IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, KARANJA & MARAGA, JJ.A)

CIVIL APPEAL NO. 179 OF 2003

BETWEEN

RAHAB MICERE MURAGE

(suing as a representative of the Estate of

ESTHER WAKIINI MURAGE …………………………….. APPELLANT

AND

ATTORNEY GENERAL…………………….……………. 1ST RESPONDENT

SIMON PETER MWANGI ……………..……………. 2ND RESPONDENT

JOHNSON MUGO NGUNGA ………..……………… 3RD RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Ang'awa J.) delivered on 3rd July 2001

in

H. C. C. C. NO. 2775 OF 1991)

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JUDGMENT OF THE COURT

By a plaint dated 30th May 1997 and filed in the High Court at Nairobi within the same month **Rahab Micere Murage**, (*the appellant*) the legal representative of **Esther Wakiini Murage** (*the deceased*), impleaded **The Hononourable Attorney General**, **Simon Peter Mwangi** and **Johnson Mugo Ngunga**, for damages under the Fatal Accidents Act and the Law Reform Act, for her own benefit, and for the benefit of Nicholas Murage Wakiini who was the surviving son of the deceased.

The Attorney General (*1st respondent*) was sued on behalf of the Government of Kenya, which as at the 1st June 1990, owned motor vehicle registration **No. GK M 400**, which was involved in a collision with the other motor vehicles, then owned by Peter Mwangi (2nd Respondent) and Johnson Mugo Ngunga (*3rd Respondent)* respectively. Those other two motor vehicles were **No. KLW 617** and **KUE**

189. In the course of the collision the deceased who was a passenger in the government vehicle was fatally injured. In the aforesaid plaint the appellant set out particulars of negligence for each of the motor vehicles involved in the collision. As against the government driver, who also died in the course of the collision, the appellant averred, that he was negligent by, *inter alia* by:

> **"5 (C): Driving on the wrong side of the road and having done so failing to return to his correct side of the road in time or at all."**

As against the 2nd respondent the appellant averred, *inter alia*, that he was negligent in:

> **"(b) failing to keep any or any proper look out or failing to have any sufficient regard for the motor vehicles which were or might reasonably be expected to be on or by the said road.**
>
> **(c) Failing to take any evasive action or at all to avoid the collision with motor vehicle registration number GK M400.**
>
> **(d) …**
>
> **(e) Failing to notice in sufficient time the presence of the vehicle GK M400".**

And as against the 3rd respondent the appellant made, more or less, similar averments with regard to particulars of negligence, among others.

The Attorney General entered appearance and filed a written statement of defence. In paragraph two of its written statement of defence he averred as follows:

> **"2 The defendant (s) admits that the plaintiff was riding in motor vehicle registration number GK M400 when a collision occurred between the said motor vehicle and motor vehicles registration numbers KLW 617 and KUR 189, but denies that the said collision was occasioned by negligence on his part."**

The second respondent as material, averred in its statement of defence thus:

> **"(5) The 2nd defendant admits that his motor vehicle registration number KLW 617 was involved in an accident on the date and place set out in paragraph 4 of the plaint but denies each and every allegation of negligence attributed to him as set out in paragraph 5 of the plaint and puts the plaintiff to strict proof thereof."**

He then went on, in paragraph 4 of his defence, to blame the 1st and 3rd respondents for the accident.

The third respondent too filed his defence and blamed the 1st respondent for the accident.

It is clear from the pleadings that on the issue of negligence that the deceased who was a passenger in the Government motor vehicle registration number GK M400 was not to blame for the accident. The three respondents are mutually blaming each other for the accident. How did the accident happen? The deceased and the government driver of motor vehicle registration No. GK M400 as also the deceased's sibling died in the accident. The legal representative of the deceased filed a separated cause to wit, **Nairobi High Court Civil Case No. 2772 of 1991**. In that case too the appellant herein was the plaintiff. It is apparent however, that the drivers of the other two motor vehicles survived. Unfortunately, however, neither of them testified when the appellant's suit was heard. Only the appellant testified.

In her evidence she stated that the deceased was her daughter. She died in a road traffic accident along Sagana – Kutus road along with one Nicholas Murage and the driver of the government vehicle in which the two were passengers. She produced a police abstract report of the accident. In that report the

result of investigations or prosecution if known shows "*P.U.I*" which we were told means Pending Under Investigation. The appellant was not present when the accident happened and she testified as much. So as there was no other witness who testified, the court did not think it could make any finding as to the cause of the accident. In the end the trial judge (*Ang'awa J.*) dismissed the appellant's case for lack of sufficient evidence and thus provoked this appeal.

In her judgment Ang'awa J. among other findings, found as fact, that there was no proof as to how the accident happened. There was no proof that the deceased was a passenger in the 1st respondent's motor vehicle at the time of the fateful accident, and finally that negligence was not proved against any of the three respondents.

