



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCCA NO. 39 OF 2011**

**KIJANA MURINGI M’KINDIA (suing as the legal representative  
of the estate of deceased RAEK KAREMA NTONGAI).....APPELLANT**

**VERSUS**

**IMAN ALI.....1<sup>ST</sup> RESPONDENT**

**MERU FAMOUS.....2<sup>ND</sup> RESPONDENT**

**TRISHUL GENERAL M.....3<sup>RD</sup> RESPONDENT**

**J U D G M E N T**

1. The appellant was the plaintiff at the lower court. He had sued the respondents claiming general damages under the Law Reform Act and Fatal Accidents Act, special damages of Kshs.15,500, costs of the suit and interest and any other relief which the court may grant. The respondents filed a joint defence denying liability and sought the appellant’s claim to be dismissed with costs. The appellant filed reply to the defence and reiterated the contents of the plaint in support of his claim.

2. The suit proceeded to hearing. The appellant gave evidence and called two witnesses, whereas the respondents gave evidence through the 1<sup>st</sup> respondent and called one witness. That after trial and submissions by parties Counsel the trial court dismissed the appellant’s claim with costs and failed to indicate what he would have awarded the appellant had he been successful.

3. The appellant being dissatisfied with the learned trial Magistrate’s judgment preferred this appeal setting out 7 grounds of appeal.

4. When the appeal came up for hearing on application of both counsel, the court directed that the appeal be determined by way of written submissions. The appellant’s submissions were filed on 5/6/2014 by Mr. Omari learned Advocate whereas the respondents’ submissions were filed on 26/9/2014 by the firm of M/S Kiautha Arithi & Co. Advocates. The appeal was subsequently set down for highlighting on 27/11/2014; however on the material date there was no appearance from Counsel for the respondents. Mr. Omari learned Counsel for the appellant condensed all the seven grounds of appeal to two. That is to say the learned trial Magistrate imposed a higher burden of proof in a civil matter and disregarded the appellant’s authorities urging the burden of proof in a civil matter is on balance of probability as opposed to that in criminal cases which is beyond reasonable doubt. He submitted on his second ground of appeal that the learned trial Magistrate was in error in failing to assess the damages that the court would have

awarded the appellant incase he was successful.

5. This is first appellate court and is under duty to evaluate the whole evidence and come to its own conclusion bearing in mind it did not see or hear any of the witnesses and cannot determine their misdemeanor. In dealing with this appeal I propose to deal with all the grounds of appeal together as they touch on the evaluation of evidence on the issue of liability and damages.

6. The appellant's case is briefly that PW1 brother- in -law to the deceased Rael Karema Ntongai(deceased) was granted letters of administration in respect of the deceased herein to clothe him with capacity to file and pursue this claim for benefit of the deceased estate. That the deceased died on 12/05/2008 along Meru-Maua Road after she was hit by M/V KAG 353K driven by the 1<sup>st</sup> respondent employee/agent of the two other respondents. PW1 was not present when the accident occurred but went to the scene at around 4.00 p.m after the accident had occurred at 1.30 p.m. At the scene he found blood on the left side of the road where the deceased laid near the tarmac road. PW1 stated the deceased was survived by 8 children and named them giving their ages. The Chief's letter listing the deceased children was produced as exhibit 2. He stated the deceased was aged 45 years; and was both a businesswoman and a farmer estimating her income at Kshs.15,000/- per month. He produced death certificate as exhibit 3. Limited grant of letters of administration as exhibit 4. Receipts on seeking grant of letters of administration as exhibit 5, copy of motor vehicle records as exhibit 6. Receipt for Kshs.500/- as exhibit 7, demand notice and certificate of postage as exhibit 8(a),(b) and (c) respectively.

7. PW2 a Police Officer attached to Maua Police Station produced records of an accident involving M/V KAG 353K and a pedestrian on 12/5/2008;accident register Fatal No.24/08. He gave the name of the pedestrian as Rael Karema Ntongai and the driver of the vehicle as Ali Arabi Imani, the respondent herein. The owner of the vehicle as Meru Farmers, 2<sup>nd</sup> respondent. PW2 produced police abstract as exhibit 1. He testified that PC Ndambuki was the Investigating Officer, however investigation is pending and that the scene was visited on 12/5/2008 and sketch plans were drawn. He stated that the sketch plan does not show the point of impact but only the location of the body and vehicle. That the body was 3.6 metres off the tarmac on the left side facing Maua direction and vehicle 4.3 metres off the tarmac on the left said facing Maua direction. He produced a sketch plan as exhibit 9 adding the investigating Officer recommended that public inquest be conducted. He added that it was for the court to determine who was to blame for the accident. On cross-examination he stated P.O Ndambuki blamed the deceased for the accident for crossing at a blind corner without heeding a hooting warning from the driver.

