



**Mohammed v Mungai & another (Civil Appeal E109 of 2024)  
[2025] KEHC 7136 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7136 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E109 OF 2024**

**E OMINDE, J  
MAY 30, 2025**

**BETWEEN**

**FARIDAH HASSAN MOHAMMED ..... APPELLANT**

**AND**

**DUNCAN MUNGAI ..... 1<sup>ST</sup> RESPONDENT**

**TRIPPIN LUXURY SHUTTLE T/A TRIPPIN SACCO**

**LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This Appeal arises from the Judgment delivered on 26/10/2020 in Eldoret CMCC No. 602 of 2019 in which the Appellant (as the Plaintiff) instituted a claim against the Respondents (as Defendants) seeking compensation for injuries allegedly suffered by her as a result of a road traffic accident. The Appeal is stated to be against the Trial Court's decision to dismiss the suit.
2. The background of the matter is that by the Plaint filed on 22/06/2019 and Amended on 08/06/2023 through Messrs Mwinamo Lugonzo & Co Advocates, the Appellant (then the Plaintiff) pleaded that on 02/07/2019 she was lawfully walking along the Eldoret Webuye road at Roadblock area when the Defendant or his agent/employee, negligently drove Motor vehicle registration no. KCJ 603L and caused it to knock her down and as a result, she sustained injuries.
3. The Respondents filed their statement of defence on 09/09/2019 which was then amended on 20/08/2023 through Messrs Kimondo Gachoka & Co Advocates wherein they denied the occurrence of the accident in totality and further, stated that if the accident occurred, the same was due to the negligence of the Plaintiff. They urged the Court to dismiss the appeal.
4. The matter then proceeded to full hearing whereof the Respondent called 4 witnesses while the Appellants did not call any.



### **Appellant's evidence before the Trial Court**

5. PW1 was Dr. Paul Rono who produced a continuation report, radiology request form and receipts as exhibits. In cross examination, he stated that there was no loss of consciousness and that the injuries were soft tissue and the Appellant was treated as an outpatient.
6. PW2 was Dr. Sokobe who produced a P3 form and a Medical report on behalf of the Appellant. In cross examination, he stated that the injuries were soft tissue in nature and that the Appellant was treated as an out patient and must have recovered.
7. PW3 was PC Cheserek Kiptoo who produced an abstract for an accident involving the subject motor vehicle in the suit. He stated that the matatu knocked down the Appellant and she sustained injuries. In cross examination, he stated that the pedestrian was crossing the road and was hit by a side mirror. Further, that the driver was not to blame and he could not tell whether there was a zebra crossing at the scene.
8. PW4 was the Appellant. She adopted her witness statement and stated that the motor vehicle hit her while she was on the side of the road. That it hit her hand, chest, eye and leg and she blamed the owner of the vehicle for her injuries. In cross examination, she stated that the accident occurred on 21/07/2019 at 7.30am and that she was not crossing the road. Additionally, that the vehicle was overtaking when it hit her and that she was at the stage, and there was no Zebra Crossing.

### **Respondents' evidence at the Trial Court**

9. After several adjournments, the parties produced the Death Certificate of the Defendant, Duncan Mungai as an exhibit and the Court closed the Defendants' case.

### **Judgement at the Trial Court**

10. Upon considering the pleadings filed testimonies of the parties and the submissions tendered, the Trial Court dismissed the suit with costs vide a Judgement delivered on 26/04/2024.

### **Appeal**

11. Being aggrieved with the judgement of the Trial Court, the Appellant instituted the present Appeal vide a Memorandum of Appeal dated 28/05/2024 premised on the following grounds;
  - a. The learned trial magistrate erred in law or in fact in dismissing the Appellants case.
  - b. The learned trial magistrate erred in law or in fact in finding that the evidence of the Appellant and the police officer contradicted each other.
  - c. The learned trial magistrate erred in law or in fact in failing to consider the Appellants' submissions.
  - d. The learned trial magistrate erred in law or in fact in failing to find that the Appellant had proved her case on a balance of probability as required by law.
  - e. The learned trial magistrate erred in law or in fact in failing to find that the Respondents were liable for the accident as no evidence was offered in defence to challenge the testimony of the Appellant and her witnesses.



