Said & another v Kerubo (Legal administrator of the Estate of the Late Isaac Mogere - Deceased) (Civil Appeal E004 of 2024) [2026] KEHC 2638 (KLR) (27 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2638 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E004 OF 2024

PJO OTIENO, J

FEBRUARY 27, 2026

BETWEEN

JAMIL SAID ..... 1ST APPELLANT

PETER TUNOI ..... 2ND APPELLANT

AND

EVERLINE KERUBO (LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE ISAAC MOGERE - DECEASED) ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. J.Ndeng'eri (SRM) in Naivasha MCCC No. 287 of 2016 delivered on 10th September, 2024)

JUDGMENT

Background facts

1. By a Plaint dated 24th March 2016, the Respondent as the personal representative of the deceased's estate, instituted a suit against the Appellants seeking damages under both the *Fatal Accidents Act* and the *Law Reform Act*, special damages of Kshs. 75,500/-, costs of the suit, and interest thereon.

2. The Respondent's case was that on or about 30th April 2013, the deceased was travelling aboard motor vehicle Chassis number KM510034362 along the Gilgil–Nakuru Highway when at Kigio Conservancy area, the 2nd Appellant negligently drove and/or controlled motor vehicle registration number KBT 147B, registered in the name of the 1st Appellant, causing it to be involved in an accident with motor vehicle Chassis number KM510034361, thereby occasioning fatal injuries to the deceased.

3. The 1st Appellant, in an Amended Statement of Defence dated 24th April 2017, denied ownership of motor vehicle registration number KBT 147B (DAF Prime Mover) and further denied that the said motor vehicle was involved in the accident as described by the Respondent as having occurred on or about 30th April 2013.

4. On a without prejudice basis, the 1st Appellant attributed the accident to the negligence of the deceased and the driver of motor vehicle registration number KM50034361. The particulars of negligence attributed to the deceased included allowing himself to board a motor vehicle knowing that it was not a public service vehicle. The driver was alleged to have driven without due care and attention, failed to pay attention to and/or heed the life savers placed at the rear of motor vehicle registration number KBT 147B, driven off the road, and rammed into the middle rear of motor vehicle registration number KBT 147B, among other particulars.

5. The 2nd Appellant, in a Statement of Defence dated 4th July 2019, averred that motor vehicle registration number KBT 147B was lawfully parked two meters off the road on the left-hand side, facing Gilgil when rammed onto by the deceased motor vehicle. He attributed the accident to the negligence of the deceased in the manner he drove and controlled the motor vehicle Chassis number KM510024361, which had been imported and was on transit to Uganda.

6. By its judgment delivered on 10th September 2024, the learned Trial Magistrate apportioned liability at 50% in favour of the Respondent on account of contributory negligence. The Court awarded the Respondent total damages in the sum of Kshs. 1,195,500/-, less 50% contribution, resulting in a net award of Kshs. 597,759/-. The Respondent was further awarded costs of the suit and interest thereon.

7. Aggrieved by the said decision, the Appellants lodged the present appeal vide a Memorandum of Appeal dated 8th October 2024, seeking orders that the Judgment and Decree of the Trial Court be set aside and/or quashed in its entirety, and that the costs of this appeal be awarded to them.

8. The appeal is premised on the following grounds:

    a. That the learned magistrate erred in law and in fact by treating the evidence of the lone defence witness one PC Maitamei Kivutu superficially and/or as hearsay evidence, when it was clear that the evidence adduced by the said witness was in reference to the reports made at the police station where the alleged accident was reported; and not his own opinion hence arriving at the wrong conclusion on liability and quantum.

    b. That the learned magistrate erred in law and in fact by grossly misdirecting herself, by failing to appreciate that there is no law that places liability on a motor vehicle parked off the road in the event of an accident involving a motor vehicle that veers of the road and rams the subject motor vehicle off the road; hence arriving at the wrong conclusion on liability and quantum.

