REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO E181 OF 2022

COLLINS ASOHA MAGOMERE……APPELLANT

VERSUS

JANET NDINDA MUSYOKA & SAMMY MUTISYA
(Suing as the administrators and legal representatives of the late **DANIEL MUTINDA MULWA……. RESPONDENT**

(*Being an appeal from the judgment of Hon. S. Kandie, Resident Magistrate delivered on 08/11/2022 at the Chief Magistrates Court in Mavoko in CMCC E187 of 2022)*

JUDGMENT

1. This an appeal against the findings on liability in respect to a motor accident which occurred between its motor vehicle and Daniel Mutinda Mulwa, (deceased), which the Respondent attributed to negligence on the part of Appellant.
2. Briefly, the Respondent's case was that on 6th November, 2021 at about 1630 hours, the deceased was walking along the Nairobi-Mombasa road in Mlolongo area, when the Appellant who is the beneficial owner of motor vehicle registration number KCX 235Q TATA LORRY/TRUCK carelessly and negligently managed it causing it to lose control and knock down the deceased thereby occasioning him fatal injuries.

3.According to PW1, CPL Amdany, the deceased was rolling a wheel from the left side to the right side of the road Mombasa-wards when he was hit by the lorry; That they charged the driver with the offence of causing death by dangerous driving to which he pleaded guilty and was fined Kshs 100,000 in default, to imprisonment for one year. He produced the police abstract in evidence.

4.PW2 stated that she was the widow of the deceased; that the deceased was 55 years; that he sold tires for a living and would earn about Kshs 80,000 per month. That they had four children, and he was also survived by his mother who was fully dependent on him. She also stated that the deceased died after about 5 hours between 4pm and 5 pm.

5. DW1, Allan Gadwa, admitted that he was the driver of the subject motor vehicle. He stated that the deceased was knocked down when he suddenly emerged from a blind spot arising due to obstruction caused by a stationary truck; that the deceased ran into the vehicle's path in pursuit of a tyre. DW1 contended that driving on that road was difficult due to the construction works. He admitted that he was charged with causing the death of the deceased; that he pleaded guilty to the charge and that he was fined Kes 100,000.

6. Upon considering the evidence and submissions by both sides, the trial Magistrate found it a fact that the Respondent had acted negligently and found it 100% liable and awarded the Respondent a sum of Kshs.779,710/- broken down as follows: -

- Pain and suffering Kshs. 50,000.
- Loss of expectation of life Kshs.100,000.
- Loss of dependency Kshs 503,960.
- Special damages Kshs 125,750
- Costs and interest.

7. Aggrieved by the Judgment, the Appellant lodged this appeal and asked the court to review the findings on liability on grounds that:-

"a. The learned magistrate erred in law and in fact in rendering a judgment in favour of the Plaintiff/Respondent against the weight of evidence adduced in court.

b. The learned magistrate erred in law and in fact in failing to appreciate that there was no reasonable and sufficient evidence tendered in court to prove the claim hence erroneously holding the defendant/ Appellant wholly liable.

c. The learned magistrate erred in law and fact when it relied on contradictory authorities to arrive at a decision that is not supported by the authorities relied on,

d. The learned magistrate erred in fact and law by not taking into account the cited authorities in the submissions filed by the Defendants/Appellants on liability.

e. In all the circumstances of the case, the findings of the Learned Trial Magistrate are insupportable in law or on the basis of evidence adduced."

8. The appeal was canvassed by way of written submissions.

Submissions

9. Learned Counsel for the Appellant submitted that even with a conviction on a plea of guilt, the plea of contributory negligence was still available to the Appellant. That through its defence, it was proven that the road was under construction and was closed for pedestrians and other road users therefore the driver could not have forseen that a pedestrian would be crossing at that point in such a manner, that PW1 and PW2 confirmed that the deceased suddenly emerged from a blind spot which was behind a parked truck rolling a tyre, there was a footbridge nearby which the deceased ought to have used and that the deceased failed to check that the road was clear before crossing. It was also submitted that the Trial court failed to take into consideration their submissions. The court was urged to apportion liability at 80: 20% in favour of the Appellant against the Respondent. The Appellant also prayed for the costs of appeal. In support of the submissions, reliance was placed on the following cases; ***Caren Auma Oyugi Okwiri v Emergency Relief Supplies Ltd & another [2017] KEHC 6000 (KLR), Charles Ocharo Momanyi v United Millers Limited [2017] KEHC 4102 (KLR) and Murigi & another v Mwangi & another (Administrator of the Estate of Bernard Njuguna (Deceased) (Civil Appeal 389 of 2019) [2023] KEHC 27113 (KLR).***

