Wayo & another (Suing on Behalf of the Estate of Benjamin Wayo Sailoki - Deceased) v Bwire (Civil Appeal E033 of 2022) [2025] KECA 866 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 866 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E033 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MARCH 7, 2025

BETWEEN

JORAM SAIDI WAYO ..... 1ST APPELLANT

EULIAN NABALAYO SAILOKI ..... 2ND APPELLANT

SUING ON BEHALF OF THE ESTATE OF BENJAMIN WAYO SAILOKI - DECEASED

AND

JOHN BWIRE ..... RESPONDENT

(Being an appeal from the Judgement and Decree of the High Court of Kenya at Voi (Mativo, J.) delivered on 24th January 2022)inCivil Appeal No. E032 of 2021)

JUDGMENT

1. This second appeal arises from the decision of the High Court of Kenya sitting at Voi (Mativo, J.) (as he then was) in which the court allowed John Bwire's (the respondent) appeal. At the heart of the dispute was the compensation of the alleged wrongful death of Benjamin Wayo Sailoki (the deceased), for damages both under the *Law Reform Act* and the *Fatal Accidents Act*. The suit was filed on behalf of the deceased's estate before Taveta Principal Magistrate's Court by Joram Said Wayo and Euliana Nabalayo Sailoki (the appellants) as the administrators and legal representatives of the estate of the deceased.

2. The background to the dispute is that, by a Plaint dated 30th September 2020, the appellants sued the respondent following a road traffic accident which occurred on 20th May 2020 along the Taveta-Cess Road at Darajani area involving the deceased and Motor Vehicle Registration Number KCT 315R (the motor vehicle). The respondent was sued as the registered, insured and/or beneficial owner of the motor vehicle.

3. The appellants attributed the occurrence of the accident to the alleged negligent driving, management and/or controlling of the motor vehicle by the respondent's authorised driver, agent and/or servant. The appellants alleged that the respondent's driver was driving the motor vehicle at a high speed that it abruptly overtook a tricycle, which was ahead of it and, in the process, it lost control, veered off the road and knocked down the deceased who was walking on the roadside on a path off the tarmac. As a result of the impact, the deceased sustained fatal injuries. The appellants held the respondent vicariously liable for the loss and damage which the deceased's estate and family suffered.

4. The appellants particularised the respondent's authorised driver, servant and/or agent's negligence and damage as:

    a. Overtaking while it was unsafe to do so.

    b. Driving without due care and attention, thereby causing the accident.

    c. Failing to heed the presence of other road users on the said road, especially the deceased.

    d. Failing to manage and or control the motor vehicle.

    e. Recklessly veering off the road.

    f. Driving the motor vehicle at a very high speed.

    g. Failing to exercise proper lookout while driving the said motor vehicle.

    h. Driving a defective motor vehicle.

    i. Failing to apply brakes in sufficient time to avoid the accident.

    j. Employing an incompetent driver.

    k. Failing to exercise due care and skills in managing the motor vehicle.

    l. Being inattentive.

    m. Failing to steer in a clear and proper course.

    n. Driving dangerously.

5. As for the loss of dependency, the appellants pleaded that the deceased was 55 years old, used to work as a mason and also ran a farming business, both occupations of which earned him Kshs.32,000 a month. It was stated that he had an extended family who relied on him as dependants, namely:

Name	Age	Extent of Dependency	
1.	Boniface Nginoru Wayo	36 years	Son
2.	Agnes Mwemba Wayo	33 years	Daughter
3.	Moses Sembua Wayo	31 years	Son
4.	Dickson Mhabashi Wayo	28 years	Son
5.	Joram Saidi Wayo	26 years	Son

6. It was pleaded that the deceased died hours after the accident; that he suffered acute and excruciating pain before his death for which damages for pain and suffering were claimed.

7. As for special damages, the appellants claimed Ksh.75,000 as funeral expenses and Ksh.30,000 as cost for obtaining Limited Grant of Administration, making a total of Ksh.105,000.

8. The appellants pleaded that the doctrine of res ipsa loquitor was applicable.

9. In the end, the appellants prayed for judgement against the respondent for general and special damages; loss of future income and/or lost years and/or dependency; loss of expectation of life; pain and suffering before death; costs of the suit; and interest thereon.

