

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HIGH COURT CIVIL APPEAL CASE NO. E076 OF 2024**

**ESTHER WAMBUI GITHINJI.....1<sup>ST</sup>**

**APPELLANT**

**BETH WANGECHI WARIARI.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**ABERDARES NATIONAL PARK.....**

**RESPONDENT**

**JUDGEMENT**

1. Before this Court is the Memorandum of Appeal dated **19<sup>th</sup> November 2024** by which the Appellants **ESTHER WAMBUI GITHINJI** and **BETH WANGECHI WARIARI** suing as the legal representatives and Administrators of the Estate of the late **SAMWEL KIBERA WARIARI** (Deceased) sought the following orders:-

**“(a) THAT this Appeal be allowed and the decision/judgment of the learned magistrate who**

wrote and delivered judgment on behalf of the learned trial magistrate Honourable M. N. Lubia in Nyeri CMCC No. 117 of 2021 be set aside and replaced by a judgment of this court.

(b) **THAT** this Honourable Court do find that the Appellant's suit in the court below was proved on a balance of liability and negligence as required by the law and the relief proposed by the senior Resident Magistrate Honourable V. S. Kosgei be awarded to the appellants.

(c) **THAT** the Appellants be awarded costs of the suit in the court below."

2. The appeal was canvassed by way of written submissions. The appellant filed the written submissions dated **9<sup>th</sup> July 2025** whilst the Respondent relied upon their written submissions dated **18<sup>th</sup> September 2025**.

### **BACKGROUND**

3. This appeal arises from a road traffic accident which occurred on **19<sup>th</sup> July 2019** along the **Kihara Dirt Road** at **Thatua**. It is alleged that the Victim **Samwel Kibera**

**Wariari** (hereinafter '**the Deceased**') was walking along the said road when a motor vehicle Registration **KAE 814F** being driven carelessly and recklessly hit the Deceased causing him to sustain fatal injuries.

4. Following the accident the mother and widow of the Deceased filed a suit in the Lower Court seeking General and Special damages. The suit was heard and vide a judgment delivered on **25<sup>th</sup> October 2024 Hon V. S. KOSGEI Senior Resident Magistrate** dismissed the suit.
5. Being aggrieved by this decision the Appellants filed this appeal which is premised on the following grounds;-

**“1. The learned Magistrate erred in law and in fact in condemning the Appellant 100% on liability without any evidence having been tendered before the court by an independent witness on the Appellant’s negligence.**

**2. The learned magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the Appellant’s evidence, the written**

**submissions of the Appellant on record, the legal authorities annexed and cited therein in support of the Appellant's case hence arriving at a wrong decision.**

**3. The learned magistrate erred in law and in fact by failing**

**to follow the case laws/legal authorities in awarding general damages in a fatal matter where an eye witness was not available.**

**4. The learned Magistrate misdirected herself into misapplying and misapprehending the law of evidence**

**and in arriving at a wrong decision on the issue of negligence and liability.**

**5. The learned Magistrate failed to keep at the back of her**

**mind that having not had the advantage of observing the demeanor of the witness and hearing their evidence and only been directed to**

**write the judgment for and on behalf of the trial magistrate Honourable M. N . Lubia who was out of the country and who heard the parties misdirected herself into arriving at a decision that was obviously against the weight of evidence on record.”**

### **ANALYSIS AND DETERMINATION**

6. I have considered the appeal before this court, the record of the proceedings before the Lower Court as well as the written submissions filed by both parties.

7. This is a first appeal and in this regard I take cognizance of the holding

in **Imanyara & 2 others v Attorney General [2016]**

**KECA 557**

**(KLR)** in which the **Court of Appeal** stated as follows:-

***This being a first appeal it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an***

***appeal is 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. v Brown [1970] E.A.L***

***As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words:-***

***“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of***

***circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.....”***

8. The fact that the appellants have requisite locus standi in this matter is not in any doubt. At **Page 31** of the Record of Appeal is a limited Grant of letters of Administration issued in favour of the appellants authorising them to file suit on behalf of the estate of the deceased.
9. Similarly the fact that an accident occurred on **19<sup>th</sup> July 2019** is also not in doubt. At **Page 34** of the record is a copy of a police abstract dated **5<sup>th</sup> September 2019** confirming that an accident had occurred involving the motor vehicle Registration **KAE 814 F** and a pedestrian. At **Page 15** of the record is the Death Certificate Serial Number **0401944** confirming that the Deceased **Samwel Kibera** died at the age of thirty two (32) years as the result of injuries sustained in a road accident.
10. The Appellants are aggrieved by the finding of the trial court that liability had not been proved as against the Respondents.

11. It is trite law that he who alleges must prove. It is a general proposition of the law that the legal burden of proof lies upon the party who invokes the aid of the law. **Section 107(1) of the Evidence Act Chapter 80 Laws of Kenya** provides:

**“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

12. **Sections 109 and 112** of the same Act provide as follows:-

**“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**“112. In Civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.**

13. The two provisions were considered in the case of **Anne Wambui**

**Ndiritu -vs- Joseph Kiprono Ropkoi & Another [2005] 1**

**EA**

**334**, in which the Court held as follows:

***“As a general proposition under Section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Section 109 and 12 of the Act.”***

14. This being a civil case the Appellants were required to prove on a balance of probability that it was the driver of the vehicle who caused the accident, which led to the death of the victim.

15. The Appellants only called one witness in support of their case. **PW1**

was the widow of the victim - **PW1** did not witness the accident and

thus could not tell how the same occurred. The Respondent did not

call any evidence during the trial.

16. The appellants sought to rely on the police abstract as proof that the

accident was caused by the negligence of the Respondents driver. The

said police abstract was produced in evidence by consent of both

parties. The maker of the document was not called to testify. No

evidence was called from the police officer who visited the scene.

No sketch map was produced as an exhibit. In short no evidence was

called to prove the contents of that sketch plan.

17. A police abstract does not provide proof of how the accident occurred

and cannot be deemed to be proof of liability. In the case of

**PETER**

**KANITHI KIMUYU -VS- ADEN GUYO [2014] eKLR** it was held that

**“A police abstract is not proof of the occurrence of an accident but of the fact that following an accident, the occurrence thereof was reported at a particular police station.”**

18. Therefore the production of the police abstract did not absolve the

appellants of their legal obligation to prove liability as against the

respondent. A police abstract is merely proof that a report was made

to a particular police station. In the absence of evidence from an officer

who visited the scene and/or a sketch map the police abstract is of little

value to the court.

19. In the case of **ZOS and CAO -vs- AMOLLO STEPHEN [2019]**

**eKLR, Hon. Lady Justice Aburili** observed as follows

**“The police abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of the accident but proof of the fact that following an accident the occurrence thereof was reported to the police who took cognizance of that accident. It is the police, having received information of a report of occurrence of an accident [who] would investigate and establish the circumstances under which such an accident occurred.....”**

**[Own emphasis]**

20. In the same case the Court went on to state that:-

**“.....it was incumbent upon the appellant at the time of hearing to either call an eyewitness who saw the accident take place to prove the listed particulars of negligence attributed to the**

**Respondent or to call the police from Bondo Police Station who investigated the accident to shed light on the result of the investigations and as to who was to blame for the subject accident wherein the Deceased lost his life.”**

21. Likewise in this case I find that failure to call an eye witness of the accident and/or a police officer who investigated the case was a fatal omission. The mere fact that a vehicle hit a pedestrian is not in itself proof that the driver was negligent. A police abstract alone will not suffice as proof of liability. In the circumstances I cannot fault the findings of the trial court - I find that the appellants failed to establish liability on a balance of probabilities.

22. Finally I find no merit in this appeal. The same is dismissed in its

entirety. Costs are awarded to the Respondent.

**Dated in Nyeri this 6<sup>th</sup> day of March 2026.**

.....  
**MAUREEN A. ODERO**  
**JUDGE**

ORIGINAL