



**Adula & another v Munyue & another (Suing as Personal Representatives
of Gregory Wanyui Munyue (Deceased)) (Civil Appeal E430 of 2024)
[2025] KEHC 11394 (KLR) (Civ) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11394 (KLR)

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

CIVIL

CIVIL APPEAL E430 OF 2024

TW OUYA, J

JULY 31, 2025

BETWEEN

TOCHE AGE ADULA 1ST APPELLANT

CHATO ADO DARO 2ND APPELLANT

AND

LYDIA WANJIKU MUNYUE 1ST RESPONDENT

CHARLES MUNUE WARUI 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVES OF GREGORY WANYUI MUNYUE
(DECEASED)**

*(Being an appeal from the judgement of Hon. B. M Cheloti (PM) in
Nairobi MCCC No. E1525 of 2021, delivered on 28th February, 2024)*

JUDGMENT

1. This appeal emanates from the judgment of the lower court, in a suit which was instituted by the respondents against the appellants in their capacity as the legal representatives of the estate of the late Gregory Wanyui Munyue (the deceased). This appeal relates only to the issue of liability. In the suit at the lower court, the appellants had prayed for general damages under the Law Reform Act and the Fatal Accidents Act, special damages together with costs of the suit and interest.
2. As per the Amended Plaintiff dated 14th March, 2023, the cause of action arose from an accident that occurred on 23rd May, 2019, along Muratina Road involving motor vehicle registration number KCE 810J (the suit vehicle) owned by the 2nd Appellant in which the deceased was crushed by the said vehicle while he was cycling along the said road, and as a result he sustained fatal injuries. The respondents



- averred that the accident was caused by the negligence of the 2nd appellant's driver and/or agent in the manner in which he drove and or controlled the suit motor vehicle. The particulars of the appellant's alleged negligence were pleaded at paragraph 4 of the amended plaint.
3. In their statement of defence dated 4th October, 2022, the appellants denied the occurrence of the accident as well as any liability for its occurrence and put the respondents to strict proof thereof. They however averred that should it be found that the deceased died as a result of a road traffic accident then the same was wholly caused or substantially caused/contributed by the negligence of the deceased.
 4. After considering the evidence placed before the court as well as the written submissions filed on behalf of the parties, the learned trial magistrate found both parties liable for the accident and apportioned liability at the ratio of 85:15 in favor of the respondents against the appellants. The learned trial magistrate then proceeded to assess the damages payable to the respondents.
 5. The appellants were aggrieved by the trial court's decision hence they proffered an appeal to this court vide a Memorandum of Appeal dated 13th March, 2024. In the Memorandum of Appeal, the appellants relied on four (4) grounds of appeal in which they faulted the learned trial magistrate for failing to properly evaluate the evidence on record thus reaching an erroneous decision on the issue of liability; for failing to base her decision on the facts and evidence on record, thereby arriving at a wrongful apportionment on liability; and for failing to follow and uphold legal parameters and binding precedent on apportionment of liability in similar circumstances.
 6. On the above grounds, the appellants urged this court to allow his appeal and set aside the judgement of the lower court. The appellants also urged this court to apportion liability equally between the parties and to award them the costs of this appeal.
 7. The appeal was canvassed by way of written submissions, following the directions issued by this court on 16th July, 2024. The appellants submissions were filed on their behalf by their learned counsel AKO Advocates LLP; while those by the respondents were filed on their behalf by their learned counsel Ngonyo Munyua & Company Advocates.
 8. In their written submissions, the appellants contended that the deceased was fully to blame for the ordeal that begot him, as the accident was solely caused by his own negligence when he chose to carelessly and negligently hang behind the motor vehicle without any regard to his own safety or the safety of other reasonably expected road users.
 9. They submitted that the deceased failed to comply with traffic rules as he was not wearing any protective gears while riding on his bicycle. They further submitted that the circumstances of this accident were beyond their control as nothing would have been done to save the deceased in the circumstances.
 10. The appellants contended that no police evidence, copy of the occurrence book, or the investigations report was adduced at trial to corroborate the allegations of the respondents against the appellants. They further contended that the police abstract adduced by the respondents only confirms that the accident occurred and not that the appellants were liable or negligent on the road; as such, the deceased should be held 100% liable for the accident.
 11. It was the appellants submissions that should this court not be persuaded to hold the deceased 100% liable for the accident, then liability should be apportioned at the ratio of 50:50 between the parties.
 12. The respondents on the other hand submitted that the 1st appellants evidence on what caused the accident was hearsay, as it was derived from what he was told by an alleged passer-by; as such, his evidence cannot rebut the respondent's direct evidence. They further submitted that whereas the appellants discredited the credibility of their evidence, they did not adduce any evidence to discredit the