10. In defence, the respondent filed a Statement of Defence dated 18th November 2020. He denied that the fatal accident was caused by the alleged negligence of respondent's authorised driver, servant and/or agent; and that any liability whether strict or vicarious was attributable to him for the alleged accident. He pleaded that, if any accident occurred, which was denied, the same was caused by the deceased's negligence, and he particularised the elements of such negligence as:

    a. Failing to take any or any proper lookout on the road;

    b. Failing to heed the presence of other road users and, in particular, motor vehicle registration number KCT 315R;

    c. Walking into the path of motor vehicle registration number KCT 315R;

    d. Failing to walk on the designated pedestrian path; and

    e. Failing to adhere to the *Traffic Act*, Cap. 403 Laws of Kenya.

11. The respondent further denied: that the deceased earned an income of Kshs.32,000 a month; and that the doctrine of res ipsa loquitor was applicable. He accordingly put the appellants to strict proof thereof and, in the end, prayed that the appellants' claim against him be dismissed with costs.

12. The appellants further filed a Reply to Defence dated 27th November 2020 in which they reiterated the contents of the plaint. They denied that the accident was caused and/or attributable to the negligence of the deceased as alleged. They reiterated that the respondent's driver, servant and/or agent was

entirely to blame for the accident for which he (the respondent) was vicariously or directly liable to pay the damages claimed.

13. The appellants called two witnesses in support of their case. PW1, No. 71094 PC Wilson Shichavi from Taveta Police Station testified that, on 20th May 2020, a report was made at the station of an accident which had occurred along Taveta Cess Road; that the accident occurred when the motor vehicle aforesaid tried to overtake a tricycle, and due to the high

speed it was being driven at, knocked down a pedestrian (the deceased), who died on the spot; that the driver of the suit motor vehicle abandoned the vehicle and fled the scene; and that, when they visited the scene, they found the deceased lying on the pavement.

14. PW1 testified that there was a continuous yellow line on the road at the point of the accident, and that the driver ought not to have overtaken at that point; and that, therefore, the driver of the motor vehicle was to blame for the accident. He produced the police abstract and post mortem reports as P. Exhibits 1 and 2 respectively.

15. In cross examination, he stated that, even though he visited the scene of the accident, he did not prepare a sketch map.

16. PW2, Joram Sidi Wayo, testified as the deceased's son and adopted his witness statement dated 30th September 2021. He testified that, on 30th May 2020, his father was involved in an accident. He produced the Grant ad Litem as P.EXH 3 he and his aunt were issued with that conferred them with the locus standi to file that suit. He also produced a receipt – P.EXH 4 of Kshs.30,000 as the legal fees paid to their advocate for obtaining the Grant ad Litem; a Death Certificate

- PEHX 5; a letter from the Chief - PEXH 6, which indicated who the dependants of the deceased were; a burial permit as PEHX 7; and a demand letter sent to the respondent as PEXH

8. He testified that the deceased passed on within 30 minutes of the accident; and that the deceased used to grow bananas and vegetables and used to earn Kshs.32,000 a month.

17. According to PW2, the burial expenses incurred amounted to Kshs.75,000 for which he had some receipts as proof thereof; and that he was a student at Kenya Technical Training College. He prayed for compensation for the damages occasioned by the death of his father.

18. The respondent did not call any witness to support his defence.

19. In a Judgment dated 3rd June 2021, the learned Magistrate (Hon. Khapoya S. Benson, PM) held that the appellants had discharged their evidential burden, more so taking into account that the respondent did not call any witness to controvert and challenge the appellants' case; that it was demonstrated that the deceased was knocked down by the motor vehicle while lawfully walking home on a path along the road; that the motor vehicle was to blame for the accident as it knocked down the deceased while overtaking a tricycle; that it was demonstrated that, since the driver of the motor vehicle fled the scene, no contributory negligence could be attributed on the deceased's part; and that on a balance of probabilities, the appellants had successfully established a case against the respondent. Consequently, judgement was entered in favour of the appellants in the following terms: liability at 100%; special damages at Kshs.30,000; funeral expenses at Kshs.75,000; pain and suffering at Kshs.50,000; loss of expectation of life at Kshs.200,000; and loss of dependency at Kshs.1,080,760. The total award being Kshs.1,330,760.

