REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CIVIL APPEAL NO. 13 OF 2019

KENYA RED CROSS.....APPELLANT

VERSUS

IDS (Suing as the Legal Representative

of the Estate of MDR (DECEASED).....RESPONDENT

(Being and appeal from the judgment of the Hon. Senior Resident Magistrate J.J. Masiga delivered on the 14th May, 2019 in Garissa CMCC No. 3 of 2016)

JUDGEMENT

1. By a plaint filed on 16/2/2016 the claimant sought the following reliefs:

- **General damages.**
- **Special damages.**
- **Costs and interest of the suit.**

2. The Respondent who was a legal representative of estate of deceased 13 yrs old child after obtaining limited grants of letters of Administration Ad Litem pleaded that on 19/9/2011 along Mwingi – Garissa road near Bunta Bunta Shopping Centre the deceased pedestrian while walking far from the road she was hit by motor vehicle KAQ 138J due to negligent drive of same motor vehicle by driver/agent of the Defendant occasioning her fatal injuries.

3. The Defendant/Appellant denied the claim and attributed negligence which occasioned the accident to be blamed on the victim/deceased.

4. The Defendant also pleaded that it would raise a preliminary objection as claim was time barred under the provisions of Limitation of Actions Act.

5. The suit went into full trial and the court found for the claimant on liability 100% in Respondent's favour and awarded damages Kshs.1,500,000/-.

6. The Appellant was aggrieved thus lodged instant suit setting out:-

a. That the learned magistrate erred in law in failing to appreciate that the suit was time barred and no sufficient reasons had been advanced to warrant extension.

b. That learned magistrate erred in law and fact in finding liability at 100% as against the Appellant despite overwhelming evidence to the contrary.

c. That the learned magistrate erred in law and fact in awarding under Law Reform Act a sum of Kshs.200,000/- and under Fatal Accidents Act for loss of dependency of Kshs.1,300,000/- which amount is excessive.

d. That the award of damages by the learned magistrate was excessive and an erroneous estimate of the damages that may awarded to the Respondent considering the circumstances of the case before the subordinate court and the weights of precedents in similar circumstances.

e. That the learned magistrate erred in law and fact in disregarding crucial evidence in arriving at his decision based on only partial evidence.

SUBMISSIONS BY APPELLANT

7. The appellant contested was whether the leave granted to file out of time was justified. The majority decision in the case of **Mary Wambui Kabugu vs Kenya Bus Service Ltd Civil Appeal No. 195 of 1995**, was to the effect that the only time a defendant can challenge the order granting extension of time is at the time of the trial.

8. This line of reasoning has been adopted in many decisions and indeed it has been held that failure by the Respondent to establish that the reasons given in order to obtain leave to use out of time are valid should lead to dismissal of the suit. (See **P.M.N. vs Kenyatta National Hospital & 6 Others [2015] eKLR**).

9. The issue of limitation was raised in the defence, during the trial the Respondent stated that there was delay in filing suit because there were negotiations. It wasn't clear with whom the Respondent was negotiating, if at all; neither was there any evidence tendered to demonstrate that the delay in filing suit was indeed caused by any negotiations.

10. In the submissions by the Appellant, this was raised but the trial court's finding was oblivious of the lacunae in the explanation of the Respondent. The burden was on the Respondent to establish that the grounds for the leave were valid. Failure to establish such meant that the leave obtained was invalid and the suit remained time barred. (See **John Gachanja Mundia vs Francis Muriira & Anor [2017] eKLR**).

11. On liability it was argued that, It was incumbent upon the Respondent to prove fault on the part of the Appellant.

12. The trial court observed that the Respondent was an eye witness is contrary to the evidence of the Respondent. How would one who is 200 metres away from the scene become an eye witness? It is in these circumstances that section 119 of the Evidence Act, on presumption of likely facts should avail.

13. The fact that the Appellant did not call evidence is not a cushion against analysis of the evidence by the lower court. The Appellant had no burden to discharge.

14. That failure by the Respondent to establish the exact circumstances of the accident rendered the finding on liability open to disturbance by this court.

15. On whether the award of damages was erroneous? the Appellant submitted that the trial court awarded Kshs.100,000/- for pain and suffering, Kshs.100,000/- for loss of expectation of life and Kshs.1,300,000/- for loss of dependency.

