

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**THE CIVIL APPELLATE DIVISION**  
*(Coram: A.C. Mrima, J.)*  
**CIVIL APPEAL NO. E293 OF 2025**

*-between-*

1. **AGNES NDUTA**  
2. **NJOROGE WAITHE.....**  
**APPELLANTS**

*-versus-*

1. **MAZERAH MASAI MAZERAH**  
*(Suing as Personal Representative of Nyamawi Mazera Masai)*
2. **RAJAB KALINGA MAZERA**  
*(Suing as Personal Representative of Nyamawi Mazera Masai) .....*  
**RESPONDENTS**

*[Being an Appeal from the Judgment and Decree of the Hon. Mercy Malingu (SRM) delivered on 28<sup>th</sup> February 2024 in Milimani CMCC No. E4610 of 2023]*

**JUDGMENT**

**Introduction:**

1. This is an appeal regarding the tragic death of one *Nyamawi Mazera Masai* (“hereinafter referred to as **“the deceased”**), who died on 24<sup>th</sup> July 2023, following an accident involving Motor Vehicle Registration Number KCX 413B (hereinafter referred to as **“the vehicle”**).
2. The trial Court found *Agnes Nduta* and *Njoroge Waithe* the Appellants herein 100% liable for negligence and made damages totalling to Kshs 3,782,650. It is that decision that prompted the instant appeal which was heard by way of written submissions.

**The Appeal:**

3. Through a Memorandum of Appeal dated 12<sup>th</sup> March 2025, the Appellant preferred the following grounds of appeal as hereunder: -
1. *THAT the Learned Magistrate in the matter herein delivered Judgment on 28<sup>th</sup> February 2024 in favour of the Respondent herein thus contrary to the law and facts availed before the Honourable Court.*
  2. *THAT the Learned Magistrate erred in fact and law in finding that the Respondents herein had discharged the burden of proof in CMCC NO. E4610 OF 2023.*
  3. *THAT Learned Magistrate erred in Law and Fact by finding that the Respondents herein had discharged the burden of proof in CMCC NO. E4610 OF 2023 despite failure by the respondent in calling an eyewitness who saw the happening of the alleged accident.*
  4. *THAT Learned Magistrate erred in Law and Fact by finding that the Respondents herein had discharged the burden of proof in CMCC NO. E4610 OF 2023 despite failure by the respondent in calling the investigating officer who would have shed light on the circumstances of the alleged accident that took place in 2023.*
  5. *THAT Learned Magistrate erred in Law and Fact by finding that the Respondent herein had discharged the burden of proof in CMCC NO. E4610 OF 2023 despite the police abstract filed in CMCC NO. E4610 OF 2023 showing that the subject accident is pending under investigations.*
  6. *THAT Learned Magistrate erred in Law and Fact by holding the Appellants herein 100% liable in CMCC NO. E4610 OF 2023 awarding the Respondents a sum of Kshs 3,782,650.*
  7. *THAT Learned Magistrate erred in Law and Fact by failing to strike out the suit which is CMCC NO. E4610 OF 2023 for failure by the Respondent herein in discharging the burden of proof.*
  8. *THAT the Learned Magistrate erred in law and fact by failing to take account authorities stated in the Appellants' submissions in CMCC NO. E4610 OF 2023 particularly authorities stated therein in order for her to arrive at a reasonable conclusion.*

The submissions:

4. In their written submissions dated 15<sup>th</sup> September 2025, the Appellants contended that the Respondents failed to discharge the requisite burden of proof as mandated by law. They relied on Sections 107, 108, and 109 of the *Evidence Act (Cap 80)* and the Supreme Court decision in *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 others* [2014] eKLR, which established that a person making an allegation bears the initial legal burden of proof, and only after this is discharged does the evidential burden shift to the opposing party. Further, in reference to *Charlesworth & Percy on Negligence (9th Edition, p. 387)*, the Appellants argued that in a negligence action, the burden falls upon the Plaintiff to adduce evidence establishing each element of the tort.
5. Regarding the specific evidence adduced at the trial Court, the Appellants argued that the Respondent failed to call crucial witnesses, specifically an eyewitness to the accident or the investigating officer who visited the scene. They emphasized that the Police Abstract presented in evidence indicated that the matter was still pending under investigations. Consequently, they submitted that the trial Magistrate erred in finding for the Respondent in the absence of such proof. They prayed that the appeal be allowed and the suit be dismissed with costs.