20. The respondent was aggrieved by the decision of the trial court, prompting him to file an appeal in the High Court at Voi. He raised 4 grounds of appeal, namely that the finding of negligence was based on extraneous issues and hearsay evidence; that liability was not proved; that the damages awarded were

inordinately high; and that the Magistrate applied the wrong principles in the assessment of damages under the *Law Reform Act* and the *Fatal Accidents Act*.

21. Upon re-assessing and re-analysing the evidence, the learned Judge (Mativo, J.) (as he then was) allowed the respondent's appeal. According to the Judge, the evidence of the two witnesses called by the appellants, namely the police officer and the deceased's son was secondary evidence as none of them saw the accident take place; and that an eye witness' testimony was critical as it would have convinced the court precisely how the accident occurred; that the evidence of the two witnesses was of no probative value; that, therefore, there was no basis upon which the trial court made a finding of liability at 100% in favour of the appellants; and that the trial court failed to make a finding as to whether the appellants had discharged the evidential burden; that if the court had properly addressed itself to the applicable law, especially as regards the burden of proof, it would have found that there was nothing for the respondent to rebut; and that it was irrelevant that the respondent did not adduce evidence in his defence.

22. On the issue of damages awarded to the appellants under the different heads, the learned Judge opined that there was no discussion by the trial Magistrate on how he arrived at the said figures, or what considerations or principles he considered in arriving at the final orders. However, the learned Judge went on to further add that, should his decision on liability have favoured the appellants, as regards quantum, he would have used a multiplier of 10 years and allow the amount of Kshs.6,736.30 as reasonable income; 1/3 as the dependency ratio; Kshs.50,000 for pain and suffering; and the funeral expenses. However, he would set aside the special damages of Kshs.30,000 awarded as legal fees as the appellants would have to have obtained the locus standi to sue.

23. In the end, the learned Judge allowed the appeal in favour of the respondent by setting aside the Judgment of the trial court delivered on 3rd June 2021, which is what has prompted the instant appeal.

24. The appellants have raised 5 grounds of appeal as follows:

> " i. The learned Judge erred in law and in the unique circumstances of this case by applying the rule(s) on "burden of proof/legal burden/evidential burden" and "evidentiary standards" and "burden (s) of proof" past their elasticity limits thereby arriving at a wrong conclusion that resulted to gross injustice to the family and the estate of the deceased in dismissing the appellant's case;
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> ii. The learned Judge failed to apply the necessary legal presumption against the respondent and his driver's failure to adduce any evidence, the driver being the only eyewitness who was alive and thereby arrived at the wrong decision in dismissing the appellants' case;
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> iii. The learned Judge failed to consider and apply the doctrine of res ipsa loquitor and the evidence adduced, direct or circumstantial thereby arrived at a wrong decision in dismissing the appellant's case;
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> iv. The learned Judge failed to analyse the appellants' case with equal weight as that attributed to the respondent's case in the High Court and failed to properly distinguish the cases by the respondent before him and in the Judge's own words in paragraph 24 of his judgement got lost in the 'thickets and branches' thereby arriving at the wrong decision;
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> v. As regards quantum, the learned Judge merely reversed the trial court's decision without tangible grounds and without ascribing cogent reasons in law for so doing."

25. The appellants prayed that: the decision of the learned Judge be set aside; the Judgement of the trial Magistrate be reinstated on both liability and quantum; and that costs of this appeal and in the High Court be awarded to the appellants.

26. We heard this appeal on the Court's GoTo virtual platform on 29th October 2024. Learned counsel Mr. Njoroge appeared for the appellants while learned counsel Mr. Django appeared for the respondent. Mr. Njoroge highlighted the written submissions dated 17th May 2023 while Mr. Django highlighted written submissions dated 19th July 2023.

27. Mr. Njoroge submitted that the fundamental question in this appeal was how the estate of a deceased's person who suffers death without any eyewitness is expected to prove the tort of negligence in law; that, the respondent having failed to avail evidence in rebuttal and file a witness statement under Order 11 of the Civil Procedure Rules, the appellants' case stood established and proved on a balance of probabilities.

28. Counsel contended that, after the respondent entered appearance and filed a defence, and the appellants in turn filed a reply to the defence and joined issue, the respondent was under an obligation to tender evidence, but which he failed to do; that the driver of the motor vehicle was in a better position to write a statement and testify, but equally failed to do so. To buttress this position, counsel relied on the decision of this Court in the case of Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi -Deceased) v Joseph Kiprono Ropkoi & Four By Four Safaris Company Ltd [2004] KECA 65 (KLR) where it was held that, when issues are joined, each party has a duty to prove its own assertions.

