



REPUBLIC OF KENYA



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**Miti v Muchira & 2 others (Civil Appeal E234 & E235 of 2023
(Consolidated)) [2026] KEHC 2943 (KLR) (19 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E234 & E235 OF 2023 (CONSOLIDATED)**

NIO ADAGI, J

FEBRUARY 19, 2026

BETWEEN

MARTIN SHIKUKU MITI APPELLANT

AND

MERCY MWENDE MUCHIRA 1ST RESPONDENT

**PAUL MUSEMBI MUSAU (SUING AS THE WIDOW, BROTHER AND
PERSONAL REPRESENTATIVES OF THE ESTATE OF MOSES JOHN MUTUA
MUSAU (DECEASED)) 2ND RESPONDENT**

**AS CONSOLIDATED WITH
CIVIL APPEAL E235 OF 2023**

BETWEEN

MARTIN SHIKUKU MITI APPELLANT

AND

STEPHEN MULWA MUTHOKA RESPONDENT

*(Being an appeal from the judgement delivered by the Hon. Daffline Nyaboke
Sure (PM) on 22nd August 2023 in Kangundo CMCC No. 45 & 46 of 2020)*

JUDGMENT

1. By a Plaint filed on 11/03/2020 the Respondent then Plaintiff sued the Appellant then Defendant for damages under Law Reform Act and Fatal Accidents Act following a road traffic accident that occurred on 17/04/2019 along Kangundo-Nairobi Road at Kwa area involving motor vehicle registration



- number KBY 198S Toyota S. Wagon allegedly owned by the Appellant and Motor cycle registration number KMDL 694A TVS being ridden by Moses John Mutua who sustained fatal injuries.
2. The suit was opposed by the Appellant who filed a Statement of Defence on 11/02/2021 in which the Claim was denied and, in the alternative, negligence was attributed to the Deceased.
 3. Also involved in the accident was Stephen Mulwa Muthoka, who was being carried as a pillion passenger on motor cycle registration number KMDL 694A TVS and sustained serious bodily injuries. He too filed a suit against the Appellant in Kangundo PMCC No. 45 of 2020 via a Complaint filed on 10/03/2020 seeking damages and costs for the injuries he sustained.
 4. The suit in Kangundo PMCC No. 46 of 2020, the appeal herein was selected as the Test-Suit on liability in respect of the sister file being Kangundo PMCC No. 45 of 2020 (now Machakos HCCA No. E235 of 2023).
 5. 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 50% liable for the accident. On 22/08/2023, Judgement was entered against the Appellant as follows: -
 - a. General damages:
 - i. Under the Fatal Accidents Act
(Loss of dependency) Kshs.5,818,848/=
 - ii. Pain & suffering under Law Reform Act Kshs. 30,000/=
 - iii. Loss of expectation of life Kshs. 150,000/=
 - b. Special damages Kshs. 56,400/=The above amounts are subject to 50% contribution.
 6. In Kangundo PMCC No. 45 of 2020 (now Machakos HCCA No. E235 of 2023), the Plaintiff sustained the following injuries:
 - i. Open left tibia fibula fracture (comminuted with bone loss)
 - ii. Fracture left midshaft humerus
 - iii. Deep cut wound on the leg.The trial court made the following award :- .
 - a. General damages: Kshs.1,500,000/=
 - b. Future Medical Costs Kshs. 150,000/=
 - c. Special damages Kshs. 12,350/=The above amounts are subject to 50% contribution.
The Plaintiffs/Respondents were also awarded costs of the suit and interest.
 7. Being aggrieved by the trial court's judgement the Appellant lodged an appeal vide a Memorandum of Appeal dated 13/09/2023 raising four (4) grounds of appeal basically challenging both liability and quantum as follows:-



