Ndung'u v Ngwai (Suing as the Legal Representative and Administrator of the Estate of Jimmy Maghanga Nyambu - Deceased) & another (Civil Appeal E068 of 2024) [2025] KEHC 15276 (KLR) (29 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15276 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL E068 OF 2024

AN ONGERI, J

OCTOBER 29, 2025

BETWEEN

SAMUEL MBURU NDUNG'U ..... APPELLANT

AND

VAINES SOKO NGWAI (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF JIMMY MAGHANGA NYAMBU - DECEASED) ..... 1ST RESPONDENT

STEPHEN KALA MIGWANU ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon. C. K. Kithinji (PM) in Voi CMCC No. E254 of 2023 delivered on 13th November 2024)

JUDGMENT

1. The 1st Respondent Vaines Soko Ngwai in this appeal filed Voi CMCC No. E254 of 2023 seeking general damages under the Law Reforms Act and the *Fatal Accidents Act* on behalf of the estate of Jimmy Maghanga (Deceased).

2. The cause of action arose out of an accident that occurred on 31st December 2020 at Ngolia area along Mombasa road while the deceased was travelling as a lawful passenger in motor vehicle registration No. KBX 205Y belonging to the 2nd Respondent Stephen Kala Migwanu when it collided with motor vehicle registration No. KBG 087R belonging to the Appellant Samuel Mburu Ndung'u.

3. At the time of the accident, the deceased was a trained mason working as a casual labourer earning Kshs. 20,000/= per month.

4. He was aged 22 years providing for his mother VAINES SOKO NGWAI who is the 1st Respondent.

5. The 2nd Respondent and the Appellant who were sued as the 1st and 2nd Defendants respectively in the trial court filed their defences denying the 1st Respondent's claim.

6. The 1st Respondent did not witness the accident. The only eye witness was the Appellant's driver who testified as DW1.

7. DW1 said he was driving motor vehicle registration No. KBG 087R belonging to the Appellant from Mombasa towards Nairobi transporting fertilizer to Kiambu.

8. DW1 said he was doing 40km/h because he was ascending a hill and he collided with motor vehicle registration No. KBX 205Y Toyota Probox.

9. The trial court found that DW1 did not give explicit details on how and where the accident occurred and held that both the Appellant and the 2nd Respondent were 100% jointly and severally liable for the accident.

10. The trial court assessed the award of damages as follows:-

    i. General damages for pain and suffering Kshs. 50,000/=

    ii. Loss of expectation of life Kshs. 100,000/=

    iii. Loss of dependency Kshs. 1,628,640/=

    iv. Special damages Kshs. 20,000/=

    Kshs. 1,798,640/=

11. The Appellant who was the 2nd Defendant has appealed against the said judgment on the following grounds:-

    i. The learned Magistrate erred in law and misdirected herself when she failed to consider the Applicants submissions on both points of law and facts.

    ii. That the learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    iii. The learned Magistrate erred in law and fact in finding the Appellant 100% liable in view of the evidence produced before the trial court and in particular the following:

        a. That the 1st Respondent failed to prove his case on liability against the Appellant.

        b. That in fact the 1st Respondent proved their case against the 2nd Respondent.

        c. That the 2nd Respondent did not enter appearance and nor did he tender any evidence.

    iv. The learned Magistrate erred in law and fact in finding the Appellant and 2nd Respondent jointly and severally liable despite the fact that the Appellant called a witness to testify which evidence was not rebutted by the 2nd Respondent who had failed to enter appearance.

    v. The learned Magistrate erred in fact and in law in failing to consider the Appellant's submissions on liability and legal authorities relied upon in support thereof.

    vi. The learned Magistrate erred in law and fact by overly relying on the Respondents' submissions which were not relevant and without addressing his mind to the circumstance of the case.

vii. The learned Magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

12. The parties filed written submissions as follows; The Appellant contends that the trial court erred in its apportionment of liability, arguing that the evidence conclusively establishes the 2nd Respondent as the sole party at fault.

13. The core of the appeal rests on a re-evaluation of the evidence concerning the accident's cause.

14. The Appellant further submitted that the first respondent (PW1) did not witness the event.

15. That the testimony of the police officer (PW2) and the Appellant's driver (DW2) was consistent and uncontroverted that the accident was caused when the 2nd Respondent's vehicle, a Probox registration KBX 205Y, dangerously attempted to overtake multiple vehicles at a sharp corner marked with a continuous yellow line, thereby veering into the path of the Appellant's oncoming lorry on its rightful lane.

16. The police abstract, produced as evidence, explicitly blamed the driver of the Probox for the incident.

17. The Appellant submitted that the negligent act of the 2nd Respondent's driver—overtaking in a prohibited and dangerous area—was the direct and proximate cause of the collision. It is argued that had the Probox remained in its lane, the accident would not have occurred.

