



**Ndegwa & another (Suing as the Administrators of the estate of Francis Ndegwa Muruthi (Deceased)) v Nagoya Enterprises Limited & 2 others; Safety Auto Spares EA Limited (Interested Party) (Civil Appeal E093 of 2021) [2025] KEHC 12046 (KLR) (11 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12046 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E093 OF 2021  
TM MATHEKA, J  
AUGUST 11, 2025**

**BETWEEN**

**MARY WANDIA NDEGWA ..... 1<sup>ST</sup> APPELLANT  
JOHN MURUTHI NDEGWA ..... 2<sup>ND</sup> APPELLANT  
SUING AS THE ADMINISTRATORS OF THE ESTATE OF FRANCIS NDEGWA  
MURUTHI (DECEASED)**

**AND**

**NAGOYA ENTERPRISES LIMITED ..... 1<sup>ST</sup> RESPONDENT  
SAFETY AUTO SPARES LIMITED ..... 2<sup>ND</sup> RESPONDENT  
MURANGA GEOFFREY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**SAFETY AUTO SPARES EA LIMITED ..... INTERESTED PARTY**

*(Being an Appeal from the Judgment of Hon. J.D Karani, (RM) in the Resident Magistrate's Court at Makindu, Civil Case No.242 of 2018, delivered on 15th December 2021)*

**JUDGMENT**

1. On 12/11/1998 a road accident occurred involving motor vehicles KAE xxxU and KUG xxx. It was the plaintiff's case that Francis Ndegwa Muruthi (deceased) was a passenger in motor vehicle KAE xxxU which was driven so negligently that it collided with KUG xxx and as a result, he sustained fatal injuries.
2. This matter began as CMCC 9690/2001 at the Chief Magistrate's Court in Nairobi. The Plaintiff had sued Nagoya Enterprises as the only Defendant vide the plaint dated 31/10/2002. The appellants filed



- a suit in the subordinate court on behalf of the estate of the deceased seeking general damages under the Law Reform Act (LRA) and the Fatal Accidents Act (FAA)
3. By a letter dated 17/10/2005 the firm of Raikundalia & Co. Advocate stating that they were acting for Safety Auto Spares Ltd “...and for the Defendant in this matter...” (meaning Nagoya Enterprises Ltd) wrote that it was Safety Auto Spares Limited who were the registered proprietors of the said Motor Vehicle and not Nagoya Enterprises.
  4. The letter informed the Plaintiffs of this position and advised that it would be in their best interest to amend their plaint to sue Safety Auto Spares Ltd.
  5. Consequently, vide a Notice of Motion dated 10<sup>th</sup> March 2014, the Plaintiff sought leave to amend the plaint to include the said Safety Auto Spares Ltd and their driver one Muranga Geoffrey as defendants. Leave was granted on 10<sup>th</sup> September 2015. The re-amended plaint dated 22/2/2016 was filed on 18/1/2018.
  6. In the re amended plaint the plaintiffs deleted from the plaint the fact that the deceased died from the injuries that he had sustained. They removed from the plaint any indication that the deceased had died from the said injuries, and all claims related to his death including dependency. The suit now simply stated that the said Francis Ndegwa Muruthi has sustained serious injuries set out as head injury, fracture base of skull. The Particulars of dependants were deleted.
  7. The re amended plaint indicates that the Plaintiffs Mary Wandia Ndegwa and John Muruthi Ndegwa as the administrators of the estate of Francis Ndegwa Muruthi the deceased bringing the claim under the Fatal Accidents Act and the Law Reform Act on ‘her their behalf and that of the estate and dependants of the deceased. They sought special and general damages. the special damages are particularized as funeral expenses Ksh 5000, police abstract, Ksh 100, and death certificate Ksh 50 - total at Ksh. 5,150/=
  8. The matter was later transferred to Makindu Law Courts and became Makindu SPMCC 242/2018.
  9. While the matter was at Makindu, Safety Auto Spares E.A Limited sought to join the suit as an interested party and was allowed to do so vide orders made on 17/6/2020
  10. The 1<sup>st</sup> respondent filed a statement of defence, denied each allegation of fact in the plaint and put the plaintiffs to strict proof of the claim. It specifically denied being the registered owner of motor vehicle KAE xxxU. It averred, on a without prejudice basis, that the accident was wholly caused or materially contributed to by the driver of motor vehicle KUG xxx.
  11. With respect to the 1<sup>st</sup> and 3<sup>rd</sup> defendants the record of 30<sup>th</sup> October 2019 states simply “1<sup>st</sup> defendant & 3<sup>rd</sup> defendant interlocutory judgment”
  12. The 2<sup>nd</sup> defendant/respondent filed a statement of defence, denied each and every allegation of fact in the plaint and also put the plaintiffs to strict proof of the claim. It specifically denied being in existence at the time of the alleged accident.
  13. The interested party filed a statement of defence and denied each and every allegation of fact in the plaint. It specifically denied being the registered/beneficial owner of motor vehicle KAE xxxU at the time of the accident or at any time thereafter. It also denied being in existence at the time of the alleged accident.
  14. In response to the interested party’s defence, the appellants averred that the interested party was originally a business name trading as Safety Auto spares and then it changed its name to Safety Auto Spares Ltd and then to Safety Auto Spares E.A Ltd hence it was one and the same thing.



