



Kenya Power & Lighting Company Limited v Mwikwa & 3 others (Suing as the Administrators of the Estate of the Late Asompta Mutila Kimondia - Deceased) (Civil Appeal E131 & E132 of 2023 (Consolidated)) [2026] KEHC 3126 (KLR) (10 February 2026) (Judgment)

Neutral citation: [2026] KEHC 3126 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E131 & E132 OF 2023 (CONSOLIDATED)**

NIO ADAGI, J

FEBRUARY 10, 2026

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

JAMES MUSAU MWIKWA 1ST RESPONDENT

DENIS MUTHINI MUSAU 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
ASOMPTA MUTILA KIMONDIA - DECEASED**

**AS CONSOLIDATED WITH
CIVIL APPEAL E132 OF 2023**

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

PATRICK KIMANZI 1ST RESPONDENT

PRISCILLAH NZISA NZYOKI 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF SHARON MUMBUA
KIMANTHI - DECEASED**

(Beings appeals against the judgements and decrees of Hon. M.E Analo (SRM) Chief Magistrate's Court dated 18/5/2023 in CMCC No. E627 of 2021 and CMCC E 629 of 2021)



JUDGMENT

1. By a Plaint dated 02/11/2021 the Respondents then Plaintiffs sued the Appellant then Defendant for damages under Law Reform Act and Fatal Accidents Act following a road traffic accident that occurred on 4/12/2020 involving motor vehicle registration number KBT 500N allegedly owned by the Appellant and in which Sharo Mumbai Kimanthi (deceased) who was a lawfully passenger sustained severe bodily injuries, endured pain and eventually succumbed to the injuries on 4/12/2020.
2. The suit was opposed by the Appellant who filed a Statement of Defence dated 22/02/2022 in which the Defendant admitted the occurrence of the accident involving motor vehicle registration No. KAL 148T and KBT 500N on 04/12/2020 along Kitui-Machakos Road at Mwanyani area but refuted the rest of the allegations and particulars of negligence pleaded in the Plaint.
3. The Appellant further stated that the subject matter collision on 04/12/2020 was solely and/or substantially caused by the utter negligence of the deceased herself and the driver and/or owner of motor vehicle KAL 148T. The Appellant invited the Respondent to prove the contrary and Notice of intention to take out Third Party Notice was given.
4. The suit herein was selected as the Test-Suit on liability in respect of the sister file being Machakos CMCC No. 627 of 2021 (now Machakos HCCA No. E132 of 2023).
5. The Appellant has invited this court to note that the Appellant's (DW-1's) evidence in the trial court was apparently recorded in the related file Machakos CMCC No. 627 of 2021 (now Machakos HCCA No. E132 of 2023).
6. Upon considering the evidence tendered and the Parties' submissions, the trial court found that the Respondent had proved his case against the Appellant on a balance of probabilities thus the Appellant was held 100% liable for the accident. On 18/05/2023, Judgement was entered against the Appellants jointly and severally as follows: -
 1. General damages:
 - a. Under the Fatal Accidents Act (Loss of dependency) Kshs.1,300,000/=
 - b. Pain & suffering under Law Reform Act Kshs. 20,000/=
 - c. Loss of expectation of life Kshs. 100,000/=
 2. Special damages Kshs. 44,720/=Total Kshs.1,464,720/=
7. In Machakos CMCC No. 627 of 2021 (now Machakos HCCA No. E132 of 2023), the trial court made the following award :- .
 1. General damages:
 - d. Under the Fatal Accidents Act (Loss of dependency) Kshs.1,300,000/=
 - e. Pain & suffering under Law Reform Act Kshs. 20,000/=
 - f. Loss of expectation of life Kshs. 100,000/=
 2. Special damages Kshs. 61,775/=