    c. That the learned magistrate erred in law by being biased against the appellants by ignoring all the evidence and submissions presented to her by the appellants yet adopting the evidence and submissions presented by the respondents.

    d. That the learned magistrate misdirected herself by ignoring the fact that the deceased was the author of his fate by riding a motor vehicle which was not registered and/or licensed to carry passengers and consequently arrived at a wrong decision.

    e. That the learned magistrate erred in law and grossly misdirected herself when she held that a death certificate was sufficient proof that the deceased succumbed to injuries sustained in the RTA, an allegation which ought to have been strictly arrived by medical evidence and thereby arrived at the wrong conclusion.

    f. That the learned magistrate erred in law by grossly misdirecting herself by superficially treating the evidence of the fact that the trailer was parked off the road and/or the evidence that a motor

vehicle parked off the road has no responsibility under the law to place warning signs and/or life savers and consequently arrived at the wrong conclusion.

g. That the learned magistrate erred in law and grossly misdirected herself when she made a finding that the appellants were liable to shoulder 50% liability when they ought to have shouldered none.

h. That the learned magistrate erred in law and in fact by awarding excessive compensation and contribution of the liability of the respondent.

9. Parties were directed and have canvassed the appeal by way of written submissions. The court has read the rival submissions, derived valuable benefits from same and will deploy such benefit to enrich its decision. A summary of the submissions suffices in appreciation of the industry.

Appellants' Submissions

10. The Appellants submit that PW1, the widow of the deceased, testified that she was informed of the accident and subsequently travelled to Naivasha, where she found her husband already deceased. She later visited Gilgil Police Station and was informed that the vehicle in transit in which her husband had been travelling as a passenger had rammed into trailer registration number KBT 147B from behind.

11. It is the Appellants' submission that, upon cross-examination, PW1 conceded that the vehicle in transit was not registered in Kenya and was not authorized to ferry passengers. She further admitted that she questioned why her husband had boarded the ill-fated vehicle. The Appellants contend that PW1 did not witness the accident and that her evidence was therefore purely hearsay in so far as liability was concerned. Consequently, her testimony could not properly form the basis for apportioning liability against the Appellants.

12. The Appellants further rely on the evidence of DW1, PC Meit Ai Mei Kinoti No. 93177 of Gilgil Police Station, who produced the Occurrence Book extract and the Accident Register. According to the OB entry, one Kilonzo reported that on 30th April 2018 at about 6:00 a.m., an unregistered motor vehicle travelling towards Naivasha rammed into the rear of a trailer that had been parked off the road on the left-hand side. The witness also testified that the driver of the said motor vehicle was charged with causing death by dangerous driving and was fined Kshs. 80,000/-.

13. On the strength of the such evidence, the Appellants urge this Court to absolve them of liability. They place reliance on the decision in John Wainaina Kagwe v Hussein Dairy Limited [2010] KEHC 1764 (KLR) where it was held:

> " A prudent driver should travel at such a speed and at such a distance that he is able to pull up without colliding with a vehicle ahead of him. His primary duty is to keep a reasonable look-out for destructions or conditions which may impair efficacious operation of the vehicle ..."
>
> "Drivers have to contend with problems of blinding lights and obstructing vehicles, or such other adverse conditions, they drive sensibly, steadily and they also have a duty to keep a reasonable look-out and be attentive. They also have to anticipate unreasonable or dangerous behaviour on the part of other drivers ..."
>
> The Plaintiff of his own volition got into his vehicle and drove off after nearly six hours of imbibing alcoholic drinks. He has no one to blame for the consequences of this short-sighted action other than himself. The cause of the accident was not the presence of the trailer on the road but rather the negligence of the Plaintiff in driving recklessly and disregarding its presence on the road. I am satisfied that the Defendants took all measures including moving

the trailer off the road, having reflective chevrons on their vehicle and placing branches on the road to warn on-coming drivers of its presence on the well-lit and straight road. I find no liability to attach to the Defendant. On the contrary I find the Plaintiff 100% to blame for the occurrence of this accident. In the absence of liability, no damages can flow. I note that the Plaintiff did suffer serious injury – indeed it is a miracle that he survived the accident but sadly he is the author of his own misfortune. He is not entitled to any damages. This claim fails entirely and I do hereby dismiss this suit with costs to the Defendant."