15. After the preliminaries; the matter proceeded for hearing and judgment was delivered. The learned trial magistrate dismissed the suit on the grounds that the plaintiff did not prove the occurrence of the accident as alleged or prove negligence on the part of the defendants/interested party. She that she would have awarded general damages of Ksh 1,000,000/= and special damages of Ksh 500/= if the suit had been successful.
16. Aggrieved by the decision, the appellants filed this appeal and listed the following grounds;
  - a. The honorable magistrate erred in law and fact in holding that the plaintiff did not present evidence as to who was to blame for the accident yet John Muruthi Ndegwa testified as eyewitness and his evidence was not controverted by the defendants.
  - b. The honorable court erred in law and fact in holding that the plaintiff had not proved ownership of motor vehicle registration KAE xxxU by the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> defendants yet the police abstract confirmed the 1<sup>st</sup> defendant as the beneficial owner of the motor vehicle, the copy of records for the motor vehicle confirmed the 3<sup>rd</sup> defendant as the registered owner and a letter from the defendants dated 17/10/2005 confirmed the 2<sup>nd</sup> defendant as the insured owner and none of the three defendants controverted that evidence in court.
  - c. The honorable magistrate erred in law and fact in holding that without prejudice communication is absolute yet the same is not under certain circumstances.
  - d. The honorable magistrate erred in law and fact in interpreting the documents presented to court by the plaintiff and hence arrived at a wrong judgment on liability.
17. The appeal was canvassed through written submissions. The appellant’s undated submissions were filed by the firm of Mutunga & Muindi on 6<sup>th</sup> December 2023, and following the court’s directions , further submissions were filed on 5<sup>th</sup> June 2024.

There are no submissions by the respondents.
18. They submitted that the trial magistrate dismissed the suit for lack of an eye witness yet the deceased’s son was travelling with him and he testified as an eye witness. That this was to be found at paragraph 2 of his witness statement. They submitted that the defendants did not call any witness to controvert his evidence to the effect that the driver of KAE xxxU was to blame for careless overtaking.
19. They submitted that ownership of motor vehicle KAE xxxU by the 1<sup>st</sup> defendant was proved through production of the police abstract. That the vehicle was returned to the 1<sup>st</sup> defendant after proving to the satisfaction of the police that they were the beneficial owners though not registered in the log book. They contended that the 1<sup>st</sup> defendant should have been held liable as it did not call any evidence to controvert that fact. The court was referred to *Embu Public Road Services Ltd v Riimi* [1968] EA 22 where the court of appeal stated

“Where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence
20. They submitted that they produced a copy of records showing that as at 12/11/1998, the offending motor vehicle belonged to the 3<sup>rd</sup> defendant hence there was no basis to dismiss the suit against the 3<sup>rd</sup> defendant.



