

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL APPEAL CASE NO. E049 OF 2024

POULINE GATHIGIA MURIUKI.....1ST

APPELLANT

CHARLES MURIU MURIUKI.....2ND

APPELLANT

VERSUS

SIMON KAMANGARU MURIITHI.....

RESPONDENT

JUDGEMENT

1. Before this Court for determination is the Memorandum of Appeal dated **13th August 2024** filed by the Appellants **POULINE GATHIGIA MURIUKI** (1st Appellant) and **CHARLES MURIU MURIUKI** (2nd Appellant)
2. The Respondent **SIMON KAMANGARU MURIITHI** opposed the appeal. The matter was canvassed by way of written submissions. The appellant filed the written submissions dated

20th May 2025, whilst the Respondent relied upon his written submissions dated **2nd January 2025**.

BACKGROUND

3. The genesis of the suit is a road traffic accident which occurred on **16th May 2022** at about **6.00pm** along the Sagana-Karatina Road. The accident involved motor vehicle Registration Number **KDH 057 L** Mazda, **KCK 443 H** Toyota Delta and a Motor cycle Registration **KMCX 928J** make being driven by the Deceased **KELVIN MURIU**, who was carrying a minor **DAVID KINYUA** as a pillion passenger.
4. The Appellants evidence was that on the material date the Deceased riding the motorcycle was heading towards Sagana direction from Karatina. At **Kagocho area** the motor cycle was going downhill and the Respondent his driver/agent driving the **KDH** was coming, uphill from the opposite direction.
5. The Appellants claimed that the **KDH** was being driven uphill at a high speed and swerved onto the right side of the road where the motorcycle was being driven. That as a result the **KDH** blocked the path of both the motor cycle and another vehicle

Registration **KCK** which was behind the motorcycle. That the motorcycle rammed head on into the **KDH**. Due to the impact the Deceased was tossed into air and landed on the tarmac sustaining fatal injuries. The minor pillion passenger was also tossed into the air and landed on the windscreen of the **KCK** sustaining serious injuries.

6. The Appellants who are the legal representatives of the Deceased and the parents of the minor filed in the Nyeri Magistrates Court Civil Suit No. **056 of 2022** seeking the following prayers

For the Deceased Kelvin Muriu;-

- (i) Special Damages at Kshs. 181, 500/=
- (ii) Loss of Expectation of Life
- (iii) Loss of dependency/Lost years
- (iv) Loss of Consortium, love, care and affection.

For the minor David Kinyua

- (i) General damages for Pain, Suffering and loss of amenities.
- (ii) Reduced earning capacity.
- (iii) Special damages at Kshs. 176,000/=

- (iv) Interest on the above from date of filing suit.
- (v) Costs of the suit.

7. The Respondent filed a statement of Defence dated **6th September 2022** in which he denied having caused the accident by reckless driving. Instead the Defendant averred that it was the Deceased who caused and/or substantially contributed to the occurrence of the accident.

8. The suit was heard by way of Vive Voce evidence in the Lower Court. On **16th July 2024 Hon. V S KOSGEI Senior Resident Magistrate** dismissed the Appellants suit in its entirety. Being aggrieved by the decision of the trial Court the appellants filed this appeal which is premised upon the following grounds:-

- “1. That the learned trial Magistrate erred in law and therefore arrived at a wrong conclusion and decision on liability.**
- 2. The Honourable trial Magistrate erred in law and fact in entirely disregarding the testimony of PW3 stating she had been untruthful in stating the deceased was an adult when he was not whereas this was not his actual testimony.**

- 3. The Learned trial Court erred in fact and law in not giving proper weight to each witness' testimony and finding that the Appellants witnesses contradicted each other and dismissed the Plaint in lieu;**
- 4. The Learned trial Court erred in fact and law in overly relying on the testimony of a PW2 who was inconsistent and not an eye witness to the accident and disregarded testimony of PW1 and PW5 who gave eye witness accounts of the accident;**
- 5. The learned trial magistrate erred in law in failing to give issues arising the interpretation that best favoured the enjoyment of the fundamental rights litigated upon.”**

ANALYSIS AND DETERMINATION

9. I have carefully considered this appeal as well as the submissions filed by both parties.

10. This is a first appeal, it is settled law that the duty of the first appellate

court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions **[see Peters - vs- Sunday Post Limited [1958] E.A 424]**

11. In **SELLE and Another -vs- ASSOCIATED MOTOR BOAT COMPANY LTD & Others [1968] 1 E.A 123** it was stated that

“An appeal to this court from the High 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 [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account

particular circumstances or probabilities materially to estimate the evidence.”

12. Likewise in **GITOBU IMANYARA & 2 Others -vs- Attorney general [2016] eKLR**, the Court of Appeal stated as follows:-

“An appeal to this court is by way of a 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.”

