



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITUI**  
**CIVIL APPEAL NO. 14 OF 2018**

**DAVID KASYOKA NDIVO & MORRIS NGULI MULI**

(Suing as the legal representative of the estate of

**WILLY MUTUA MULI (Deceased).....APPELLANTS**

**-VERSUS-**

**BUZEKI ENTERPRISES LTD.....1<sup>ST</sup> RESPONDENT**

**AFRICAN E. AUTO MOBILE COMPANY.....2<sup>ND</sup> RESPONDENT**

(Being an appeal against the judgment of the subordinate court at Kitui of Hon. Ms. Murage delivered on 23<sup>rd</sup> May, 2017 in Kitui CMCC No. 148 of 2014)

**JUDGEMENT**

1. Appellants filed suit on behalf of the estate of Willy Mutua who was involved in a fatal road traffic accident on 13/11/13 while a pedestrian along Katutu Masuu-Kabati road.
2. He was hit by motor vehicle registration No. KBL 958H/ZB 5603. The appellants blamed both respondents for the accident.
3. Respondents admits occurrence of the accident but deny liability and blames the deceased for the same.
4. The trial court a finding that; ***“From the evidence before court, there is no evidence to prove that DW1 was speeding at the time of the accident. There was no eye witness to the accident and the only evidence as to how it happened is the evidence of DW1 the driver of respondents’ motor vehicle. The particulars of negligence pleaded by the appellants are not proved. Suit is dismissed. Each party to bear its own costs”***
5. Being dissatisfied with the above decision the appellant lodged appeal and set out the following grounds-
  - (1) **The learned magistrate erred in law and fact by totally failing to take into account the evidence of the appellant.**
  - (2) **The learned magistrate erred in law and in fact in failing to consider the submissions of the appellant’s counsel together with the case law in support.**

**(3) The learned magistrate erred in law and fact by holding that there was no evidence that DW1 (driver of the suit motor vehicle) was speeding despite PW1 police officer testimony on the contrary.**

**(4) The learned magistrate erred in law and in fact by assessing damages which were minimal in the circumstances.**

6. The parties were directed to canvass appeal via submissions.

#### **APPELLANTS' SUBMISSIONS:**

7. The appellant submitted that, the trial court failed to consider the submissions of the appellant together with case law in support to wit; liability.

8. He argued that, PW1 Cpl. Charles Kiprotich testified on 28<sup>th</sup> March 2017 and stated that the suit motor vehicle KBL 958H/ZB 5603 was driven at a high speed and the point of the accident was a market place, as such the driver ought to have moved slowly.

9. He blamed the driver of the suit motor vehicle for the accident based on the foregoing.

10. The witness produced a police abstract confirming the deceased person's involvement in the accident. PW1 further stated that the driver of the suit motor vehicle escaped from the scene of the accident and was only apprehended by the police.

11. PW2 Kasyoka Ndivo (appellants) produced the motor vehicle search certificate indicating the respondents as the owners of the suit motor vehicle.

12. DW1 Wilson Kandie testified on 28<sup>th</sup> March 2017 and confirmed that point of the accident was a market place and found it difficult explaining how a low speed car could lead to an instant death since the impact was big.

13. He also misled the court when he said the deceased crossed the road running, and then went back when he saw the suit motor vehicle. It is not practical to cross the road running then go back immediately. This can only happen when a person was walking. He must first stop, before going back.

14. The witness testimony should therefore not be relied upon. DW1 also testified that he was charged with the offence of causing death by dangerous driving and the case was yet to be concluded. The defence did not produce any document or police abstract to support their averments. The appellants are therefore 100% liable for the accident.

#### **RESPONDENTS' SUBMISSIONS:**

15. The respondent submitted that he was driving at 48Km/h when the deceased suddenly dashed onto the road. His efforts to avert the accident by swerving to the left side of the road did not bear fruits as the deceased dashed back to the same side causing the accident.

16. He relies in the case of *Lilian Birir & Anor vs Ambrose Lenmon, Nakuru HCCA No. 116 of 2013*, Lady Justice Mulwa which held that:

**“I have stated that in my view which has been the view of other courts, that a conviction in a traffic offence alone is not sufficient without further evidence, to hold the respondent liable or culpable. There must be evidence by the appellant to show why and how the respondent is culpable. Mere statements are not enough. In this case, there is absolutely nothing on record to show in what way, if at all the respondent was to blame or contributed to the accident.”**

17. Also relied on the case of *Eldoret HCCA No. 102 of 2005 – Sally Kibii & Anor vs Dr. Francis*

**Ogoro, Justice Ibrahim** (as he then was) held that negligence must be proved. He stated:

**“In the Kenital case (above), I held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. The appellants simply did not adduce any evidence before the trial court on liability. They could have called eye witnesses and/or the investigating police officer. Proof of negligence was material in this case and the burden of proof was upon the appellants. She did not discharge the burden and the appellant’s counsel submission before me that ‘someone had to explain how the accident took place is telling. That ‘someone’ is the appellants who alleges negligence on the part of the defendant.”**

ISSUES, ANALYSIS AND DETERMINATION

18. After going through the proceedings and submissions on record, I find the issues are; **whether the appellant proved his case on balance of probabilities? If above in affirmative, what is the quantum ? what is the order as to costs?**

19. The appellant case was that, PW1 Cpl. Charles Kiprotich told the court that the accident occurred involving respondents’ motor vehicle and deceased. The motor vehicle was at a speed at the time of the accident and the scene was a market place. There was no eye witness to the accident.

20. The officer did not have police file as he never investigated the case nor did he witness the accident. His role was to produce the police abstract. He said that he did not know whether the driver was charged with any offence. PW2 the appellant did not witness the accident at all.

21. On behalf of defence DW1 told the court that he was the driver of the respondents’ motor vehicle. At the scene of the accident, a bus overtook him and stopped. As he passed it the deceased came from his left side and attempted to run across the road. He applied brakes but unfortunately the deceased was hit and died on the spot. He blamed the deceased for crossing the road without checking.

22. From the evidence before court, there was no evidence to prove that DW1 was speeding at the time of the accident. There was no eye witness to the accident and the only evidence as to how it happened is the evidence of DW1 the driver of respondents’ motor vehicle. He exonerates himself and there is no evidence implicating him with negligence.

23. There must be evidence by the appellant to show why and how the respondent is culpable. Mere statements are not enough. See **Lilian Birir & Anor vs Ambrose Lenmon, supra**. See also **Eldoret HCCA No. 102 of 2005 – Sally Kibii** where court held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses.

24. The court therefore finds that the appellant never proved their case to the required legal threshold thus court makes the following orders;

**i) The appeal is dismissed with no orders as to costs in this appeal and the lower court.**

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JANUARY, 2020.**

.....

**C. KARIUKI**

**JUDGE**