21. They submitted that they produced a letter from the insurer of the offending motor vehicle confirming that the 2<sup>nd</sup> defendant was the insured owner of motor vehicle KAE xxxU at the date of the accident hence on a balance of probabilities, they demonstrated that the three defendants were jointly and severally liable as owners of the subject motor vehicle.
22. Relying on Order 1 Rule 7 of the *Civil Procedure Rules*, they submitted that the law allows a plaintiff to sue the three suspected owners for them to come to court and explain who the true owner is.
23. They submitted that the trial court erred by failing to assess the quantum of damages it would have awarded if the suit had been successful. They relied on *Joseph Muthuri v Nicholas Kinoti Kibera* (2022) eKLR.
24. With regard to quantum, they submitted that the deceased's injuries were serious as he stayed in hospital from 11/11/1998 until 09/12/1999 when he died. They submitted that he underwent a lot of pain. They relied on the following cases;
  - a. *Maintenance Ltd & Anor v W.A (Minor suing through his next friend and father J.N)* (2018) eKLR where the victim sustained a fracture at the base of the skull; comminuted mandibular fracture, loss of incisor tooth and right eye vertical dystopia. An award of Ksh 1,000,000/= was made for general damages for pain and suffering.
  - b. *Kyoga Haulers (K) Ltd & Anor v Philip Mabihi Nyingi* (2017) eKLR where the victim sustained; comminuted fracture of the skull at the occipital bone, intracerebral hematoma at the right occipital area, soft tissue injuries on the right ankle joint and chest. An award of Ksh 1,000,000/= was made for general damages for pain and suffering.
  - c. *Alfred Ngige Karanja v Charles Ndungu Mundia* (2005) eKLR where the victim sustained a head injury with fracture of the base of the skull and the middle cranial fossa, loss of consciousness for 48 hours and post traumatic epilepsy. An award of Ksh 1,200,000/= was made for general damages for pain and suffering.
25. The appellants submitted that considering that the deceased went through a lot of pain and considering the fact of inflation as well, an award of Ksh 1,500,000/= would be adequate compensation.
26. On whether a claim under FAA and LRA could be converted into a personal injury claim where the deceased had not filed a claim before he died, it was submitted that the accident occurred on 12<sup>th</sup> November 1998 the deceased was hospitalized at Kenyatta Hospital and the Nyahururu district hospital due to the injuries he sustained in the accident and was discharged on the 11<sup>th</sup> of February 1999 after he regained consciousness.
27. That he later developed as a complications pneumonia and cancer and he died on the 9<sup>th</sup> December 1999 when undergoing treatment at Nyahururu District Hospital That clearly the course of death was not the injury sustained in the accident on the 12<sup>th</sup> Of November 1998.
28. It was submitted that under order 8 rule 5 of Cap 21 an amendment to pleadings may be allowed with leave of the court under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action is in respect of which relief has already been claimed in the suit by the party applying for leave to make their amendment.
29. It was submitted that the late Francis Ndegwa died before he could lodge a claim for injuries, he sustained in a road accident on 12 November 1998 and his claim subsisted his death for compensation for the injuries he had sustained. That there was no law that requires that it is only when the deceased



had filed a claim for personal injuries sustained in an accident that his estate can proceed with his claim upon his death.

### **Duty of Court**

30. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.
31. I have considered the grounds of appeal, the rival submissions and entire record, the issues for determination are;
  - a. Whether the ownership of motor vehicle KAE xxxU was established.
  - b. Whether the finding on liability should be disturbed;
  - c. The quantum of damages awardable (if any).

### **Analysis**

#### **Ownership of motor vehicle KAE xxxU**

32. The appellants pleaded that the respondents were the owners of the motor vehicle at the time of the accident. They produced a police abstract (P. Ex 3) which indicated the owner as Nagoya Enterprises (1<sup>st</sup> respondent).
33. The 1<sup>st</sup> respondent denied ownership in its defence but did not call any witness to give evidence on its behalf. It is trite that where a party fails to call evidence in support of its case, the pleadings of such a party remain mere statements as they are not substantiated. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)*; Kisumu HCCC No. 68 of 2007, the learned Judge stated that;

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1<sup>st</sup> plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.
34. There is also *CMC Aviation Ltd v Cruisair Ltd (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835 where Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact is established, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”
35. Consequently, the appellants established that the 1<sup>st</sup> respondent was an owner of the motor vehicle at the time of the accident. According to the judgment, the finding by the trial magistrate was that ownership against the 1<sup>st</sup> respondent had been established.