16. That in the judgement the magistrate awarded the sum of Kshs.100,000/- for pain and suffering on the basis that the deceased died 3 hours after the accident while at Mwingi Hospital. Was there any evidence of any attendance to hospital, none, and this was erroneous analysis. Even if the deceased was to be held to have passed on after three hours, the precedents do show a low award would have been considered. See **John Mureithi Kariuki vs George Mwangi [2012] eKLR** an award of Kshs.10,000/- for pain and suffering was made.

17. For loss of expectation of life, the precedents cited to the learned magistrate pointed to awards of Kshs.70,000/- and there was no reason to depart from such conventional awards.

18. On the award of dependency under Fatal Accidents Act, the lower court ably appreciated the circumstances required a global award rather than multiplicand – multiplier approach.

19. However, it is their submissions that the trial court erred in awarding Kshs.1,300,000/- when there was nothing exemplary to give such an award in respect of a thirteen-year-old. The case cited by the Appellant i.e. the case of **Wesley Kipkoech Kendagor vs Unistar Transporters Ltd HCCC No. 116 of 2004** where the deceased was aged 21 years old and been admitted at Eldoret Polytechnic.

20. He had not earned a living. He however used to assist his disabled mother at the farm. The court awarded a global sum of Kshs.500,000/-. And in **Oyugi Judith & Anor vs Fredrick Odhiambo Ongong & 3 Others [2014] eKLR** wherein the Respondent was a Form 2 student and 18 years of age and the court awarded a global sum of Kshs.120,000/- were on point.

21. The proposed award of Kshs.500,000/- was made.

RESPONDENT'S SUBMISSIONS

22. On the issue of justification of the leave to file suit out of time, it is submitted that, an *ex parte* order of leave of time to file suit was issued on 9th of February 2016 in **Garissa Chief Magistrates Court Miscellaneous Civil Application No. 1 of 2015** on the grounds that, the suit was filed late because parties were negotiating for settlement out of court. It was based on this ground that the Court granted leave to file suit out of time. The trial Court found this reason sufficient to warrant the extension of time for filing the suit. The respondent relied on provisions of Section 28 (2) of this Act of cap 22LOK.

23. This means that the Court has to be satisfied that the evidence adduced by the respondent would in the absence of any evidence to the contrary, be sufficient to establish that cause of action and to fulfill the requirements of extension of time under Section 27 (2) of the Act.

24. The trial Court found the grounds for the *ex parte* application by the Respondent to be satisfactory and in accordance with the aforementioned section.

25. The parties entered negotiations for settlement prior to the suit being filed. The Respondent entered the negotiations in good faith in the hope of coming to an amicable settlement. It was during these negotiations that the time limit for filing the suit expired.

26. The Appellant has not denied that the parties entered negotiations.

27. Moreover, the Respondent was put to task on cross-examination to explain why it took time to file the suit during the trial and the respondent categorically explained to the Honorable Court the circumstances leading to the delay. The trial Court took consideration of all facts laid before it prior to reaching its conclusion.

28. It should therefore be concluded that the delay in filing the suit was inadvertently caused by the negotiation of the parties.He also relied on in the case of **Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Autoplus Used Parts Trading Company Nairobi high court civil case no. 145 of 2010 eKLR .**

29. (On the issue of liability, the Respondent submit that the Appellant was wholly liable for the accident and the fatal injuries of the deceased child.

30. The appellant's authorized driver of vehicle registration number **KAQ 138J** caused the vehicle to hit the deceased and was later arraigned and charged in **Garissa Magistrate's Court Traffic Case No. 374 of 2013** for causing death by careless driving. He was found **GUILTY ON HIS OWN PLEA**.

31. According to the police records, the said driver is **YAHYA MOHAMED**. No further testimony from the police was needed at the trial to prove the driver's culpability. If the driver was not guilty, he would have pleaded **NOT GUILTY** and the matter set down for hearing to ascertain who was on the wrong.

32. The Respondent testified that the said vehicle attempted to overtake a stalled lorry but at a very high speed. The driver then lost control and hit the deceased who was not on the road at the time. This testimony was not challenged by the appellant at any stage during the proceedings.

33. Uncontroverted evidence in the trial indicates that the accident occurred at around 11.00 a.m. and that the child died almost instantly. This is an indication of the high velocity of the vehicle. The driver had clear immediate vision of the deceased child but failed to take the preemptive action of slowing down or moving far away from the deceased.

