Murianki v Nkabuni (Suing Through His Administrator Dickson Gitonga Mbuba) (Civil Appeal E006 of 2024) [2025] KEHC 11527 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E006 OF 2024

RL KORIR, J

JULY 31, 2025

BETWEEN

PETER KARIUKI JUSTUS MURIANKI ..... APPELLANT

AND

MURATHI NKABUNI (SUING THROUGH HIS ADMINISTRATOR DICKSON GITONGA MBUBA) ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. T.W. Wachira Resident Magistrate in Chuka CMCC No.E180 of 2022 delivered on 26th March, 2024.)

JUDGMENT

1. Murathi Nkabuni [now deceased] was crossing the Embu Chuka Road at Qunu on 19th December, 2021 when he was fatally knocked down by Motor Vehicle Registration Number KCN 831R Honda owned by Peter Kariuki. His son Dickson Gitonga Mbuba filed suit by Plaint dated 17th September, 2022 against the said Peter Kariuki [Defendant] on behalf of the estate of the deceased. He claimed general and special damages particularized at Paragraph 5 of the Plaint.

2. The Defendant [now Appellant] filed a Statement of Defence dated 24th April, 2023 denying the claim. He attributed negligence to the Plaintiff which he particularized at paragraph 5 of the Statement of Defence.

3. At the conclusion of the trial the court found for the Plaintiff and awarded damages as follows:-

    a. General damages

        Loss of dependency - Kshs.800,000.00

        Pain and suffering - Kshs.50,000.00

        Loss of expectation of life - Kshs.100,000.00

Sub-Total Kshs.950,000.00

b. Special damages - Kshs.299,160.00

c. Interest on the general damages from the date of the judgement herein.

d. Interest on special damages from the date of filing of the suit.

e. Costs of the suit with interest from the date of judgment herein.

4. Aggrieved by the judgement, the Appellant [then Defendant] filed the present Appeal against both liability and quantum. He listed the following grounds:-

i. That the appeal herein be allowed and the suit in the Subordinate Court be dismissed with costs.

ii. That liability and quantum of damages be varied and reduced to the extent that this Honourable Court deems fit.

iii. That the costs of this Appeal be awarded to the Appellants in any event.

5. The Appellant prayed that the judgement be set aside and damages be re-assessed afresh in line with ease current law.

6. My duty as a first appellate court is to re-evaluate and re-examine the evidence presented in the trial court and come to my own findings and conclusions. The Supreme Court of India in the case of Santosh Hazari v Purushottam Tiwari [Deceased] by L.Rs [2001] 3 SCC 179 aptly elaborated this duty in the following terms:-

> "A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgement of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it"

The Plaintiff's Case

7. The Plaintiff's case was that Murathi Nkabuni alias Mbuba Gacuca was crossing Embu Chuka road at Qunu on 19th December, 2021at around 6pm when the Defendant's Motor Vehicle KCN 831R which was negligently driven hit him. That the deceased succumbed to the injuries while undergoing treatment at Chuka Referral Hospital on the same day.

8. The Plaintiff particularized the Defendant's negligence at paragraph 5A of the Plaint.

9. The Plaintiff prayed for general and special damages. He particularized special damages at paragraph 5B of the Plaint.

The Defendant's case

10. The Defendant denied that he was the registered owner of the vehicle KCN 831R and further denied the particulars of negligence attributed to its driver. He blamed the victim for having negligently

crossed the road whereby he was hit by the side mirror and driver's door causing him injury. The Defendant particularized the negligence of Plaintiff at Paragraph 5 of the Statement of Defence. He pleaded the doctrine of volenti non-fit injuria.

11. The Appeal was canvassed by way of written submissions as directed by the court. The Appellant's submissions were dated 15th November, 2024 while the Respondent's submissions were dated 4th January 2025.

12. I have considered the Record of Appeal and the respective submissions of the parties. The two main issues for my determination are liability and quantum.

Whether the liability was apportioned correctly

13. Grounds 1, 2 and 3 of the Appellant's Memorandum of Appeal are on liability. The Appellant faulted the trial court for finding the Defendant 100% liable. He submitted that the Plaintiff's witnesses were not eye witnesses and could not testify on how the accident occurred and who was to blame. That PW1 received a call informing him that his father had been hit, while PW2 did not elaborate what exactly transpired. That PW3 stated that the deceased was hit when he was about to reach the yellow line when the driver of the motor vehicle was trying to overtake a motorcycle at high speed.

14. The Appellant further stated that PW4 stated that the witnesses had testified that the deceased rushed across the road. This part of his testimony cannot be taken into account as it amounts to hearsay.

15. The Appellant urged the court to consider that they had pleaded res ipsa loquitor which the trial court did not take into consideration.

