



**Wanjohi (Suing as the Administratrix of the Estate of Clement Mbatia Kabugi-Deceased) v Mbanya & 2 others (Civil Case 381 of 2010) [2025] KEHC 12322 (KLR) (Civ) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 12322 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL CASE 381 OF 2010**  
**SN MUTUKU, J**  
**AUGUST 6, 2025**

**BETWEEN**

**ELIZABETH WAMUYU WANJOHI (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF CLEMENT MBATIA KABUGI-DECEASED) ..... PLAINTIFF**

**AND**

**JOHN MURIITHI MBANYA ..... 1<sup>ST</sup> DEFENDANT**  
**SIMON KINOTI IKUNDA ..... 2<sup>ND</sup> DEFENDANT**  
**VERA ADHIAMBO ODERA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**The Plaintiff**

1. Clement Mbatia Kabugi, the deceased, brought the instant suit by way of a plaint dated 26<sup>th</sup> July 2010 against John Muriithi Mbanya, Simon Kinoti Ikunda and Vera Adhiambo Odera (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively), seeking general damages, special damages in the sum of Kshs. 158,200/-, costs of the suit and interest thereon, arising out of a road traffic accident causing him bodily injuries. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were sued in their respective capacities as the beneficial and registered owners of the motor vehicle registration number KAT 470L (the subject motor vehicle), while the 1<sup>st</sup> Defendant was sued in his capacity as the driver of the subject motor vehicle and agent of the 2<sup>nd</sup> Defendant.
2. The Plaintiff claimed that sometime on or about 27<sup>th</sup> June 2008 the deceased was lawfully walking along Kinaisha Street in Ongata Rongai area at around 6.20pm, when the 1<sup>st</sup> Defendant so carelessly, negligently and/or recklessly drove, managed and/or controlled motor vehicle registration number KAT 470L that it lost control and knocked the deceased, resulting in severe injuries. The particulars



of negligence are pleaded in the plaint. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are deemed vicariously liable for the accident. The Plaintiff also relied on the doctrine of *res ipsa loquitur*.

3. The record shows that upon the request of the deceased, an interlocutory judgment was entered against the Defendants on 8<sup>th</sup> June 2010 for their failure to enter appearance within the statutory timelines.
4. The record further shows that sometime thereafter, the deceased died and Elizabeth Wamuyu Wanjohi successfully applied to be substituted as the Plaintiff, in her capacity as the administratrix of the estate of the deceased.
5. Consequent to the interlocutory judgment, the matter proceeded for formal proof and final judgment was delivered in favour of the Plaintiff and against the Defendants on 24<sup>th</sup> April 2015.
6. The 2<sup>nd</sup> Defendants applied to set aside the judgment entered against him. Vide a ruling delivered on 2<sup>nd</sup> February 2017, the court set aside the judgment and granted leave to the 2<sup>nd</sup> Defendant to file a statement of defence out of time.
7. The Statement of Defence
8. The 2<sup>nd</sup> Defendant entered appearance and filed a statement of defence dated 14<sup>th</sup> February 2017 denying the key averments in the plaint and liability. He pleaded that in the alternative and without prejudice to the foregoing denials, if an accident did occur, then the same was solely caused and/or substantially contributed to by the negligence of the deceased. He set out the particulars thereof under paragraph 5 of the statement of defence.

