substituted with a finding that the respondents were 100% liable for the accident. The appellants also pray for the costs of this appeal and the costs of the suit in the lower court. Even though the appeal merely challenges the apportionment of liability and applying such apportionment to costs, a whooping and rather tautologous nine grounds of appeal have been proffered thus: -
 - a. That the learned magistrate erred both in law and in fact in entering judgment on liability at 50:50 between the appellants and the respondents when there was no legal or otherwise basis for doing so.
 - b. That the learned magistrate erred both in law and in fact by apportioning liability at 50:50 between the respondents and the appellants whereas the appellants have proved respondent's liability on a balance of probabilities.
 - c. That the learned magistrate erred both in law and in fact for apportioning liability in 50:50 in disregard of the evidence of the eye witnesses.
 - d. That the learned magistrate erred both in law and in fact by failing to take into account all material and relevant facts as to the causation of the accident and as a result thereof she reached a wrong decision by holding the deceased 50% liable for the accident.
 - e. That the learned magistrate erred both in law and in fact by holding that the appellant had proved negligence as against the respondents on a balance of probabilities only to find the respondents 50% to blame for the accident in light of the evidence adduced.
 - f. That the learned magistrate erred both in law and in fact by applying the wrong and inapplicable principle of law in a civil case and which did not form any basis to warrant her determination on liability.
 - g. That the learned magistrate erred both in law and in fact by apportioning costs at 50:50 between the respondents and the appellants.



- h. That the learned magistrate erred both in law and in fact by failing to consider the appellants' submissions and thereby ignoring the relevant guiding facts to reach a fair and seasoned determination.
 - i. That the judgment of the learned magistrate is in the circumstances unfair, unjust and irregular and should not be allowed to stand.
7. Parties have canvassed the appeal by way of written submissions as directed by the court. A summary of the submissions is as bellow.

Appellants' Submissions

8. To reveal that there is only one issue in the appeal, the appellants identify the sole issue for determination as whether the learned trial magistrate erred in apportioning liability at 50:50. It is submitted that PW3 and PW4 were eyewitnesses to the occurrence of the accident, and that both their testimonies confirmed that the respondents' motor vehicle and the deceased's motorcycle were moving in the same direction, with the deceased riding ahead of the bus. They contend that the witnesses testified that the bus was being driven at a high speed, and that in the course of attempting to overtake the deceased, the bus lost control, veered towards the deceased's lane, and knocked him down.
9. The appellants dispute the version given by DW1, who alleged that the deceased was overlapping and overtaking the bus on the left lane, when he allegedly hit a pedestrian, lost control, and fell in front of the bus, leading to the accident due to close proximity.
10. The appellants argue that a driver bears a greater duty of care and must keep a proper lookout for other road users. In support of this position, they rely on the decisions in; *Isabella Wanjiru Karanja v Washington Malele* [1983] KLR 142; *Zarina Akbarali Shariff & Another v Noshir Piroshesha Seshna & Others* [1963] EA 239; *Masembe v Sugar Corporation & Another* [2002] 2 EA 434; *Okoth v Oulo* [2022] eKLR; *Ochard Juice Limited & Another v Gekera* [2023] eKLR and *Amani Kazungu Karema v Jackmash Auto Ltd & Another* [2021] eKLR in faulting the apportionment.
11. In conclusion, the appellants urge the court to find the respondents 100% liable for the accident and to award them the costs of this appeal.

Respondents' Submissions

12. On its part, the respondents support the trial court's finding on liability. They submit that PW1, a police officer, testified that she was not the investigating officer and merely produced a police abstract indicating that the accident was "pending under investigation." They argue that, in the absence of completed investigations or traffic charges against the 2nd respondent, it was difficult to ascertain fault on the part of the respondents.
13. The respondents further interrogate the evidence of PW3, who stated on cross-examination that the deceased was riding on the extreme left lane when the vehicle hit him from behind. They also challenge the credibility of PW4, who testified that he was a pillion passenger on a motorcycle riding behind the respondents' vehicle, traveling in the same direction as the deceased. On cross-examination, PW4 stated that the 2nd respondent was attempting to overtake the deceased when the accident occurred.
14. The respondents question how PW4, being a pillion passenger on a motorcycle behind the respondents' vehicle, could have seen that there was another rider (the deceased) in front of the bus. They argue that if PW4 indeed saw the deceased, it must mean that the deceased was riding on the footpath, thereby overlapping the bus on the left side.



