



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 22 OF 2015**

**ELIAS NJUGUNA GATHAIYA.....APPELLANT**

**VERSUS**

**JAMES MAINA MUCHOKI.....RESPONDENT**

***[Appeal from the original decree of B. Ochieng, Chief Magistrate, in***

***Murang'a CMCC No. 134 of 2005 delivered on 16<sup>th</sup> February 2015]***

**JUDGMENT**

1. The appellant challenges the findings of the lower court on the twin issues of *liability* for negligence and *quantum* of damages.
2. The memorandum of appeal is dated 18<sup>th</sup> March 2015. It raises seven grounds. The centre-piece is that the claim was *fictitious* and not borne out by the *evidence*. In a synopsis, the appellant contends that the lower court erred by holding him 100% liable for the road traffic accident.
3. The respondent vigorously opposes the appeal.
4. The Court granted directions on 18<sup>th</sup> July 2017 that the appeal be canvassed through written submissions. The appellant filed submissions on 2<sup>nd</sup> March 2018 while those by the respondents were lodged on 11<sup>th</sup> July 2018.
5. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. I have re-evaluated the evidence and submissions and drawn independent conclusions. I am cognizant that I neither saw nor heard the witnesses. ***Peters v Sunday Post Limited*** [1958] E.A 424, ***Selle v Associated Motor Boat Company Ltd*** [1968] E.A 123.
6. The respondent (PW1) testified that he left Murang'a town at 6:30 in the evening. He said he marked the time on his watch. He was cycling down the slope towards the Mathioya River Bridge.
7. At the sharp corner adjacent to the bridge, he ran into a vehicle that had its full lights on. He claimed that the vehicle was in the middle of the road. He tried to avoid it and flashed his bicycle lights in vain. He was hit by the *side* of the vehicle. He claimed that he suffered severe injuries.
8. Due to the age of the suit and constant transfers of magistrates, the respondent ended up testifying on three different occasions before three trial magistrates. On the last occasion before E.N. Osoro, PM, on 1<sup>st</sup> August 2012, he testified as follows-

*At a corner an oncoming vehicle veered off the road to my side and hit me; it pushed me to the road pavement. I sustained injuries to my right shoulder. I was off [sic] the extreme side of the road as one faces Kiria-ini direction.....the vehicle did not stop and I was taken to Murang'a District Hospital.*

9. When he had testified earlier on 21<sup>st</sup> June 2010 before E. K. Usui, SRM, he had stated-

*The vehicle hit me on its right hand. I fell into the embankment. The vehicle did not stop; I was hit on my right shoulder. I broke the shoulder blade. The hand does not function and move. I am now able to do a fist move [sic]. My hand can't lift on its own. It only swings the body [sic].*

10. He said that his brother, Francis Ndung'u, was riding another bicycle behind him. He is the one who assisted him to get to hospital; and,

who later reported the matter to the police. The respondent claimed he gave his brother the registration number of the offending vehicle.

11. However, and it is material, the extract from the Occurrence Book produced by Inspector David Some (DW2) only indicated the particulars as *KTU*. His brother never took to the stand in the renewed trial. The full registration of the vehicle was only given to the police days later. I will revisit the subject shortly.

12. The appellant (DW1) on the other hand denied causing the accident. He relied on his statement dated 17<sup>th</sup> February 2012. In that statement he said-

*On 7/8/2004 at around 6:30 p.m., I was travelling home from Murang'a. I was using [sic] my motor vehicle Registration No. KAA 857U (Pick-up). It was about 7:20 p.m., when I reached at New Mathioya Bridge. At a corner known as Gitogi, I saw a cyclist on my side. His bicycle had no lights on. I managed to drive off the road so as not to hit him. I saw him proceed with his journey.....three months later on 28<sup>th</sup> October 2004 my vehicle was taken to Murang'a Police Station. I was told that I had hit a cyclist on 7/8/2004.*

13. In his oral evidence he testified that-

*I am still in touch with the police officer [Munyiri] who recorded the report. I cannot tell how I was implicated instead of the owner of *KTU*. The person who gave the registration number of my vehicle implicated me but I do not the person. I did not hit the plaintiff; if he was knocked down.....it was not mine.*

14. Granted that rebuttal, I find that it was erroneous for the succeeding trial magistrate, B. Ochieng, PM, to hold that-

*The defendant did not call any evidence to rebut that of the plaintiff and his witness and it remains controverted [sic]. The fact that the vehicle veered to the wrong side of the road at a sharp corner is clear evidence, prima facie, of driving at a speed that was not prudent and failing to steer the vehicle properly [underlining added]*

15. I say so because the appellant had taken to the stand and given a different version of events. He also called a witness, Inspector David Some (DW2) who produced records showing that at the time of the incident, neither the respondent nor his brother were sure of the full registration particulars of the offending vehicle. Doubt is completely removed by the report of the accident (Defendant's exhibit 1). On the material night, the respondent's brother recorded that the offending vehicle was "*KTU*".