### **The Evidence**

9. When the suit came up for hearing on the scheduled date, neither the 2<sup>nd</sup> Defendant nor his advocate was in attendance despite there being evidence of service of a notice to that effect. The matter therefore proceeded *ex parte*, with the Plaintiff's case.
10. The Plaintiff relied on the evidence of Dr. Okemwa Minda who had previously testified on 18<sup>th</sup> June 2014 as PW1. The doctor had produced a medical report he had prepared in respect of the deceased as P. Exhibit 1.
11. The Plaintiff, who testified as PW2, adopted her signed witness statement dated 21<sup>st</sup> July 2014 and produced her list and bundle of documents of like date as exhibits. She testified that she was married to the deceased and that together, they had two (2) children born in the years 1984 and 1987 respectively; that on the material date, she received a telephone call urging her to visit the scene of the accident, where she found the deceased, who had been injured and that subsequently, the deceased was taken to Kenyatta National Hospital (KNH) where he was admitted and received treatment before being discharged.
12. The Plaintiff further testified that the deceased later died on 21<sup>st</sup> July 2011. She testified that prior to his death, the deceased was working at General Motors Ltd as a driver, though she could not confirm the extent of his earnings.
13. It was her evidence that the 2<sup>nd</sup> Defendant was the owner of the subject motor vehicle, while the 1<sup>st</sup> Defendant was its driver on the material date and that she is before the court seeking compensation on behalf of the estate of the deceased, both on general and special damages.



## Written Submissions

14. I have noted that the Plaintiff had filed written submissions on liability and quantum of damages. At the close of her case, she did not indicate whether she was relying on those submissions or not. Given that neither of the defendants participated in the trial, I find no prejudice in considering the submissions filed herein.
15. The Plaintiff has submitted that the 1<sup>st</sup> Defendant ought to be found wholly liable for the accident, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants ought to bear vicarious liability for the acts or omissions of the driver, the 1<sup>st</sup> Defendant; that the 1<sup>st</sup> Defendant faced criminal charges in relation to the accident in Traffic Case No. 3543 of 2008 at the Chief Magistrate's Court at Kibera, where he pleaded guilty and was fined a sum of Kshs. 3,000/- in default, one (1)-month imprisonment and that following the accident, the deceased developed other complications whereas he had previously enjoyed good health.
16. On quantum, the Plaintiff has proposed an award of Kshs. 2,500,000/- under the head of general damages for pain, suffering and loss of amenities upon consideration of the nature of injuries sustained by the deceased, namely, distal fracture of the femur in the right supracondylar region of the knee; right elbow dislocation and deformity and soft tissue injuries in the right lower paraspinal region and lower limbs. She relied on the case of Michael Njagi Karimi v Gideon Ndungu Nguribu & another [2013] KEHC 6544 (KLR) where the court awarded a sum of Kshs. 2,000,000/- in respect of compound fractures of the right tibia and fibula, closed fractures of the right radius and the right ulna, and a closed fracture of the left femur.
17. The Plaintiff also relied on the case of Mwaura Muiruri v Suera Flowers Limited & Benson Maundu - Nakuru HCCC No. 189 of 2009 in which the court awarded a sum of Kshs. 1,450,000/- under the same head, at the instance of a plaintiff who suffered compound double fractures of the right leg upper and lower 1/3 tibia-fibula, comminuted fractures of the right humerus upper and lower third of the tibia, multiple lacerations on the face and soft tissue injuries.
18. The Plaintiff further sought special damages to the tune of Kshs. 158,200/- arguing that the same have been both pleaded and proved by way of evidence. The Plaintiff has thus urged that judgment be entered as prayed.

## Analysis and Determination

19. I have considered the pleadings filed and the evidence tendered at the trial, as well as Plaintiff's submissions and authorities relied on. The 1<sup>st</sup> and 3<sup>rd</sup> defendants did not challenge the interlocutory judgment already in place against them.
20. In my view, the issues presenting for determination are liability against the 2<sup>nd</sup> Defendant and quantum of damages payable by all the defendants to the Plaintiff.
21. By virtues of Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, the burden of proof lies with the Plaintiff. This section provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”



22. I bear in mind the evidential burden of proof, captured in Sections 109 and 112 of the same Act as follows:

“ 109. 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 the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”

23. The abovementioned provisions were discussed in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal rendered that:

“ As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

24. I have examined the evidence on record, both oral and documentary. The evidence shows that an accident took place on the material date and at the place pleaded in the plaint, resulting in bodily injuries to the deceased. Regarding the question of ownership of the subject motor vehicle, I have examined the Plaintiff’s bundle of documents collectively produced as P. Exhibit 2. The 3<sup>rd</sup> Defendant is shown as the owner of the subject motor vehicle, at all material times. The law on this subject provides that the contents of the copy of records are deemed to be ‘prima facie’ evidence of ownership pursuant to the provisions of Section 8 of the *Traffic Act*, Cap. 403 Laws of Kenya which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner.