15. The respondents rely on the evidence of DW1, who testified that he saw the deceased's motorcycle overlapping on the left through the side mirror, that the rider knocked down a pedestrian, and subsequently lost control and fell onto the road and path of the bus and was inevitably run over by the bus due to the short distance.
16. The respondents contend that, faced with two conflicting versions of how the accident occurred, the learned trial magistrate was justified in apportioning liability equally at 50:50. In support of that position, the respondents rely on the Court of Appeal decision in *Hussein Omar Farah v Lento Agencies* [2006] KECA 388 (KLR), where the court held:

“In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them.

The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party, we would think that liability for the accident could be equally on both drivers. We therefore hold each driver equally to blame.”
17. The respondents therefore urge the Honourable Court to uphold the decision of the trial magistrate and to dismiss the appeal with costs.

Issue, Analysis and Determination

18. As said before, the sole issue for determination is whether the learned trial magistrate erred in apportioning liability equally at 50:50. In faulting that finding, the appellants levy premium on the evidence of PW3 and PW4, and assert that both clearly demonstrated that the respondents' driver was solely responsible for the accident. The appellants maintain that the deceased was lawfully riding ahead of the respondents' vehicle in his proper lane when the bus, driven at high speed, attempted to overtake, veered off its path, and fatally struck him.
19. They reject the respondents' version that the deceased was overlapping or overtaking on the left, contending that the bus driver owed a higher duty of care to maintain proper control, keep a lookout, and avoid collisions.
20. The respondents, on their part, support the trial court's decision, arguing that the evidence was conflicting and that negligence on their part was not proved on a balance of probabilities. They observe that PW1, the police officer who produced the abstract, was not the investigating officer, and the abstract itself indicated that the matter was still “pending under investigation,” making it difficult to conclusively assign fault.
21. They also cast doubt on the credibility of the eyewitnesses, particularly PW4, a pillion passenger, questioning how he could have clearly seen the deceased ahead of the bus. They submit that if he did, then the deceased must have been overlapping on the footpath. The respondents rely on DW1's version that the deceased was overtaking on the left, struck a pedestrian, lost control, and fell in front of the bus, which then ran over him due to close proximity.



22. It is trite that in civil claims arising from road traffic accidents, the burden lies on the plaintiff to prove negligence on a balance of probabilities by dint of Sections 107-109 of the *Evidence Act*. The plaintiff was under duty to show that the defendant owed a duty of care, that the duty was breached, and that the breach caused the accident.
23. In the present case, although PW3 and PW4 supported the appellants' account, their testimonies contained material inconsistencies regarding positioning, distance, and sequence of events. It is thus curious how PW4 was able to observe, seeing through his rider, what was happening in front of the bus. When that evidence is juxtaposed against that by DW1's account, it would not be away from logic and reasonableness to conclude that probably both were able to recount what really happened without tilting the scale more on either side.
24. When faced with such a scenario occurs and the absence of objective, cogent and constructive additional evidence, the trial magistrate was justified in finding that liability could not be ascertained with certainty. The decision to apportion liability equally was therefore a reasonable and judicious exercise of discretion, consistent with the principle in *Hussein Omar Farah v Lento Agencies (supra)*.
25. In so holding the court reminds itself of the well settled principle of law that an appellate court will not readily interfere with findings of fact by a trial court unless it is shown that the court misapprehended the evidence, applied wrong principles, or reached a plainly erroneous conclusion. See the case of *Selle v Associated Motor Boat Co. [1968] EA 123*.
26. The record demonstrates that the trial magistrate carefully evaluated both versions and reasonably concluded that each party bore partial responsibility for the accident. There is no indication that the court misdirected itself or ignored material evidence. In the absence of clear proof that the deceased was wholly blameless or that the respondents were exclusively negligent, this court finds no basis to interfere with the trial court's apportionment.
27. Accordingly, the finding on liability was properly made. The apportionment of 50:50 stands as a fair and reasonable reflection of the evidentiary balance.
28. Having found that both sides were equally liable, was that apportionment limited to damages only or it extended and equally applicable on costs! Liability for a tort affects every burden and benefit assigned and derivable from the cause. Costs is indeed a burden to the judgment debtor as it is a benefit to the decree holder. Once the decree-holder is found to have contributed to the tort, he must carry his share of the blame all the way up to the entitlement to costs. There was no error in the trial court subjecting the costs of the suit to the apportionment of liability.
29. The appeal thus fails and is dismissed entirely with costs to the respondent being the successful party.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT LODWAR, THIS 31ST DAY OF OCTOBER, 2025

PATRICK J O OTIENO

JUDGE