14. The Appellants further submit that the driver of the unregistered vehicle was charged and convicted of causing death by dangerous driving in Criminal Case No. 4 of 2015. They argue that such conviction is indicative of culpability on the part of that driver. It is therefore contended that the Respondent ought to have pursued the driver and owner of the unregistered vehicle rather than the Appellants, who, in their view, were not responsible for the occurrence of the accident.

15. The Appellants also rely on the case of Omollo v Onyango & Another (Civil Appeal No. E023 of 2022) for the proposition that where a vehicle is stationary at the time of an accident, the duty of care primarily rests upon the driver of the moving vehicle.

16. Further reliance is placed on the case of Hamisi Gunga Baya v Salt Manufacturers Ltd & Another [1995] eKLR, where the Court held that a driver who collides with a stationary lorry on a straight stretch of road must have failed to keep a proper look-out as required of a prudent driver. The Appellants submit that this principle squarely applies to the present matter.

Respondent's Submissions

17. On the issue of liability, the Respondent contends that neither PW1 nor DW1 was an eye witness to the accident, and that both witnesses relied on post-occurrence reports and information allegedly obtained from eye witnesses. She nevertheless supports the trial court's finding on apportionment of liability, arguing that no cogent evidence such as a sketch plan or reliable photographic evidence was tendered to demonstrate that the Appellants' motor vehicle was properly parked off the road. In her view, the trial court's apportionment of liability at 50:50 was well within its discretion and was justified in the circumstances.

18. The Respondent further submits that while the deceased's decision to board an unauthorized vehicle may amount to contributory negligence, it does not exonerate the Appellants from their own statutory and common law duty of care to other road users. She argues that the Appellants' lorry, being a large and stationary object, bore a continuing obligation to ensure adequate visibility and safety for approaching motorists.

19. It is also her contention that the conviction of the driver of the other motor vehicle for the offence of dangerous driving does not automatically absolve the Appellants from civil liability, as criminal culpability does not, of itself, determine civil responsibility in negligence.

20. With regard to the award of damages, the Respondent relies on Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR, for the principle that an appellate court will not interfere with an award of general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate, or unless the trial court acted on wrong principles or misapprehended the evidence. She contends that the Appellants have failed to demonstrate any such error warranting interference by this Court.

Issues, Analysis and Determination

21. Having considered the record of appeal and the rival submissions of the parties, the gravamen of this appeal lies in the issue of liability. The Appellants contend that they should be absolved of any liability arising from the accident and any consequent claims.

22. Being a first appeal, this Court is guided by the principles enunciated in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, where it was held:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, this court must reconsider the evidence, evaluate it independently 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..."

23. The question of liability must be determined from the evidence adduced. PW1, the deceased's wife, was the sole witness for the Respondent. She testified that upon learning of the accident, she travelled to Naivasha, where she found that her husband had died and was informed by the attending doctor about the accident. She subsequently reported the incident to the Gilgil Police Station, where she was told that the deceased's vehicle had collided with a trailer from behind. On cross-examination, she admitted that her evidence was based on what she had been told, including that the vehicle in which the deceased was travelling had been moving at high speed.

24. The Appellants called DW1, a police officer stationed at Gilgil Police Station. She testified that the Occurrence Book reflected that an unregistered vehicle had collided with the rear of a trailer parked off the road on the left-hand side, as reported by one Kilonzo. She further stated that the driver of the unregistered vehicle had been charged with causing death by dangerous driving and fined Kshs. 80,000/-. On cross-examination, DW1 admitted that she was not the investigating officer, did not attend the scene, did not know the person who reported the incident, did not possess any sketch plans, and could not confirm the precise point of impact of the vehicles. Notably, she did not tender any documentary evidence before the court.