36. As for the 2<sup>nd</sup> respondent, the appellants produced a letter dated 17/05/2005 (P. Ex 5) from A. Raikundalia & Co. Advocates which had been retained by M/S Safety Auto Spares Ltd (2<sup>nd</sup> respondent). The letter was written on a ‘without prejudice’ basis and it is imperative to reproduce it as follows;

“We refer to the above matter. We have been retained to act for our client M/S Safety Auto Spares Ltd and for the defendant in this matter who have instructed us to address you as hereunder;

That Safety Auto Spares Ltd and not Nagoya Enterprises is the registered proprietor of Motor Vehicle Registration Number KAE xxxU. In the premises and strictly without prejudice we have been instructed to inform you which we hereby do that unless you amend the plaint or file a fresh suit against Safety Auto Spares Ltd, Nagoya Enterprises Limited will accept no liability for damages claimed in the aforesaid suit.”

37. The trial magistrate found that the letter was not admissible as it had been written on a ‘without prejudice’ basis. The question at this juncture is whether the non-admissibility of ‘without prejudice’ communication is absolute. In *Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280; it was stated on the rule as to “without prejudice” communications that:

“The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence ‘without prejudice’ to make clear beyond doubt that in the event of negotiations being unsuccessful they are not to be referred to in at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase “without prejudice’ and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by linguistic approach to the meaning of the phrase ‘without prejudice’. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. However, these cases show that the rule is not absolute and resort may be had to the ‘without prejudice’ material for a variety of reasons when the justice of the case requires it...”

38. In our case, the parties were not negotiating on any settlement the but the appellants acted on the letter and amended their plaint to include Safety Auto Spares Ltd as the 2<sup>nd</sup> respondent. It is my view that the without prejudice was not on the issue of ownership but on the issue of liability. Hence it is my view that the two, 1<sup>st</sup> and 2<sup>nd</sup> defendants had something to do with the m/v and the plaintiffs were right to include the 2<sup>nd</sup> defendant as a party. The 2<sup>nd</sup> defendant was served and filed their defence. It was up to the plaintiff to establish their liability.

39. This is supported by the fact that although the firm of Raikundalia & Co. Advocates was retained by the 2<sup>nd</sup> respondent, it was also speaking on behalf of the 1<sup>st</sup> respondent and the inference to be drawn is that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had a connection regarding motor vehicle KAE xxxU. The justice of this case demands that the letter from A. Raikundalia & Co. Advocates (P. Ex 5) be considered for purposes of establishing that the 2<sup>nd</sup> respondent was the registered owner of the motor vehicle. In rejecting the letter, the trial court was in error.



40. As for the 3<sup>rd</sup> respondent, they produced a copy of records (P. Ex 6a) showing that the registered owner as at 13/05/2014 was Muraya Geoffrey. This name is different from the one pleaded in the plaint and the plaintiffs did not adduce any evidence showing that Muranga Geoffrey and Muraya Geoffrey is one person. Further, the said registration was as at 13/05/2014 and the accident is said to have happened on 12/11/1998. There was no evidence that the 3<sup>rd</sup> respondent was the owner of the motor vehicle at the time of the accident.
41. As for the interested party, the appellants averred that it was originally a business name trading as Safety Auto Spares and then it changed its name to Safety Auto Spares Ltd and then to Safety Auto Spares E.A Ltd hence it was one and the same thing. The interested party produced a certificate of incorporation showing that it was incorporated on 21/03/2005. It is therefore clear that it was not in existence at the time of the accident. In cross examination of the interested party's legal officer, the witness said that he was surprised that the director of their company was also the director of the 2<sup>nd</sup> respondent. In reexamination however, he conceded that he had not seen any document showing directorship of the 2<sup>nd</sup> respondent or the location of the 2<sup>nd</sup> respondent or change of name filed. Indeed, the plaintiffs did not produce anything showing nexus between the interested party and the 2<sup>nd</sup> respondent hence no basis to conclude that it was one company.
42. The upshot is that, on a balance of probability, the appellants proved that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the owners of motor vehicle KAE xxxU.