12. The Respondents also filed a Cross Appeal dated 12/05/2024 through the firm of Kimondo Gachoka & Company advocates which was deemed as properly on record by consent filed on 30/11/2024. The cross appeal was premised on the following grounds;
- a. That the learned magistrate misdirected herself when she failed to find that the suit had abated despite the Appellants' producing the death certificate of the 1<sup>st</sup> Appellant.
  - b. That the learned magistrate misdirected herself when she failed to find that there has been no nexus between the 2<sup>nd</sup> Appellant and the accident thus the ownership of the motor vehicle had not been proved.
  - c. The learned trial magistrate erred in law or in fact by disregarding and failing to appreciate the judicial authorities and the Appellants' submission thereby arriving at an erroneous finding of law.

### **Hearing of the appeal**

13. The Appeal was canvassed by way of written submissions. The Appellant filed submissions dated 29/07/2024 through the firm of Messrs Mwinamo Lugonzo & Co Advocates whereas the Respondent filed undated submissions through the firm of Messrs Kairu McCourt & Company advocates.

### **Appellants' Submissions**

14. Learned Counsel for the Appellant submitted that the evidence of the Appellant and the Police corroborated on the circumstances the led to the accident. He reproduced their evidence and urged that it is clear that the Appellant was knocked whilst she was lawfully walking besides the road along the Eldoret - Webuye Road when Motor Vehicle Registration KCJ 603 L came from behind overtook another vehicle suddenly and veered off the Road on the right side where the Appellant was walking and knocked her down whilst she was away from the road. Further, that the Respondent did not call any evidence to challenge and or controvert the Appellants testimony as to the circumstances that led to the accident. Having come from behind it was incumbent upon the Respondent's driver, agent, servant and or employee to exercise utmost care and skill so as not to knock down the Appellant. The Appellant did not in any way contribute to the accident and therefore the Trial Court ought to have found the Respondents and or their driver, agents, servant and or employee 100% liable for the accident
15. Counsel submitted that the Courts' finding on liability was not supported by the proceedings and the Judgement of the Honourable Principal Magistrate ought to be set aside and the Appellate Courts makes a finding that the Respondents were 100% liable for the accident.
16. On Quantum of Damages, he urged that from the medical documents the Appellant sustained the following injuries: -
- a. Blunt injury to the head (scalp) left
  - b. Blunt injury to the face with epistaxis
  - c. Blunt injury to the neck.
  - d. Blunt injury to the chest.
  - e. Blunt injury to the right shoulder.
  - f. Blunt injury and bruises to the right upper limb.
  - g. Blunt injury to the right thigh.



- h. Bruises on the left knee.
  - i. Bruises on the right ankle laterally.
17. Further, that the Court stated that it would have awarded Kshs 150,000 as General Damages if the Appellants case had succeeded which is inordinately low. In view of the injuries sustained, Counsel urged that the award of Kshs 500,000 as general damages would have sufficed as just and adequate compensation to the Respondent. He relied on the following authorities in this regard; Nyeri HCCC NO. 320 OF 1998 Catherine W. Kingori & 3 Others vs Gibson T Gichubu where the 1<sup>st</sup> Plaintiff sustained injury on the left ankle, injuries on the legs and injuries to the chest and General damages were assessed at Kshs 300,000. Nairobi HCCA No. 791 OF 1999 Martin M Mugi vs Attorney General where the Plaintiff sustained a deep extensive cut on the face and General damages were assessed at Kshs 300,000, Eldoret HCCA No. 32 of 2017 - Jyoti Structures 7 Anor vs Charles Ogada Ochola, Eldoret HCCA No. E090 OF 2022 Emily Otieno & Anor vs Wilberforce Mwangi among others. He submitted that the sum of Kshs. 6,000/- as special damages was specifically pleaded and proven and urged the Court to allow the appeal.
18. On the cross appeal, he submitted that the effect of the Amended Plaintiff was that the Respondents were the owners of Motor Vehicle Registration KCJ 603L. That the Respondent did not adduce any evidence to disprove the fact that they were the owners of Motor Vehicle Registration No. KCJ 603 L and further, that it was incumbent upon the Respondents to provide evidence of non-ownership of the Motor Vehicle Registration KCJ 603 L. He urged that the Respondents did not raise the issue of abatement of the suit at the trial of the Suit and that they consented to the Appellants application to amend the Plaintiff. The issue of abatement ought to have been raised at the trial and at the time of Amendment of the Plaintiff. Counsel posited that the Death Certificate produced by the Respondents, the Deceased is named as Duncan Mburu Mungai whereas the 1<sup>st</sup> Respondent is described as Duncan Mungai. That the two are different persons and it was necessary that evidence be adduced to show that the two are one and the same person and thus no nexus between the two persons was shown.
19. Counsel urged that in the absence of any proper evidence on the demise of the deceased the Court could not find that the Appellants suit as against the Respondents had abated. Having enjoined a 2<sup>nd</sup> Respondent to the Case it was incumbent upon the Respondents to show that there was no nexus between the Two Respondents and that they were not the owners of Motor Vehicle Registration KBJ 602 L. He stated that as per the Police Abstract, it was indicated the Motor Vehicle Registration KCJ 603J was owned by Duncan Mburu. The Owner of the Motor Vehicle Registration KCJ 603 J is totally different from the person named in the Certificate of Death. He maintained that the Respondents did not adduce contrary evidence to demonstrate that the Motor Vehicle Registration KCJ 603 J did not belong to them. He urged the Court to dismiss the Cross Appeal.