16. The Respondent on the other hand submitted that the trial court correctly attributed the negligence to the Defendant as he had the duty of care to pedestrians and other road users. That the Appellant did not testify to controvert the evidence of the plaintiff. The Respondent relied on the same authorities it had cited in the trial court being:-

    a. Eunice Wayua Munyao v Mutilu Beatrice & 3 Others [2017] eKLR.

    b. NM & Another [Suing as representative of the Estate of LN [Deceased] v Ndungu Isaac [2020] eKLR

    c. Nickson Muthoka Mutavi v Kenya Agricultural Research Institutes [2016] eKLR and Also Treadsetters Tyres Ltd v John WEkesa Wepukhulu [2010] eKLR

    d. William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR 256.

17. I now proceed to analyse the evidence that was before the trial court in the succeeding paragraphs.

18. The Plaintiff [PW1] testified that he received a call informing him that his father was involved in a road traffic accident. When he got to the scene, he found the father lying on the left side of the road from Chuka to Embu. He saw the car that had hit him on the left side of the road heading towards Chuka. Cross-examined PW1 stated that he did not witness the accident and that the Defendant's car was on the left lane.

19. PW2 testified that on the material date 19th December, 2021 at around 6.30 pm, he was walking along Meru – Embu road on the right towards Embu when he witnessed the deceased being hit. That the deceased was on the outside of the road. Cross-examined, PW2 stated that he knew Murati Nkabuni [deceased] very well and he saw him wanting to cross the road but had not crossed the road when he was hit.

20. Joseph Kirimi Douglas [PW3] testified that he was with the deceased and both of them were trying to cross the road when the deceased was hit. He said that the deceased was ahead of him and was hit by the vehicle which was trying to overtake a motorcycle. That the car was speeding. In cross-examination PW3 said that he was not hit as he was behind the deceased.

21. No.77477 PC Sammy Otuoma of the Traffic department [PW4] testified that he investigated the accident under OB No.42/19/12/2021 involving Motor Vehicle Registration No. KCN 831R which was driven by Peter Kariuki from Embu heading towards Chuka. That Murati Nkabuni was crossing from right to left facing Chuka at about 6.30pm. That he attended the scene immediately and found the injured already rushed to hospital. That he conducted investigations.

22. PW4 further testified that the deceased did not cross the road according to procedure and may have misjudged the speed of the motor vehicle. He stated that the victim was knocked down after he had crossed the yellow line. He further stated that the accident occurred in a busy and built area and there were no skid marks on the road.

23. The Defendant closed his case without calling any witnesses.

24. The standard of proof in civil cases is one of balance of probability. It is also sound principle that whoever lays a claim before the court has the burden to prove it. That is the import of Section 107 of the *Evidence Act* which provides as follows:-

    107 [i] Whoever desires any court to give judgment as to any legal right or liability dependent on the existent of facts which he asserts mut prove that those facts exist.

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

25. With respect to negligence, the court in Kiema Mutuku v Kenya Cargo Handling Services Ltd [1991] IKAR 258 held that:-

    > " There is yet no liability without fault in the legal system in Kenya and a Plaintiff must prove negligence against the Defendant where the claim is based on negligence"

26. I have looked at the evidence of the Plaintiff. From the testimonies, of the witnesses the deceased was crossing the road when he was hit by the motor vehicle confirmed by PW1 and PW4 to be KCN 831R. The vehicle was found on the left side of the road [Chuka-Embu] while it was headed in the direction of Chuka from Embu. This means that it was not on wrong side of the road. PW3 testified that the vehicle was trying to overtake a motorcycle when it hit the pedestrian. PW3 further stated that the area was a built up area with buildings on either side. To the mind of the court, it was necessary, and indeed a legal requirement that motorists exercised heightened care while driving in such area.

27. The Investigating Officer [PW4] stated that they analyzed and documented the scene. He indicated that being a built up area, a prudent driver would move at a speed of 30-40km per hour. The Investigating Officer went on to state that there were no skid marks and explained that skid marks may not appear when a vehicle is moving at a slow speed.

28. The fact that the vehicle had crossed the yellow line means that it was overtaking at a place where overtaking was not allowed. Further, had the vehicle been moving slowly, its driver would have seen the pedestrians and slowed down or stopped to avoid knocking the deceased. It is my finding that the driver owed a duty of care to the pedestrians. He was negligent in that duty when he knocked down the deceased.

29. The Defendant did not controvert the Plaintiff's evidence which I have analyzed above. As earlier stated, the Defendant filed a Statement of Defence denying liability. However they did not lead any evidence to counter the Plaintiff's case. They closed their case without calling any witnesses.

30. I am persuaded by Lesiit J. [as she then was] in Trust Bank Limited v Paramount Universal Bank Limited & 2 others]2009] eKLR, where she held:-

> " The 2nd and 3rd Defendants closed their cases without calling a witness. It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's Defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2nd and 3rd Defendants was uncontroverted and therefore unchallenged. In Auta Singh Bahra And Another v Raju Govindji Hccc No. 548 Of 1998 [UR] Mbaluto J. held:-
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> "Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

31. It is my finding that the Plaintiff's case on negligence was uncontroverted. It is my further finding that the trial court was not in error when it found the defendant now Appellant 100% liable for the accident.

