



REPUBLIC OF KENYA  
 IN THE COURT OF APPEAL  
 AT NAIROBI  
**CORAM: LAKHA, OWUOR & O'KUBASU JJ.A**

**CIVIL APPEAL NO. 185 OF 1999**

**BETWEEN**

**NJUGUNA MACHARIA.....APPELLANT**  
**AND**  
**JOSEPHAT MATHIA MWIHIA**  
**(AS ADMINISTRATOR OF THE ESTATE OF**

**THE LATE JACINTA WANGUI MWATHIA) .....1ST RESPONDENT**  
**JOSEPH K. LANGAT .....2ND RESPONDENT**  
**EDWARD NDICHU MURIITHI .....3RD RESPONDENT**

**JUDGMENT OF THE COURT**

This is an appeal from the judgment of the superior court (Aganyanya J) delivered on 21st day of October, 1998 in which he found the appellant wholly to blame for an accident in which four vehicles were involved. There were 9 grounds of appeal in the filed Memorandum of Appeal, but when the appeal came up for hearing on 19th July, 2000, Mr. Kirundi for the appellant condensed all these grounds into only two which in our view are grounds 1 and 9. These were as follows:-

"1.THAT the learned trial Judge erred in law and in fact in holding the Appellant 100% liable for the accident that occurred on 27th September, 1992 when the evidence before the Honourable Judge did not support the said decision.

2 - 8 ..... 9.THAT the learned Trial Judge erred in law in awarding damages under the Law Reform Act while the plaintiff was not entitled to the same having taken out the Letters of Administration after the filing of the suit".

The broad and basic facts giving rise to this appeal can be briefly stated as follows:- On 27th September, 1992 shortly after 4.0 p.m. an accident occurred along Nairobi- Naivasha Road, at Kamirithu in which four vehicles were involved. There was the Nissan matatu registration number KYH 320 which was carrying passengers from Nairobi towards Naivasha. When this Nissan matatu reached near Kamirithu market, there was a bus registration number KAC 564A which was at a bus stage but was trying to pull out. Then there was a lorry registration number KYD 851 which emerged from the left hand side of the road and joined the main road. There were these three vehicles (a bus KAC 564A, a lorry KYD 851 and Nissan matatu KYH 320) all heading towards Naivasha. They were all on the left hand side of the road as one faces Naivasha direction. The Nissan matatu then decided to overtake the lorry which had emerged from the left hand side of the road as the bus which was at a bus stop started also pulling out. In the process of overtaking these two vehicles the Nissan matatu collided with an oncoming lorry registration number KYT 352. As a result of this collision one Jacinta Wangui Mathia died and hence her father filed suit against the owner of the Nissan matatu and the lorry registration number KYT 352. Jacinta Wangui Mathia was a fare paying passenger in the Nissan matatu registration number KYH 320.

The issue before the learned trial judge was, who was to blame for this accident? After considering the

evidence of all those who testified the learned trial Judge came to the conclusion that the driver of the Nissan matatu (KYH 320) was wholly to blame for the accident. The learned trial judge then entered judgment in favour of the plaintiff for Shs.135,000/- with costs of the suit. It is from that judgment that this appeal was lodged.

As already indicated at the commencement of this judgment there are only two grounds of appeal which were argued. In our view, the main ground of appeal here relates to the issue of liability.

Mr. Kirundi for the appellant argued that it was wrong to hold the driver of the Nissan matatu registration number KYH 320 wholly liable. In his view, this accident was caused substantially by the driver of the lorry which emerged from the left hand side of the road and the other lorry from the opposite direction. He asked us to hold that the oncoming lorry was 10% to blame and the lorry that emerged from the left hand side was 80% liable while the Nissan matatu was only 10% liable. It was Mr. Kirundi's submission that without the lorry which emerged from the left hand side of the road there would have been no accident.

Mr. Maina and Mr. Ngare who appeared for 2nd and 3rd respondents respectively supported the decision of the learned trial judge. They were of the view that the accident was caused by the Nissan matatu registration number KYH 320. Mr. Kamonde who appeared for one of the interested parties associated himself with the submissions of his other colleagues who supported the decision of the learned trial judge on the issue of liability.

