



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

Civil Appeal 134 of 2003

MORRISON MBUTHIA MAINA

MWANGI KIONGO

APPELLANTS

VERSUS

JANE WANJIKU MWANGI

FLORENCE NJERI WAWERU

.....RESPONDENTS

J U D G M E N T

Morrison Mbuthia Maina and Mwangi Kiongo (*hereinafter referred to as the Appellants*) have brought this appeal against the judgment of the Senior Principal Magistrate Murang'a in which she found the Appellants 45% liable and gave judgment for the Respondents Jane Wanjiku Mwangi and Florence Njeri Waweru for Kshs.453,600/- together with costs and interest.

The Respondents claim was a claim under the Fatal Accidents Act and the Law Reform Act which arose out of an accident involving motor-vehicle KYC 899 which was being driven by Joseph Mwangi Waweru (*hereinafter referred to as the deceased*) and motor vehicle KAB 003B which was owned by the 1st Appellant and driven by the 2nd Appellant. As a result of injuries sustained in the accident the deceased died. The Respondents filed the action contending that the accident was caused by the negligence of the 1st Appellant's driver.

The particulars of negligence alleged in the plaint were as follows: -

- (a) *Driving at a speed which was excessive in the circumstances.***
- (b) *Failing to keep or maintain any effective control of the said motor-vehicle on the road and in particular allowing the same to ram into motor-vehicle registration number KYC 899.***
- (c) *Driving contrary to the Highway Code and Traffic Act and in particular overtaking when it was unsafe so to do.***
- (d) *Driving without any regard for other road users and in particular ramming into motor-vehicle registration number KYC 899.***

(e) Failing to apply brakes sufficiently or in good time so as to avoid the said accident.

(f) Failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor-vehicle so as to avoid the said accident.

During the trial in the lower court two witnesses testified in proof of the Plaintiffs' case. These were the 1st Respondent and one Teresiah Njuhi who was the eye witness to the accident. The evidence of this eye witness who was a passenger in the motor-vehicle KYC 899 being driven by the deceased was as follows:

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"I saw a lorry coming towards us. The road was straight as we had reached at a corner. Our vehicle went to the lorry and hit it. Our vehicle was on a high speed."

During cross-examination the witness explained further: -

"The accident occurred in a straight part of the road. There was another vehicle which KYC wanted to overtake."

The above was the evidence relied upon by the Plaintiffs to prove their alleged particulars of negligence. However that evidence did not show that the Appellants' motor-vehicle was being driven at a speed which was excessive. It did not show that the Appellants' motor vehicle rammed into motor-vehicle KYC 899 being driven by the deceased. It did not show that the Appellants motor vehicle was overtaking or that it drove contrary to the Highway Code or in any way failed to avoid the accident.

To the contrary, this evidence shows that it was the deceased who was driving very fast. It was the deceased who was in the process of overtaking when it was not safe to do so as there was an on coming motor-vehicle, another vehicle and it was the deceased's motor-vehicle which rammed into the Appellant's motor-vehicle. The finding of the trial Magistrate that the Appellants' driver was partly to blame for the accident was totally against the weight of the evidence.

Before the issue of apportionment of liability could arise, the Respondents had to establish their case and prove that the Appellants' driver was indeed negligent. That not having been done the Respondents' case could not stand and therefore ought to have been dismissed. The Appellants' driver having swerved, He cannot be blamed for having failed to swerve off the road, no evidence having been adduced as to whether it was safe for him to swerve off the road. I find that in the circumstances of this case, there was no negligence at all on the part of the Appellants' driver and no liability ought to have been apportioned against the Appellants.

As regards the evidence regarding the deceased's income and the assessment of damages the trial magistrate did not use the 1/3 rule but pegged the Respondents' dependency on her evidence that the deceased was giving the 1st Respondent 200/= daily for the house upkeep. The multiplier adopted of 14 years was also reasonable given the deceased's age and the 1st Respondent's age. I am satisfied that proper principles were applied in considering and assessing the damages and I would not have interfered with the same. However the Respondents having failed to prove their case, I allow this appeal set aside the judgment of the lower court and substitute it with an order dismissing the Respondents' case. Those shall be the orders of this court.

Dated, signed and delivered this 23rd day of March 2006.

H. M. OKWENGU

JUDGE