### **Liability**

43. The circumstances of this court requires that the court determines whether or not the claim is tenable. This is because of the convoluted path the matter has gone through: starting with the wrong defendants, then misplaced claim, the plaint being amended twice to a whole new cause of action.
44. The claim is brought under both the [FAA](#) Cap 32 and the [LRA](#) Cap 26 of the LoK.
45. The [Fatal Accidents Act](#) is described as 'An Act of Parliament for compensating the families of persons killed in accidents'. At s. 3 it states;

Action maintainable against person causing death through wrongful act;

Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death was caused under such circumstances as amount in law to felony.

46. It states further at s. 4 inter alia

Action to be for benefit of family of deceased

- (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased;

47. At the outset it is evident that this claim is not tenable under this [Fatal Accidents Act](#) as the death was not as a result of the accident.



48. Part II of the Law Reform Act provides for the Survival of Causes of Action

Section 2 of the Act provides

(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

(2) Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

(a) shall not include any exemplary damages;

(b) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry; and

(c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either—

(a) proceedings against him in respect of that cause of action were pending at the date of his death; or

(b) proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation.

49. In this case the cause of action for damages was vested in him but he died before he could file the cause

50. There were no proceedings pending before his death.

51. Was the matter filed within the statutory period as per s. 3 of the Act? The limited grant of letters of administration in Nbi HCC P&A 2339 of 2001 in the estate of Francis Ndegwa Muruthi was issued on 27<sup>th</sup> September 2001. The original plaint was filed on 31<sup>st</sup> October 2001 in Milimani CMCC 9690 of 2001. It was therefor filed within the requisite time as required by the law.

52. The appellants pleaded that the deceased was travelling aboard motor vehicle KAE xxxU when the driver managed it so negligently that it collided with motor vehicle KUG xxx and the deceased sustained serious bodily injuries.

53. PW1 was John Muruthi Ndegwa and he adopted his statement dated 08/10/2002 as his evidence in chief. This was the same statement that supported the claim for damages under the FAA. He stated that the deceased was his father and was a carpenter by profession. That on the night of 11-12/11/1998, he was with his father in motor vehicle KAE xxxU which was being driven by one of the persons who had given the deceased work in Mombasa. On reaching Tangu area near Salama, their driver was at a



very high speed of about 140 KPH and while attempting to overtake, he came face to face with a vehicle from the opposite direction and an accident occurred out of which (Francis) sustained injuries severe head injuries , fracture of the base of the skull.

54. It was in his statement that Francis was taken to Machakos General Hospital ,to 20/11/1998, referred to KNH, admitted for ‘some time’ discharged to a hospital near home as his spinal cord was affected, he could not walk without assistant, difficulties with talking: was admitted to Nyahururu District Hospital , discharged on physiotherapy but died on 9<sup>th</sup> December 1999
55. On cross examination he confirmed that death was from Pneumonia. That the m/v belonged to one Muraya George and Further that Safety Auto Spares Limited were the owners of the m/v.
56. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not participate at trial .
57. The Interested party called one witness, the legal officer . He told the court that they joined the matter because they were served with pleadings . He said the Company was registered in 2005, and was not in existence in 1998 when the accident allegedly happened. He denied that the interested party came into existence when the 2<sup>nd</sup> respondent changed its name.
58. The police abstract shows that there was mv reg no. KAE xxxU Pajero whose owner was Nagoya Enterprises. The copy of records dated 13<sup>th</sup> May 2014 shows the owner as Muraya George. The Original Police abstract does not show the registration no. of the other m/because that part is torn. It is not clear where the particulars KUG xxx came from. The plaint does not say who the owner was.
59. The re amended plaint named Nagoya Enterprises, Safety Auto Spares Limited and Muranga Geoffrey as the owners of m/v registration no KAE xxxU
60. The particulars of negligence pleaded were that; the driver failed to keep any proper look out or to observe the traffic rules, driving without due care and attention, driving excessively in the circumstances speed wise, failing to brake, swerve, manage or otherwise control the motor vehicle so as to avoid the accident.
61. The police abstract says that the accident was between the m/v registration no. KAE xxx U Pajero and a passenger
62. It is noteworthy that no driver was named in the pleadings or the Police Abstract. It is noteworthy that the accident happened in the day time and neither of the drivers was identified.
63. So what evidence was there to support this claim?
64. It was submitted that PW1 was the eye witness?
65. The plaintiff ‘s evidence that he was an eye witness is doubtful. His testimony and statement on the record do not give a credible account of what transpired. There is no corroboration of material facts and there are gaps.
66. There nothing to support his claim that he was travelling in the accident m/vehicle. He says he was in m/v reg no KAE xxx. He names the driver as one Mr. Kashmir. It is not explained why this driver was not mention in the abstract or the pleadings.
67. The Police abstract produced by the plaintiff bears the names of three witnesses Stephen Muhoho, Pritpal Singh, Cpl Patrick Musyoka, and he is not one of them, yet he was the key witness. If the witness was travelling in the said m/v his name would have been in the Police Abstract as he too was a victim of the accident. It is noteworthy that he says nothing about what happened to him when the accident happened, raising further doubt as to whether he too was in the accident.