29. It was also submitted that the first appellate court fell into an evidential error when it failed to appreciate that PW1, the investigating officer, was actually the person who went to the scene and interacted with it; that it was found that the deceased was knocked down from the pavement and pushed two meters away; that there was a continuous yellow line on the road where the driver should not have overtaken; and, as such, it was the driver who was entirely to blame for the accident.

30. Counsel went on to submit that the evidence of the investigating officer could not be termed as hearsay evidence as it was based on what an experienced traffic police officer was able to perceive and observe at the scene of the accident; that his (investigating officer) evidence was direct evidence and, even if the court were to treat it as not being direct evidence, it sufficed as circumstantial evidence which is also good evidence on which a court can rely on; and that the dismissal of the appellants witnesses' evidence was tantamount to elevating the evidential burden far beyond on a balance of probability.

31. Further, the appellants contended that, by virtue of the driver fleeing the scene, the court should have drawn an adverse inference that he ran away because he was culpable, consequent to which he should have availed evidence to exonerate himself; and, for this proposition, reliance was placed on the persuasive decision of the superior court in Hillary Tom Mboya v Jane Wangechi Njihia & Another [2022] KEHC 1403 (KLR).

32. On the application of the doctrine of res ipsa loquitor, counsel relied on the decision of the superior court by Odunga, J. (as he then was) in Susan Kanini Mwangangi & Another v Patrick Mbithi Kavita [2019] KEHC 9906 (KLR) where it was held that the doctrine of res ipsa loquitor may be successfully invoked where there is no eye witness to the

accident, but there exists credible evidence upon which negligence may be inferred.

33. On the quantum, it was held that the Kshs. 30,000/= used to obtain the Grant of Letters of Administration Ad Litem was not denied by the respondent; that the first appellate court was in error

in reversing the award under this head; that it was not denied that the deceased was a farmer; that it was therefore also an error on the part of the learned Judge to 'pluck a figure from the air and substitute it for the learned Magistrate's award on the deceased's multiplicand which was based on the minimum wage as at the time of the accident'; that as regards the dependency ratio, the deceased was a family man with some of his children like PW2 being in college; that it was an error for the learned Judge to substitute the dependency ratio of 2/3 for 1/3 without giving reasons for doing so; and that the learned Judge went against the well settled principle that an appellate court should not interfere with an award of damages by a trial court unless there was an error in the award in the first instance. In this regard, reference was made to the decision of this Court in Kisumu C.A. No. 284 of 2001 - Catholic Diocese of Kisumu v Tete [2004] eKLR.

34. Learned counsel urged us to allow the appeal as prayed with costs both in the trial court and high court with interest at court rates.

35. On the part of the respondent, Mr. Django submitted that, this being a second appeal, this Court is confined to determining issues of law only as was held by this Court in Naomi Kemunto v Total (K) Limited & Another [2008] KECA 1 (KLR), but that the appellants have largely submitted on findings of fact by the learned Judge; and that we should not be tempted to consider matters of fact.

36. Counsel submitted that the appellants bore the burden of proving negligence on the part of the respondent; that the first appellate court properly found that the appellants did not discharge this burden. To buttress this submission, regard was had to superior court's decisions in Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another [2010] KEHC 381 (KLR); Dharmagma Patel & Another v T A (a minor suing through the mother and next friend H H [2018] KEHC 6277 (KLR); this Court's decisions in Kenya Revenue Authority & 2 others vs Darasa Investments Limited [2018] KECA 358 (KLR); Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] KECA 642 (KLR); and Mbuthia Macharia v Annah Mutua Ndwiga & Another [2017] KECA 290 (KLR) for the proposition that he who alleges must prove and, more so, in negligence, cogent and credible evidence must be established.

37. It was submitted that PW1's evidence on how the accident occurred was hearsay evidence as he was not at the scene when the accident occurred; that, in any case, he failed to draw the sketch plans of how he found the scene, which would have showed if there were skid marks and where he found the motor vehicle and the body of the deceased; that such information would have pointed to who was to blame for the accident; that, in the absence of this crucial evidence, PW1's evidence should be treated as a mere opinion that was not binding on the court; that the evidence of an investigating officer is not sufficient proof of negligence; and that further corroborating evidence is required for discharge of the burden of proof of negligence as was observed in the superior court's cases of David Kajogi M'mugaa v Francis Muthomi [2012] KEHC 4363 (KLR); and Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karenge [2021] KEHC 8336 (KLR).