13. The fact that the Appellants had Locus Standi to file suit on behalf of

the estate of the Deceased is not in any doubt. At **page 35** of the record is a copy of the Limited Grant of Letters of Administration Ad litem issued to the Appellants on **14th June 2022** authorising the two to file suit on behalf of the estate of the late **Kelvin Muriuki Muriu**.

14. The Appellants also purported to file suit on behalf of their minor son

David Kinyua who was a pillion passenger on the motorcycle. Their legal authority or locus standi to file suit on behalf of the minor was addressed at great length by the trial magistrate in her judgment.

15. **Order 32 Rule 1** of the **Civil Procedure Rules 2010** provide as follows:-

“(1) Every Suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

(2) Before the name of any person shall be used in any action as next friend of any infant where the suit is instituted by an advocate, such person shall sign a written authority to the advocate for that purpose and the authority shall be filed.”

16. As pointed out by the trial magistrate no written authority of the next friend was signed or filed together with the plaint in

this case. Due to this omission and due to the fact that the two cases (of the Deceased and the Minor) had not been consolidated the trial court proceeded to dismiss the suit filed on behalf of the minor. I cannot fault the analysis and finding of the trial court and as such I do uphold the same.

17. Regarding the accident which occurred on **16th May 2022**, it was necessary to first determine the issue of liability. The Appellants alleged that the Deceased was riding his motorcycle from Karatina towards Sagana direction. That at the **Kagocho area** the motorcycle was being ridden downhill and behind it was the motor vehicle **KCK**.
18. According to the appellants the Respondents vehicle **KDH** was coming in the opposite direction i.e uphill. It was claimed that the **KDH** was speeding uphill and swerved into the lane of oncoming traffic thereby colliding head on with the motorcycle.
19. However this evidence was contradicted by **PW2 CORPORAL HUSSEIN MOHAMED** the Investigating officer who produced the Police abstract dated **10th June 2022**. **PW2** who was the officer who visited the scene blamed the

Deceased for causing the accident. He stated that the Deceased dangerously overtook the **KCK** and in so doing swerved into the left lane and collided with the **KDH** which was coming from the opposite direction. Under cross-examination **PW2** insisted that the driver of the **KDH** was not to blame for causing the accident.

20. Unfortunately although he visited the scene and took measurements, **PW2** did not produce a sketch map which would have enabled the court to visualize the scene and would have shown clearly on which side of the road the impact occurred. It was alleged that the road was under construction and that there were diversions at the point of the accident. The sketch map was therefore of greater importance to give a view of the road and the diversions at the point of the accident.

21. The minor **David Kinyua** testified as **PW1**. He was the pillion passenger on the motorcycle and was therefore effectively an eye-witness. **PW1** stated that as they took a bend on the road he saw a red car (**KDH**) moving towards them at high speed. The car which was being driven in their

lane collided with the motorcycle. **PW1** lost consciousness and awoke to find himself in hospital.

22. **PW1** in cross-examination denied that the motor cycle was overtaking any other vehicle at the time. He stated that rather it was the driver of the **KDH** who was overtaking and so swerved into their lane.
23. **PW5 JOSEPH MUCHIRI** was also an eye witness to the accident. He stated that he ran a workshop near the scene of the accident. According to **PW5**, the driver of the **KDH** caused the accident because he remained on the tarmac instead of moving into the diversion which was a Murram road to be used by the vehicles coming from Sagana direction.
24. However in his written statement dated **10th August 2022** at **Paragraph 6** this witness stated that the motorcycle '**drove into**' the **KDH** which was coming from Sagana direction.
25. On his part the Respondent stated that it was the motorcycle rider who in overtaking carelessly collided with his vehicle.

26. It is quite clear that the Appellants own witnesses gave contradictory statements. The Investigating Officer **PW2** did not agree with the evidence of the plaintiffs other witnesses. There was inconsistency in their narration of how their accident had occurred. Further I find it quite unlikely if not impossible that the **KDH** was speeding whilst being driven. There is no clarity on how the accident occurred.
27. During the hearing it transpired that he Deceased did not have a valid licence to ride a motorcycle. Whilst this may not be grounds to assume liability it does show that the Deceased himself was in breach of **Section 30** of the **Traffic Act Cap 403 Laws of Kenya**. Having no valid licence to drive the motor cycle it would not be far-fetched to posit that the Deceased was not a competent rider.
28. Finally I find that the appellants failed to establish liability as against the Respondents on a balance of probability. In the circumstances I do agree with the decision of the trial court to dismiss the suit.

29. Regarding the question of damages, if the Appellant would have been successful the court agrees with the awards as proposed by the trial court as follows:-

(a) General Damages for pain and suffering -

Kshs. 150,000/=

(b) Loss of Life Expectation

- Kshs.

100,000/=

(c) Loss of Dependancy

- Global

sum

(d) Special Damages

- Kshs. 181,500/=

30. Finally this appeal is dismissed in its entirety. Costs will be met by the Appellant.

Dated in Nyeri this 5th day of December, 2025.

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MAUREEN A. ODERO
JUDGE