1. That the learned trial Magistrate erred in fact by failing to judiciously analyse the evidence on record thereby arriving at a finding that the appellant was equally (50%) liable for the accident subject of this matter which decision was against the weight of evidence, untenable and manifestly to the Appellant.
 2. That the learned trial Magistrate erred in law and fact by failing to judiciously interpret the applicable provisions of the law thereby arriving at a decision on liability that was erroneous, untenable, not supported by law and manifestly unjust to the Appellant.
 3. That the learned trial magistrate erred in law by failing to judiciously analyse the case law cited by the Appellant thereby arriving at a decision on liability that was erroneous, untenable, not supported by law and manifestly unjust to the Appellant.
 3. That the learned trial magistrate erred in law and fact by failing to judiciously analyse the evidence on record thereby awarding a sum on quantum that is manifestly excessive and erroneous estimate of the sum awardable to the respondent.
 3. That the Appellant shall upon receipt of typed proceedings file a supplementary memorandum of appeal to include other grounds and reasons that may become apparent therein.
8. No.5 is not a ground of appeal.
 9. The Appellant also lodged an appeal in Kangundo PMCC No. 45 of 2020 (now Machakos HCCA No. E234of 2023), The Appellant raised similar grounds in the appeal which are similar to those in this appeal.
 10. The Appellant prayed that the appeal be allowed, the judgement and decree of trial court be substituted with an order dismissing the Respondents' suits and that the Appellant be granted costs of the appeals and of the lower court.
 11. The appeals were canvassed through written submissions.

Analysis and determination

12. 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.
13. 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.

14. 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
15. 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.
16. I will therefore proceed to consider whether the trial court's findings on liability and quantum should be disturbed on this appeal.

Liability

17. The Appellant submitted that in their evidence, the Respondents called the following witnesses;
18. PW1 —Mercy Mwende Muchiru confirmed that she did not witness the accident but only got informed about it. (pages 11 and 123 of the record of appeal). Her evidence is thus of no probative value as far as liability is concerned.
19. That on his part, PW2 in his stated as follows:-

“.....On reaching Kwa Kuku area there was motor vehicle registration number KBY 1985 Toyota S. Wagon which was ahead of us moving towards the same direction being driven slowly as if it had mechanical problems and the rider (MOSES JOHN MUTUA MUSAU now deceased) decided to overtake it. While trying to overtake, he saw another motor vehicle which was coming from the opposite direction and he immediately returned to our lane but motor vehicle registration number KBY 1985 Toyota S. Wagon which was ahead of us suddenly and abruptly stopped in the middle of the highway without indicating or warning causing the rider to ram into its rear. ” (at page 13 of the road of appeal).
20. However, during his testimony in court at page 124 of the record of appeal) he introduced totally different version that :-

“On reaching Kwa Kuku area, a motor vehicle was ahead of us. It turned suddenly without indicating. ””
21. The driver of motor vehicle KBC 181S was liable for the accident as he ought to know that he was not authorized to carry a passenger in the load station.
22. On cross-examination, he stated;

“We were heading to Nairobi motor vehicle KBY 198S turned without indication. I don't know if there was a junction ahead but I saw the motor vehicle turn. ... ”
23. That it is clear from the foregoing that the said witness was inconsistent and lacked credibility and the trial court ought not to have relied on the same.



24. The Appellant submitted that on his part, he stated that;-

“I was driving at an estimated speed of suddenly the rider of motor cycle registration number KMDL 697A changed to the right lane in an attempt to overtake me but noticed an oncoming vehicle Toyota Land cruiser registration number 16CG 0704 belonging to Machakos County Government. Due to close proximity, the rider who had a male pillion passenger on board decided to swerve back to his correct left lane and in the process hit my vehicle's rear right and thereafter lost control of his motor cycle which fell on the right-lane.

The oncoming vehicle driver tried to swerve to the left to avoid the motor cycle but it was already too late and his vehicle proceeded to hit the already fallen motor cycle injuring the rider and killing the pillion passenger on the spot”

25. That the Appellant produced a certificate of examination and test of vehicle (at page 45 of the record of appeal) which noted the following on his vehicle;-

“Rear bumper dented on o/s”

26. That the certificate further indicated that the motor vehicle did not have any pre-accident defects. It also bears the initials 'N.V. D' to mean No visible defects. It finally bore the words "intact effective." All the foregoing clearly disapproves the allegations by PW2 that the appellant's motor vehicle appeared to have mechanical problems.

27. That in his evidence in court (at pages 125 and 126 of the record of appeal), the Appellant was very consistent in his evidence on the manner of occurrence of the accident. His evidence was not shaken on cross-examination.