10. Learned Counsel for the Respondent submitted that there was no error in the judgment of the learned magistrate. That is as much as the conviction for dangerous driving does not impute negligence on its part, the Appellant did not in subsequent proceedings, lead any evidence to prove contributory negligence on the part of the deceased. Further, that no appeal was preferred against the sentence despite there being a right of appeal. Lastly, that the Respondent pleaded *res ipsa loquitor* which cast upon the Appellant the onus to prove that he was not negligent.

11. The Respondent on their part, prayed that the award of damages be upheld as it was not disputed. In support of their submissions, reliance was placed on the cases of ***Mary Ambeva Kadiri suing as the administrators of estate of Saleh Juma Kadiri (Deceased) vs Country Motor Limited [2017] e KLR, Mary Njeri Murigi vs Peter Macharia and another [2016] e KLR.***

ANALYSIS AND DETERMINATION.

12. As the first appellate court, this court is enjoined to consider and re-evaluate the evidence in the court below so as to arrive at its own independent findings while keeping in mind that it did not see or hear the witnesses. [See **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)].**

13. This appeal is against the liability only. It is not disputed that an accident occurred involving KCX 235Q and the deceased

who suffered fatal injuries. It is also conceded that the driver of the motor vehicle pleaded guilty to causing the death of the deceased, was found guilty and convicted and when fined paid the fine. It was his evidence that he did not appeal.

14. In the case of **Mkube v Nyamuro [1983] KLR at 403** the Court of Appeal reiterated that-

> ***"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."***

15. In the case of **Isabella Wanjiru Karanja v Washington Malele [1983] KECA 72 (KLR), the court stated**;

> "***There are two elements in the assessment of liability, namely causation and blameworthiness. See Baker v Willoughby [1970] AC 467. In my opinion there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. I would not disagree with the learned judge's finding that the appellant's speed was excessive in the circumstances, but the failure to keep a proper look out would seem to be the predominant factor. I respectfully agree that the learned judge was right to apportion the blame 75 per cent to the appellant driver and 25 per cent to the respondent pedestrian.***
>
> ***…***

I agree with what Law JA said in Malde v Angira Civil Appeal No 12 of 1982 (unreported) that apportionment of blame represents an exercise of a discretion with which this court will interfere only when it is clearly wrong, or based on no evidence at all nor did he apply a wrong principle."

16. In this case, the plaintiff did not call an eye witness but according to the driver of the vehicle the deceased emerged from a blinfd spot and crossed into the path of the vehicle as he was running after a tyre. The driver did not himself allude to the manner in which he was driving the vehicle but if the road was difficult to drive on due to construction works then it means that he was driving at a high speed as to have not been able to avoid hitting the deceased. His allegation that his view of the road had been obstructed by another vehicle was not proved either. Moreover, he admitted that he drove dangerously and hence caused the death of the deceased. The elements of the offence of causing death by dangerous driving are that the driver drove recklessly or at a speed or in a manner which is dangerous to the public. By pleading guilty the driver of the lorry admitted all those elements. Section 47A of the Evidence Act provides that once a person is convicted for a criminal offence and they do not appeal, then the conviction is conclusive evidence that they committed the offence. He cannot now be heard to say otherwise. In the premises, I am not persuaded that there was an error in the findings of the learned magistrate as to liability. The fact that

even the police blamed him for the accident can only make the evidence that he was negligent **even stronger.**

17. The upshot is that this appeal has no merit. It is dismissed with costs to the Respondent**.**

Orders accordingly.

Judgment signed, dated and delivered virtually on this 25th day of September 2025.

E.N. MAINA

JUDGE

IN PRESENCE OF:

Miss Miya, Advocate HB for Mr Obuoga for the Respondent.

Mr Animo, Advocate HB for Mrs Kiarie for the Appellant.

Geoffrey Court Assistant/Interpreter.