Total Kshs.1,481,775/=

8. The Respondents were also awarded costs of the suit and interest at court rates. Interest on general damages was to run from the date of the judgement until payment in full. Interest on special damages was to accrue from the date of filing suit until payment in full.
9. Being aggrieved by the trial court's judgement the Appellant lodged an appeal vide a Memorandum of Appeal dated 13/06/2023 raising nine (9) grounds of appeal basically challenging both liability and quantum.
10. The Appellant also lodged an appeal in Machakos HCCA No. E132 of 2023 arising from Machakos CMCC No. 627 of 2021 which is a sister file to this appeal equally challenging liability and quantum. The Appellant raised nine (9) grounds in the appeal which are similar to those in this appeal.
11. The Appellant prayed that the appeal be allowed, the judgement and decree of trial court be substituted with an order dismissing the Respondent's suit and that the Appellant be granted costs of this appeal and of the lower court.
12. The appeals were canvassed through written submissions. In this appeal, the Appellant's submissions are dated 29th September 2024. The Respondent did not file submissions in this appeal as directed by the court on 29/09/2025.
13. In appeal Machakos HCCA No. E132 of 2023, the Appellant's submissions are dated 29/09/2024 while the Respondent's submissions are dated 24th February 2025 only addressing quantum.

Analysis and determination

14. This being a first appeal, I am reminded of the primary role as a first appellate court namely, to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others* and in *Peters v Sunday Post Limited* (1968) E.A 123. (1958) E.A Page 424.
15. In the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] KEHC 282 (KLR) (6 April 2022), the court held that: -

A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

16. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues



and decide the case by giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion

17. I have had a chance to critically assess and peruse the Records of Appeal, considered and weighed the rival submissions on the appeals and also taken into consideration the judicial decisions cited.
18. Notably, in his submissions on both appeals herein, the Appellant indicated that he no longer wished to pursue the challenge on quantum of damages as assessed by the trial Court, the Respondents having failed to prove the liability/ negligence of the Appellant and, instead having succeeded in proving the liability of a party whom they did not sue. In those circumstances, it was equally wrong for the trial Magistrate to condemn the innocent Appellant to bear the costs of the suit, instead of ordering the Respondent to restate the Appellant.
19. On the foregoing, I will therefore proceed to consider whether the trial court's findings on liability should be disturbed on this appeal.

Liability

20. The Appellant contends that at the hearing on 30/06/2022, 07/12/2022 and 19/01/2023 the witnesses who spoke to liability were PC Daniel Chacha (PW-I), Ngao Kithome (PW-2) and Lawrence Mulwa Musau (DW-I, in HCCA No. E132/2023.L The evidence of the Traffic Police Officer who testified on behalf of the Respondents (Plaintiffs) corroborated the Appellant's (Defence) case in all respects, viz: -

"I have the OB in respect of the accident. The accident was reported by an anonymous caller. They alerted the Police. The scene was then visited. The lorry was from Kitui area towards Machakos. The salon car (KAL 148T) was on the other side. The road at the scene is marked. I am conversant with the road. The edges are marked in white. There is a continuous yellow line. At the scene, there is no bend, I can't confirm if one is as I didn't visit the scene. I don't know if any guard rails are in place. Only two vehicles were involved. No pick up is mentioned. The accident happened on the road. KAL 148T was moving to Kitui. It left its lane and the point of impact was on the lane heading to Machakos. That was the jumb lane. No explanation is given why the vehicle veered off its road. The lorry driver recorded a statement. I have seen the Defendant's Abstract. They conclude that the salon car was blamed for the accident. The driver of the small car died on the spot. Three passengers passed on. They were in the saloon car"

21. The Appellant further submitted that on the other hand, the eye witness (PW-2) is on record as testifying on oath that;

"I was about half a kilometre away when I saw the accident"

22. That his evidence is controverted by DW-I in HCCA No. 132/ 2023 as follows;

"The scene at the road traffic accident if you are at 500m away, you cannot see. PW-2 was not at the scene of the road traffic accident"

"PW2 states lies in Court. He was not present at the scene. The people on the photos PExh 3-6 are the people who were present at scene"

