



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NUMBER 146 OF 2012**

**JOSEPH MUCHIRI NJUGUNA (Legal Representative of Estate of DOMINIC GITHIEYA  
MUCHIRI.....APPELLANT**

VERSUS

**MUSA KIPLANGAT**  
**NGETICH.....RESPONDENT**

*( Appeal from the judgment of the Chief Magistrate Court at Nakuru Law Courts Delivered by  
HON. S. MUNGAI on 8<sup>th</sup> August 2012 in Nakuru CMCC NO 1284 OF 2010)*

**JUDGMENT**

1. The appeal before the court is against the trial court's judgment on liability. On the 12<sup>th</sup> March 2010 Motor vehicle Registration Number **KAC 380B**, a Lorry, while being driven along **Geoffrey Kamau Street at Nakuru**, and while at a round about, a collision occurred with a motor cyclist one **Dominic Muchiri** (deceased) who was riding **motor cycle Registration KMCA 009L**. He sustained fatal injuries.

2. The Appellant, being the administrator and father of the deceased sued the driver and owner of the said motor vehicle for negligence and causing death to his son. The lorry driver denied having been negligent and in turn blamed the deceased.

After a full trial, the court made a finding that the plaintiff failed to prove any negligence against the Respondent, on a balance of probability and dismissed the suit with costs. The appellant being aggrieved by the judgment brought this appeal and stated seven grounds that in my view can be summarised into two:

1. That the trial magistrate erred in law and fact in holding that the plaintiffs only eye witness evidence was wanting and discrediting it on the ground that he had not recorded a statement at the police station to enable the police complete investigations.

2. That the trial magistrate erred in law and fact in failing to find that the accident was solely caused and/or substantially caused by the negligence of the driver thus arrived at a wrong decision by dismissing the plaintiff's case.

3. The appellants case before the trial court was advanced by PW3, one Joseph Gathiya Mbugua. He testified that on the fateful day, he, a motorcycle rider like the deceased, was riding behind him at around

4.30 p.m. and was heading to town from Shabab area, and that there was a lorry ahead of him. As it approached the Total round about, it did not stop but he stopped. He then heard a bang as it was knocked by the motor bike that the deceased Dominic was riding. It was coming from town direction and had entered the round-about. The lorry failed to give Dominic way at the round-about. He was run over by the lorry. We went to his rescue but he did not survive. He stated that he witnessed when the lorry ran over him. He stated that the lorry driver was to blame for failing to slow down.

On cross examination, he stated that the deceased's motor bike entered the roundabout before the lorry and that he did not go to record a statement at the police station as he was not asked to by the police.

4. Police officer (PW2) PC Stephen Lengopilo who testified produced the police abstract. He was not the investigating officer and that the case was still under investigation, and that he did not visit the scene of accident.

5. The Defendant's driver, **Joseph Njuguna Muturi (DW1)** testified that he left Shabab heading to total round-about, that he checked left and right and there was no vehicle, that he accessed the round-about and when almost finishing, he heard a bang and stopped. He saw a cyclist had been run over by the right rear tyres of the lorry and that the tyres were on top of the motorcyclist. That the tyres were lifted to remove the body. He testified that the cyclist entered the round about when he could not see him and he knocked the lorry at the rear. He blamed the deceased for the accident. He stated that he was not charged for any traffic offence.

On cross examination, he stated that he could not tell which direction the deceased came from and that the deceased fell under the right rear tyres of the lorry. He stated that if the cyclist was ahead of the lorry, he would have knocked him with the front part of the lorry.

6. In his judgment, the trial Magistrate stated that the onus of proof was upon the plaintiff to show why he blamed the lorry driver for the accident and that PW3, the eye witness, did not record a statement at the police station explaining how the accident occurred, and thus the credibility of his evidence was wanting, and was insufficient to rebut the evidence presented by the defendant that was unchallenged by the plaintiff as expected if liability was to be attributed to the Respondent's driver. The trial Magistrate after analysis the evidence as presented held that for the deceased to have had the right of way at the round-about overriding that of the lorry driver, he had to access the round about before the lorry and if he had done so, he would have been run over by the lorry's front part and not by the rear tyres.

7. The appellant in his written submissions faulted the trial Magistrate for discrediting evidence by the only eye witness to the accident for the only reason that he did not record a statement at the Police station, that the police never requested him to record his statement yet it was the duty of the police to look out for witnesses to assist with their investigations. He stated that the police never investigated the accident as no sketch plans were drawn nor statements taken and as such the police in action should not be visited upon and to punish the appellant. The appellant continued to submit that PW3, the eye witness saw exactly what happened and the trial court should not have ignored that piece of evidence which he stated, was sufficient to prove negligence on the respondent. He further submitted that the trial court erred in law and fact in believing the evidence of the lorry driver without warning himself that the lorry driver had an interest in the outcome of the case.

