



REPUBLIC OF KENYA



**Kamau & another v Mumo & another (Civil Appeal E706 of 2022)
[2025] KEHC 701 (KLR) (Civ) (27 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

CIVIL APPEAL E706 OF 2022

AM MUTETI, J

JANUARY 27, 2025

BETWEEN

JOSEPHAT MUGE KAMAU 1ST APPELLANT

AMOS MBUGUA NJENGA 2ND APPELLANT

AND

MUSEE MUSYIMI MUMO 1ST RESPONDENT

MARY GICUKU NJAGI 2ND RESPONDENT

(Being an appeal from the Judgement delivered by the Honorable court delivered on the 28th March 2021 by the Honorable Magistrate E. Kagoni (Ms) Principal Magistrate in Nairobi Chief Magistrate's Court Civil Suit No. 6935 of 2019)

JUDGMENT

Introduction

1. The appellants are aggrieved by the decision of the Hon. E.M Kagoni PM in Nairobi Chief Magistrate's Civil Suit No. 6935 of 2019 delivered on the 28th March 2021 in which he entered judgment against the appellants in the following terms:-
 - a. Liability 100%
 - b. Pain and suffering Kshs. 100,000
 - c. Loss of expectation of life Kshs. 100,000
 - d. Loss of dependency Kshs. 500,000



- e. Special damages Kshs. 77,150
 - f. Costs and interests on the award from the date of judgment.
2. The appellants have raised the following grounds in their memorandum of appeal:-
- a. The Learned Trial Magistrate erred in law and facts in holding the Appellants herein 100% liable in negligence without considering the evidence which pointed to the fact that the accident was solely caused by the deceased.
 - b. The Learned Trial Magistrate erred in fact and in law in holding that the Respondents had established a case against the Appellant contrary to the evidence on record.
 - c. The Learned Trial Magistrate erred in law and fact in failing to make a finding as to whether or not the issue of liability was adequately proved considering the evidence on record revealed that the accident was caused by the deceased.
 - d. The Learned trial Magistrate erred in Law and fact in entering judgment for the Respondent without considering the credible evidence by the defence witness who confirmed that the deceased was liable for the accident.
 - e. The Learned Trial Magistrate failed to consider the submissions and authorities filed by the Appellants hence erroneous judgment.
 - f. The Learned trial Magistrate erred in law and fact in failing to dismiss the Respondents claim with costs for want of proof.
 - g. The Learned Magistrate erred and misdirected himself by proceeding on wrong principles when assessing damages to be awarded to the respondent under the head of general damages and thereby failed to apply precedents and tenets of the law applicable.
 - h. The Learned Trial Magistrate erred in law and in failing to capture and/or record all the evidence and/or testimonies adduced in Court thereby omitting important material which were necessary for determination of issues in question.
3. The issues that arise in this appeal are:
- i. Who was to blame for the accident.
 - ii. Whether the evidence presented by the plaintiff supported the 100% finding on liability.
 - iii. Whether the defence of the appellants was adequately considered by the trial
 - iv. Whether the learned Honorable court proceeded on the correct principles of law in assessing the damages.

Duty of Court on First Appeal

4. The High Court sitting as a first appellate court is tasked with the duty of reviewing the evidence tendered in the lower court and proceeding to draw its own conclusions on the matter while remembering that unlike the trial court this court did not have the opportunity to hear or see the witnesses thus the court is enjoined to make due allowance . *Selle & Another V Associated Motor Boat Company Ltd & Others*, [1968] EA.



