



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram:Gicheru, Kwach & Tunoi, JJ A)**

**CIVIL APPEAL NO 14 OF 1989**

**Between**

**MAINA KANIARU.....APPELLANT**

**JANE WAHITO.....APPELLANT**

**AND**

**JOSEPHAT M. WANG'ONDU.....RESPONDENT**

***(An appeal from the judgment of Hon Mr Justice Mboghli-Msagha delivered on 18th March, 1988***

***in***

***HCCC No 2556 of 1986)***

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**JUDGMENT**

This is an appeal and cross-appeal from a judgment of the High Court of Kenya at Nairobi (Mboghli-Msagha J) delivered on March 18, 1988 the facts of which, so far as relevant, may be stated briefly as follows: On June 4, 1985 at about 5.45 pm the deceased Caesar Wanyahora, a sewing machinist aged 26 years, was crossing Naivasha Road near Dagoretti, Nairobi, when he was knocked down by motor vehicle registration number KDL 111 owned and driven by the respondent (the defendant in the suit) as a result of which accident the deceased sustained serious injuries to which he succumbed and died on the same day. The appellants (the plaintiffs in the suit) are the father and widow of the deceased and claimed damages against the respondent for the benefit of the dependants of the deceased and his estate under the Fatal Accidents Act and the Law Reform Act. After trial the learned judge held:-

“Taking into consideration all the evidence in totality I find that both the deceased and the defendant were equally to blame in the occurrence of the accident. Each shall bear 50% of the blame.”

The learned judge found the deceased's salary to be Shs 3,000/= per month and that half of it, ie Shs 1,500/= per month, went for the upkeep of his family. The learned judge held that a multiplier of 15 was appropriate in the circumstances. He assessed the loss of dependency in the sum of Shs 270,000/=. He awarded Shs 7,500/= for pain and suffering and Shs

60,000/= for loss of expectation of life. The funeral expenses were agreed at Shs 5,000/=. Finally, he reduced all these awards by 50% on the ground of contributory negligence by the deceased.

The appellants' main ground of appeal is that the learned judge erred in concluding that the deceased was 50% negligent yet no issue of contributory negligence was ever pleaded. Mr Mureithi, counsel for the appellants, who also appeared for them in the superior court, has contended that the learned judge was not entitled to reduce the damages on the ground of contributory negligence, because no such matter was in issue, the respondent not having pleaded it nor having adduced any evidence in that respect. Moreover, Mr Mureithi submitted, the respondent having admitted his conviction for causing death by dangerous driving, the learned judge erred in not finding the respondent solely to blame for the accident.

The respondent had filed a defence to the suit. In it he denied that he was guilty of negligence as alleged. He averred that the accident was occasioned solely as a result of gross negligence on the part of a third party who allegedly overtook the respondent's motor vehicle at a very high speed and in a most dangerous manner and hit the deceased thereby knocking him down and injuring him. The respondent contended that he only stopped at the scene of the accident to help carry the deceased to hospital as the third party's motor vehicle had fled the scene. When the trial commenced the respondent's advocate sought formal leave to amend the defence to incorporate a plea of contributory negligence on the part of the deceased. It was resisted by Mr Mureithi and the learned judge ruled that as the issue was not raised in the defence and even on two other previous occasions when the case came up for hearing, it would be prejudicial to the appellants' case if he granted leave to amend. He rejected the application but also said:

“... if however there is evidence canvassed in the course of the trial in respect of the issue not pleaded the Court shall have the discretion to consider the same in the final judgment.”

In this case it should have been apparent to counsel for the respondent right from the beginning that the issue of contributory negligence might possibly arise but despite his very wide experience he did not plead it. Moreover, he did not take the appropriate steps to amend the defence until the trial commenced. It was quite clear at the outset that the action was for damages resulting from the negligence of the respondent. There was no allegation that the deceased had been negligent. In those circumstances, was it right for the learned judge to make a finding of negligence against the deceased in the absence of a plea to that effect? In our view it was wrong for him to do so.

In the case of *Fookes v Slaytor*, [1978] ICLR 1293 the plaintiff, while driving at night, came into collision with the unlighted trailer of an articulated vehicle parked by the side of the road as a result of which he suffered personal injuries. He brought an action for damages for negligence against the driver and owners of the articulated vehicle. After the owners had delivered a defence alleging that the driver was not acting as their servant or agent, the action against them was discontinued. The driver did not serve a defence. On the plaintiff's application he was ordered to deliver a defence within a stated time, failing which he would be debarred from defending. He failed to deliver a defence and, although he was informed of the date and time of the hearing in the county court, he did not appear and was not represented. The plaintiff gave evidence of the accident. The judge found that the defendant had been negligent but that the plaintiff's own negligence had contributed to the accident and he reduced the amount of damages by one third

On appeal by the plaintiff it was held, allowing the appeal, that contributory negligence had to be specifically pleaded by way of defence to a plaintiff's claim of negligence; that, since there had been no such plea, the judge had erred in law in finding that the plaintiff's negligence had contributed to the accident.

The authority, though not of course in any way binding on this Court, is directly on the point and is in favour of the proposition on which the appellant relies herein. With all due respect to the learned judge it was not open for him to treat the matter as if there was a plea of contributory negligence before him. Again, it was an error on his part having disallowed the application to amend the defence to hold that he still had a discretion to consider the issue in his final judgment.

We see no substance in the other grounds of appeal and we need not revisit them. In the result, we allow the appeal, set aside the decision of the High Court dated 18th March, 1988. The appellants will have the costs of the appeal.

We now deal with the cross-appeal. It was contended by Mr Inamdar, for the respondent, that it was wrong on the part of the learned judge to award a sum of Shs 60,000/= under the Law Reform Act when damages had already been assessed at Shs 270,000/= under the Fatal Accidents Act. Mr Inamdar submitted that the final award should be reduced accordingly by that sum.

The rights conferred by section 2(5) of the Law Reform Act (cap 26 Laws of Kenya) for the benefit of the estates of deceased persons are stated to be “in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act.” This does not mean that damages can be recovered twice over but that if damages recovered under Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act. The House of Lords held in the case of *Davies and another v Powell Duffryn Associated Collieries Ltd* (1942) All ELR p 657 that in assessing damages under the Fatal Accidents Act, 1846, damages under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in the case of dependants who will benefit under the latter Act. The cross-appeal, in our view, must succeed and is allowed with costs.

As the appeal and cross-appeal have been allowed the appellants will have judgment in the sum of Shs 222,500/= together with 3/4 of the costs of the appeal and interest at Court rates.

**Dated and delivered at Nairobi this 11th day of July 1995**

**J.E GICHERU**

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**JUDGE OF APPEAL**

**R.O KWACH**

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**JUDGE OF APPEAL**

**P.K TUNOI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**