25. Upon a further examination of the record, I have noted the police abstract dated 17<sup>th</sup> July 2008 also found in the Plaintiff’s bundle of documents produced as exhibits. The 2<sup>nd</sup> Defendant is listed as being the owner of the subject motor vehicle as at the material date. No contrary material was tendered to rebut this position, whether in the 2<sup>nd</sup> Defendant’s statement of defence or by way of evidence. In the absence of any contrary evidence therefore, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in *Wellington Nganga Muthiora v Akamba Public Road Services Ltd & Another* (2010) eKLR as referenced in the case of *Lochab Transport (K) Limited & another v Daniel Kariuki Gichuki* [2016] eKLR thus:

“ Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the Plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”



26. From the foregoing, I am satisfied that the Plaintiff has sufficiently demonstrated that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the beneficial and/or registered owners of the subject motor vehicle at all material times.
27. On the subject of negligence, it is the evidence by the Plaintiff, in sum, that the 1<sup>st</sup> Defendant directly caused the material accident through his negligence and that he therefore ought to be held fully liable, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants ought to be held vicariously liable. No contrary evidence was tendered to controvert this position.
28. From the totality of the evidence before the court, the deceased was walking along the above-referenced road when the accident took place. From a perusal of the police abstract on record, the court observed that the 1<sup>st</sup> Defendant was listed as being the driver of the subject motor vehicle on the material date. The police abstract further discloses that the aforesaid Defendant was charged in relation with the accident vide Traffic Case No. 3543 of 2008 and was found guilty and consequently fined. As earlier mentioned, the contents of the police abstract remain unchallenged.
29. The particulars of negligence on the part of the 1<sup>st</sup> Defendant as the driver of the said motor vehicle has not been challenged. The accident resulted in bodily injuries of the deceased. This, too, has not been challenged. Further, by virtue of credible proof of their ownership of the subject motor vehicle at all material times, I am satisfied that there is basis upon which to find the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vicariously liable for the accident.
30. It is also worth mentioning that where a defendant pleads contributory negligence on the part of a plaintiff or deceased person, as did the 2<sup>nd</sup> Defendant herein, he or she must adduce evidence to prove those specific acts of contributory negligence. In the present instance, I did not find any such evidence by the 2<sup>nd</sup> Defendant demonstrating that the deceased contributed to the accident in any manner. I find support in the Court of Appeal's decision in *Embu Public Road Services Ltd v Riimi* [1968] EA 22 when it stated that:
- “...where the circumstances of the accident give rise to the inference of negligence then the defendant, 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.”
31. After careful consideration of all the evidence tendered orally and through documents, it is my finding, and I so hold, that the Plaintiff has proved the case against the Defendants on a balance of probabilities. Consequently, I find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly and severally liable.
32. On the issue of quantum, I address the damages sought under general and special damages. On general damages for pain, suffering and loss of amenities, the plaintiff particularized supracondylar fracture of the right femur and deformed right knee
33. The medical report dated 8<sup>th</sup> July 2011 prepared by Dr. M.P. Okemwa (P. Exhibit 1), the injuries shown are:
- a. a distal femur fracture in the right supracondylar region of the knee,
  - b. right elbow dislocation and deformity, and
  - c. soft tissue injuries in the right lower paraspinal region and lower limbs.