**The Respondents' case:**

6. In response to the appeal, the Respondents filed written submission dated 12<sup>th</sup> September 2025. They argued that the trial Court's decision was sound. On the issue of liability, they relied on the case of *Chao -vs- Dhanjal Brothers Ltd & 4 Others* [1990] KLR 482, arguing that where the circumstances of an accident give rise to an inference of negligence, the burden shifts to the defendant to show a probable cause that does not connote negligence. The Respondents further cited the longstanding decision in *Caparo Industries PLC -vs- Dickman* (1990) 1 ALL ER 568 to illustrate the duty of care owed by the

- driver to the deceased passenger and *Statpack Industries Ltd -vs- James Mbithi Munyao* [2005] eKLR regarding the proof of a causal link between negligence and injury.
7. A central pillar of the Respondent's argument was the Appellants' failure to proffer any evidence at trial. They drew support from the case of *Kimani (suing as the Administratrix of the Estate of Amos Kanina Kimani (Deceased) -vs- Mwangi* (Civil Appeal 120/2021) (2024) KEHC 2434 KLR, where it was observed that a party undermines its case drastically by failing to call witnesses.
  8. The Respondents further relied on the case of *Mursal & another -vs- Manese (suing as the legal administrator of Dalphine Kanini Manesa)* (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (*referencing Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 Others*), to fortify the argument that where a defendant fails to call evidence, their pleadings remain mere statements of fact and the plaintiff's evidence stands uncontroverted.
  9. On the quantum of damages, the Respondents defended the trial Magistrate's assessment. They cited *Nyambati Nyaswabu Erick -vs- Toyota Kenya Ltd & 2 Others* (2019) eKLR and *Herman Onamu -vs- Spin Knit Diary Limited* [2019] KEHC 354 (KLR) to argue that an appellate Court should be slow to interfere with the discretion of a trial court unless the award is inordinately high or low.
  10. Finally, regarding the award for pain and suffering, they relied on *Sukari Industries Limited -vs- Clyde Machimbo Juma* [2016] eKLR to show that the award was reasonable. They concluded by urging the Court not to interfere with the trial Court's findings and as such, to dismiss the appeal with costs.

**Analysis:**

11. From the above discourse, the issues that emerge for determination are as follows: -
  - i. *Whether the Respondent discharged the burden of proof regarding negligence.*

ii. *Whether the award of damages was excessive.*

12. The Court will now deal with the above issues, but first, its role in this appeal. This being a first appellate Court, its duty is to re-assess and re-analyse the evidence afresh, with a view to arriving at its own independent findings. In ***Abok James Odera t/a AJ Odera & Anor; Associates vs- John Patrick Machira t/a Machira & Co Advocates*** [2013] eKLR, the Court observed as follows: -

*... This being a first appeal, we are reminded of our primary role as a first appellate Court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons Judgment.*

13. With the foregoing, a consideration of the issues now follows.

**[a] Whether the Respondents discharged the burden of proof regarding negligence:**

14. The deceased was a passenger in the vehicle. It is not in dispute that he sustained fatal injuries, specifically a fractured pelvic bone and crush injuries, caused by the wheels of the very vehicle he had boarded. The Appellant's case was that the vehicle moved while the deceased was alighting at Nyayo Stadium. Crucially, after the incident, the 2<sup>nd</sup> Appellant, the driver of the vehicle, did not immediately rush the deceased to the hospital. Instead, evidence on record shows the vehicle proceeded to the CBD to drop off other passengers, then to Langata Police Station, and finally to Industrial Area Police Station before the deceased was taken to Mbagathi Hospital, where he succumbed.
15. The Appellants contended that the Learned Magistrate erred because the Plaintiff did not call an eye witness or the Investigating Officer, and that the Police Abstract indicated investigations were pending. As said, the deceased was a fare-paying passenger. A public service vehicle owes a duty of care to its passengers to ensure they alight safely. The fact that a passenger was run over by the rear tires of the vehicle he was

alighting from raises a strong presumption of the operation of the doctrine of *res ipsa loquitur*.