34. The attempt by the defendant to blame the mother for the accident does not remove the duty of proper care by the driver. Blaming the mother for not walking with the child does not make the child herein blameworthy.

35. The driver simply did not exercise reasonable standard of care in the circumstances of the case, for he did not take into account the fact that the pedestrian was a child and the severity of the degree of injury to be expected if the pedestrian was struck.

36. Even looking at the evidence by the Respondent which was not controverted, she was standing approximately 200 meters from where the accident took place and saw the stalled lorry on the road. The presence of such a stalled vehicle on the road is ordinarily a sign for an oncoming driver to drive carefully when approaching. This, coupled with the fact that the driver saw the child on the side of the road, means that he ought to have been extremely careful.

37. At a tender age of **thirteen (13) years**, the deceased cannot be blamed for contributory negligence. Generally, an ordinary 13-year-old should not be expected to consider taking the same level of road precautions as an adult. It would be asking too much of the victim to say that she should not have walked alone near the road or should have waited for her mother.

38. Respondent urged the court to find the appellant 100% liable for the accident and to dismiss this appeal. He relied on the case of **BUTT V KHAN [1978] EKLR (CIVIL APPEAL 40 OF 1977)**.

39. In light of the above citation, it should be noted that the deceased in the present case was not crossing the road but was walking far away from it.

40. The driver bears full responsibility for failing to take reasonable care for the safety of the deceased child who was not capable of contributing to the recklessness of the driver. In that situation, the whole portion of the overall responsibility and negligence rests upon the perpetrator of the act who is the driver.

41. Victim blaming in the instant case is a selfish strategy by the appellant which serves to maintain the economic interests of the appellant at the expense and suffering of the deceased and her poor family.

42. For the above reasons, we urge this Honorable Court to uphold the trial Court's decision that the defendant/appellant's driver is wholly liable for the accident involving the minor child and that the trial magistrate did not err in so finding that the defendant is 100% liable for the minor's fatal injuries.

43. On quantum, the first issue was Pain and Suffering: the deceased died on the same day. She underwent excruciating pain while

undergoing treatment for her fatal wounds. Considering the age of the deceased he urged this Court to uphold the award of the trial court for pain and suffering of **Kshs. 100,000/=** and find it reasonable.

44. They relied on the case of **MOMBASA CIVIL APPEAL NO. 152 OF 2015 ALI SHEIKH AHMED & ANOTHER –VS- NKJ & ANOTHER (Suing on their own behalf and in their capacity as the administrators of the estate of the late JMJ) eKLR** where the Court upheld an award of **Kshs. 80,000/=** for pain and suffering of the deceased who was a minor.

45. On the issue of loss of expectation of Life ,the award of **Kshs. 100,000/=** under this head is conventional and well merited and in accordance with the applicable principles of law.

46. The Respondent proved that the deceased was a **thirteen (13) year old** school going minor with a bright future hence there is no reason why the trial Court could not make the award after taking into consideration the age of the deceased. She was a promising student with ambitions of becoming a doctor before this dream was tragically cut short.

47. The approach in assessing damages for loss of expectation of life is to take the income the deceased child would have earned assuming that she lived and worked up to the age of retirement.

48. Under this head, he relied on the case of **KAKAMEGA HIGH COURT CIVIL APPEAL NO. 9 OF 2017 CHABHADIYA ENTERPRISES & ANOTHER – VS – SARAH ALUSA MWACHI (Suing as the Legal Administrator and Personal Representative of the Estate of the Late Faiza Musa) eKLR** where the deceased was a minor aged twelve (12) years and the court upheld an award of **Kshs. 100,000/=** for loss of expectation of life.

49. On general damage for lost dependency it is awarded to the estate of the deceased so as to compensate her estate for the loss in income her family would have benefited from the deceased had she lived.

50. As a gainfully employed doctor in Kenya, she would have contributed greatly towards the welfare of her poor parents and siblings.

51. The deceased was a primary school going minor with a full life ahead of her. Upon completing education and gaining employment, she would have worked for a fair wage of above **Kshs. 10,000/=** until the age of retirement of fifty-five (55) years.

52. While damages for lost years may be speculative, they are not non-existent; they are available and awards should ordinarily be made in deserving cases such as this one.

53. In the case of **NAKURU CIVIL APPEAL 133 OF 2003 ABDI KADIR MOHAMMED alias MOHAMED OSMAN & ANOTHER –VS- JOHN WAKABA MWANGI (suing as the legal representative of the Estate of the late DAVID KARANJA MWANGI) eKLR** the Court relied on the use of minimum wage to assess the damages for loss of dependency. The deceased was a minor aged twelve (12) years and was awarded **Kshs. 900,000/=** under this head.