34. The doctor, upon examining the deceased, found that the long-term effects of the injuries sustained would include osteoarthritis of the right knee which would require a total knee replacement at an estimated cost of Kshs. 2,000,000/-. The doctor further stated that the long-term use of analgesics resulted in anemia to the deceased, who had similarly developed psoriasis and hypertension. Consequently, the doctor proceeded to assess permanent disability at 70%.
35. I have considered the proposal by the Plaintiff for an award of Kshs. 2,500,000/-, under this heading. It is my view that this figure is on the higher side and that the supporting authorities cited in the Plaintiff in her submissions entailed severe injuries.
36. I have considered the case of Elizabeth Wamuyu Wanjohi v John Muriithi Mbanya & 2 others [2015] KEHC 7220 (KLR) where a plaintiff who suffered a fracture of the right femur and a deformed right knee was awarded a sum of Kshs. 1,500,000/-. In Shiro v Mini Bakeries (NBI) Limited [2024] KEHC 16642 (KLR), the court awarded general damages in the sum of Kshs. 1,300,000/ under this head, at the instance of fracture and soft tissue injuries with permanent disability being assessed at 30%. As earlier mentioned, permanent disability in the present instance was assessed at a higher percentage of 70%.
37. Taking into account all the comparable awards made above, inflation, the passage of time and other vitiating factors, this court is persuaded to award a sum of Kshs. 1,800,000/- under the head of general damages for pain, suffering and loss of amenities.
38. On special damages, the standing legal position on this is that special damages must be specifically pleaded and strictly proved. This was reaffirmed by the Court of Appeal in David Bageine v Martin Bundi [1997] eKLR when it stated thus:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;

“Plaintiff must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.’”

39. The Plaintiff pleaded special damages as follows:
- a. Police abstract Kshs. 200/-
  - b. Medical report Kshs. 2,000/-
  - c. Medical treatment Kshs. 156,000/-
- Total Kshs. 158,200/-
40. She tendered the following receipts as P. Exhibits 3:



- a. Copy of a receipt dated 1<sup>st</sup> October 2009 for the sum of Kshs. 500/- in obtaining the copy of records.
  - b. Copy of a receipt dated 17<sup>th</sup> June 2011 in preparation of the medical report-for the sum of Kshs. 3,000/-
  - c. Travel receipts totaling a sum of Kshs. 96,000/-
  - d. Hospital and medical related receipts totaling a sum of Kshs. 86,492.73
41. Upon examining the court record, I have noted that the Plaintiff did not tender any receipts to support the amount pleaded for preparation of the police abstract. Likewise, it is noted that while the Plaintiff tendered receipt under (b) for the sum of Kshs. 3,000/- she had pleaded in her Plaint a sum of Kshs. 2,000/-. The Plaintiff would therefore only be entitled to the sum of Kshs. 2,000/- which was both specifically pleaded and strictly proved. In addition, while it is apparent that the Plaintiff availed various receipts pertaining to travel related costs incurred, the same were not pleaded and are therefore will not be awarded.
42. Further to the foregoing, it is apparent that the receipt referenced in (a) above pertaining to the copy of records was not pleaded and cannot therefore be awarded. In the same manner, out of what was pleaded, only a sum of Kshs. 88,492.73 on medical and related expenses incurred, as well as expenses in obtaining the medical report, was strictly proved. This is the sum this court can award, upon being guided by the foregoing principles in awarding special damages and as rightly submitted by the Defendant.
43. Consequently, judgment is hereby entered in favour of the Plaintiff and against the Defendants jointly and severally, in the manner hereunder:
- a. Liability 100%
  - b. General damages for pain, suffering and loss of amenities .....Kshs. 1,800,000/-
  - c. Special damages.....Kshs. 88,492.73  
Total Award.....Kshs. 1,888,492.73
  - (c) Costs of the suit
  - d. Interest at court rates on the general damages from the date of judgment until payment in full.
  - e. Interest on the special damages at court rates from the date of filing the suit until payment in full.
44. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 6<sup>TH</sup> AUGUST 2025.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Elizabeth Wamuyu the Plaintiff

N/A for the Defendants

