



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 378 OF 2009**

P.G. NJUGUNA ..... 1ST APPELLANT

PETER GAKUNGA ..... 2<sup>ND</sup> APPELLANT

VERSUS

JOSEPH KAMAU KURIRI (Suing as the legal

Representative of the estate

of PAUL MUNGAI KAMAU (Deceased)..... RESPONDENT

*(Being an appeal from the judgment delivered by Honourable Mrs. Ongeru, Principal Magistrate, Kiambu Law Courts on 23<sup>rd</sup> June, 2009)*

**JUDGMENT**

The suit in the lower court arose out of a road traffic accident where the deceased Paul Mungai Kamau was knocked down by motor vehicle registration No. KAX 255B which was being driven by Paul Ndungu Nyambura the 1<sup>st</sup> appellant herein.

The 2<sup>nd</sup> appellant is the owner of the subject motor vehicle while the respondent Joseph Kamau Karuri is the father and legal representative of the estate of the deceased. The deceased died as a result of this accident. The accident is said to have taken place at about 7 p.m. in the evening of 15<sup>th</sup> March, 2007.

P.W 2 and P.W. 3 did not witness the impact between the deceased and the motor vehicle as in their own testimonies, they only heard a bang. P.W. 4 however testified that he was in the motor vehicle that knocked down the deceased. He said that he was a passenger and that if the driver was not fast he would not have knocked the deceased. After the deceased was knocked down the driver of the motor vehicle ran away without waiting for the police to come. In his evidence he said it was at night and dangerous.

The three witnesses, that is, P.W. 2, P.W.3 and P.W. 4 appear to be in agreement that the impact took place at a zebra crossing. The driver D.W. 1 however said there was no zebra crossing nearby and that it was not true the deceased was crossing there. According to this driver, he had passed the zebra crossing by 50 metres. In fact, he denied that he was carrying P.W. 4 as a passenger. The learned trial magistrate believed the evidence of the plaintiff's witnesses and found out that the driver was 100% to blame for the accident.

As the first appellate court it is my duty to consider all the evidence adduced before the trial court and come to independent conclusions. This I have done.

It is common ground that the accident took place when it was relatively dark. Both P.W. 2 and P.W. 3 did not witness the collision. In fact P.W. 2 was clear when he said **“I never witnessed the collision as it was darkening.”** Whereas P.W. 2, P.W. 3 and P.W. 4 maintained that the collision took place at a zebra crossing, the first appellant who gave evidence as D.W. 1 denied that there was any zebra crossing and testified that the deceased jumped over the wall dividing two roads and landed on the path of the motor vehicle.

There was no suggestion that P.W. 2, P.W. 3 and P.W. 4 had any interest in this case to testify negatively against the 1<sup>st</sup> appellant. When P.W. 1 told the court that he only heard a bang and never witnessed the collision in my view this enhanced his credibility and I believe what he said. That being the case I am persuaded that his evidence, that of P.W. 3 and P.W. 4 should be believed in relation to the fact that the deceased was knocked by the motor vehicle at a zebra crossing.

A zebra crossing is reserved for pedestrian, and it is the duty of every motorist to respect the right of persons crossing thereat. If it was dark as the evidence points, then the 1<sup>st</sup> appellant must have had the head lights of the motor vehicle on. He was duty bound to keep a proper look out, break, hoot and or do everything possible to alert the pedestrians who would be expected to use the road at that point. He did not do anything of that sort and had he done so he would have said this in his evidence.

I am persuaded that the 1<sup>st</sup> appellant was solely to blame for the accident that led to the death of the deceased and have no reason whatsoever to disturb the finding of the trial court that he was entirely to blame for the accident.

The deceased was working at a petrol station as a petrol attendant. He was then aged 35 years old and lived with his parents. His salary per month was Kshs. 6,850/=. According to the plaint he supported his parents and the evidence that he supported any other person is not acceptable at this stage.

The learned trial magistrate (as she then was), used the multiplier of 20 years which I do not think is misplaced. On dependency, I consider that although the father was a preacher, there is no evidence that his wife, who is the mother of the deceased, was in any employment. The dependency of 2/3 cannot be said to be on the higher side. I accept the judgment of the learned trial magistrate in that regard. Special damages were agreed at Kshs. 11,510/=. The learned trial magistrate was also correct in deducting the amount of money awardable under the Fatal Accident Act from the damages awarded under the Law Reform Act.

The end result is that the judgment of the lower court is hereby upheld and the appeal dismissed with costs to the respondent.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of March, 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**