54. The Respondent contended that there was no indication that the learned magistrate acted on the wrong principle of law; neither is there any evidence that he misapprehended the facts. In these circumstances, there is no basis to interfere with the award under this head of **Kshs. 1,300,000/=.**

55. On whether the trial Court Considered all the Evidence? the appellants did not present any evidence to challenge the respondent's claim during the proceedings. When the respondent's side presented one witness, the defence on its part did not call any witness and closed their case without producing any evidence to controvert the evidence of the respondent.

56. The appellant/defendant, apart from filing a defence, failed to adduce any evidence to controvert the respondent's claim

57. The trial Court found the respondent's evidence unchallenged and proven on a balance of probabilities. The respondent proved liability of the defendant for causing the accident and tragic death of the deceased.

58. It is a principle of law that pleadings, such as a statement of defence, are merely averments that do not count as evidence. No decision can be founded on them. Proof is the foundation of all evidence. Where a defendant does not adduce evidence, the respondent's evidence is to be believed, as allegations by the defence is not evidence.

59. Any party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value. They remain as unsubstantiated pleadings. A defence in which no evidence is adduced to support it cannot be used to challenge the respondent's case.

60. The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. This is in accordance with **Section 107(1) of the Evidence Act** (Chapter 80 of the Laws of Kenya.

61. The evidential burden is cast upon any party pleading any particular fact which he desires the court to believe in its existence. That is captured in **Sections 109 and 112 of the Act** .See also the case of **LINUS NGANGA KIONGO & 3 OTHERS –VS- TOWN COUNCIL OF KIKUYU NAIROBI HIGH COURT CIVIL CASE 79 OF 2011 eKLR** .

62. In light of the foregoing, he prayed that this Honorable Court finds this appeal to be unmerited and should be dismissed in its entirety

with costs.

ISSUES, ANALYSIS AND DETERMINATION

63. After going through the evidence on record and parties' submissions', I find the issues are;

> **whether the trial court erred in upholding the old granting leave to file suit out of time, whether the trial court erred in holding appellant 100% liable in occasioning the accident by its agent/driver, whether the award made was so inordinately high to justify this court to intervene and what is the order as to costs?**

64. This appeal is against both liability and damages. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123.**

65. On the first issue as to whether the Respondent's suit in the trial Court was time barred under section 4 of the Limitation of Act. It is evident that an ex parte order of leave to file suit out of time was issued on 9th of February 2016 in Garissa Chief Magistrates Court Miscellaneous Civil Application No. 1 of 2015.

66. The grounds given by the Respondent for leave were that the suit was filed late because parties were negotiating for settlement out of court. It is based on this ground that the Court granted leave to file suit out of time. The trial Court found this reason sufficient to warrant the extension of time for filing the suit.

Under section 28 (2) of this Act states that:

> **"(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates if, but only if, on evidence adduced by or on behalf of the respondent, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient—**
>
> > **(a) to establish that cause of action, apart from any defence under section 4(2) of this Act; and**
> >
> > **(b) to fulfil the requirements of section 27(2) of this Act in relation to that cause of action."**

67. This means that the Court has to be satisfied that the evidence adduced by the respondent would in the absence of any evidence to the contrary, be sufficient to establish that cause of action and to fulfill the requirements of extension of time under Section 27 (2) of the Act.

68. The trial Court found the grounds for the ex parte application by the Respondent to be satisfactory and in accordance with the aforementioned section.

69. The parties entered negotiations for settlement prior to the suit being filed. The Respondent entered the negotiations in good faith in the hope of coming to an amicable settlement. It was during these negotiations that the time limit for filing the suit expired.

70. The Appellant has not denied that the parties entered negotiations.

71. Moreover, the Respondent was put to task on cross-examination to explain why it took time to file the suit during the trial and the respondent categorically explained to the Honorable Court the circumstances leading to the delay. The trial Court took consideration of all facts laid before it prior to reaching its conclusion.