28. It is submitted that the deceased attempted to dangerously overtake the Appellant when it was not safe to do so in the face of the oncoming motor vehicle registration number 16CG 070A. Seeing that he couldn't manage to overtake, he swerved to the left in an attempt to return to his lane only for him to ram into the Appellant's motor vehicle on the rear right-hand end.

29. That as submitted above, the evidence of PW2 (who was the plaintiff in the related suit PMCC No. 45 of 2020 and the Respondent in HCCA 234 OF 2023) was inconsistent and lacks credibility. The Respondents did not prove any negligence against the Appellant as required under Section 107 and 108 of the *Evidence Act*.

30. The Appellant submitted that the learned trial magistrate failed in her duty to judiciously analyse the evidence on record, thereby holding the Appellant equally liable for causing the accident, when clearly the primary cause of the accident is the dangerous overtaking by the deceased as confirmed by both witnesses. Had he waited until the road was clear before embarking on overtaking, the accident would not have occurred.

31. Reliance was placed in Nairobi MCCA 75 of 2012, Dupcan Kimatili Karagania -vs- Ngugi David & Others. Lady Justice Aburili held;

“24. It is my humble view that from the available evidence, the 4th defendant drove recklessly and without due care. He was overtaking the matatu without ensuring that the road ahead was clear or that he would have sufficient opportunity to complete the act of overtaking the matatu and get onto the left lane ahead without encountering the motor vehicles from the opposite direction.



"25. The 4th defendant endangered his life and the life of others like the plaintiff and PW2 by taking the risk of overtaking without ensuring that it was safe to do so thereby swerving onto the defendant's lane and colliding with the 1st defendant's motor vehicle. It was at night. He did not drive carefully. If he had been a careful driver, he should have seen the oncoming lorry and waited until the road was clear before overtaking. He was negligent and it is his negligent and rashy or reckless driving by overtaking dangerously that caused the accident wherein the plaintiff was injured. I hold him solely responsible. . "

32. The Appellant made reference to Guideline No. 52 of the Highway Code provides;

"Overtake only when it is safe and legal to do so. Do not get too close to the vehicle you intend to overtake. Use your mirrors, signal when it is safe to do so, take a quick sideways. Glance if necessary into the blind spot area and then start to move out... .."

33. Reliance was also made in Machakos HCCC No. E261 of 2022. John Mwaka -vs- Martha Wangari Kama & Anor where the court held;

"82. The conduct of the rider led to contact with the motor vehicle which was ahead of the said motor vehicle, sprawling them on the hard tarmac on the right-hand side which then exposed the plaintiff to be hit by the driver of motor vehicle registration number KBM 001P. The conduct of the plaintiff was by all standards reckless in the manner and threshold counter-plated by Section 46 and 47 of the *Traffic Act*."

34. The Appellant referred this court to paragraph 8 of the judgment, where the trial court stated;

"I have considered the above probabilities and find they are both probable. I have considered various authorities and when the court is unable to assign liability or is of the opinion that both probabilities are probable, then the safest finding is to hold both equally liable for the accident. "

35. The Appellant submitted that the first thing to note from the said court's finding is that the learned trial magistrate did not cite any of the authorities she considered. Secondly, as held by the Court of Appeal in DT. Dobie & Co. Limited -YS- Wanyonyi Wafula Chebukati (2014) eKLR, where probabilities are equal or where a court cannot decide one way or another which evidence to accept, the party bearing the burden, in this case the Respondents, will lose.

36. The Appellant invited this court to find that the deceased was wholly to blame for the accident and the appellant was not in any way to blame.

37. The Appellant prays that the judgment of the trial court be set aside and the suit be dismissed with costs to the Appellant.

38. The Respondents submitted that the learned trial magistrate NEVER erred in making a finding that the Defendant/Appellant was 50% liable for the occurrence of accident and liability of 50:50 was awarded by the Court. The deceased was riding motor cycle registration number KMDL 694A TVS was apportioned 50% liability. The PWI Stephen Mulwa Muthoka testified that he was lawfully travelling as a pillion passenger on motor cycle registration number KMDL 694A TVS being rode by the deceased Moses John Mutua Musau and in front of them was a motor vehicle registration number KBY 198S Toyota S. Wagon which was moving slowly as if it had mechanical problems and the rider



decided to overtake it and while trying to overtake he saw an oncoming motor vehicle from the opposite direction and he immediately returned to his lane but the driver of motor vehicle registration number KBY 198S Toyota S. Wagon abruptly stopped in the middle of the road after the motor vehicle switched off without indicating or warning causing the rider to ram into and die on the spot. No inspection report was ever produced in Court by the defence as they knew they were driving a defective motor vehicle which suddenly switched off and stopped on the road thus causing the accident by obstructing the rider's path.

