REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL APPEAL NO. 13 OF 2018.

KENYA PLANT INSPECTORATE SERVICES..APPELLANT

VERSUS.

JAPHETH MUKOYANI KHOYA (*Suing as the personal and legal representative of the estate of*

EVAN MUTOTO MUKOYANI (DECEASED)**...1ST RESPONDENT**

ISAAC MWANGI...2ND RESPONDENT

JESSIKAY ENTERPRISES LTD...3RD RESPONDENT

*[An Appeal from Judgment and Decree in Original Bungoma CMCC No. 532/2013 on 5.3.2018 by E.N. Mwenda (**Senior Resident Magistrate**].*

J U D G M E N T

The 1st Respondent Japheth Mukoyani Khaoya was the father of Evans Mutoto Mukoyani (deceased) and on Personal representative of the estate of the deceased Evans Mutoto Muyoyani. By Plaint dated 3.12.2013 the 1st Respondent sued Isaac Mwangi (2nd Respondent) Jessikay Enterprises Limited (3rd Respondent) and Kenya Plant Health Inspectorate Services (the Appellant) seeking general damages, special damages arising from a road traffic accident involving the appellant's Motor vehicle and the deceased where he sustained serious injuries from which he died. The 1st Respondent therefore prayed for damages under the Law Reform Act and Loss of dependency under the Fatal accident Act.

After the hearing, the learned trial magistrate found the driver of the appellant negligent and therefore found the appellant 100% liable. Aggrieved by the Judgement the appellant preferred this appeal on the following grounds;

1. ***THAT** the learned trial magistrate erred in fact and law in holding that the plaintiff had proved his case on a balance of probabilities as against the Appellant.*

2. ***THAT** the learned trial magistrate erred in law and fact in holding the Appellant is 100% liable in negligence and/or at all.*

3. ***THAT** the learned trial magistrate erred in law and fact in failing to hold that the 1st Respondent and the deceased were substantially liable in negligence.*

4. ***THAT** the learned trial magistrate erred in law and fact in failing to evaluate the evidence in its totality and thereby holding the Appellant 100% liable.*

5. ***THAT** the learned trial magistrate erred in law and fact in adopting a multiplier of 33 years without being guided by the well laid down principles of law.*

6. ***THAT** the learned trial magistrate erred in law and fact in adopting the wrong principles in assessment of damages awarded to the 1st Respondent.*

7. ***THAT** the learned trial magistrate erred in law and fact in awarding damages under the Law Reform Act and the Fatal Accident Act without taking into consideration that the same devolve to the same individuals.*

The evidence before the trial Court was that on 21.11.2012 Pw1 Martha Nafula Khaoya an aunt of the deceased was along Kimilili –

Bungoma road near river Kibungei Bridge when she saw a Pedal Cyclist riding his bicycle facing Chwele. She saw 2 vehicles behind the Cyclist. The vehicles behind the cyclist was a Matatu and a Prado. It was on a slope and she saw the Matatu hit the Cyclist by the side Mirror; the cyclist from the impact started moving in a zig-zag manner when the next vehicle a Prado hit him too. The Matatu was Reg. No. KBW 465T and Prado Reg. No. KAW 276U. As a result of the impact the deceased fell down and died.

Jackson Were the driver of Motor Vehicle KAW 465T Matatu testified that while driving the said Motor vehicle along the said road he saw a cyclist who was a head of him and was waving to people on a tractor. The Cyclist swerved to the right side of the road. He was then hit by a vehicle KAN 276U which was behind him and fell on the road. The statement of Francis Wambugu the driver of Motor Vehicle KAN 276U Nissan Terrano was adopted as evidence. He testified that he was driving his Motor Vehicle following Matatu when he suddenly saw an object thrown towards the bumper of his vehicle. He saw it was a Pedal Cyclist who had been hit by a Matatu and thrown to his side in the middle of the road. The trial magistrate upon considering this evidence in his Judgment stated;