18. That the 2nd Respondent failed to adduce any evidence to counter these allegations.

19. Therefore, the Appellant urged the Court to set aside the trial court's finding on liability and hold the 2nd Respondent 100% liable for the accident.

20. Consequently, the Appellant also prays that the costs of this appeal be awarded to them.

21. The 1st Respondent submitted that the appeal against the trial court's judgment is without merit and should be dismissed.

22. That the trial magistrate correctly evaluated the evidence to establish both liability and quantum.

23. Regarding liability, the 1st Respondent contends that the trial court was justified in finding the Appellant and the 2nd Respondent jointly and severally liable.

24. The evidence established that a fatal head-on collision occurred between the two vehicles, resulting in the death of the 1st Respondent's son, who was a passenger.

25. The Appellant's attempt to shift blame solely to the 2nd Respondent is undermined by the lack of crucial evidence from the police, such as the occurrence book extract or a sketch plan, and by the fact that the testifying police officer did not witness the accident.

26. Conversely, the driver of the Appellant's vehicle (DW1) provided inconsistent testimony, introducing new details in court that were not in his initial statement or pleadings, which constituted an unfair "trial by ambush."

27. Furthermore, DW1 admitted he took no evasive action, such as braking or swerving, despite the accident occurring in clear daylight, demonstrating a failure to keep a proper lookout.

28. The trial court correctly applied the doctrine of res ipsa loquitur, as the nature of the collision itself suggested negligence on the part of both drivers, a presumption that neither defendant successfully rebutted.

29. In conclusion, the 1st Respondent maintained that the trial court's decision was sound, based on a proper assessment of the evidence, and therefore, the appeal should be dismissed with costs.

30. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.

31. The issues for determination in this appeal are as follows;

    i. Whether the learned trial magistrate erred in law and fact in apportioning liability for the accident jointly and severally between the Appellant and the 2nd Respondent; and

    ii. Whether the award of damages was excessive and based on wrong principles.

32. On the first issue of liability, the Court has re-evaluated the evidence presented before the trial court.

33. The Appellant's driver, DW1, testified that he was driving his lorry at a speed of 40km/h while ascending a hill and that the 2nd Respondent's Probox, which was attempting to overtake at a sharp corner, encroached into his lane, causing the head-on collision.

34. This account was supported by the evidence of PW2, the police officer, who produced a police abstract that placed the blame on the driver of the Probox.

35. The 1st Respondent, who did not witness the accident, and the 2nd Respondent, who failed to enter a defence or adduce any evidence, did not provide any credible evidence to counter the Appellant's version of events.

36. The principle of law is clear that he who alleges must prove. In this instance, the 1st Respondent, as the plaintiff, bore the initial burden.

37. However, the Appellant, through DW1 and PW2, presented a coherent and uncontroverted narrative that the accident was solely caused by the negligent act of the 2nd Respondent's driver who was overtaking at a dangerous section of the road.

38. The trial magistrate's finding that DW1 did not give explicit details was, with respect, an insufficient basis to impute negligence on the Appellant.

39. The doctrine of res ipsa loquitur, which the trial court invoked, is not a rigid rule to be applied in every accident case, particularly where, as here, a clear explanation for the accident has been provided.

40. The Appellant's evidence, which was not rebutted, satisfactorily discharged any evidential burden that may have shifted.

41. Consequently, the finding of joint liability cannot be sustained. The appeal on this ground succeeds. The 2nd Respondent is held to be 100% liable for the accident.

42. On the second issue regarding quantum, the Appellant has challenged the award of damages as being excessive. The trial court awarded Kshs. 50,000 for pain and suffering, Kshs. 100,000 for loss of expectation of life, Kshs. 1,628,640 for loss of dependency, and Kshs. 20,000 as special damages.

43. An appellate court will be slow to interfere with an award of damages unless the trial court acted on wrong principles, misapprehended the evidence, or awarded a sum that is so inordinately high or low as to be an entirely erroneous estimate of the damage.

44. In assessing the award for loss of dependency, the trial court applied a multiplier of 30 years, based on a retirement age of 55, and a multiplicand of Kshs. 15,000, having discounted the claimed monthly income of Kshs. 20,000 by a third for contingencies.

45. I find no reason to interfere with the findings of the trial court as the same is reasonable and will not be disturbed.

46. In the final analysis, the appeal partially succeeds. The judgment of the trial court on liability is set aside and substituted with an order that the 2nd Respondent, Stephen Kala Migwanu, shall be 100% liable for the accident.

47. Judgment is entered in favour of the 1st Respondent against the 2nd Respondent in the sum of Kshs. 1,798,640/=.

48. This sum shall accrue interest at court rates from the date of the judgment in the lower court.

49. Since the appeal succeeded partial, each party shall bear its own costs of this appeal.

50. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 29TH DAY OF OCTOBER 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

.....for the Appellant

.....for the Respondents