It was his further submission that in the circumstances of the case, and there being no clear cut evidence on who between the lorry driver and the deceased was to blame, the trial court should have apportioned liability equally and relied on the case **BerKeley Steward Ltd & Another -vs- Lewis Kimani Waiyaki (1982-88)** and **Peter Ndungu -vs- Africa Apple Promotions systems Ltd HCCC No. 1424 of 2001** where the courts apportioned liability equally where there were no clear evidence as to who was to blame for the accident.

8. The respondent on the other hand supported the trial courts findings that PW3, the eye witness ought to have recorded a statement with the police hence was right to discredit his evidence. It was urged that the defence had no obligation to record a statement as the burden of proof lies with the one who alleges,

and that since the lorry driver's evidence was unrebutted, then, the trial court was right when it held that for the deceased to acquire the right of way to the round-about over riding that of the defendant's driver had to precede and access the round-about before the defendant's lorry and that had he done so he would have been run over by the lorry's front part and not the rear tyres.

9. This court has analysed and re-evaluated the evidence tendered before the trial court. As mandated of a first appellate court, it is my duty to consider the said evidence and come up with my own independent findings and conclusions – See– **Selle & Another -vs- Associated Motor Boat Co. Ltd & Another (EA) 123.**

From the above, two issues arise. Whether the trial court erred in discrediting the evidence of the only eye witness (PW3) to the accident on account only that he did not record a statement with the police, thus held the defendant's evidence unchallenged.

Secondly, whether the circumstances of the case the court ought to have apportioned liability between the deceased and the defendant's driver.

10. PW3 stated that he was riding his motor bike behind the lorry and saw how the accident occurred. The police did not seek him out to go and record a statement. Indeed the police did not investigate the accident. No sketch plans or drawings were produced in court. The lorry driver was not charged with any traffic offence.

The eye witness (PW3) stated that while at the round about, the lorry driver did not stop to give way to the deceased motor cycle rider who he stated had proceeded into the round about from the right before the lorry. The lorry driver stated that the round about was clear when he entered and that he never saw the deceased, that if the deceased had proceeded into the round about before the lorry, he would have been run over by the front part of the lorry, not the rear tyres.

11. I am persuaded to agree with the trial court's finding that if the deceased had proceeded into the round about first before the lorry, he would have been run over by the lorry's front part and not the rear tyres. The eye witness (PW3) in his evidence stated that the lorry was ahead of him as they approached the round about, meaning, he was behind the lorry. He stated that he heard a bang as it was knocked by the motorbike which Dominic (deceased) was riding, as it had entered the round-about. Analysis of the above evidence presents to me that the motor cyclist (deceased) must have entered the round-about after the lorry had proceeded and accessed the round about and was in the process of negotiating the same. This is evident from how the deceased was run over by the rear tyres of the lorry. This could only have happened if the deceased was behind the lorry, and not in front or better, it had accessed the round about before the lorry. If that were so, then the deceased would have been run over by the front part of the lorry. To that extent, I find that the trial magistrate not only considered the defence evidence but also the eye witness (PW3) evidence though he had stated that it was wanting. The circumstances point to the deceased having been to blame for the accident. I find no ground upon which to attach contributory negligence on the lorry driver. He could not see the cyclist who was behind. I believe the lorry driver that he must have entered the round-about before the deceased cyclist who collided into the rear part of the lorry as it was negotiating the round about.

12. On the failure of (PW3) – eye witness to record a statement at the police station, it has come out clearly from the evidence that the police did not investigate the accident and therefore as PW3 stated, he was not requested to go and record a statement. Notwithstanding, in my view, failure to record a statement cannot tantamount to terming the evidence inadmissible. Indeed and as I have stated above, the trial court considered the evidence, analysed it and made a finding based on the said evidence.

In **Nairobi Civil Appeal No 49 of 2011 Charles Masoso Barassa & Another (2014) KLR** the Honourable Judges, in very similar circumstances where the witnesses did not record their statements made findings that their evidence was admissible as they stated what they saw. Admission of such evidence cannot cause a miscarriage of justice.

13. Accordingly, the court finds that the trial Magistrate considered all the evidence as presented to him, analysed the same and made his findings that the plaintiff did not prove its claim against the defendant to the required standard nor did he find contributory negligence to attach to the defendant.

Consequently, the Appeal is dismissed with costs.

**Dated, signed and delivered in open court this 16<sup>th</sup> day of December 2015.**

**JANET MULWA**

**JUDGE**