23. The Appellant's defence case was that it (Appellant) was NOT liable/ negligent at all. Per its pleadings, driver's Witness Statement, documentary exhibits (including Abstracts and photographs at the scene)



and sworn testimony of DWI, the lorry was on its rightful left lane when the Third-Party saloon car KAL 148T in which the deceased was travelling veered off its lane and encroached the lorry's lane, thereby causing a head-on collision. Contrary to the "particulars of negligence' on the Plaint, the photographic evidence shows clearly that indeed the lorry's driver tried to avert the impact by veering to his extreme left off the road and next to the roadside guard rails, upon applying brakes as evidenced by the skid marks on the road tarmac surface. This evidence was clear, forthright, credible, unshaken in cross-examination and supported by the Police and the Abstracts. What else was the Appellant expected to do? Where is the negligence in the circumstances? There can be no liability without fault in our jurisprudence.

24. The Appellant submitted that in light of the self-explanatory contents of the photographs that were admitted in evidence and interrogated accordingly, the evidence of the alleged eye witness "PW-2" who supposedly witnessed the collision from a record 500 metres away fails the test of credibility for the reasons that ; -
- a. He does not appear on the photos taken at the scene.
 - b. His name is not in any of the three (3) Abstracts as a witness at pg. 15, 39, 40.
 - c. In cross-examination, he could not remember the date when he allegedly recorded a Statement at the Police Station.
 - d. The Police witness PWI never mentioned or acknowledged him in his evidence, yet they were both witnesses for the Plaintiffs. The Officer testified that the OB Report [which incidentally supports the Defence (Appellant's) version] was recorded after an informed visit to scene of accident.
 - e. The Investigation Diary or Police file that would verify his allegations was not produced, either.
 - f. He contradicted himself materially when he stated that "... The Defendants never hit the Plaintiffs car" (Pg. 54) and that "...There are no guard rails on the road" (pg. 55) yet the photographic evidence shows the contrary. This invites credible doubts that he was not at the scene and did not witness the impact.
 - g. There is no suggestion that the lorry driver was to be charged with any Traffic Offence relating to the incident.
25. It was submitted that the Respondent's (Plaintiff's) own witness PWI PC Daniel Chacha having certified that the saloon car in which the deceased was a passenger left its lane and confronted the Appellant's lorry on the opposite side of the road, WE SUBMIT that it behoved the Respondent/ Plaintiff to have sued or to enjoin the Owner of the saloon car in negligence. That burden/onus does NOT belong to and cannot be transferred to a Defendant as mischievously sought by the Plaintiff and wrongly endorsed by the Court, particularly where it is evident that the Plaintiffs sued the wrong Defendant/person such as here. The Appellant relied on the case of *Midans Services Limited & Anor. v Ronald Rapute* [2022] eKLR, the trial Magistrate had held as follows: -

“Secondly, the defendants have not deemed it fit to bring in the alleged driver of the vehicle that rammed into the accident as a third party. In effect the plaintiff_ was just a passenger cannot be blamed for contributing to the causation of the accident. In effect, the defendants are (wholly liable for the accident and the injuries sustained to the plaintiff’.



That on Appeal, the Judge overturned that finding and dismissed the suit, thus: -

“There was uncontroverted evidence that the other vehicle was not identified as it seemingly sped off after colliding into the accident vehicle. With respect, there was no firm evidence to support a finding of 100% liability on the 2nd Appellant, or at all. Additionally, what the trial court said of the 2nd Appellant could also be said of the Respondent: having admitted that in fact the accident vehicle lost control and overturned after being hit by the unknown vehicle, the Respondent ought to have sued the driver of that vehicle as well.