16. The **Black's Law Dictionary** 9<sup>th</sup> Edition at page 1424, defines the *Res ipsa loquitur* as follows: -

*[Latin "the thing speaks for itself"] Torts. The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. Often shortened to res ipsa."*

17. Further, the Dictionary expounds the circumstances a Court will infer negligence as follows:-

*The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."*

*"It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."*

*'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability ...*

*The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from*

*knowledge of the causes of the type or category of accidents involve.*

18. In Civil Appeal 100 of 2004, **Kenya Bus Services Limited - Vs- Peter Mirara Kariuki**, the Court of Appeal discussed the duty of care public vehicle drivers owe to passengers as follows:

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*.... We therefore come to the conclusion that the respondent proved the particulars of negligence as pleaded. **In any case, the fact that the deceased was a passenger on the 1<sup>st</sup> appellant's public carrier cast a duty on the 1<sup>st</sup> appellant to carry the deceased safely as far as reasonable care and forethought could attain.**\_(emphasis added)*

19. In *Mugunya & others -vs- Abdalla* [2004] KEHC 1046 (KLR) His Lordship Maraga, J (as he then was) further discussed the above duty in reference to an English decision. He observed as follow: -

*.... It is the duty of any public transporter to maintain his vehicle or vehicles by taking all reasonable precautions for the safety of his passengers and not to expose them to danger of a risk he knows or ought to know. Commenting on such duty, Eric, CJ, in *Scott Vs London Dock Co.* (1865), 3 H & C 596; 13 L.T. 148 cited in ***Barkway vs South Wales Transport Co. Ltd.*** [1950] ALL ER 395 said:*

*... Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care.*

20. In the premises, the burden shifted to the Appellants to explain how the accident occurred without their negligence. Secondly, the record reveals a critical procedural lapse by the defence at the trial. The Appellants filed witness statements for the driver. one *James Njoroge* and a conductor one *Sammy Musembi*, yet they closed their case without calling these witnesses to testify. Pleadings and witness statements are not evidence unless adopted by consent or a witness adduces

evidence on oath and is subjected to cross-examination. By failing to call the driver, the Appellants left the Plaintiff's version of events, that the driver moved the vehicle carelessly, uncontroverted. The Appellants cannot now rely on the unsworn statement of the driver claiming the deceased jumped as that evidence is not properly before the Court.

21. Thirdly, the notation '*pending under investigation*' on a Police Abstract neither operates as a stay of civil proceedings nor does it absolve a tortfeasor of liability. Civil cases are decided on a balance of probabilities, not the higher criminal standard of proof.
22. For the foregoing reasons, this Court finds that the trial Court handled the aspect of liability correctly and the Appellants' otherwise contention is legally unsustainable.

**[b] Whether the award of damages was excessive:**

23. The Appellants challenged the award of Kshs 3,782,650. On the multiplier, is notable that the deceased was 36 years old. A multiplier of 20 years is within the reasonable range for this age bracket and a ratio of 2/3 is standard for a father supporting children and an elderly parent.
24. With regard to pain and suffering, the award of Kshs 50,000/= was on the lower side given the deceased survived for hours in pain while being driven around Nairobi, but since there is no cross-appeal, the issue rests there.
25. This Court, therefore, finds no merit on the challenge against the awards.

**Disposition:**

26. Flowing from the above discussion, this Court finds and hold that the learned trial Magistrate properly directed herself on the law and facts and the appeal is unsustainable.
27. In the end, the following final orders hereby issue: -

**[a] The appeal is wholly dismissed.**

**[b] Costs of this appeal are awarded to the Respondents.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at NAIROBI this 20<sup>th</sup> day of February, 2026.**

**A. C. MRIMA  
JUDGE**

**Judgment virtually delivered in the presence of:**

**No appearance** for the Appellants.

**Miss Ngigi**, Learned Counsel for the Respondents.

**Michael/Amina** - Court Assistants.