two eye witnesses who witnessed the occurrence of the accident. It was the respondents' submission that the evidence of the 1st appellant that prior to the accident, the deceased was hanging on the back of the lorry is not only illogical but also incredible.

13. The respondents contended that the trial court's apportionment on liability was discretionary, and that this court should only interfere with the same if it is of the opinion that the apportionment was erroneous. They further contended that based on the evidence adduced, the appellants should be found 100% liable for the occurrence of the accident, as the appellants failed to adduce evidence to prove that the deceased contributed to the occurrence of the accident.
14. They respondents submitted that they proved their case beyond the required standard, as the evidence they presented was credible and adequate as required in civil cases. They also submitted that the testimony of the two eye witnesses who witnessed the occurrence of the accident does not need to be verified by a police officer who was absent when the accident occurred, as that would be calling for proof beyond reasonable doubt.
15. It was the respondents' submissions that the allegation that the testimony of the eye witnesses can only be corroborated by the evidence of a police officer negates the principles of trials in civil cases. They submitted that the trial court's decision on liability should stand as the same was correct based on the facts adduced by the parties.
16. This being a first appeal, it is the duty of this court as a first appellate court to re-analyse, re-consider and re-evaluate the evidence tendered before the trial court and to arrive at my own independent conclusion on whether or not the findings of the trial court should stand, although I should bear in mind that I neither heard nor saw the witnesses and to make due allowance in that respect.
17. This duty was reiterated in the Court of Appeal case of [*Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates*](#) [2013] eKLR; 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-analyse 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. See the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212 wherein the Court of Appeal held inter alia that: “On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
18. I have carefully considered the grounds of appeal, the parties rival written submissions together with all the authorities cited, and I find that the main issue arising for determination in this appeal is whether the trial court's findings on liability should stand.
19. It is settled law, that apportionment of blame represents an exercise of discretion which the appellate court will not easily interfere with save in exceptional cases such as where it is clearly wrong, or based on no evidence or it is based on the application of a wrong principle.



20. This principle was reiterated in the Court of Appeal the case of *Khambi and Another v Mabithi and Another*; (Civil Appeal no. 18 of 1968); where the court expressed itself as follows:

“It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge.”

21. Again, in *Isabella Wanjiru Karanja versus Washington Malele* (1983) eKLR; the court stated as follows:

“I agree with what Law JA said in *Malde v Angira* Civil Appeal No 12 of 1982 (unreported) that apportionment of blame represents an exercise of a discretion with which this court will interfere only when it is clearly wrong, or based on no evidence at all nor did he apply a wrong principle.”

22. From the above cited cases, it is clear that for the appellants to succeed in persuading this court to interfere with the trial court’s apportionment of blame, they must show that the learned trial magistrate either based her decision on no evidence, or that she applied wrong principles or that her decision on liability was clearly wrong.

23. That being said, the respondents at the trial court called a total of three witnesses to support their claim that the deceased died as a result of the 1st appellant’s negligence. Peterson Maina Mwangi who testified as PW2 at the trial court and adopted his witness statement as his evidence in chief, recalled that on 23rd May, 2019, at around 8:20 PM, he was standing at the junction of Muratina-Pumwani road, waiting to cross the road when he witnessed the road accident that occurred.

24. It was his evidence that the deceased was cycling at the said road while carrying a gas cylinder, and he slowed down because there were bumps on the road. He stated that the suit vehicle caught up with the deceased from behind and started moving alongside him. It was his testimony that as the deceased and the suit vehicle were going over the bumps alongside each other, the driver of the suit vehicle swerved to the left so as to comfortably move over the bumps, and unfortunately the vehicle’s body hit the deceased and he fell down and was run over by the lorry. It was his testimony that he then called the employer of the deceased, who was also his family member, and informed him. That after a while, the father of the deceased came to the scene of the accident and the 1st defendant ran away from the scene of the accident.