26. The Appellant submitted that faced with the above evidence the trial Court instead did the following; -

a. Completely ignored the evidence of PC Daniel Chacha (PW-I) which was material to a proper determination of the query of liability. The Honourable Magistrate only noted as follows in passing; -

The police also testified and produced a police abstract and blamed the suit vehicle.

b. The Court opted to be wilfully vague as to which "suit vehicle" the witness PC Chacha had referred to. PWI also made comments on the Abstracts produced by the Defence showing that the saloon car KAL 148T was blamed but the Magistrate overlooked this as well.

c. For failure to take into account material that he ought to have reasonably considered and analysed, the Magistrate exercised his discretion wrongfully and this Court ought to interfere and intervene.

d. Contradictorily, the Court held the Appellant 100% liable for the reason that:

“I am alive to the fact that a well driven motor vehicle do not just loss control and veer off the road and collide for no apparent reasons thus I find that the defendant 100% liable for the accident”

27. The Appellant submitted that obviously, this ignores the fact that it is the saloon car that veered off its lane and thereby impacted the Appellant's lorry which was on its lane according to Police investigations and the photographic evidence. If any vehicle can be said to have "lost control", clearly it is the third party saloon car and NOT the Appellant's lorry.

28. The Appellant urged this Court to reconsider, reflect and re-evaluate the evidence and to come to such conclusion, so that the trial Court extremely misapprehended and mis-applied the evidence before it, and thus arrived at a patently wrong decision that was against the weight of credible evidence. By preferring the discredited version of PW2 to the probative evidence of PWI and DWI combined, the Court committed a fatal error in law and in fact.

29. The Appellant submitted that to require the Appellant to have taken out Third Party Proceedings against the owner of the saloon vehicle in the peculiar circumstances obtaining herein is to irregularly and prejudicially shift and transfer the burden and onus of proof and to require the Defendant to assist the Plaintiff in prosecuting and/or proving his case in our adversarial set-up. Such is unprecedented and wrong in all aspects, yet it heavily influenced and swayed the Court's decision on liability. The Trial Court treated the Appellant casually as if the Respondents' case was un rebutted/ uncontroverted, which was not the case. Having failed to pronounce himself on the photographic evidence before him, the Magistrate took a skewed approach to the issues before him for determination. Reliance was placed on the case of Josephat Kamau Wamburu v John Kamere & 3 Others [2017] KEHC 5790 (KLR) in which the Plaintiff was found 100% liable and the suit dismissed for overtaking on a continuous yellow



line and colliding head-on with a third party vehicle whose driver had tried to veer off the road to avoid impact in vain. Both drivers died in the accident. It was held: -

“ 17. For the above reasons, I am satisfied that the 2nd defendant's matatu registration No. KXD 140 was negligently driven, was carelessly overtaking another vehicle on a downhill slope on a no overtaking zone and continuous yellow line, and on an excessive speed that caused it to lose control and veer onto the path of the 1st defendant's lorry. Registration No. KZL 129 causing a head on collision. Given the circumstances as analysed the 2nd defendant's lorry_ driver tried to avoid the accident but nevertheless the accident occurred.

30. The Appellant also cited *Mwanthi & Another v Njoka* (civil appeal 48 of 2022) [2023] KEHC 18125 (KLR) the appellate Court considered a strikingly similar incident and dismissed a suit filed by a pillion passenger where the motorbike rider negligently emerged from behind a Canter and encroached the opposite lane of the Defendant/ Appellant's oncoming Toyota van, thereby causing a head-on collision from which the rider died. The trial Magistrate was found to have erred in imposing liability on the Defendant simply because the Plaintiff was a passenger and the rider was dead yet his estate had not been enjoined in the suit (para. 25). The Judge also took issue with the Magistrate's failure to consider the evidence of the vehicle driver or to give reasons why she disbelieved him yet the Police confirmed his version. The Judge held that the Defendant/ Appellants had sufficiently discharged his onus and burden of proof and proved that they were innocent of blame. Thus, where negligence is not proved, there would be no fault and the doctrine of *res ipsa loquitur* would be inapplicable to aid a Plaintiff. Such is the case obtaining herein. The Respondents are labouring under the mistaken notion that because the deceased was a mere passenger, it is invariably the duty and obligation of the Appellant to salvage the deficiency in their pleadings by bringing on board the proper tort-feasor in the matter, being the saloon car owner.

