



Marjorie & another (Suing on Behalf of the Estate of Daniel Mwenda Bundi – Deceased) v Wangai (Civil Appeal E332 of 2023) [2026] KEHC 4363 (KLR) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E332 OF 2023
F WANGARI, J
MARCH 5, 2026**

BETWEEN

EMMIE MKAMBURI MARJORIE 1ST APPELLANT

JANE MAKADI 2ND APPELLANT

**SUING ON BEHALF OF THE ESTATE OF DANIEL MWENDA BUNDI –
DECEASED**

AND

BENARD GACHANGA WANGAI RESPONDENT

(Being an appeal against the Judgment of Hon. G. Sogomo (PM) delivered on 27th October 2023 in Mombasa PMCC No. 1333 of 2019, Emmie Mkamburi Marjorie & Jane Makadi (suing on behalf of the estate of Daniel Mwenda Bundi (deceased) v Bernanrd Gachanga Wangai)

JUDGMENT

1. The Plaintiffs/ Appellants through a Plaint dated 31st July 2019 sued the Defendant/ Respondent for General damages under the Fatal Accident Act (Cap 32) and the *Law Reform Act* (Cap 26), Laws of Kenya, Special damages of Kshs. 86,000, costs of the suit, interest on general damages and special damages at prevailing court rates from the date of judgment and filing suit respectively, and any other relief that the court may deem fit and just to grant.
2. It was averred that on or about 5th February 2019, the deceased was lawfully and carefully walking on a pavement in the course of his work as a water vendor at Kengeleni area along Mombasa – Malindi road when the Defendant and/or his authorized driver, servant, agent and/or employee negligently and/or carelessly drove the said motor vehicle registration number KBT 446W causing it to lose control and without warning violently knocked down and ran over Daniel Mwendwa Bundi (Deceased) as a result whereof, the deceased sustained fatal injuries.



3. The Plaintiffs prayed for judgment against the Defendant for general damages The Defendant was served but failed to enter appearance and interlocutory judgment was entered as prayed. The matter then proceeded for formal proof hearing on 1st December 2020 and judgment was issued on 23rd November 2021.
4. Thereafter, the Defendant entered appearance and made an application to set aside of the ex-parte judgment, which application was allowed. The Defendant and filed his Statement of Defence dated 4th November, 2022, denying the averments of the Plaintiffs. The Defendant blamed the deceased for his negligence which caused him the fatal injuries.
5. This suit was heard inter-partes. Judgment was delivered on 27th October 2023 in favour of the Defendant by dismissing the Plaintiffs suit. The court held as follows: -

- “ 1) Liability Not proved.
- 2) Quantum (if (1) above had been proved)
- Kshs
- a) Pain & suffering 10,000/=
 - b) Loss of Expectation of Life 100,000/=
- Sub-Total I 110,000/=
- c) Loss of Dependency 1,519,604.80/=
- Sub-Total II 1,629,604.80/=
- d) Special Damages 86,400/=
- Sub-Total III 1,716,004.80/=
- 3) Costs & Interest To have been assessed
- TOTAL ?

6. Being dissatisfied with the judgment of the trial court, the Appellants filed this appeal through the Memorandum of Appeal dated 16th November 2023 on grounds that the learned trial magistrate erred in law and fact by dismissing the Appellants’ case on the basis that there was no eye witness to support the Appellants’ case when indeed there was a police officer who blamed the driver of the Respondent for the accident, by superficially considering and/or totally failing to consider the Appellants’ witness evidence on record and submissions and thereby arriving at a wrong decision, by raising the burden on strict proof rather than on balance of probabilities, by exonerating the Respondent from liability when there was overwhelming evidence that his agent herein, the driver, was to blame for the accident, and by misdirecting himself and basing his finding on wrong considerations.
7. The Appellants prayed for orders that the appeal be allowed by setting aside the judgment of the trial magistrate and entering judgment in favour of the Appellants, that costs of this appeal and magistrates court be awarded to the Appellants, and that the Appellants be awarded interest at the prevailing court rates.
8. The appeal was canvassed by way of written submissions. Both parties complied. The Appellants in their submissions dated 27th January 2025 stated that it was a fact that an accident occurred and all the witnesses testified by admitting the same. That though the 1st Appellant who is the deceased’s mother



did not witness the accident, she was not far from the scene and when she was told about the accident, she rushed and found the deceased lying on the ground.