> ***"15. It is also apparent from the evidence of Dw3 that he suddenly slowed down when he saw the brake lights applied by KAW 465T. The explanation given by the driver of KAW 465T is that he braked and swerved to the extreme right because the deceased strayed onto his path. There is common consensus that the deceased was impacted on the left side of the road. Indeed the evidence by Dw1 and Dw2 is that there was an oncoming tractor on the right lane. Therefore the deceased was struck on his side of the road. In this circumstances it would have been prudent for the Dw2 to slow down to the speed of the deceased on the bicycle and overtake him safely. The sudden application of brakes, the sudden swerving to the extreme right suggests that he was also tailgating (following closely) the deceased on his bicycle. It is also probable that he clipped the deceased with the side mirror causing him to zig zag on the road; the evidence by Pw1 is that she saw this happen. She says she was about 100 metres away.***
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> ***16. The Dw1 and Dw2 are also adamant that the motor vehicle KAW*** **465T** ***did not hit the deceased and that the deceased is to blame because he was waving at an oncoming tractor. It must be remembered that the deceased had the right to the whole left lane. The motor vehicle KAW*** **465T** ***could only overtake when it was safe to do so. Therefore it cannot be said that the deceased contributed to the accident by zigzagging on his rightful lane.***
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> ***17. The 3rd defendant also submits that the inquest was not able to apportion blame. This is certainly not unusual as the standard of proof in an inquest is beyond reasonable doubt. The standard of proof in a civil suit is a balance of probabilities. The third defendant also admits that KAW*** **465T** ***was obstructing him, yet the evidence is that he was trying to overtake it.***
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> ***18. To be liable in tort, the evidence must disclose a causal link between the breach of duty of care and the damage that it complained off. In this case the only person that links the motor vehicle KAW*** **465T** ***to the accident is Pw1 and she says that she saw, the vehicle hit the deceased with the side mirror from 100 metres away. From that distance she could not make out the facial features of the deceased and only identified him when she saw his corpse later. It is therefore unlikely that she saw the impact of the side mirror on the body of the deceased. Given that there is contradictory evidence by Dw1 and Dw2 I am prepaid to hold that what is certain is that Dw3 is tailgating Dw2 as he overtook and he hit the deceased. I am therefore convinced that Dw3 was 100% liable and consequently the 3rd Defendant is vicariously liable."***

It is the finding of the trial court that the accident involved the deceased cyclist and two vehicles. From the evidence of the witnesses, the Matatu KAW 465T hit the motor cyclist and from the impact swerved and started moving in a zig-zag manner on the road and then was knocked by the Motor Vehicle KAN 276U. It is evident therefore that the hitting of the Pedal Cyclist by the Matatu, caused him to move in a zig zag manner on the road and subsequently being hit by Motor Vehicle KAN 276U. In terms of causation the Motor Vehicle KAW 465T caused the Cyclist to swerve to where the Motor vehicle KAN 276U found him and knocked him. That being so both the driver of Motor vehicle KAW 465T Matatu and KAN 276U contributed to the accident where the Pedal Cyclist the deceased died. I therefore find both the 2nd and 3rd defendant drivers liable. I therefore set aside the Judgment on liability at 100% against the appellant and substitute thereof that the 2nd defendant (Jessikay Enterprises) bears 50% liability and 3rd defendant (Kenya Plaint Health Inspectorate Services – the Appellant) 50% liability.

On quantum I do not find any grounds advanced for this court to interfere with the assessment which is hereby confirmed, save that the 2 nd defendant (Jessikay Enterprises) will pay 50% and 3rd defendant/appellant (Kenya Plaint Health Inspectorate Services – the Appellant) pay 50% of the quantum of damages. Each party to bear its costs.

Dated, signed and delivered at Bungoma this 29TH day of May 2020.

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S.N. RIECHI

JUDGE