**IN THE COURT OF APPEAL**

**NAIROBI**

**CIVIL APPEAL NO. 131 OF 1994**

**MAIMUNA W/O PARICK MUTOO……..APPELLANT**

**AND**

**WILSON NJAU NYAKI…….RESPONDENT**

**(Appeal from the judgement and decree of the High Court of Kenya at Nairobi (Mr. Justice Mbogholi-Msangha) dated 15th day of July, 1993**

**in**

**H.C.C.C. NO. 4758 OF 1987**

**DRAFT JUDGMENT OF THE COURT**

On the 2nd day of September, 1986 the husband of the appellant (hereinafter referred to as "the deceased") was injured as a result of a traffic accident which occurred along Kubukubu Road, in Embu township. The deceased succumbed to his injuries and died on the 9th day of September, 1986. The appellant instituted proceedings in the superior court against Mr. Wilson Njau Nyaki who was at the material time owner of motor vehicle registration number KRK 745, a white Chevrolet pick-up.

The respondent in his defence in the superior court claimed that his said vehicle was not involved in any accident on the 2nd day of September, 1986. He denied driving along Kubukubu Road on that day. It is noteworthy that he had not even in his amended defence filed on 19th October, 1990 taken the alternative defence of no negligence. His defence, simpliciter, was that his said vehicle was not involved at all in the suit accident.

Even in his evidence in the superior court his stand was the same. He said he entered Embu town from Meru direction and upon reaching the town parked his vehicle near EMCO Building in Embu, and went into a bank for some business. Upon his return to his vehicle he was confronted by two police officers standing near his vehicle who informed him that his vehicle was involved in an accident that morning. He insisted his vehicle was not involved in any such accident.

As a result of investigations carried out by the police he was charged in the Resident Magistrate's Court at Embu with two offenses namely (1) Causing death by dangerous driving contrary to section 46 of the Traffic Act and (2) Failing to stop after an accident contrary to section 73(3) of the Traffic Act. Whilst he was convicted of the second of the said offenses he was acquitted in respect of the first offence. That conviction, failing to stop after an accident, still stands. He did not file any appeal. Therefore according to section 47 A of the Evidence Act, that conviction is to be taken as conclusive evidence that he was guilty of the offence of failing to stop after an accident contrary to section 73(3) of the Traffic Act.

Clearly that conviction points to the fact of his vehicle being involved in the accident in respect of which he was charged in the Resident Magistrate's court at Embu.

Mr. Chege for the respondent argued that the proposed appeal against such conviction was not filed as a result of his then counsel's negligence and that such negligence ought not be visited unto his client. Counsel's negligence in not taking a step or steps in instituting an appeal may be a ground for extension of time to file such an appeal but it certainly does not alter the effect of section 47 A of the Evidence Act. Mr. Chege's such argument, with respect, is totally untenable. It is not even a serious argument.

The evidence of Mr. Ramadhan Njoka (P.W.2) who is an Embu businessman, was to a certain extent believed by the learned judge who said in his judgment:

"Both P.W.2 AND P.W.3 in this court gave evidence before the learned trial magistrate in the traffic proceedings. So did the defendant. The learned trial magistrate found, despite denial by the defendant that it was motor vehicle Reg. No. KRK 745 that knocked down the deceased and caused his death. On my part going by what P.W.2 and P.W.3 told both this court and the court below, I believe it to be true. Both did not lose sight of the motor vehicle after the deceased was knocked down and made a report to the police at the earliest opportunity."

The learned judge accepted the fact of accident between the respondent's vehicle and the deceased and we think correctly so. What then is left is the issue of negligence. The learned judge said:

"I have looked at the particulars of negligence as set out in paragraphs 3 (i) to (viii) of the plaint as against the evidence hereinabove set out. Regrettably I am unable to read any negligence on the part of the defendant. It is true that he never stopped after the accident but that is not proof of negligence."