### **Respondents' submissions**

20. Learned Counsel for the Respondent submitted that the evidence of the Appellant and the investigating officer contradicted themselves which led to the finding of the Trial Court. he highlighted the testimony and submitted that the Appellant testified that she was not crossing the road at the time of the accident which was completely different from her evidence in chief. Further, that she testified that the accident occurred on 21/07/2019 and not on 02/07/2019 as she alleged in her pleadings. Counsel pointed out that PC Cheserek Kiptoo testified, in cross examination, that the Appellant was crossing the road when the accident occurred and further, that in re-examination he stated that he wrote the applicants statement as he was the investigating officer.



21. Citing sections 107 and 109 of the *Evidence Act*, Counsel submitted that the Appellant never adduced evidence to show that the Respondent was to blame and further, that her evidence was marred by contradictions. He relied on the case of *John Onteri Momanyi v Motor Boutique Limited* [2018] eKLR on contradictory evidence.
22. On the cross appeal, Counsel submitted that the Appellant did not produce any records from the registrar of Motor Vehicle to show that the Appellants were the owners of the Motor Vehicle Registration Number KCJ 603L. The only record to show that the vehicle was owned by the Defendants was a police abstract which showed that the 1<sup>st</sup> Appellant was the owner of the Motor Vehicle. In the absence of the copy of records from the Registrar of Motor Vehicles and police abstract showing that the 2<sup>nd</sup> Appellant was the owner; the Respondent did not prove ownership as against them. In this regard, Counsel sought to rely on the decision in *Hermant Kumal Raval v Jubilee Jumbo Hardware limited* [2016] eKLR, urging that the Respondent only proved ownership of the Motor Vehicle against the 1<sup>st</sup> Appellant but not the 2<sup>nd</sup> Appellant.
23. Counsel submitted that the Plaintiff filed this suit on 19/07/2019 with the 1<sup>st</sup> Appellant being the only one sued. On 30/05/2023, the Plaintiff filed an application seeking to amend the Plaintiff by adding the 2<sup>nd</sup> Appellant. Further, that the Appellants filed a supplementary list of documents on 23/08/2023 with the 1<sup>st</sup> Appellant's Death certificate dated 28/12/2020 as the date he passed on. He submitted that Order 24 Rule 4(3) of the Civil Procedure Rules states that where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant. Further, that Sub rule (1) states where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit. He pointed out that the Respondent made the application to add the 2<sup>nd</sup> Appellant to the suit more than one year after the death of the 1<sup>st</sup> Appellant thus the suit had already abated against him. Counsel urged the Court to allow the cross appeal with costs.

### **Analysis & Determination**

24. Having addressed myself to the issues raised in the Grounds of Appeal as well as the submissions filed by both Counsel, it is my considered opinion that the following issues arise for determination;
  - i) Whether the Trial Court erred in dismissing the suit
  - ii) Whether the suit had abated as against the Respondent
25. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the Court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”



26. In *Williamson Diamonds Ltd and another v Brown* [1970] EA 1, the Court held that:

“The appellate Court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the Trial Court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

27. Further, in *PIL Kenya Limited v Oppong* [2009] KLR 442, it was held that:

“It is the duty...of a first appellate Court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the Trial Court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that”.