8. PW3 Japhet Kailu testified that on 12/5/2008 at 1pm she was at Muiyo with Rael Karema(deceased) waiting for another woman standing along the road. That at about 1.30 pm a canter wanted to overtake a Nissan when an oncoming vehicle from Maua direction approached forcing the driver of the canter to swerve to where the two were standing. PW3 was able to run away but the deceased was hit by the vehicle breaking her leg. She gave the vehicle Reg. No. as KAG 353K which stopped 10 metres from the scene of the accident. She returned to the scene and found her companion already dead. She sent a message to the deceased relatives. That the police from Maua police Station came and took the deceased body away. She testified that she never heard any hooting. During cross-examination PW3 testified that they were standing on the left side of the road facing Maua Direction. She was facing the road but the deceased's back facing the road. That she saw the vehicle approaching suddenly. PW3 further on cross-examination said they were standing on the right side of the road facing Maua direction.

9. The defence case on the other side is that DW1, Imani Ali, is an employee of Meru Famous. That on 12/5/2008 he was driving M/V Reg. No. KAG 353K at around 11 a.m towards Maua from Meru. That between Ntoruba and Muiyo market where the road is straight he saw a woman at a distance of 100 metres wanting to cross the road from the right to left while facing Maua direction but she stopped on the tarmac. He hooted and she returned back. That as he approached the woman suddenly she turned back to the road when he was 20 metres from her and came facing the vehicle and was hit. DW1 testified he swerved to the left and she fell one foot on the left of the vehicle. A crowd came and DW1 left to report to Maua Police Station.

10. That Officers came and took measurements, the vehicle was towed and that they found the deceased

was already dead. DW1 testified that he was with his turn boy Charles Mbijiwe. The deceased body was taken to the mortuary. DW1 denied he was to blame for the accident but blamed the deceased as she went to the road and collided with the vehicle. During cross-examination DW1 testified that he saw the woman at a distance of 100metres and the road was straight and market was ahead of the scene of accident. That he was driving at 35 KPH and the vehicle had good brakes and that the vehicle stopped at the point where she was hit. That the deceased was hit by the front side of the vehicle but he stated she was hit by the left front side near the side mirror and she fell off the tarmac on the left facing Maua direction. That she was not hit while standing off the road.

11. DW2 Charles Murithi Mbijiwe, DW1's turn-boy testified that on 12/05/2008at 1.30 p.m they were travelling in M/V KAG 353K towards Maua from Meru. That the vehicle is owned by 2<sup>nd</sup> respondent. That he was seated in the cabin in the co-driver's seat when they reached a straight section of the road they saw a woman wanting to cross the road from the right side to the left. The driver hooted and she returned back but when they were near her she started crossing again at a distance of 15 metres. The driver swerved to the left to avoid her but she continued crossing and was knocked by the vehicle. That she was hit off the tarmac. They noticed she had already died when they checked on her. During cross-examination DW2 testified when he saw the deceased for the first time she was coming from the shops. He added the driver hooted many times. He testified that the deceased had already reached the left side of the road when she was hit adding he could not remember which side of the vehicle hit the deceased. That the body lay 2 metres from the tarmac and 3 metres from the vehicle.

12. The appellant's grounds of appeal Nos. 1, 2, 3, 4, and 5 deal with the issue of findings of the learned trial court on liability. The appellant urge that the trial court was at wrong to fail to find the respondents liable for causing the accident in issue and 2<sup>nd</sup> and 3<sup>rd</sup> respondents viciously liable for the negligence of the 1<sup>st</sup> appellant.

13. It is further the appellant's ground of appeal that the learned trial Magistrate erred in law and fact in finding the deceased wholly to blame for the occurrence of the accident despite respondent's contradicting evidence on record and having made a finding in his judgment that the deceased had crossed the road before the occurrence of the accident. The appellant's witness PW2 in his evidence testified that investigation in this matter is still pending. That after visit of the scene of the accident and drawing of sketch plans, the point of impact was not determined, however, PC Ndambuki blamed the deceased. PW2 did not agree with PC Ndambuki's conclusion as he stated that court would determine who was to blame. The learned trial Magistrate seems to have been in his judgment influenced by the recommendation by PC Ndambuki and fail into error by failing to analyze the evidence of PW2 carefully. On what basis did PC Ndambuki who never gave evidence come to conclusion **that the deceased was to blame**? the court stated as follows:

***“ PWII PC Joseph Murage based at Maua Police Station traffic accident investigation told the court that investigation done by PC Ndambuki showed that the deceased was to blame from crossing the road at a blind corner.”***

14. The trial Magistrate failed to consider the evidence of DW1 and DW2 who stated at the scene of the accident there was straight section of the road. None of the appellant's witnesses or respondents' witnesses mentioned a blind corner. PC Ndambuki findings which the court relied upon are unsupported by evidence on record. The findings are mere speculation and cannot be a basis for making a finding.