With respect the learned judge, in our view, erred in concluding that there was no negligence. We set out below relevant portions of the evidence of P.W.2 and P.W.3, Mr. Mohamed Rajab which at least show that there was enough prima facie evidence of negligent driving which the respondent ought to have explained or rebutted. P.W.2 said:

"Near Esso there is a corner and an electric lamp post. I saw a motor vehicle in front of me driving (sic) Chevrolet KRK 745 pick up white in colour. I first saw it afar. I cannot estimate distance. The motor vehicle was fast. It was going up hill. I saw it hit a man and it did not stop. The road was wet. The motor vehicle swerved to the right and hit a man lifting him. The man was hit by the body of the motor vehicle. I saw it hit the man. The man was then off the road on the right hand side."

In cross examination P.W.2 said:

"I saw the man being hit by the body of the pick up. I saw him being thrown up the air. I have been a driver for a long time. It is possible for someone to be hit by a body of the motor vehicle and thrown up."

"Motor vehicle KRK 745 was driving in high speed uphill. I have long experience in driving. It was possible to follow the motor vehicle KRK 745"

P.W.3 said in his examination in chief:

"When that motor vehicle reached the corner it knocked down somebody with the body. The man was at the corner on right hand side off the road….." We followed the motor vehicle. The man was knocked and thrown up. He fell off the road."

In cross examination P.W.3 said:

"The motor vehicle ahead of us was fast. Our lorry was following at same speed. About 40 K.P.H. our motor vehicle was about 50 meters from the point where the man was hit. The left side hit the man."

At least in so far as P.W.2 was concerned there was acceptable evidence of somewhat high speed and in going by the evidence of P.W.2 and P.W.3 there was evidence that the deceased was knocked off the road, by the body of the respondent's vehicle, lifted up and thrown off the road. This is clearly evidence, prima facie, of driving at a speed which was excessive in the circumstances, driving in a manner dangerous to other road users, failing to steer the vehicle properly and in fact even failing to see at all the deceased in time to avoid the accident.

With all this evidence, which was not controverted, the learned judge erred in concluding that there was no evidence of negligent driving. This is a first appeal and we are bound to reappraise the evidence before the superior court but we would be slow in differing from the judge on finding of facts. We would only do so only if it (a) appears to us that in his decision the trial judge failed to take into account particular circumstances material to an estimate of the evidence or (b) that his impression based on the demeanor of a material witness was inconsistent with the evidence in the case generally. See Ephantus Mwangi & Another vs Duncan M. Wambugu (1982-88) 1K.A.R.278.

In the case we are more concerned with the issue that the learned judge failed to take into account the particulars circumstances of the accident as narrated by P.W.2. and P.W.3. Their evidence shifted the burden of showing no negligence (albeit on a balance of probability) on the respondent. The respondent (as well his witness) insisted on stating that there was no such accident at all. The respondent's witness went to the extent of stating that the deceased was hit by a dark green landrover.

Considering all that has been gone into by us we can only come to the inescapable conclusion that the respondent's motor vehicle registration number KRK 745 was negligently driven and caused the death of the deceased. The fact that the accident was poorly investigated by the police does not detract one from the fact of the accident and the manner of driving as deponed to by reliable witnesses and P.W.2 and P.W.3 were, as found by the judge himself, reliable witnesses.

This appeal on the issue of liability therefore succeeds. The learned judge, quite properly, proceeded to assess damages as was his duty. He assessed the damages for loss of dependency at Shs.900,000/=, for pain and suffering at Shs.10,000/=. There is no cross-appeal against the award of damages.

In the result this appeal is allowed so that the judgment of the superior court dismissing the appellant's claim with no order as to costs is set aside and judgment is hereby entered in favour of the appellant against the respondent in the sum of Shs.910,000/= with interest thereon at 12 (twelve) percentum per annum from 15th day of July,1993, until date of payment in full. The appellant will have costs of the suit in the superior court as well as costs of this appeal.

Dated and delivered at Nairobi this 5th day of November, 1996.

**R.S.C. OMOLO**

**…….**

**JUDGE OF APPEAL**

**A.B. SHAH**

**……**

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

**……**

**AG.  JUDGE OF APPEAL**