39. The Respondent submitted that the Appellant never brought any third party proceedings against the rider who was carrying the Stephen Mulwa, the Respondent herein.

40. The Respondent cited the case of Stanley Njihia Njenga -vs- Francis Peter Masilu Kamuyua HCCA No. 603 OF 2012 which held:-

“It is a finding on the demeanour and credibility of a witness by the trial court which this court cannot interfere with unless it is demonstrated that the finding was not supported by evidence or was otherwise plainly wrong. Taking into account al/ the forgoing, we are satisfied that the learned judge did not base her decision merely on the demeanour of the witnesses as claimed by the appellants, but on the evidence that was adduced by the two parties’

41. The Respondent submitted that the Learned Magistrate judiciously interpreted the provisions of the law in arriving at her decision.

42. After re-analysing and re-evaluating the evidence on record, I have established that whereas the Appellant's position on one hand is that the primary cause of the accident is the dangerous overtaking by the deceased as confirmed by both witnesses. Had he waited until the road was clear before embarking on overtaking, the accident would not have occurred and the Respondents' position on the other hand is that PW1 Stephen Mulwa Muthoka was lawfully travelling as a pillion passenger on motor cycle registration number KMDL 694A TVS being rode by the deceased Moses John Mutua Musau and in front of them was a motor vehicle registration number KBY 198S Toyota S. Wagon which was moving slowly as if it had mechanical problems and the rider decided to overtake it and while trying to overtake he saw an oncoming motor vehicle from the opposite direction and he immediately returned to his lane but the driver of motor vehicle registration number KBY 198S Toyota S. Wagon abruptly stopped in the middle of the road after the motor vehicle switched off without indicating or warning causing the rider to ram into and die on the spot. That no inspection report was ever produced in Court by the defence as they knew they were driving a defective motor vehicle which suddenly switched off and stopped on the road thus causing the accident by obstructing the rider's path.

43. The parties seem to be blaming each other for negligence and occurrence of the accident.

44. Notwithstanding what PW2 stated regarding the accident, I observe that the certificate of examination and test of vehicle produced by the Appellant noted "Rear bumper dented on o/s" on his vehicle. This to some extent confirms the Respondent's version of how the accident happening. However, it is my view that the deceased ought to have been more careful and had he kept safe distance, he could have managed to brake and avoid ramming the rear of the Appellant's vehicle even if it stopped abruptly. The Appellant too is to blame for causing the accident as he did not put on hazards if his vehicle had a mechanical problem. In any event he did not provide any evidence to demonstrate that his vehicle was mechanically sound.



45. On the above analysis, I find that the Deceased was substantially to blame for the occurrence of the accident and I am constrained to disturb the trial court's holding on liability and I proceed to apportion liability at 80% against the deceased and 20% against the Appellant.

Quantum

46. Notably, in his submissions on both appeals herein, the Appellant did not submit on the issue of quantum despite him challenging the trial magistrate for awarding quantum that is manifestly excessive and erroneous estimate of the sum awardable to the Respondents under his ground 4 of the appeal.

47. The Appellant having not submitted on quantum, I see no reason to belabour on the same save that I will order that Special damages ought not to be subjected to the apportioned liability. See Hashim Mohamed Said & another v Lawrence Kibor Tuwei [2018] eKLR where the court stated that special damages should not be subjected to the apportionment.

48. Accordingly, the appeal partially succeeds as follows:-

- a. Liability is apportioned as at 80% against the Respondents and 20% against the Appellant.
- b. The Quantum on awards is upheld subject to the apportionment.
- c. Special damages shall not be subjected to apportionment.
- d. The Respondents will have the costs and interest at the lower court.
- e. Each party to bear their own costs of the appeals.

It is so ordered

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 19TH FEBRUARY 2026

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS 19TH FEBRUARY 2026