28. Sections 107(1) and (2) of the *Evidence Act* provide as follows on the burden of proof

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.

29. Section 109 of the *Evidence Act* provides as follows;

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.

30. In *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the Court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The Appellant did not discharge that burden and as section 108 of the *Evidence Act* provides the burden lies on that person who would fail if no evidence at all were given as either side.”

31. Order 24 rule 4 (4) of the Civil Procedure Rules provides as follows on the abatement of a suit;

“4.

- (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

(2) .....



- (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.”

32. In the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through the Attorney General) & 5 Others [2015] eKLR, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure as follows:

“There are three stages according to these provisions. As a general rule the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the Court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the Plaintiff’s legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the Court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased Plaintiff may apply for the abated suit to be revived after satisfying the Court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.”

33. On the proof of ownership of a motor vehicle, Section 8 of the *Traffic Act* provides:

The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.

34. In *Securicor Kenya Ltd v Kyumba Holdings Ltd* [2005] eKLR the Court held as follows:

“Our holding finds support in the decision in *Osapil v Kaddy* [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The Appellant had, indeed, proved otherwise.”

35. In the case of *Nancy Ayemba Ngaira v Abdi Ali* [2010] eKLR, Ojwang, J. (as he then was stated:

“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the *Traffic Act* is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the



evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1<sup>st</sup> Defendant was one of the owners of the matatu in question."

36. Having laid out the relevant Statutory provisions as well as the Case Law relevant to the issues that the court is called upon to determine in this matter, is required of the first Appellate Court, I have carefully perused the proceedings of the Trial Court and particularly on the areas where the Learned Magistrate found that the evidence of the Appellant and her witnesses was contradictory as well as the allegation by the Respondents that the Appellant gave contradictory dates on when the accident occurred. Upon a careful re-evaluation of the evidence on the date of the occurrence of the accident, the following facts emerge. In her plaint, the date of the occurrence of the accident is indicated as 2<sup>nd</sup> July 2019. In her Witness Statement, she states that the accident occurred on 2<sup>nd</sup> July 2019. In her oral testimony, she testified that the accident occurred on 2<sup>nd</sup> July 2019. In the submissions, the date of the occurrence of the accident is given as 21<sup>st</sup> July 2019.
37. The court notes that the discrepancy on the date is in the submissions and not in the pleadings and the evidence. The question then is whether this error in the submission is fatal to the Appellants case. The short answer is no. This is because a party lays out their claim in the pleadings and then proceeds to expound on the matters pleaded by adducing evidence by way of oral testimony and also by producing exhibits in support of the case if any. It is the pleadings then that belong and must therefore be owned by any party to a suit. That is why the law is that parties are bound by their pleadings because it is the pleadings that comprise the facts of that which a party is claiming and/or denying. Submissions on the other hand comprise of a summation of the parties' case as derived from the sum total of the facts as proffered in the pleadings and the evidence with the aim of applying the law to these facts in a bid to persuade the court that the party has proved its case to the required standard.
38. Submissions are therefore not pleadings. Oftentimes, submissions are prepared on behalf of parties by their legal representative as is the case here. If there be a mistake in the submissions that go to the very primary and material particulars of the case which mistake is not reflected in the pleadings, such a mistake cannot be attributed to a party. It is the mistake of Counsel that cannot and ought not be visited upon a litigant. Having considered the disparity in dates, I am well satisfied that all it amounts to is a typographical error on the part of Counsel. In light of these findings, I see no contradiction at all in the Appellant's case on the date of the occurrence of the accident and I now hereby so find.
39. On the issue that the Appellant's evidence was contradictory of itself firstly, and also contradicted the evidence of her key witness the Police Officer who testified as PW3, I have considered the said evidence. I note that it is on the basis of the said stated contradiction that the Learned Magistrate dismissed the Appellants case in toto. I have considered and re-evaluated the evidence of PW3. I note that in examination in chief, the witness stated that the Appellant was hit while walking off the road. In cross examination, he stated that the Appellant was hit when crossing the road. In re-examination he reverted to his initial testimony that the Appellant was hit while walking off the road.
40. I have also considered and re-evaluated the evidence of the Appellant, I have not been able to discern any contradiction by herself of her evidence. The same is clear. She testified that she was hit by the Respondent's motor vehicle as she was walking off the road. In noting that she did testify after the PW3, the court also takes note of the fact that she was resolute in her testimony even when confronted with the evidence of the PW3 on this aspect of the evidence that is said did contradict her evidence. She maintained her testimony that she was off the road.
41. The Learned Magistrate in dismissing the Appellant's case stated in her judgement that she expected the evidence of the PW3 to corroborate the evidence of the Appellant on how the accident occurred and that because she found the same to be contradictory, she was satisfied that the said evidence had not