Summary of the Evidence

5. The respondents in this matter were the father and the mother of the deceased Peter Mutugi Musee.
6. The plaintiff called PWR Musee Musemi Mumo as the only witness. It is therefore obvious that there is an error on the face of the record the witness should have been indicated as PW1 not PW2.
7. Be that as it may, the witness testified that the deceased was his son. The witness conceded that he did not witness the accident. He went ahead to produce the Police Abstract and other documents which were received in evidence as Exhibits 1.
8. The witnesses told the court that the deceased was a student who was a student who was training as a mechanic at the time of the accident. He was not married and he wholly depended in the witness Musee Mumo.
9. The plaintiff (1st respondent) witness pleaded with the court to consider his statement and documents which he produced and award him the damaged prayed for in the plaint.
10. The deceased was said to have been born in the year 2000
11. Upon cross examination the 1st respondent was not able to prove that he was a student at the time of the accident.
12. The witness was not certain whether the driver of the motor vehicle was ever charged.
13. The statement of the witness indicated that the accident occurred on 29th December 2018 and at the time of the accident the deceased was a pillion passenger on a motor cycle Reg. No. KMDU 325L along Kipande road when it was hit by motor vehicle KBY 566F driven by the 1st appellant at the time of the accident.
14. The respondent blamed the occurrence of the accident upon the 1st appellant even though he did not witness the accident.
15. The post mortem form confirmed that the deceased died of injuries consistent with an accident and the doctor indicated the cause of death as being head injury due to blunt force trauma.
16. The respondent's case was closed with the evidence of the 1st respondent.
17. The appellants called a police officer No. 78666 PC. Samuel Longole Lowel from Parklands Police Station.
18. The witness was not the investigating officer but he appeared before the court to produce documents which included the OB entry and extract.
19. The witness testified to the effect that the accident occurred as alleged by the respondents. The witness stated:-

“Motor cycle rider was to blame for the accident. He was driving on the wrong side of the road. The rider was charged and fined Kshs. 100,000.”
20. The police officer produced the police abstract and the motor vehicle inspection report as EXH. D2.
21. The witness testified further that he did not visit the scene but that was what was captured in the Police Abstract and the occurrence book extract.



Analysis And Determination.

22. The above file evidence that the trial court was called upon to consider and render judgment.
23. This court having perused the entire record is at a considerable difficulty un upholding the finding of the learned Honorable Magistrate on liability.
24. The respondents did not call anyone who could narrate to the court the circumstances surrounding the occurrence of the accident.
25. Indeed, the witness who testified on behalf of the respondents admitted that he was not at the scene of the accident thus he could not tell how the same occurred.
26. The duty to prove on a balance of probabilities the occurrence of the accident and the particulars of negligence was upon the respondents. The burden in my view was not discharged.
27. Section 107 (1) of the [Evidence Act](#) provides that:-

“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.”
28. The respondents having alleged negligence on the part of the appellants, it was incumbent upon them to prove that the accident was actually caused by the appellants out of their negligence. It is not enough to plead negligence. The party alleging negligence must prove the same.
29. The failure to load evidence on the circumstances surrounding the occurrence of the accident should have led the trial magistrate to dismiss the suit. Section 108 of the [Evidence Act](#) stipulate as follows:-

“The burden of proof in a suit or proceeding person who would fail if no evidence at all were given on either side.”
30. The respondents stood to fail if no evidence was tendered by either side. See *Ainushamsi Construction & Transporters Company Limited v County Government of Vihiga (Civil Appeal E003 of 2022) [2024] KEHC 3288 (KLR) (20 March 2024) (Judgment*

Notably, Section 107(1) of the [Evidence Act](#) Cap 80 (Laws of Kenya) states that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exists.”
31. The court noted that the evidence that was tendered by the defence (appellants) attributed liability for the accident to the rider of the motor vehicle and the police officer went on to state that the rider was charged and convicted for causing the accident. The evidence by the defence was uncontroverted thus the learned honorable court erred in failing to consider the defence. If the court had addressed its mind to the defence tendered by the appellants it would have arrived at a different finding on liability.
32. Following the analysis of the evidence tendered, this court finds that the finding of 100 % liability against the appellants was not supported by evidence and that the decision to condemn the appellants light of the evidence on record, the trial court misdirected itself on the evidence thus arriving at a wrong finding in law.
33. The casual link of one’s actions to the injury suffered by another must be established.



34. The Court of appeal in *Timsales Limited v Stanley Njihia Macharia* [2016] eKLR discussing the principles of 'causation' cited with approval the decision by Musinga J (as he then was) in *South Nyanza Sugar Co. Ltd v Wilson Ongumo Nyakwemba* [2008] eKLR quoting *Statpack Industries Limited vs. James Mbithi Munyao HCCA No. 152 of 2003 (UR)* where it was held that:

“It is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence.”

35. The respondents having failed to establish any aspect of negligence on the part of the appellants the appeal by the appellants must therefore succeed.

36. In the end I find and hold that the instant appeal has merit and is hereby allowed the judgment of the lower court is hereby set aside with no order as to costs.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY, 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Kimondo Gachoka absent for the /appellant

Nguma for the 1st & 2nd Respondent