Issues were agreed. They were as follows:

> **"(a) Whether or not the plaintiff has the *locus standi* necessary to institute this suit.**
>
> **(b) Whether or not the deceased was a passenger in motor vehicle registration number GK M400 at the time of the accident.**
>
> **(c) Whether or not the accident was caused by the negligence of either the first, second or third defendant's driver, agent or servant.**
>
> **(d) Whether or not the accident was contributed to by the negligence of either the first, second or third defendant's driver, servant or agent and if so how should liability be apportioned between the said drivers.**
>
> **(e) Whether or not the plaintiff has suffered loss and damage and if so, how much.**
>
> **(f) Damages and costs."**

On the first issue, the appellant produced a copy of the grant of letters of administration intestate of the estate of Esther Wakiine Murage, and thus proved that she had the *locus standi* to bring action on behalf of the estate of the deceased. And on the second issue, there was no necessity of the appellant calling evidence on it as the 1st respondent, as stated earlier, admitted in its written statement of defence, that the deceased was a passenger in motor vehicle registration number, G.K. M400 at the time of the accident. In our view the trial Judge had no basis for holding that there was no proof on this aspect. We will revert to the issue later in this judgment.

With regard to the remaining issues apart from (e) and (f), the issues relate to who, among the three respondents, was blameable for the accident in which the deceased was fatally injured. As stated earlier the respondents blamed each other for the accident. They tactfully avoided calling any evidence regarding the cause of the accident presumably relying on the provisions of **section 109** of the Evidence Act, which provides that:

> **"The burden of proof as to any particular facts lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

The deceased was a passenger in the 1st respondent's motor vehicle when the accident in which she died occurred. The driver of the said motor vehicle also died. All the respondents appear to have recognized that the issue whether or not the deceased was a passenger was central to the determination of the question of liability. However, as we stated earlier in this judgment the 1st respondent having admitted that fact there was no obligation to call evidence on it. By the rules of pleadings any allegation made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading. (see **O.2 rule 11(1)** of the Civil Procedure Rules). The 1st respondent having admitted the deceased was a passenger in his accident vehicle it was not open to the

learned trial Judge to find otherwise.

We agree the learned trial Judge erred when she found as fact that the deceased was not a passenger in motor vehicle registration No. G.K. M400 at the time of the accident in view of the 1st respondent's admission in his statement of defence that she was a passenger.

In the second ground of appeal the appellant complains that the learned trial Judge erred in finding that no negligence was proved in light of the fact that the respondents were blaming each other for the cause of the accident, the subject matter of the suit. That an accident did occur is not in dispute. Nor is there a dispute that the three cars involved in the accident were respectively owned by the three respondents. How the accident happened was a matter within the knowledge of the respective drivers of those three vehicles. Well driven motor vehicles do not just get involved in accidents. The driver of the 1st respondent's vehicle died in the accident. The remaining ones, we suppose, were alive at the time the appellant's case was heard. The failure on their part to testify must have been a deliberate act on the part of the 2nd and 3rd respondents. The police appear not to have been in a hurry to conclude investigations as to the cause of the accident. The appellant went to them to get a police abstract report on the accident. They gave one but the accident was said to be still under investigation. The conduct of the respondents appears to us to suggest that they deliberately withheld evidence as to the cause of the accident to frustrate the appellant's suit. **Section 112** of the Evidence Act Cap 80 of the Laws of Kenya, we think was meant to deal with situations as those in the present case. That section provides thus:

> **"In civil proceedings , when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."**

The appellant alleged negligence against all the respondents as the cause of the accident in which her daughter died. She was not there at the scene and could not have known how the accident happened. As stated earlier vehicles driven on public roads in a proper manner do not without cause become involved in accidents. It must be for that reason that the appellant accused the respondents of negligence. Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent, and through such negligence caused the accident in which the deceased died. It is not a presumption arising out of the doctrine of *res ipsa loquitur,* but from the evidential burden as imposed under **s.112**, of the Evidence Act.

Having come to the foregoing conclusion, it is our judgment that Ang'awa J. erred in ruling that no negligence was proved. The burden was on the respondents to disprove negligence on their part as the cause of the accident was a matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law. It follows that each of the three respondents is liable to the appellant in damages in equal shares.

As regards quantum, we find no basis for interfering with the figure Ang'awa J. arrived at. Mr. Namada, for the appellant complained that a multiplier of 20 years was on the lower side for a deceased person who was 25 years of age. He cited the case of **Lucy Njoki Chege** (suing as the personal representative of the **Estate of Francis Kara Wainaina**) **vs. James Macharia Kungu t/a Marsh Transporters & Another Nakuru High Court Civil Case No. 239 of 1998,** but it was not in point.

The learned trial Judge in coming to her decision must have borne in mind several imponderables and given allowance for them before settling for a multiplier of 20 years. As stated earlier the deceased was 25 years old, worked as a clerk earning Kshs.3600/= per month as basic salary. No further details were given. In those circumstances there would be no proper basis for contending that the multiplier of 20 years was low.

We allow the appeal, set aside the order dismissing the appellant's suit with costs, and substitute therefor an order entering judgment in favour of the appellant against the three respondents jointly and severally, in the sum of Kshs.476,000/= being damages under the Fatal Accidents Act, with costs.

Dated and delivered at Nairobi this 20th day of April 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

W. KARANJA

……….………

JUDGE OF APPEAL

D.K. MARAGA

……..………..

JUDGE OF APPEAL

I certify that this is a

true copy of the original