reached the required threshold of proof and she therefore dismissed the Appellant's case. The question then is whether the stated contradiction if at all by PW3 was fatal to the plaintiff's case in the sense that it was the only evidence that was relevant to the proof of the Appellant's case such that if found wanting, then the Appellant's case has no legs to stand on and must therefore be dismissed.

42. The first thing of note is that the evidence that the Appellant was crossing the road when she was hit is the evidence of PW3 and not the Appellant. Further, this testimony came out at cross examination. In the re-examination of PW3 the record of proceedings shows that PW3 clarified that it is the Respondent who reported to him that the Appellant was hit while crossing the road. PW3 further clarified that he in fact is the one who recorded the Appellant's statement on how the accident occurred and her report was that she was hit while walking off the road.
43. It is important to note that as a matter of significance, with the clarification, the evidence of PW3 then reverted to his initial testimony in chief which then corroborated the evidence of the Appellant on the material particular on how the accident occurred. This is an aspect of the evidence in support of the Appellant's case that ought not to have been overlooked by the Learned Magistrate. This is precisely because the procedure of re-examination is provided so that a witness is able to clarify areas of their testimony that may have not come out properly in cross-examination. The also notes that the Respondents did not call any witness in their defence and for this reason, this aspect of the Appellant's evidence stands as unchallenged.
44. Furthermore, the pleadings and proceedings show that there is also other evidence on record in support of the Appellant's case to wit the Police Abstract, The P3 Form, the Treatment Records from Moi Teaching and Referral Hospital and the Medical Report by Dr. Sokobe which did corroborate the Appellant's testimony. All this evidence was not at all rebutted, contradicted and or denied in their material particulars by the Respondent either in their cross examination of the Appellant's witnesses or in their testimony in defence for reasons that they did not call any witnesses. The record shows that the Learned Magistrate did not at all consider and evaluate the veracity and/or weight of this evidence before reaching the determination to dismiss the Appellant's case. In light of the above, I am of the finding firstly that there was no contradiction at all in the Appellant's testimony and secondly, there was other credible evidence on record that was not considered to warrant her dismissal of her suit.
45. On the issue raised by the Respondent in the Cross Appeal on the abatement of the suit it is the Respondent's case that because the 1<sup>st</sup> Respondent died during the pendency of the suit, the Appellant in compliance with the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules ought to have within one year of the death of this Respondent made an application under sub rule (1) thereof to add the 2<sup>nd</sup> Appellant. Counsel submitted that the Respondent made the application to add the 2<sup>nd</sup> Appellant to the suit more than one year after the death of the 1<sup>st</sup> Appellant by which time the suit had already abated against him.
46. On this issue, the lower court proceedings refer. It shows that the Defendant's Supplementary List of Documents that introduced the Death Certificate of one Duncan Mburu Mungai was filed on 23<sup>rd</sup> August 2023. The said Death Certificate indicates that the deceased therein died on 28<sup>th</sup> December 2020. The Application seeking to amend the plaint on the other hand was made on 8<sup>th</sup> June 2023 before the filing of this document. The court also notes that notwithstanding the fact that the date of the death of the 1<sup>st</sup> Respondent was already within the Knowledge of their Counsel, they did not object to that application for amendment.
47. The court further notes that throughout the proceedings, this issue was not raised by the Defendants (now Respondents) to give the Appellants ample time and opportunity to respond and make the appropriate application. Further, because the fact of this death was within the sole and peculiar



knowledge and purview of the Respondents, they ought to have brought it to the attention of the Appellants in good time. They did not do so until after the amendment of the plain. I cannot therefore in these circumstances be said that time for the Appellants started running from the point of the demise of the Respondent on 20<sup>th</sup> December 2020 as submitted by their Counsel. Time started running at the time that Appellants were notified of the same and this is on 23<sup>rd</sup> August 2023.