72. Thus the delay in filing the suit was inadvertently caused by the negotiation of the parties. See the case of **Rosemary Wanjiru Kungu vs Elijah Macharia Githinji & Autoplus Used Parts Trading Company Nairobi high court civil case no. 145 of 2010 eKLR** where the Court held:

> **"In the result, where the defendant or his representative such as the insurance company leads the respondent to believe that the claim is capable of being settled and in reliance thereof the respondent or his advocate refrains from filing the suit until after the limitation has run its course, that may constitute a good ground for extending time notwithstanding the provisions of section 27 aforesaid"**

73. At the time of the application for extension of time as was held in **Lucia Wambui Ngugi vs. Kenya Railways & Another,** where the court held that; **"court assumes that the facts as deposed in the supporting affidavit are true. It was therefore upon the defendant at the hearing to challenge the grounds upon which the order extending time was granted. Whereas the defence concentrated on the provisions of section 27 of the Limitation of Actions Act, no serious challenge was directed to the issue of negotiations. I am therefore unable to find that the order extending time to file the suit was not properly granted."**

74. Thus the ground fails.

75. On issue of liability, the Respondent submits that the Appellant was wholly liable for the accident and the fatal injuries of the deceased child.

76. The appellant's authorized driver of vehicle registration number KAQ 138J caused the vehicle to hit the deceased and was later arraigned and charged in Garissa Magistrate's Court Traffic Case No. 374 of 2013 for causing death by dangerous driving vide pex 5. The respondent advocate stated that the appellant driver was to blame in line with respondent testimony but appellant never tendered any evidence to controvert the same.

77. According to the police records, the said driver is YAHYA MOHAMED. No further testimony from the police was needed at the trial to prove the driver's culpability. If the driver was not culpable, he would have availed himself to rebut the respondent evidence.

78. The Respondent testified that the said vehicle was moving in a zigzag manner and at a high speed. The driver then crashed the deceased who was not on the road at the time. This testimony was not challenged by the appellant at any stage during the proceedings.

79. Uncontroverted evidence in the trial indicates that the accident occurred at around 11.00 a.m. and that the child died almost instantly. This is an indication of the high velocity of the vehicle. The driver had clear immediate vision of the deceased child but failed to take the preemptive action of slowing down or moving far away from the deceased.

80. The attempt by the defendant to blame the mother for the accident does not remove the duty of proper care by the driver. Blaming the mother for not walking with the child does not make the child herein blameworthy.

81. The driver simply did not exercise reasonable standard of care in the circumstances of the case, for he did not take into account the fact that the pedestrian was a child and the severity of the degree of injury to be expected if the pedestrian was struck.

82. Even looking at the evidence by the Respondent which was not controverted, she was standing approximately 200 meters from where the accident took place and saw the stalled lorry on the road.

83. The presence of such a stalled vehicle on the road is ordinarily a sign for an oncoming driver to drive carefully when approaching. This, coupled with the fact that the driver saw the child on the side of the road, means that he ought to have been extremely careful.

84. At a tender age of thirteen (13) years, the deceased cannot be blamed for contributory negligence. Generally, an ordinary 13-year-old should not be expected to consider taking the same level of road precautions as an adult. It would be asking too much of the victim to say that she should not have walked alone near the road or should have waited for her mother. See the case of **BUTT V KHAN [1978] EKLR (CIVIL APPEAL 40 OF 1977)**.

85. In that case, the Court of Appeal held that a child of tender years cannot be found to have been contributorily negligent unless it is proved that the child knew or ought to have known that he should not do the act or make the omission.

86. In the said case, the court referred to the English authority, **Gough v. Thorne [1966] 1 WLR 1387** in which the English Court of Appeal refused to attribute any contributory negligence to a girl aged 13-and-1/3 years who was knocked down while crossing a road. The learned judge in the case held that;

> **"a very young child could not be guilty of contributory negligence, although an older child might be depending on the circumstances. The test was whether the child was of such age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child."**

87. In light of the above citation, it should be noted that the deceased in the present case was not crossing the road but was walking far away from it.

88. The driver bears full responsibility for failing to take reasonable care for the safety of the deceased child who was not capable of contributing to the recklessness of the driver. Thus this court finds no fault by the trial magistrate in finding that the defendant 100% liable for the minor's fatal injuries.

89. On quantum, the deceased died on the same day. She underwent excruciating pain while undergoing treatment for her fatal wounds. Considering the age of the deceased, respondent urged this Honorable Court to uphold the award of the trial court for pain and suffering of Kshs. 100,000/= and find it reasonable.