38. The respondent further placed reliance on this Court's case of Francis Mburu Njoroge v Republic [1987] eKLR for the proposition that the opinion of a police officer should not be accepted unless he can show the years of experience he has in inspecting scenes of traffic accidents; and that, in this case, this requirement was not demonstrated.

39. Counsel also contended that negligence cannot be inferred by the mere fact that the driver of the suit motor vehicle ran away from the scene of the accident; and that there are many reasons which could have led the driver to run away; that, in any event, the act of running away was not pleaded as a particular of negligence; and that the submission by the appellants that the learned Judge should have resorted to circumstantial evidence to find that negligence was proved, was untenable, as circumstantial evidence

does not oust the hearsay rule. To buttress this submission, reliance was placed on Mursal & another v Evelyn Nthangu Manesa (Suing as the legal administrator of Chris Kipkoech) (Civil Appeal E23 of 2021) [2022] KEHC 286 (KLR) (6 April 2022) (Judgment).

40. In conclusion, counsel urged us to dismiss the appeal as the tort of negligence was not proved.

41. We have accordingly considered the record of appeal, the detailed submissions of both parties and the law. This being a second appeal, our mandate is limited to points of law only. Section 72(1) of the *Civil Procedure Act* provides:

> 72. Second appeal from the High Court
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> 1. Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely-
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> a. the decision being contrary to law or to some usage having the force of law;
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> b. the decision having failed to determine some material issue of law or usage having the force of law;
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> c. a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

42. The Court can however, in exceptional circumstances consider matters of fact as was enunciated in Charles Kipkoech Leting v Express (K) Ltd & Another [2018] KECA 187 (KLR) as follows:

> " This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See – (Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007 and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR), for the holdings, inter alia, that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

43. Having further considered the grounds of appeal, it is our view that the main issue that falls for us to determine is whether the appellants proved liability against the respondent on a balance of probabilities.

44. Undeniably, in this case, there were no eyewitnesses to the accident. Neither PW1 nor PW2 were at the scene of the accident to narrate how the accident occur. The only person who would have shed light was the respondent's driver, but he ran away from the scene. We understand that the respondent is not denying that an accident did in fact occur. His contestation is that the appellants did not prove that his driver, servant and/or agent was responsible for the fatal accident.

45. The testimony of the investigating officer was that he visited the scene of the accident and found that the deceased had been thrown off the pavement to the middle of the road. It was his further testimony that the accident happened on a continuous yellow line where the respondent's driver was not supposed to overtake another motor vehicle.

46. Section 107 (1) and (2) of the *Evidence Act* is instructive as regards to who bears the burden of proof of the existence of a fact, being that it lies with he who alleges. It provides as follows:

    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.

47. The South African Court of Appeal in Stellenbosch Farmers' Winery Group Ltd and Another v Martell and Others (427/01) [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (6 September 2002) considered how factual disputes should be resolved to ascertain as far as possible where the truth lies between conflicting factual assertions as follows:

> "To come to a conclusion on the disputed issues, a court must make findings on:

48. Where the onus of discharging the burden of proof rests on the appellants as in the present case, and where there are two mutually destructive stories, the appellants can only succeed if they satisfy the court on a balance of probabilities that their version is true and accurate and therefore acceptable; and that the other version advanced by the respondent is therefore false or mistaken, and falls to be rejected.

49. Further, the predecessor of this Court, the then Eastern Africa Court of Appeal in Lakhamshi v Attorney General, [1971] E.A. 118, 120 held as follows on proof of negligence or apportionment thereof:

> "It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident." (emphasis ours)

50. A police sketch map is prepared after the event. It is not an eyewitness' account. However, its probative value was found by this Court to be an item of evidence to be considered as it shows the actual position the parties to an accident were immediately after the accident - See Equator Distributors v Joel Muriu & 3 Others [2018] KECA 53 (KLR).