48. This being the case, the position then is that as at the time the judgement was delivered, one year had not yet lapsed. Further to this I do agree with the submissions made by Counsel for the Appellant that because the person named in the Death Certificate is Duncan Mburu Mungai and the person sued as the 2<sup>nd</sup> Respondent is Duncan Mungai, without the Respondents sufficiently demonstrating to court that the two persons named are one and the same person, the court cannot conclusively and with certainty find that the 1<sup>st</sup> Respondent herein is deceased as alleged.
49. On the other issue raised that by the appellants failing to produce a Copy of Records from the Registrar of Motor Vehicles showing that the Respondents owned the accident motor vehicle, then they have not proved that the 1<sup>st</sup> Respondent did in fact own the said motor vehicle. On this issue, suffice to say that I fully associate myself with the holding of Ojwang J (as he then was) in the above cited case of Nancy Ayemba Ngaira v Abdi Ali [2010] eKLR that even in the absence of a Copy of Records, if a Police Abstract indicating that the said vehicle belonged to a Defendant is produced, that on a balance of probabilities is sufficient to demonstrate that that individual is the owner of the motor vehicle. This is because as pointed out by the Hon Judge in that decision, there are various categories of ownership of a motor vehicle as he has therein listed. In line with the said ratio decidendi, I am satisfied that even in this case, the absence of a Copy of Records notwithstanding, the Police Abstract produced that indicates that the 1<sup>st</sup> Defendant was the owner of the motor vehicle in question as at the time of the occurrence of the accident is sufficient proof of ownership and has adequately demonstrated this issue in favour of the Appellant on a balance of probabilities.
50. On the last issue that the Appellants did not establish any nexus between the 2<sup>nd</sup> Respondent and the accident, having considered the record of the lower court in its entirety, I do agree with the Respondents. This is because save to describe the 2<sup>nd</sup> Respondents as a limited liability company in the amended plaint at paragraph 2A and thereafter making an averment at paragraph 3 that the 2<sup>nd</sup> Respondent and the 1<sup>st</sup> Respondent were at all material times the owners of the motor vehicle, which ownership they then proceeded to bracket as (legal, beneficial, registered), ss is required of them under the provisions of Section 107, 108 and 109 of the *Evidence Act*, and particularly in light of the fact that this averment was rebutted by the Respondents in their Defence to the amended plaint, the Appellants needed to avail sufficient evidence at the hearing to prove that which they had alleged. In this regard, the decision of the Learned Justice Ojwang herein relied upon on the issue of ownership is also relevant.
51. It is not correct as has been submitted by Counsel for the Appellant that the onus was on the 2<sup>nd</sup> Respondents to demonstrate that they were not co-owners of the motor vehicle. Such a scenario is only applicable where the Appellants themselves, to support that which they have alleged in their pleadings, avail sufficient evidence to demonstrate ownership and which evidence then, the Respondents fail to sufficiently rebut and/or refute by way of evidence to the contrary. This is because pleadings are not evidence. They are mere allegations which must be proved by way of evidence. In this case, the Appellants did not adduce any evidence to indicate under what capacity as categorized by themselves in their own pleadings, the 2<sup>nd</sup> Respondent owned the motor vehicle so as to establish a nexus between them and the accident. The court further notes that this Respondent is also not listed in the Police Abstract in any capacity of ownership of the motor vehicle or all. Given these circumstances, the court finds in favour of the Respondents on this particular issue.