25. PW2 stated that the 1st appellant was to blame for the accident. Given that he overtook the deceased and caused the lorry to swerve left yet he knew or ought to have known that the deceased was riding his bicycle on that side.

26. Moses Wainaina, who testified as PW3, and adopted his witness statement as his evidence in chief, stated that on 23rd May, 2019, at around 8:20 PM, he was standing at the junction of Muratina-Pumwani road, waiting to cross the road when he witnessed the road accident that occurred. It was his evidence that the deceased was cycling at the said road while carrying a gas cylinder, and he slowed down because there were bumps on the road. He stated that the suit vehicle caught up with the deceased from behind and started moving alongside him. It was his testimony that as the deceased and the suit vehicle were going over the bumps alongside each other, the driver of the suit vehicle swerved to the left so as to comfortably move over the bumps, and unfortunately the vehicle’s body hit the deceased and he fell down



- and was ran over by the lorry, as a result he sustained fatal injuries. PW3 also stated that he blamed the 1st appellant for the accident as he overtook the deceased and swerved left too close to the deceased, yet he ought to know or should have known that the deceased was riding his bicycle on that side.
27. PW3 also stated that it was not true that the deceased was hanging onto the rear of the lorry. He stated that had that been the case, then he would not have been run over by the lorry. He stated that the deceased was hit by the lorry's left side of the body and fell beneath it.
28. PW1, Charles Munyue Warui, testified that on 23rd May, 2019, at around 8:30 PM, he was called by his cousin and informed that his son had been involved in an accident. he stated that he rushed to the scene of the accident, and that the deceased was still there although he had already died. It was his testimony that he found PW2 at the scene, who was his neighbour, and who informed him that the deceased was hit by the lorry as the two were going over bumps at the junction of Pumwani and Muratina road, and that he died instantly after being ran over.
29. The 1st respondent on the other hand, who testified as DW1 and adopted his witness statement as his evidence in chief, recalled that on 23rd May, 2019, at 19:30 hrs, he was driving the suit vehicle along muratina road, near Pumwani hospital. He stated that he applied brakes near Pumwani maternity hospital at a certain bump then all of a sudden, he felt some impact at the back of the vehicle. It was his testimony that he stopped immediately and alighted to check what was happening. That he found a cyclist who had been hit on the head by the back tires lying on the ground fatally injured.
30. He stated that some witnesses who were at the scene told him that the deceased was hanging on the extreme back of the left side when he lost control as he applied the brakes at the bump. That the deceased then came in contact with the back-left tires which smashed his head.
31. I have noted that although the 1st respondent indicated that he was informed by some witnesses that the deceased was hanging on the extreme back left side of the suit vehicle at the time the accident occurred. He did not call those witnesses to confirm his allegations. Furthermore, whereas the appellants adduced a report from pinnacle insurance investigators, which stated that the deceased was 100% to blame for the accident, the said report was clearly bias as from the report, the investigator only interviewed the appellants. There was no indication that the appellants interviewed any other independent witness, who were present at the scene when the accident occurred.
32. In my considered view, the evidence adduced by the appellants did not rebut the testimonies of the eye witnesses on how the accident occurred. The testimonies of the eye witnesses were consistent on what happened prior to the deceased being hit by the suit vehicle. In my view the appellants have failed to show that the learned trial magistrate either based her decision on liability on no evidence, or that she applied wrong principles or that her decision on liability was clearly wrong.
33. Flowing from the foregoing, I am of the considered view that the present appeal lacks in merit and the same is dismissed with costs for the respondents. The trial court's decision on liability is upheld.
34. Final orders:
- Appeal dismissed. The trial court's decision on liability is upheld. Costs to the Respondent

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY, 2025.

HON. T. W. OUYA

JUDGE

For Applicant.....Arianda HB Mr Alaka



For Respondent.....Kuria

Court Assistant.....Brian

