REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.59 B OF 2010

BETWEEN

MUTUNGA KARORI MUTOKULEA (*suing as a legal representative & administrator of the estate of)* FREDRICK MWITI MUTUNGA *(deceased)*.....APPELLANT

AND

1. JADIEL GICHURU

2. FRIDAH K. THURANIRA.....RESPONDENTS

(Being an Appeal from the Judgment and Decree of Hon .S.M Githinji, SPM, in Nkubu SPMCC No.69 of 2006 dated 13th May 2010).

JUDGMENT

The appellant herein, **MUTUNGA KARORI MUTOKULEA**, was the plaintiff in the Nkubu Senior Principal Magistrate's Court Civil Case Number 69 of 2006. He was *suing as a legal representative and administrator of the estate of* **FREDRICK MWITI MUTUNGA,** *deceased for damages after the latter was fatally knocked down by the vehicle owned by the second respondent and driven by the first respondent.*

The respondents entered appearance and filed defence. Liability was denied.

The learned trial magistrate dismissed the claim made a finding that the appellant did not prove liability. The appellant was aggrieved by the judgment of the learned trial magistrate and filed this appeal. In the Memorandum of Appeal the appellant set out eight grounds of appeal that I have summarized as follows:-

1. The learned trial magistrate erred in law and in fact by finding that the plaintiff failed to state whether a post mortem was performed on the body of the deceased.

2. The learned trial magistrate erred in law and in fact by disregarding the evidence of PW2 and PW3.

3. The learned trial magistrate erred in law and in fact by failing to assess general damages if the suit had succeeded.

4. The learned trial magistrate erred in law and in fact by imposing a higher standard of prove than

is required in a civil suit.

The respondents prayed that the judgment and decision of the trial magistrate be upheld.

When the matter came for directions on 10th February 2011, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged .

This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

At the trial in the magistrate's court, the appellant adduced evidence that on 8th April 2006, the deceased was walking along Meru-Nkubu road when motor vehicle KAM 855 R fatally knocked him down. According to the evidence of **REUBEN KINYUA** (PW3) the deceased was walking off the road on the right as one faces Meru from Nkubu. This is where he was knocked down. This evidence suggests that the motor vehicle left the road. He does not give any reason as to why it did so. Ordinarily, vehicles do not veer off the road without an explanation. However, his evidence was contradicted by that of **P.C OSCAR WASIKE** (PW2), a police officer. He testified that the accident point of impact was 2.8 meters from the edge of the road inside the road. There were break marks measuring 22 meters to the point of impact. The motor vehicle was damaged on the right side. This evidence would suggest the deceased was crossing the road.

Although these two witnesses contradicted each other, the evidence of PW3 confirms my finding that the deceased must have been crossing the road, though he denied the same. This is what he said:

> ***He had crossed the road. He wanted to go down home.***

The deceased was hit near his home while coming from Nkubu direction according to PW3. He must have been crossing. In the case **of KIRUGI & ANOTHER vs. KABIYA & 3 OTHERS [1987] KLR 347**, the Court of Appeal held as follows:

> ***The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.***

On the accident, this was the only evidence at the disposal of the learned trial magistrate. He considered what was available. The appellant succeeded in establishing that the deceased was fatally knocked down by the motor vehicle in issue. However, the appellant did not on a balance of probabilities prove that the first respondent was to blame. He did not discharge his onus. The remark about the post mortem was a by the way and failure to adduce the evidence on the same did not influence the decision of the learned trial magistrate.

It was contended by the appellant that the learned trial magistrate raised the standard of proof. The test on whether a party has discharged own burden is provided under Section 108 of the Evidence Act as follows:

> ***The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.***

In the instant case the evidence adduced by the plaintiff did not therefore discharge his burden. The standard was not raised at all.

The learned trial magistrate did not assess what damages he would have awarded. This is was erroneous, for if the appeal succeeds, it may deny a party a second consideration if the same were assessed at the appeal stage. This is however not fatal to the proceedings.

The upshot of the foregoing analysis of the entire evidence is that the decision of the learned trial magistrate was arrived at on the basis of the evidence on record. The appeal is therefore dismissed with costs to the respondents.

DATED at **MERU** this **28th** day of **April, 2017**

KIARIE WAWERU KIARIE

JUDGE