



REPUBLIC OF KENYA



**Kinyua v Gitahi & another (Suing as the Legal Representative of the Estate of the Deceased Dickson Cyrus Mwangi Nyuthe) (Civil Appeal E132 of 2025) [2026] KEHC 2777 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2777 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E132 OF 2025  
FN MUCHEMI, J  
FEBRUARY 27, 2026**

**BETWEEN**

**PAUL KIRANGA KINYUA ..... APPELLANT**

**AND**

**ANN WAIRIMU GITAHU ..... 1<sup>ST</sup> RESPONDENT**

**HARUN NYUTHE BURUNGU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE DECEASED DICKSON CYRUS MWANGI NYUTHE**

*(Being an Appeal from the Judgment and Decree of Hon. M. L. Nabibya (SPM) delivered on 30<sup>th</sup> April 2025 in Thika CMCC No. E210 of 2022)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment of Thika Senior Principal Magistrate in CMCC No. E210 of 2022 in a claim arising from a traffic accident whereby the trial court found the appellant 100% liable and awarded the respondents general damages for pain and suffering at Kshs. 30,000/-, loss of expectation of life at Kshs. 100,000/-, loss of dependency at Kshs. 984,640/- and special damages at Kshs. 29,690/-.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds of appeal summarized as follows:-
  - a. The learned trial magistrate erred in law and in fact in finding the appellant 100% liable for the accident.



- b. The learned trial magistrate erred in law and in fact by failing to consider the principle of contributory negligence and the role if any, played by the deceased or other parties.
3. Parties put in written submissions.

### **The Appellant's Submissions**

4. The appellant refers to Section 107(1) of the *Evidence Act* and the case of *Bwire vs Wayo Sailoki*, Civil Appeal No. 32 of 2021 (no citation given) and submits that the respondents' evidence lacked both consistency and reliability as the police officer, PW1, confirmed that he did not witness the accident and stated that there were no eyewitnesses present. On cross examination he confirmed that the appellant was not charged under the *Traffic Act* and neither was he blamed for the accident. It is argued that PW2, the widow of the deceased, confirmed that she did not witness the accident and gave no account of its occurrence. PW3, an eyewitness gave a version of events contradicting PW1's account and lacking corroboration from any material evidence. The appellant argues that the trial magistrate failed to take into account the said inconsistencies. Instead, the court adopted the respondents' narrative without subjecting their testimony to evidential scrutiny.
5. The appellant argues that his defence was strong and consistent as it included an independent investigator's testimony who inspected the scene and consulted the investigating officer. The appellant submits that the deceased was already lifeless when he arrived at the scene and he merely ran over the already lifeless body. Photographs of the damage on his motor vehicle and investigation findings corroborated this fact affirming his defence narrative.
6. Relying on the case of *Moit vs Mega Wholesalers Ltd* (Civil Appeal E094 of 2023) eKLR, the appellant submits that there was no basis for imputation of liability upon him and therefore the trial magistrate's judgment was manifestly erroneous and should be set aside.

### **The Respondents' Submissions.**

7. The respondents submit that their witnesses PW1, PW2 and PW3 testified and blamed the driver of motor vehicle registration number KBL 359Q for the occurrence of the accident. They testified that both motor vehicle registration number KBL 359Q and motor cycle KMDP 979L which the deceased was riding, were moving towards the same direction with the deceased riding in front. The driver of motor vehicle registration number KBL 359Q was over speeding and never kept the required distance and rammed into the rear of the motorcycle while trying to overtake and consequently the deceased sustained fatal injuries. The deceased did not in any way contribute to the occurrence of the accident and the trial magistrate arrived at the correct findings by holding the appellant 100% liable.
8. The respondents argue that DW1 and DW2, the appellant's witnesses testified that the deceased was hit by another motor vehicle. The position is different as stated by the eye witness and the police who gave evidence to the effect that the appellant knocked down the deceased. The fact that his front bumper came off shows that the impact was heavy due to over speeding. The appellant cannot therefore claim contributory negligence on the part of the deceased as he never proved any negligence on the part of the deceased. The respondents' rely on the cases of *Kiige Kamau vs David Kithiki alias Daniel Kithiki HCCA No. E118 & 119 of 2023 Mombasa* and *Luvumo Chimera Ndegwa & Another vs Multiple Hauliers (EA) Limited HCCA No. E080 of 2023* in support of their submissions.

### **Issue for determination**

9. The main issue for determination is whether liability apportioned by the trial court was against the weight of the evidence adduced.