90. They relied on the case of **MOMBASA CIVIL APPEAL NO. 152 OF 2015 ALI SHEIKH AHMED & ANOTHER –VS- NKJ & ANOTHER (Suing on their own behalf and in their capacity as the administrators of the estate of the late JMJ) eKLR** where the Court upheld an award of Kshs. 80,000/= for pain and suffering of the deceased who was a minor.

91. That was in 2015 decision which award cannot be held to be inordinately high in the circumstances.

92. On loss of Expectation of Life: the award of Kshs. 100,000/= under this head is conventional and well merited and in accordance with the applicable principles of law.

93. The Respondent proved that the deceased was a thirteen (13) year old school going minor with a bright future hence there is no reason why the trial Court could not make the award after taking into consideration the age of the deceased. She was a promising student with ambitions of becoming a doctor before this dream was tragically cut short.

94. The approach in assessing damages for loss of expectation of life is to take the income the deceased child would have earned assuming

that she lived and worked up to the age of retirement. See the case of where the deceased was a minor aged twelve (12) years and the court upheld an award of Kshs. 100,000/= for loss of expectation of life.

95. On loss of Dependency, General damage for lost dependency was awarded to the estate of the deceased so as to compensate her estate for the loss in income her family would have benefited from the deceased had she lived.

96. As a gainfully employed doctor in Kenya, she would have contributed greatly towards the welfare of her poor parents and siblings.

97. The deceased was a primary school going minor with a full life ahead of her. Upon completing education and gaining employment, she would have worked for a fair wage proposed to be of above Kshs. 10,000/= until the age of retirement of fifty-five (55) years.

98. While damages for lost years may be speculative, they are not non-existent; they are available and awards should ordinarily be made in deserving cases such as this one. See the case of **NAKURU CIVIL APPEAL 133 OF 2003 ABDI KADIR MOHAMMED alias MOHAMED OSMAN & ANOTHER –VS- JOHN WAKABA MWANGI (suing as the legal representative of the Estate of the late DAVID KARANJA MWANGI) eKLR** where the Court relied on the use of minimum wage to assess the damages for loss of dependency. The deceased was a minor aged twelve (12) years and was awarded Kshs. 900,000/= under this head.

99. The aforesaid award was in 2003 case and comparing with the instant case, the award is demonstrated by the appellant to be inordinately high that court upholds same award.

100. There is no indication that the learned magistrate acted on the wrong principle of law; neither is there any evidence that he misapprehended the facts. In these circumstances, there is no basis to interfere with the award under this head of Kshs. 1,300,000/=.

101. On complaint whether, the Trial Court did Consider all the Evidence? the appellants did not present any evidence to challenge the respondent's claim during the proceedings. When the respondent's side presented one witness, the defence on its part did not call any witness and closed their case without producing any evidence to controvert the evidence of the respondent.

102. The appellant/defendant, apart from filing a defence, failed to adduce any evidence to controvert the respondent's claim

103. The trial Court found the respondent's evidence unchallenged and proven on a balance of probabilities. The respondent proved liability of the defendant for causing the accident and tragic death of the deceased.

104. It is a principle of law that pleadings, such as a statement of defence, are merely averments that do not count as evidence. No decision can be founded on them. Proof is the foundation of all evidence. Where a defendant does not adduce evidence, the respondent's evidence is to be believed, as allegations by the defence is not evidence.

105. Any party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value. They remain as unsubstantiated pleadings. A defence in which no evidence is adduced to support it cannot be used to challenge the respondent's case.

106. The legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. This is in accordance with **Section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

> **"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."**

107. The evidential burden is cast upon any party pleading any particular fact which he desires the court to believe in its existence. That is captured in Sections 109 and 112 of the Act as follows:

> **"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."**

108. See the case of **LINUS NGANGA KIONGO & 3 OTHERS –VS- TOWN COUNCIL OF KIKUYU NAIROBI HIGH COURT CIVIL CASE 79 OF 2011 eKLR** where the Court held:

> **"What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lessit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated: "Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st respondent's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".**

109. Again, in the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the respondent against them is uncontroverted and therefore unchallenged.

110. In the case of **Karuru Munyororo vs. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 Makhandia, J.** held:

> **"The respondent proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the respondent's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon".**

111. The case of J**anet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997**said:

> **"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st respondent and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".**

112. In sum the court finds that the appeal has no merit and thus makes the following orders;

i) **The appeal is dismissed with costs to the respondent.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

…….

C. KARIUKI

JUDGE