31. The Appellant invited this court to concur, set aside the trial Court's finding on liability and substitute it with a finding that the Respondents failed to prove their case on negligence against the Appellant to the required standard. Their evidence where relevant and credible, contradicted the pleadings and supported the Appellant's case. The suit was a proper candidate for dismissal and we urge the Court to so find and proceed to so order.

The court observes that the Appellant's defence case was that the Appellant was NOT liable and or negligent at all. Per its pleadings, driver's Witness Statement, documentary exhibits (including Abstracts and photographs at the scene) and sworn testimony of DWI, the lorry was on its rightful left lane when the third-party saloon car KAL 148T in which the deceased was travelling veered off its lane and encroached the lorry's lane, thereby causing a head-on collision. The Appellant faults the trial court for not finding the saloon car to blame for the accident.

32. This court notes that under paragraph 5 of the Statement of Defence dated 22/02/2022, the Appellant (Defendant) pleaded as follows:-

“ AND the Respondents (Plaintiffs) are invited to prove the contrary. Notice of intention to take out a Third-Party Notice is hereby given”.

33. The law is clear. Under the provision of Order 1 Rule 15 (a) (b) and (c) of the Civil Procedure Rules, 2010 is relevant in delineating the range of issues that third party proceedings can cover.

34. I have examined the provisions of Order 15 Rule 1 (a) (b) and (c) of the Civil procedure rules which state as follows:



- (1) Where a Defendant claims as against any other person not already a party to the suit (hereinafter called the third party) –
 - a. That he is entitled to contribution or indemnity; or
 - b. That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - c. That any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the Plaintiff and the Defendant and should properly be determined not only as between the Plaintiff and the Defendant but as between the Plaintiff and Defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
2. A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.
2. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed and served within fourteen days of leave, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the Plaint shall be served therewith
2. Where a third party makes as against any person not already a party to the action such a claim as is mentioned in sub - rule (1), the provisions of this Order regulating the rights and procedure as between the Defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply Mutatis Mutandis, and the expressions “Third Party Notice” and “Third Party” shall respectively apply to and include every notice so issued and every person served with such notice.
2. Where a person served with a notice by a third party under sub - rule (4) makes such a claim as is mentioned in sub - rule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.”
35. Therefore, the provision of Order 1 Rule 15 (c) of the Rules provides for an application for leave to issue a third party notice to be made by an ex parte application in chambers.
36. The Appellant after it raised its intention to take out a Third-Party Notice it the Statement of Defence did not proceed to apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and which leave was to be applied for by summons in chambers ex parte supported by affidavit.
37. A copy of such notice was to be filed and served on the intended third party according to the rules relating to the service of a summons.



38. The Appellant herein having blamed a third party, the owner of the saloon car registration No. KAL 148T motor vehicle, for causing the accident and failed to issue a third-party notice can only be deemed to have abandoned the defence that the owner of the said saloon car is the one who was to blame for causing the accident. As such the court cannot determine the issue between the Appellant and the owner of the Saloon car as to who between them was to blame for causing the accident. That would amount to condemning the owner of Saloon car unheard. In the final end, the Appellant's defence is of no consequence and the evidence of the Respondent that the Appellant was the one to blame for causing the accident stood uncontroverted.
39. In the premises, I hold that the Appellant was wholly liable for causing the accident. Liability at 100% is therefore confirmed against the Appellant.
40. The upshot is that the appeal on liability is dismissed
41. The court will not venture into determining quantum which the Appellant opted not to submit on. The awards on quantum in both appeals herein shall therefore not be disturbed.
42. The Respondent will have the costs of both appeals assessed at Kshs.30,000/ for each Appeal.
43. It is so ordered. File closed

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 10TH FEBRUARY 2026.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS 10TH FEBRUARY 2026.