Whether the quantum was just and appropriate

32. Grounds 4, 5 and 6 relate to quantum. The Appellant submitted that the trial court was in error when it awarded a sum of Kshs.950,000/- for loss of dependency under the *Law Reform Act* when the Plaintiff had not complied with the mandatory requirement under Section 8 of the said Act. That there was no justification for the award of Kshs.800,000/- for general damages for loss of dependency. The Appellant faulted the award of Kshs.100,000/-and Kshs.50,000/- for loss of expectation of life and pain and suffering respectively as being too high. They further urged that the special damages of Kshs.299,160/- were not pleaded and proved.

33. The Respondent urged the court to uphold the award stating that the assessment and award of damages was the discretion of the trial court. They submitted that the trial court was right in adopting a global sum. They urged that the award was reasonable. With respect to special damages, the Respondent submitted that the same was pleaded and proved through the documents produced in court.

34. Assessment of damages is an exercise of discretion by the trial court and an appellant court would be slow to usurp such discretion unless it was shown that there was an error of principle. The Court of Appeal in the case of Fredrick Masaghwe Mukasa v Director of Public Prosecutions & 3 others [2019] eKLR stated that:-

> " In doing so, we shall be guided by the well-established principles as set out in Mbogo & another -v- Shah [1968] EA 93, where the predecessor of this Court stated that an appellate Court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the trial court misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration

matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

In order for this Appeal to succeed, the appellant must bring himself within the ambit of the principles set out in Mbogo v Shah [supra]. He must demonstrate to the satisfaction of this Court that the trial court exercised its discretion wrongly in making the conclusions that is it did."

35. The trial court awarded a global sum of Kshs.800,000/- for loss of dependency. The Appellant has faulted this sum as being inordinately high. They also fault it as being a double payment under both the *Law Reform Act* and the *Fatal Accidents Act*.

36. PW1 testified that the deceased was aged 75 and was still active in his farming activities. That he had one dependant who was his ailing wife.

37. The trial court used the global award formular as opposed to the multiplier approach. In the case of Mwanzi v Ngalali Mutua v Kenya Bus Ltd cited in Albert Odawa v Gichumu Githenji [2007 eKLR,] Ringera J. [as he then was] explained the two approaches as follows:-

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of Justice should never do."

38. In the circumstances of the present case, I do not see any error of principle in the approach taken by the trial court. Further, I find the award of Kshs.800,000/- reasonable.

39. With respect to special damages the Plaintiff pleaded as follows;-

    a. Post mortem charges - Kshs.20,000.00

    b. Mortuary Charges - Kshs.10,000.00

    c. Advocate charges to apply for letters of administration [Ad Ltem] - Kshs.20,000/-

    d. Funeral expenses - Kshs.238,260/-

    e. Cyber charges of copy of record of motor vehicle KCN 831R - Kshs.750.00

    f. Demand and Notice of intention to sue to the defendant - Kshs.5,000.00

40. The Appellant has urged that there was no prove of the special damages while the Respondent has faulted the Appellant for not including the Respondent's exhibits produced in the trial in the Record of Appeal.

41. At the proceedings of 19th December, 2023, the Plaintiff testified and produced a bundle of documents marked as P.Exhibits 1-13. I must point out that the trial record does not have a clear identification of each exhibit, a practice that must be discouraged. Exhibits must be clearly identifiable.

42. For the purposes of the special damages however I have seen receipts which total Ksh.315,485 against what was pleaded which total Kshs.294,010.

43. Other than submitting that the list of documents was not included in the Record of Appeal, the Respondent has neither pointed out what was contained in that bundle for this court to evaluate evidence on special damages, nor justified the award on this Appeal.

44. Based on the receipts. I have seen, and which required no explanation, I award the funeral expenses to the tune of Kshs.149,275 made up of coffin [38,500], catering [35,000], transport [10,000], tents [15000] food [40,775], Public Address [10,000]. I disallow the demand fees of Kshs.5000 as it falls in the costs of the suit.

45. The special damages will therefore be :-

    i. Post-mortem charges - 20,000

    ii. Mortuary - 10,000

    iii. Funeral expenses - 149,275

    iv. Ad Litem - 20,000

    v. NTSA -Kshs. 750

    Kshs.200,025

46. As earlier stated, the award on general damages remain undisturbed at Kshs.950,000.

47. In the final analysis, the Appeal minimally succeeds to the extent that the award is reduced to one million, one hundred and fifty thousand and twenty five shillings [Kshs.1,150,025.]

48. Each party shall bear their costs in this Appeal while costs in the suit remain as awarded by the trial court.

JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 31ST DAY OF JULY, 2025.

R. LAGAT-KORIR

JUDGE

Judgment Delivered In The Absence Of Chemeli For The Appellant, And In The Presence Of I.c Mugo For The Respondent. Muriuki [court Assistant].