52. The issue that the Learned Magistrate failed to consider the Respondents Submissions and authorities cited is neither here nor there for reasons that this is a matter that it is not possible for the court to gauge from the impugned judgement and make an authoritative determination on more particularly because the Respondents themselves did not demonstrate to court in what way it can be concluded that the Learned Magistrate did not consider their submissions. In any event, the fact that the Hon Magistrate dismissed the Appellants suit should be construed to mean that she was sufficiently persuaded by the Respondents case which would ordinarily include the facts of the case and the legal arguments based on those facts which legal arguments can only be placed before the court by way of submissions. Given this scenario, the presumption then is that contrary to their assertion in the Cross Appeal, this court is satisfied that the Learned Magistrate considered the submissions and legal authorities of the Respondents in her judgement.
53. In light of my conclusions herein upon my re-evaluation assessment and consideration of the evidence in its entirety, I find that Appellant's Appeal as against the 1<sup>st</sup> Respondent has merit and the same is allowed in its entirety. It is therefore my finding that the Learned Magistrate misdirected herself in finding that the Appellant's testimony was not corroborated and on this ground alone dismissed the Appellant's case as against the Respondents in its entirety. In this regard, the said impugned judgement and all the consequential orders thereto is now hereby set aside.
54. On the cross Appeal filed by the Respondents, save for the issue raised as against the 2<sup>nd</sup> Respondent on a lack of nexus between this Particular Respondent and the accident, it is my finding that all the other issues raised are without merit and the Cross Appeal in this regard is accordingly dismissed. The upshot on my finding on the Cross Appeal therefore is that the judgement entered as against the 2<sup>nd</sup> Respondent was made in error and the said judgement and all the consequential orders thereto is now hereby set aside. As a consequence of these findings, I will now proceed and determine her claim on its merits.
55. From the Submissions filed, let the record reflect that Counsel for the Respondent did not address the issue of liability and quantum in their submissions. The only submissions on record on both are those of the Counsel for that Appellant and the court shall proceed with its assessment based on these submissions.
56. On Liability, the Appellant's evidence is that the 1<sup>st</sup> Respondent hit her off the road when he was overtaking and lost control. The Respondent did not avail any witnesses to controvert and or contradict this evidence. In this regard and coupled with my findings herein, I am satisfied that the accident was solely caused by the negligence of the respondent. I therefore hold the 1<sup>st</sup> Respondent 100% liable to compensate the Appellant in damages.
57. On Damages, Counsel for the Appellant citing various authorities submitted that the amount of Ks. 150,000/- that the learned Magistrate stated in the judgement that she would have awarded is too low in light of the injuries sustained by the Appellant and proposed an award of Ks. 500,000/-. The Appellant sustained the following injuries;
- a. Blunt injury to the head (scalp) left
  - b. Blunt injury to the face with epistaxis
  - c. Blunt injury to the neck.
  - d. Blunt injury to the chest.
  - e. Blunt injury to the right shoulder.



- f. Blunt injury and bruises to the right upper limb.
  - g. Blunt injury to the right thigh.
  - h. Bruises on the left knee.
  - i. Bruises on the right ankle laterally.
58. I have considered the award sought, the authorities cited and the injuries sustained. The Medical Report by Dr. Sokobe dated 2<sup>nd</sup> July 2019 classified the injuries as soft tissue. He did not describe them as severe or extensive. I have considered the awards that have been given by the courts and more particularly of similar jurisdiction to this court and I note that awards for similar injuries are at the range of not more than Ks. 150,000/- as is demonstrated in the following cases;
- a. Aoko Otieno Pascal v Elizabeth Awino Ouko [2023] KEHC 24463 (KLR)
  - b. Wilson Onyango Ocholla v Elly Odhiambo Owuor [2024] KEHC 7689 (KLR)
  - c. Daniel Galana Ndungu & Anor v Harrison Angote Katana [2020] eKLR
  - d. Justine Nyamweya Ochoki & Anor v Juma Karisa Kipingwa [2020] eKLR
59. In light of the above, I find the Learned Magistrate's stated award to be reasonable and within the limit of awards for similar injuries and I therefore uphold the same and award the Appellant Ks. 150, 000/- in General Damages.
60. In the end, I now hereby enter judgement in favour of the Appellant and against the 1<sup>st</sup> Respondent as follows.
- Liability 100%
  - General Damages Ks. 150,000/-
  - Special Damages Ks. 11,307/-
  - Costs and interest at court rates

**READ DATED AND SIGNED AT ELDORET ON 30<sup>TH</sup> MAY 2025**

**E. OMINDE**

**JUDGE**

