IN THE COURT OF APPEAL
AT NYERI

(CORAM: O'KUBASU, GITHINJI & WAKI, JJ.A)
CIVIL APPEAL NO. 345 of 2000

ANNE WAMBUI NDIRITU

(*Suing as administrator for the estate of*

GEORGE NDIRITU KARIAMBURI (DECEASED)…......... APPELLANT

AND

JOSEPH KIPRONO ROPKOI………………………1ST RESPONDENT

FOUR BY FOUR SAFARIS COMPANY LTD…................................. 2ND

RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyeri

***(Juma, J) dated 9 th October,2000* in**

NYERI H.C.C.C. NO. 77 OF 1999)

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JUDGMENT OF THE COURT

This is a first appeal from the judgment of Juma, J. delivered at Nyeri on 9th October, 2000 in a road traffic accident case in which a heavy duty lorry collided with a motorcycle, killing the motorcyclist. The widow of the motorcyclist sued the driver and owner of the lorry for damages but the suit was dismissed, hence this appeal.

George Ndiritu Kariamburi (hereinafter "the deceased"), a 34–year old, was employed by M/S Kenya Power & Lighting Co. Ltd as a meter reader in Nyeri area and was assigned a motorcycle for that purpose. He lived with his wife and two children at Mweiga. On the 16th March 1998, at about 5.30 p.m., the deceased was heading to Mweiga from Nyeri direction and was going uphill in a section of the road that has blind corners. At the same time, three motor vehicles were negotiating the same corner to go down hill from the opposite direction, Mweiga towards Nyeri. One was a matatu vehicle, followed by a heavy duty lorry carrying camping equipment and 11 people on board. It was M/V Reg. No. KZF 213 owned by **M/S Four By Four Safaris Company Ltd.** (hereinafter "the defendant") and driven by its authorised driver Joseph Kiprono Ropkoi, who died before the suit was heard. Seated in the cabin with the driver and another person was **Mose Kenyatta Chogo** (*Mose*) an employee of the defendant who was the only witness called on behalf of the defendant. Behind the defendant's lorry and negotiating the same corner was another lorry, a canter in which **Geoffrey Iya Mwangi** (*Geoffrey*) a matatu conductor was

travelling as a passenger. He testified for the plaintiff and is the one who walked from the scene to inform the family of the deceased, whom he knew.

Although the police were informed about the accident and arrived at the scene at 11 p.m., there was no evidence tendered from the police or any sketch plan produced to show the nature of the road and the point of impact. The driver of the lorry was however not prosecuted. The only eye-witness account therefore came from the two witnesses who were travelling in the same direction when the accident occurred.

It was the recollection of **Geoffrey** that the three vehicles were in the following order as they negotiated the corner to go down hill towards Nyeri:- the matatu was ahead and had cleared the corner and started descending; the defendant's lorry was right in the middle of negotiating the corner and was occupying the middle of the road as it did so; the canter in which he sat in front was right behind the defendant's lorry. They were all travelling at a moderate speed. At that point he saw a motorcyclist in the opposite direction uphill. The motorcycle hit the rear wheels of the defendant's lorry and the cyclist was thrown on the road. He died instantly. He wore no helmet. Behind the motorcycle, but at a distance, were other vehicles going uphill.

From where he sat in the defendant's lorry Mose had his own observations. They were negotiating this corner which was the third along that road. Ahead of them on the other side of the road were a lorry and a matatu going uphill approaching the corner. Suddenly he saw a motorcycle with its headlights on overtaking those vehicles. Their driver Kiprono swerved to the left but then he heard a sudden bang at the rear of the lorry. The driver moved to the side of the road and they came out only to find a dead man and his motorcycle on the road. There was no damage to their lorry since the motorcyclist collided with the rear tyre. He could not recall seeing any other vehicles ahead or behind them shortly before the accident although, unlike **Geoffrey,** he recalls seeing a bunch of miraa and wrapped meat which he said the deceased had. He also smelt alcohol on the deceased.