9. That the police testified and produced an abstract clearly indicating the details. That on a balance of probabilities, the Appellants' case ought not to have been dismissed on the basis that there was no eye witness. The Appellants prayed for the appeal on liability to succeed.
10. The Respondent in his submissions dated 12th March 2025 argued that the Appellants failed to prove their case on a balance of probability. The Respondent stated that considering both the Appellants and the Respondent failed to avail a witness who saw what really transpired, the Respondent relied on circumstantial evidence to prove that indeed the deceased slipped and fell under the bus leading to the accident. It was the Respondent's contention that the Appellants produced Certificate of death as Plaintiff Exhibit 2 which indicated that the cause of death was cardio pulmonary arrest due to traumatic head and chest injury. That the aforementioned nature of injuries clearly prove that the head and chest of the deceased were under the bus at the time the rear tire ran over him which confirmed the Respondent's position.
11. The Respondent submitted that the Appellants failed to discharge the burden to prove their allegations as required under Section 107 of the Evidence Act. The Respondent further relied on Section 109 of the Evidence Act and maintained that the Appellants had failed to prove their case on a balance of probability. The Respondent therefore prayed that the appeal is dismissed with costs.

Analysis

12. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle v Associated Motor Boat Co. (1968) E.A 123* as follows: -

“... 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 ...”
13. I have considered the Record of Appeal dated 21st November 2023 and submissions by the parties. The issues for determination are: -
 - a. Whether liability was proved to the required standards
 - b. What orders on costs should issue
14. In a fatal accident claim, the claimant is required to prove liability on a balance of probabilities. The Appellants bore the burden of establishing that negligence of the Respondent caused or materially contributed to the death. The burden of proof is set out in the Evidence Act as follows: -

Section 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.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.



Section 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.

15. Subject to the above, burden of proof is placed on Appellants who allege. They were required to prove that there was duty of care, that the duty was breached, that there was causation, and that death resulted from the breach.
16. Section 49 (1) of the *Traffic Act* provides that;

“ Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and liable ...”
17. The driver was required to exercise reasonable care, skill and attention. The Appellants were then required to demonstrate that the Respondent was negligent as was set out in the case of *Kiema Mutuku v Kenya Cargo Handling Services Ltd* [1991] 2 KAR 258 that: -

“ There is a yet no liability without fault in the legal system in Kenya and plaintiff must prove some negligence against the defendant where the claim is based on negligence.”
18. This court has perused the evidence on record. None of the witnesses who testified witnessed the accident happen. For the Plaintiff, the mother to the deceased, Emmie Mramburi, PW2, went to the scene of accident after the accident had already occurred. The Traffic Police Officer, Richard Cheruiyot, PW1, produced the Police Abstract. He did not visit the scene of accident. He stated that one PC Omar and Sgt Ogutu visited the scene of accident. He further said that it was not clear who was charged or to blame for the accident. The Police Abstract indicated that the matter was still under investigations.
19. For the defence, the driver of the vehicle Patrick Muoki, DW1 and the conductor Kefah Obare, DW2, both gave similar evidence. They testified that after the bus stop, all was good to go and when the driver started driving, that is when they were alerted by the shouts of the passengers that the deceased had been knocked down. The deceased is said to have been selling water to a passenger. They denied negligence on their part.
20. I do concur with the findings of the trial court that in an action for negligence, the burden to prove the same is always on the Plaintiff. The trial court relied on the case of *Nandwa v Kenya Kazi Ltd* (1988) KLR 488 where it was held as follows;

“ In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant.”
21. I find that the Plaintiffs failed to discharge the burden of proving negligence on the part of the Defendant. The judgment of the trial court is therefore upheld.
22. On costs, I exercise the discretion of this court and direct that each party bear its own costs. The Appellants need not be burdened with the payment of costs considering the nature of the claim in the lower court.



Determination

23. In the upshot, this court makes the following orders –
- a. The appeal lacks merit and is hereby dismissed.
 - b. Each party to bear its own costs

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF MARCH, 2026

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HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

Mr. Busieka Advocate h/b for Mr. Oloo Advocate for the Applicant

Mr. Abaja Advocate for the Respondent

Ms. Salwa, Court Assistant