68. Though the evidence was not controverted and it was also not persuasive and the plaintiff having been put to strict proof of the claim, the plaintiff bore the duty to prove the same.
69. The proof of the allegations of negligence cannot be proved from inference from the occurrence of the accident. The burden was upon the plaintiff and the plaintiff failed to discharge it.

### **Quantum**

70. Were the injuries alleged to have been sustained by the subject of this cause proved?
71. The plaint indicates that he sustained head injury and fracture at the base of the skull. The Letter from Nyahururu district hospital states that he is 'said to have been involved in a traffic accident'. That suggests that the writer of the letter did not have any evidence to support was being said as the letter was written posthumously. The letter states that on admission to Nyahururu hospital he was diagnosed with pneumonia and convulsions. The letter did not attach any of the treatment notes from Machakos Hospital, Kenyatta National Hospital, and Nyandarua District Hospital. He stated that the subject of this case was discharged to follow up on physiotherapy and surgical toilet. Not even these follow ups notes were availed to court.
72. In addition, there was no P3 filled for the subject of this cause( the deceased) .
73. The certificate of death spoke of a cause of death un related to the accident: pneumonia/coma/stroke
74. The Police abstract that was produced as evidence is dated 10/7/2000. It makes reference to IAR(F)44/98 OB 26 of 12<sup>th</sup> November 1998. It lists persons injured as Francis Ndegwa and that he was a passenger. The nature of injury is stated as 'Fatal'.
75. From the Police abstract it appears that the accident happened and the Francis Ndegwa who was involved died on 12<sup>th</sup> November 1998, since that is the OB entry of that date. So, who is this other Francis Ndegwa who sustained injuries and died one year later? This is yet another gap in the plaintiff's case.
76. Clearly the plaintiff did little to support the new claim in the re amended plaint for general damages.
77. It is noteworthy that the plaint states that the result of the collision between the two m/vehicles was that 'the deceased sustained serious bodily injuries and died'. It bears a claim for Funeral expenses, death certificate on top of the cost for the police abstract.
78. There is no basis at all for the claim for funeral expense when the claim is not for damages arising from the death itself.
79. This witness testified that though the accident happened on 12/11/1998, the deceased died on the 9/12/1999. That the cause of death was stated in a letter addressed to whom it may concern from Nyahururu District Hospital dated 4<sup>th</sup> January 2000 to be pneumonia complicating an old head injury. The plaintiffs did not place evidence before the court to connect the head injury to the death of the deceased.
80. From the Police abstract there was an accident involving two m/vehicles. That the deceased was a passenger in the m/v registration no. KAE xxxU. He sustained injuries but died a year later from Pneumonia. Other than a letter there was the certificate of death which states that the cause of death was cardiopulmonary arrest due to pneumonia coma/stroke. The certificate of death bears no mention of the head injury and shows place of death as Nyandarua District Hospital.



81. Other than that, the accident happened and that one Francis Ndegwa Muruthi was a passenger, and that he died out of the accident, there is a question as to whether that said Francis was the same one who sustained injuries that led to the alleged hospitalization and eventual death from pneumonia.
82. The plaintiff's case is mired in self inflicted unresolved contradictions and inconsistencies that make it difficult for this court to asses any damages as no basis has been laid for the same.
83. In the circumstances, I find the claim untenable.
84. I find no basis upon which to asses general damages.
85. The appeal is without merit and the same is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED ON CTS THIS 11<sup>TH</sup> AUGUST 2025**

.....

**MUMBUA T. MATHEKA**

**JUDGE**

Appellant's Advocates

M/S Mutunga & Muindi