That is all the evidence the learned Judge of the superior court had to choose from to decide on liability for the accident. The only other evidence came from the widow of the deceased who had filed the suit and was mainly directed at assessment of damages once liability was determined. The Judge chose Mose's version of the story because "he impressed me as a truthful witness", and because:

> **"He was clear in his mind that the lorry in which he was travelling in was on its side of the road. It was heavy and because of the several corners, it was going at a slow speed. The fact that the place has many corners is not disputed. He also testified that another lorry followed by a matatu was traveling from the opposite side and thus their driver had to keep to his side of the road. The other vehicles were travelling uphill and they must have been travelling at a slow speed and that is why the motorcyclist tried to overtake them."**

He found the deceased was travelling at a high speed and failed to keep a proper look out, thus causing his own death. The Judge declined to apportion negligence despite readiness of counsel for the defendants entertaining such a possibility in his submissions and proposing a contribution of 30% on the part of the defendant. He proceeded to assess damages, as he was bound to, in the event that the plaintiff had succeeded in her claim as follows:

(a) Loss of expectation of life	Shs. 100,000
(b) Damages under the Fatal Accident Act	Shs. 2,081,376
(c) Police abstract	Shs. 100
	TOTAL 2,181,476

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That assessment is not challenged.

As a first appellate Court we are not bound by the findings of fact made by the superior court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial judge and the caution is always appropriate as O'Connor P. stated in **Peters v Sunday Post Ltd. (1958)** EA 424, at Pg. 429:

> **"It is a strong thing for an appellate court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness."**

This Court will however interfere where the finding 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 the finding he did. See **Ephantus Mwangi & Anor vs. Wambugu** (1983) 2 KCA 100:

We have carefully examined the evidence on record from the two eyewitnesses but are not satisfied that the learned Judge made a balanced view of it. He did, as he was entitled to, believe the evidence of one of them but he did not state why he could not believe the other eye witness. Indeed he did not refer to that evidence at all other than simply reproducing it. It was the evidence of **Geoffrey** that the defendant's lorry which was ahead of him and was negotiating a corner to go down hill was occupying the midddle of the road shortly before the collision occurred. Mose appears to lend credence to that evidence when he says the driver of the defendant's lorry moved it to his left but there was still a collision with the rear of the lorry. **Mose** could not see the rear of the lorry as he was seated in the front cabin. **Geoffrey** who was behind them was in a better position to see the rear of the lorry occupying the middle of the road. **Geoffrey** said the other vehicles following the motorcycle were at a distance while Mose said the motorcyclist was sandwiched between the two lorries as the collision occurred since he could not fully overtake the other lorry and move back to his lane. The probability is that Geoffrey was right otherwise the other lorry would have run over the motorcyclist soon after the collision. Both witnesses agree that the motorcyclist was going uphill while the defendant's lorry was about to go down hill. We think the speed of the motorcycle was exaggerated while that of the lorry was minimized without clear evidence. **Mose** did not testify on the point of impact. **Geoffrey** said it was in the middle of the road. We think both parties did themselves a disservice by failing to call traffic police evidence which no one said was impossible to obtain. That way the point of impact would have easily been verified from the sketch and measurements taken on the road. It would have confirmed whether as Geoffrey stated the defendant's lorry was in the middle of the road or on its side of the road as claimed by **Mose**. It would have verified the story by **Mose** which no one else saw that the deceased smelt of alcohol and had miraa with him. In short, it would have corroborated the two stories one way or the other for the court to weigh the balance fairly.

It was submitted by Mr. Mburu, learned counsel for the respondents that the onus was on the appellant to prove her case and it never shifted to the respondent. We agree with that proposition.

As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80, which provides:

> **"107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections **109** and **112** of the Act, thus:

> **"109. The burden of proof as to any particular fact 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.

112. 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 two sections carry forward the often repeated evidential adage: "*he who asserts must prove*".

We have looked at the pleadings on the both sides in this matter. The plaintiff asserted that the accident was solely caused by the negligence of the defendant's driver and gave particulars of such negligence which the defendants denied. The defendant also asserted that the accident was solely caused by the negligence of the motorcyclist and gave particulars of contributory negligence. Issues were subsequently joined on such pleadings. In the event each party was under a duty to prove their own assertions but they did not do a good job for it.

We have considered the submissions of both counsel, the authorities cited before us and we are persuaded by Mr. Mwangi learned counsel for the appellant that we must interfere with the judgment of the superior court. There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50.

It follows from that finding that the damages awarded which have not been challenged on appeal shall be apportioned in similar proportion. For the avoidance of doubt the damages were assessed at Shs. 2,181,476/=. The appellant is entitled to 50% of that figure which is Shs. 1,090,738/= for which judgment is accordingly entered with interest thereon at court rates from the date of judgment in the lower court. The appeal is allowed to that extent. Each party will bear its own costs here and in court below.

Dated and delivered at Nairobi this 10th day of December, 2004.

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR