



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

**CIVIL APPEAL 121 OF 2008**

**JOSEPH MWINZI MUTUTA.....APPELLANT  
VERSUS  
JANE WANZA MWANGANGI (suing on behalf of  
STEPHEN MWANGANGI MUTISO(DECEASED).....DEFENDANT**

**[Being an appeal from the original Ruling in Machakos CMCC 123/2007 be F.N. Muchemi, C.M on  
17.9.2008]**

**JUDGMENT**

1. This Appeal arises from the decision in Machakos CMCC 123/2007 where the Chief Magistrate awarded Kshs. 208,498/= plus costs of the suit to the Respondent. The claim arose from the fatal death of Stephen Mwangangi Mutiso (*deceased*) who was hit by motor vehicle registration number KWQ 418 on 6.8.2004 at Katoloni along the Machakos-Makueni Road. The Appellant, Joseph Mwinzi Mutua was the driver of the motor vehicle and it was alleged in the Plaint dated 7.12.2006 that the Appellant was negligent in the way that he handled the motor vehicle on the material date.
2. The Appellant denied the allegations of negligence in his Statement of Defence dated 2.4.2007 and instead averred that the accident “*was caused by or substantially caused by acts of negligence (sic) on the part of the deceased.*” The learned trial magistrate having heard evidence by both parties agreed with the Appellant that the deceased bore the greater blame for the accident and apportioned liability at 60:40 in favour of the Appellant.
3. The Appellant’s case is, in a nutshell, that the learned magistrate erred in finding that the Appellant was liable for the accident and in making an award that was inordinately high and constituted a miscarriage of justice.
4. What were the circumstances of the accident? From the record, the deceased was said to have been a retired teacher who ran Wisdom Nursery School, in Katoloni. He was 65 year old at the time of death and from the school’s records, his income was said to be Kshs, 26,000/= per month. That evidence was presented by Jane Wanza Mwangangi, his widow and Respondent herein.
5. One Dennis Ndeto said that he was an eye witness to the accident which occurred at 7.30 p.m on the material date. He stated that motor vehicle KWQ 418 passed him as it was being driven towards Wote Township and shortly thereafter, it started zig - zagging, lost control and hit a man who was walking ahead of it. The car made a loud noise after hitting him and when Ndetto ran to the scene, he identified the victim as his neighbour, the deceased, who had been walking by a foot path on the side of the road.
6. The Appellant, contrary to Ndetto’s evidence said that “*something*” suddenly crossed onto the path of his vehicle, away from the footpath and right on the road, and he tried to brake to avoid “*the object*” but he hit “*it*” with the left side of the vehicle. He did not stop although the windscreen was shattered but drove to Makueni Police Station and made his report. That although he was later charged and convicted of reckless and dangerous driving, the High Court overturned that decision and found that the deceased was the author of his own misfortune. He produced the judgment of *Sitati, J. in HCCA 170/2006 (Machakos)* to back up that argument.
7. What should I make of the above evidence? It is not denied that the deceased was hit by motor

vehicle KWQ 418 on the material night. Each party has blamed the other for negligence and I have read both the judgments of the trial magistrate in the traffic case and *Sitati, J.* on appeal. I take the view that the evidence of Ndetto should guide this court. He was at the scene, saw KWQ 418 passing him at high speed and knocked the deceased after it zig-zagged and lost control. Further, the Appellant's evidence that he hit the deceased with the left side of the vehicle lends credence to the fact that he veered off to the edge of the tarmac and impact with the deceased was inevitable. Granted, no evidence points clearly to the fact that the deceased was far off the road and the likelihood of him being on the edge of the tarmac is clear from the point at which impact was made. The sketch prepared by Cpl Nyanzua of Machakos Police Station validates that argument. The conclusion by the trial magistrate that the deceased partly contributed to the accident is therefore correct and I subscribe to it as does the Appellant who pleaded as much in his Statement of Defence.

8. The above being my finding, what should I say of the element of contributory negligence? In Karanja vs Malele[1983] KLR 142 it was held *inter-alia* as follows;

*"In assessing blame worthiness the distinction is that the driver had a lethal machine (car) in control. Apportionment of blame represents an exercise in discretion with which an appellant court will not interfere with unless it is clearly wrong, based on no evidence at all or if the wrong principle is applied; which was not the case here."*

9. I wholly agree and my view is that the apportionment of 60:40 made by the trial magistrate is reasonable and fair and I see no reason to interfere with it.

10. The only other issue to address is quantum of damages. I have little to say on this subject because there was sufficient evidence placed before the trial magistrate that the deceased operated a nursery school in Wote. Little challenge was made of the fact that he made Kshs. 26,000/= a month. The trial court found that as a matter of fact and as was stated in Karanja (supra); *"the appellant court is usually not in a position to substitute findings of fact reached by the trial court..."*

11. I agree and on my own assessment of the facts on record, I would have reached the same conclusion.

12. The above being my findings, I see no need to say more.

13. The Appeal has no merit and is dismissed with costs.

14. Orders accordingly.

Dated and delivered at **Machakos** this **11<sup>th</sup>** day of **February 2010**.

**Isaac Lenaola**  
**Judge**

In the presence of; Mr. Kamolo for Appellant

**Isaac Lenaola**  
**Judge**