25. It is evident that PW1's testimony was based on information provided by the doctor and the police, whereas DW1 relied on the Occurrence Book and hearsay regarding the charges against the driver of the unregistered vehicle. The trial court rightly observed that their evidence amounted to hearsay concerning the circumstances of the accident.

26. As a general rule, hearsay evidence is inadmissible unless it falls within the exceptions provided under Section 33 of the *Evidence Act*. The circumstances of the present case do not fall within any of the recognized exceptions; consequently, their accounts could not establish liability.

27. The Appellants further argued that the driver of the unregistered vehicle had been convicted of causing death by dangerous driving in Criminal Case No. 4 of 2015, and that such conviction conclusively demonstrated his culpability. This Court, however, is guided by John Wainaina Kagwe v Hussein Dairy Limited (2013) KECA 488 (KLR), which cited Chemwolo & Another v Kubende [1986] KLR 492, where it was held:

> " ...In a civil case, different aspects of evidence emerge which may not disturb a previous criminal conviction of a party to it. Although in the civil proceedings the first appellant's

conviction was evidence of carelessness, that finding did not preclude the civil court from finding that the respondent was also guilty of carelessness."

28. In other words, a criminal conviction for a traffic offence does not preclude a party from adducing evidence of contributory negligence in a civil claim.

29. While it is not disputed that an accident occurred on 30th April 2013 involving an unregistered motor vehicle in which the deceased was travelling, and another motor vehicle, registration number KBT 147B, driven by the 2nd Appellant and registered in the name of the 1st Appellant, the fact of occurrence of an accident, ipso facto, does not infer a fault on the drivers or owners of the motor vehicles.

30. The incidence and onus of proof is always upon the claimant as the person who would lose of no evidence at all is led. In the circumstances of this appeal, the obligation was upon the respondent to prove that the accident was attributable to the negligence of the appellant. On that obligation the respondent wholly failed. No effort was made to prove what is it the appellants did or failed to do thereby leading to the collision. What she told the court is what passes freely as inadmissible hearsay.

31. While the trial court correctly found that both sides led hearsay evidence, the court fell into the error of principle that it is the claimant and not the respondent with the onus of proof. In fact, in a civil matter, the defendant has no obligation to say until and unless the claimant establishes its case on a preponderance. It is once that stage is reached, when it is said that evidentiary burden has shifted and the defendant then called to displace the case so established

32. The record before the court is one where the plaintiff proved no fault. It is not that the court was unable to decide with certainty who between the two sides caused the accident. It is therefore not the case where the court was to invite the assistance of the decision in Lakhamshi v Attorney General (1971) EA 118, 120, to find both parties to blame.

33. What was more probable was that the vehicle on which the deceased was travelling rammed onto that of the appellants from the rear and while parked of the road. In such circumstances it is not conceivable what else the driver of the vehicle parked off the road could have done to avoid being hit from behind while stationary. The court finds that no iota of liability had been established against the appellants to warrant apportionment of liability against them.

34. Upon careful re-evaluation of the scanty evidence led the court agrees with the appellants that the trial court dealt with the matter in a casual and perfunctory manner and thus reached a conclusion that ought to have flowed from the evidence. Accordingly, the Court finds that the appeal is wholly merited and is allowed as prayed. The consequence is that the decision apportioning lability against the appellants is set aside and, in its place substituted a judgment dismissing the respondent's suit at trial with costs to the appellants.

35. Having succeeded, the costs of the appeal also go to the appellants

DATED, SIGNED AND DELIVERED AT LODWAR THIS 27TH DAY OF FEBRUARY 2026.

PATRICK J O OTIENO

JUDGE