We have evaluated the evidence on record and it would appear that this accident which occurred near Kamirithu was witnessed by a few witnesses. There was evidence that the Nissan matatu was being driven at high speed and that it tried to overtake the lorry and the bus when it was not safe so to do and hence collided with an oncoming lorry. Charity Ngatha Thonange, (PW1) was a passenger in the Nissan matatu and she testified that the Nissan matatu was overtaking the bus when it hit the lorry. This witness said that the bus was not properly parked at the stage as part of it was on the road and hence that is why the driver of the Nissan was overtaking. James Mburu, (PW2) was another passenger in the Nissan matatu who stated that the bus was parked partly on the road and that a lorry emerged ahead. Lucy Waithera Munga, (PW3) another passenger in the matatu said that the bus was wrongly parked or it had started moving as the Nissan matatu approached. In her evidence she blamed the Nissan matatu for the accident. Cpl. Peter Wambua (PW4) produced a sketch plan of the scene of accident. He was of the view that the driver of Nissan matatu was the cause of the accident.

Having considered the evidence on record the learned trial judge concluded thus:-

"Given this evidence and all the circumstances, I hold the view that if the driver of the Nissan matatu had taken a proper look-out of the road situation at the scene he would have seen the oncoming lorry in time and avoided overtaking the bus registration number KAC 564A and lorry registration number KYD 851 there. He did not do so with the result that he caused this accident which claimed his own life and that of the deceased herein - may the Almighty God rest their souls in eternal peace. I blame him wholly for the accident".

The learned trial judge was satisfied that the driver of the Nissan matatu was 100% liable. Mr. Kirundi was of the view that his client was not wholly to blame. He invited us to consider the decision in Berkley Steward Ltd. and Others v. Lewis Kimani Waiyaki (1982-88) 1 KAR 1118, in which it was held that where there was no concrete evidence to distinguish between the blameworthiness or otherwise of the two drivers, both should be held equally to blame. But with due respect, the facts of this case are different. Here we have the driver of the Nissan matatu driving at a high speed and on reaching this place where there was a bus stage ahead, he sees a bus and behind it a lorry which had stopped but he proceeds ahead and overtakes the two vehicles without ascertaining whether there was oncoming vehicle and in that state of carelessness collides with the oncoming lorry. Clearly the driver of the Nissan matatu was to blame for this accident. On our own evaluation of the evidence on record, we are satisfied that the decision reached by the learned trial judge was indeed inevitable in the circumstances of this case.

As was stated by this Court in Echen Agencies and Another v. Naomi Rimbui Palma and Others - Civil Appeal No. 140 of 1998 (unreported) a finding of negligence or no negligence is largely a question of fact and very often a question of degree, and that this Court should not interfere with that finding unless it is satisfied that the trial judge was wrong. We would also refer to what was said by the then President of the Court of Appeal for East Africa in Peters v. Sunday Post (1958) E.A 424 at Pg 429 in that:-

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion ...".

Bearing these principles in mind and consistent with our duty as the first appellate court, we have as already stated carefully evaluated the evidence before the learned trial judge and treated it to a fresh and an exhaustive scrutiny and in the end came to the conclusion that the learned trial judge came to a correct conclusion. Like the learned trial judge we are satisfied that the driver of the Nissan matatu vehicle registration number KYH 320 was wholly to blame for this accident in issue. The other ground of appeal was to the effect that the learned trial judge erred in law, in awarding damages under the Law Reform Act while the plaintiff was not entitled to the same, having taken out the Letters of Administration after the filing of the suit. There is no substance in this ground since in concluding his judgment the learned trial judge stated:-

"In the circumstances of this case I am not convinced the deceased estate would be entitled to any damages under the Law Reform Act (Cap.26 Laws of Kenya)".

When this was brought to the attention of Mr. Kirundi, he quickly abandoned that ground, and in our view rightly so. For the reasons above stated this appeal fails. The same is therefore dismissed with costs to the 2nd and 3rd respondents.

**Dated and delivered at Nairobi this 4th day of August, 2000.**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**E. OWUOR**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**