## The Law

10. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
11. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated 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 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.”
12. The above cases have set the appropriate standard of review to be established and can be stated in three complementary principles: -
  - a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
  - c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

### **Whether liability apportioned by the trial court was against the weight of the evidence adduced.**

13. The appellant seeks to have the court substitute the trial court’s findings of 100% liability against him with 50% liability upon the deceased. The appellant asserts that the accident was substantially caused by the deceased.
14. The principles guiding the appellate court’s power to interfere with the trial court’s finding on liability are well settled. In *Khambi & Another vs Mahithi & Another* [1968] EA 70 it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.
15. It is on record that PW3 and the appellant are the only parties who witnessed the accident. PW3 testified that he was walking along Thika Matuu road at Maguguni area when he saw the deceased riding a motor cycle registration number KMDP 979L from Matuu direction heading towards Thika direction when suddenly motor vehicle registration number KBL 359Q, which was behind him, lost control and knocked him while overtaking. The deceased fell on the roadside and sustained fatal



injuries. PW1, a police officer testified that the deceased was involved in a road traffic accident on 13/11/2019 at about 8.00 pm at Maguguni area along Thika/Matuu road while riding motor cycle registration number KMDP 979L. The witness further testified that the deceased was riding from Matuu towards Thika and at Maguguni area he was hit from behind by motor vehicle registration number KBL 359Q. On cross examination PW1 testified that no one was blamed for the accident. He further stated that he was not the investigating officer and neither did he visit the scene.

16. The appellant testified as DW1 and stated that on the material day he was driving motor vehicle registration number KBL 359Q from Mwingi Law Courts and he was in the vehicle with a colleague one Erick Kirimi Muriuki. At around 8.00pm, he was driving towards Thika at Maguguni area when he suddenly heard a bumpy impact on the left side of the car while driving at a speed of 80kph. He stopped a few meters ahead and on checking there was an impact on the left side of his front bumper that tore that section and left the left part hanging. The witness stated that he saw some blood and thought that he had hit an animal but on checking back a few meters he saw a male body lying partly on the left lane with his upper body facing down while the rest of his body was off the road. on the right lane lay a motorcycle implying that the motorcyclist had possibly been hit by another vehicle on the right lane and thrown to the left lane, prior to his care running over the body by its left wheel.
17. On cross examination, the witness stated that although he was with Erick in the car, he was unavailable to record a statement and he travelled abroad for studies. The witness further testified that he was not overtaking and there were no vehicles in front of him or behind him. He further stated that he did not knock down the deceased as the deceased was already on the ground and he only ran over his legs.
18. The appellant called DW2, a private investigator testified that he interviewed the insured, the driver of the motor vehicle and the investigating officer who handled the matter. The witness stated that the police did not blame the insured and further that the damage of the motor vehicle would have been the same if the deceased was hit as the windscreen and bumper would be damaged.
19. PW3 testified that the appellant is the one who hit the deceased from behind as he overtook. The respondent was knocked down following the impact. PW3's evidence corroborates that of PW1 who testified that the deceased was hit from behind by motor vehicle registration number KBL 359Q. The appellant on the other hand testified that he did not knock the deceased but he was already on the ground when he ran him over. The appellant admitted that he ran over the deceased. Further, when the eye witness stated that he saw the appellant hit the deceased, the burden of proof shifted to the appellant to discount the witness's testimony. The appellant has a passenger in his motor vehicle on the material day and who could have recorded a statement to corroborate his evidence. The appellant said the passenger known as Erick did not record a statement with the police on the material day.
20. It is evidence that the respondent's evidence sounds credible in view of the fact that the respondent's motor cycle was hit from behind. The vehicle of the appellant sustained damage from the front. The appellant admitted running over the deceased on the legs which demonstrates that the deceased was hit from behind by the appellant as he was overtaking. The appellant did not demonstrate how the deceased contributed to the occurrence of the accident but blames the trial court for not apportioning liability. The evidence in this case does not support contributory negligence, in my view.
21. It is my finding that the respondent proved negligence on part of the appellant. I therefore, find that the trial court's finding on negligence against the appellant at 100% was based on cogent evidence and is hereby upheld. As such, the court did not err in its finding on liability.
22. The appellant did not challenge the quantum of damages and as such the awards on special damages, general damages, loss of dependency, loss of expectation of life remain undisturbed.



23. I find no merit in this appeal and it is hereby dismissed with costs to the respondent.

24. It is hereby so ordered.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27<sup>TH</sup> DAY OF FEBRUARY 2026.**

**F. MUCHEMI**

**JUDGE**