51. We take cognizant of the fact that, in most serious road traffic accidents, the investigating officer will normally and almost always draw sketch plans for the afore-stated reason. We find it particularly disturbing that the police officer (PW1) did not find it necessary to produce in evidence the sketch map he was alleged to have drawn. This, no doubt, would have been a true reflection of what he would have found at the scene of the accident. It was expected that the police officer was to testify as an expert. He did testify as one, and in fact, we believe that he was trained on how to handle a scene of accident, but he was unable to demonstrate by a reconstruction of the scene that it was the driver of the motor vehicle who was 100% to blame. In fact, the best tool with which he would confidently have established the culpability of the respondent was a sketch drawing. We cannot fathom how, being an experienced traffic police officer who handled a serious road traffic accident, he omitted to discharge the task of adducing the drawings.

52. The decision of Ringera, J. (as he then was) in Grace Kanini v Kenya Bus Services Nairobi HCCC No. 4708 of 1989 as referred to by Odunga, J. (as he then was) in the Florence Mutheu Musembi case (supra) held that the production of a police abstract was not conclusive proof that an accident occurred as follows:

> " On the disputed facts, it is entirely probable that the accident was caused by the negligence of the second defendant who offered not to offer evidence. It is equally probable that it was caused by the negligence of the deceased. And it is equally probable that it was caused partly by the negligence of the deceased and the negligence of the defendant. Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence...a police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence came without more be evidence of negligence...
>
> There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the respondents."

53. We cannot agree more.

54. In the same vein, we are also convinced that the mere fact that the driver ran away from the scene does not impute blame on his part. The deceased's body was found on the road, but in the absence of persuasive evidentiary evidence, it does not mean that the driver was to blame; it could be that the deceased was culpable. On the argument by the appellants that circumstantial evidence came into play, we think, it was too weak to attribute the tort of negligence on the driver of the suit motor vehicle.

55. In holding that the appellants had not discharged their burden in proving that the respondent's driver was to blame for the accident, the learned Judge delivered himself thus:

> " The evidence tendered by the appellants in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of evidence tendered, there was no basis at all upon which the Magistrate court reasonably made a finding that liability has been established on 100% basis as against the appellant. In fact, the Magistrate other than saying the appellant never adduced evidence, he never explained whether the evidence before

him discharged the evidential burden of prove. Had the trial Magistrate appreciated that the initial evidential burden rests upon the plaintiff, and had he carefully applied his mind to the law, he would have held that there was nothing for the respondent to rebut since the appellants had not discharged the legal burden of prove. However, he was blinded by the mere fact that the respondent never called evidence and overlooked binding decisions cited by the defendant before him. At that point it was irrelevant that the respondent never adduced evidence at all because there was nothing to rebut. On this ground alone, I allow this appeal in its entirety."

56. We entirely concur with the finding of the learned Judge on this score. At the risk of repeating ourselves, it is trite that the evidence of both PW1 and PW2 was of no probative value in that none of them witnessed the accident. Therefore, the learned Judge was not at fault, in holding that the learned Magistrate did not properly direct his mind when he held that the respondent was 100% to blame for the accident; and that, therefore, the appellants had discharged the evidential burden. It is clear to us, in the circumstances, that there was no factual evidence on which the trial court made a finding of 100% liability on the respondent. For this reason, we are unable to disturb the judgment of the learned Judge.

57. We sympathize with the deceased's estate for the regrettable tragedy. However, the investigating officer who was charged with the hallowed responsibility of carrying out proper investigations and lay before the court facts that would have assisted the court to come up with a decision based on good investigations failed in his duty. To say the least, he conducted his duties in a very casual manner. As independent arbiters, our noble calling is to render a decision that is hinged purely on the evidence before us. We avoid at all times, and indeed, are never actuated by, sympathy or speculation when adjudicating over disputes. It is for this reason, unfortunately, that the appellants' appeal fails.

58. Having dispensed with the issue of liability in the negative, nothing falls on us to determine on quantum.

59. In the end, we come to the inescapable conclusion that the Appellants' appeal lacks merit and is hereby dismissed. Consequently, we hereby uphold the Judgment of the High Court at Voi (Mativo, J.) (as he then was) delivered on January 24, 2022.

60. Each party shall bear their own costs of the appeal. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

JUDGE OF APPEAL

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DR. K. I. LAIBUTA CArb, FCIArb.

JUDGE OF APPEAL

.....

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed DEPUTY REGISTRAR