15. I was referred to my own decision in **HCCA 118/2010 DAVID KAJOGI M'MUGAA(suing as the legal representative and administrator of the estate of the deceased PETERSON MUTHAURA KAJOGI V FRANCIS MUTHOMI** in support of the appellant proposition that Investigating Officers evidence alone cannot be a basis for determination on liability where I held at page 17 as follows:-

***“I therefore did not agree that evidence of an investigating officer alone can be conclusive as to who is to blame for the accident nor can it be said to be binding on the court and is mere opinion to the court, which court can accept or reject for various reasons.”***

16. The trial court was wrong in basing its findings on liability on investigating Officer's report without considering the evidence by appellant's side and that of the respondents as investigation was still pending and the point of the impact had not been determined. His findings is contrary to the evidence of the eyewitness and should not have been accepted as the only basis of making a finding on liability.

17. The learned trial Magistrate was perfectly entitled to consider the evidence of PW3 and reach his own conclusion which he did and found that the deceased must have had crossed the road before the accident occurred. His conclusion that evidence is consistent with DW1 and DW2 evidence that the deceased ran on the road and was hit by the left side of the vehicle was reached without the learned trial Magistrate having carefully considered and analyzed the evidence of DW1 and DW2. DW1 and DW2 testified they saw the deceased at 100 metres in a straight stretch of road at a market centre. DW1 testified at a distance of 20 metres the deceased came facing the vehicle and was hit. That he swerved to the left. He further testified she was hit by the front side of the vehicle but changed to state she was hit by the left front side near the side. DW2 contradicted DW1 by testifying that the vehicle had already swerved off the tarmac when it hit her. On cross-examination DW2 stated the deceased had already reached the left side of the road when she was hit. PW3 on her part said the accident occurred on the left side facing Maua off the tarmac. Had the learned Magistrate considered the evidence before him in its entirety; he could not have come to the conclusion that the deceased was entirely to blame for the accident.

18. The learned trial Magistrate I do appreciate was faced with two conflicting versions as to how the accident occurred. On left side of the road facing Maua side. He concluded the deceased was crossing from right to left side and found she was hit by left side of the vehicle but failed to determine the point of impact from the evidence. The trial court failed to appreciate that DW1's evidence was that the deceased was hit as she was crossing the road, whereas DW2 evidence was that she was hit after she had crossed the road while PW3's evidence is that she was on the left side. The evidence before trial court was inconsistent and contradictory from both the appellant's and the respondent's side. When court is faced with such evidence it has to look at the independent evidence to come to the conclusion on who is to blame. In the instant case there is no independent evidence as the point of impact was not determined by the investigating officer nor was there independent evidence called. Doing the best court can do in such circumstances liability should be apportioned at 50:50. I therefore find the deceased was 50 percent to blame. I therefore find merits in the appellant's grounds of appeal No's 1, 2, 3, 4 and 5 and allow the same. I enter judgment on liability against the respondents at 50 percent.

19. The appellant under ground No. 6 faulted the learned trial Magistrate by failing to assess damages. The appellant would have recovered had he succeeded in his claim against the respondents. I have considered this ground and do agree with the appellant in cases of claim for damages and special damages and especially running down matters the trial court is required to assess the damages which it could have awarded had the party succeeded. I find merit in this ground and as I have found on liability in favour of the appellant at 50 percent I would proceed to assess the damage.

20. The deceased at the time of her death was 45 years. She was a farmer and a businesswoman according to evidence of PW1 and was contributing to the welfare of her 8 children. As a businesswoman/farmer her income was said to be Kshs.15,000/- per month. There was nevertheless no evidence produced on her earnings. All the court got was a mere speculation. I will therefore consider a minimum earnings of Kshs.6,000/0 per month and apply a multiplier of 15 and dependency of 2/3. On special damages the appellant pleaded and produced receipts in support of specials of Kshs.15500/ which I would award as special damages.

21. In the circumstances I would assess damages as follows:-

**a. Special damages - Kshs. 15,560**

**b. General Damages for pain and suffering -Kshs. Nil**

**c. General damages under Law Reform Act -Kshs.100,000**

**d. General damages under Fatal Accident Act-**

(6000x15x2/3x12x50/100                      -Kshs.360,000

**Kshs.475,500**

**e. Less .....Law Reform Act                      Kshs.100,000**

**Kshs.375,500**

**f. Costs of the appeal and court below to**

**The appellant against the 1<sup>st</sup> and 2<sup>nd</sup> respondents**

The upshot is that the appeal is allowed and the appellant awarded generals and special damages of Kshs. 375,500/- with cost as indicated herein.

DATED, SIGNED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF JANUARY, 2015.

**J. A. MAKAU**

**JUDGE**

**Delivered in open court in the presence of:**

1. Mr. Omari for the appellant
2. Mr. Kiautha for the respondent

**J. A. MAKAU**

**JUDGE**