16. That may not be surprising considering that the accident occurred at night. The respondent suddenly encountered a vehicle with its full lights at a sharp corner. He said that it veered into his lane, hit him and threw him into the embankment. The vehicle did not stop. I find that it is possible but *highly improbable* that he took down the particulars of the vehicle plate number.

17. That may perhaps explain why the police did not catch up with the appellant until three months later. Like I said before, the respondent had taken to the stand on *three occasions* before three *different* magistrates in a period spanning six years from 7<sup>th</sup> March 2006 to 4<sup>th</sup> February 2012. The fourth trial magistrate only took up the case after the appellant had testified in his defence. He heard only the last witness (DW2).

18. Over that period, the respondent had now refreshed the facts to a point of claiming that he knew the vehicle very well and adding (page 110 of the record):

*My brother reported the accident to the police. The vehicle was registration number KAA 857 U. We gave the registration number of the vehicle the same day and the OB of that day could bear that accident report. But I have never seen that OB.....*

19. Although the appellant alleges fraud and insists that the accident was fictitious, he cannot resile from his pleadings and witness statement. First, he made an express admission in the statement of a close shave between his vehicle and a cyclist at the bridge between 6:30 and 7:20 p.m. on the material day. Never mind that he states that the cyclist was unhurt and peddled away.

20. Secondly, at paragraph 4 of the statement of defence dated 21<sup>st</sup> April 2005 he pleaded that "*the accident which is the subject matter of the suit was caused solely or principally by the plaintiff's own negligence*". He proceeded to list the particulars of contributory negligence. That pleading was *not* made in the alternative or without prejudice.

21. Thirdly, the appellant did *not* specifically plead *fraud* in the statement of defence as required by Order 2 Rule 4 (1) of the **Civil Procedure Rules**.

22. Fourthly, DW2 who was investigating fraud on behalf of the appellant's insurers, did not produce any documents to prove forgery. He stated at page 134 of the record that his "*mandate was to investigate fraud. Murang'a police officers declined to come to court. That presupposes fraud*". The entire claim of fraud thus hangs on a thin thread of the erroneous details of the vehicle first given to the police; and, the appellant's claim of a narrow squeak from the cyclist.

23. Fifthly, I find that the combined evidence of DW1 and DW2 pointed to material gaps in the respondent's case. But it did *not* prove fraud to the required standard. The standard of proof for fraud is *higher* than that of a balance of probabilities. **Koinange v Koinange** Nairobi, High Court case 66 of 1984 [1986] eKLR, **Ratilal Patel v Lalji Makanji** [1957] EAR 314 at 317.

24. I find on a *balance of probabilities* that it is the appellant's vehicle that knocked down the respondent. The respondent claimed the

vehicle veered off to his lane and that he had flashed his bicycle lights. The appellant countered that the cyclist was on his path; and, that the bicycle had no lights as alleged. He claimed that he saw the cyclist proceed on his journey.

25. From the conflicting testimony of the appellant and respondent I readily find that one of them was *not* telling the truth. I neither saw nor heard the witnesses; I lost the benefit of assessing their demeanour. But on the totality of the evidence and the pleadings, I have reached the conclusion that both parties were *equally* to blame.

26. I set aside the finding on liability. I hold that the appellant and the deceased contributed to the accident and shall each bear liability at 50%.

27. I will now turn to assessment of damages. As a general rule, an appellate court will *not* interfere with quantum of damages unless the award is *so high* or *inordinately low*; or, founded on *wrong* principles. **Butt v Khan** [1982-88] KAR 1, **Arkay Industries Ltd v Amani** [1990] KLR 309.

28. From the evidence and medical report of Dr. Kanyi Gitau (PW3) the respondent suffered a “*fracture lateral 1/3 right clavicle... which caused displacement of the right shoulder joint leading to compression of nerves supplying the right hand lateral aspect*”. As a result, the doctor found that there was “*loss of sensation and decreased muscle power*”.

29. According to Dr. Julius Kimani (PW4), the respondent requires corrective surgery at a cost of Kshs 300,000. At the time of the doctor’s testimony in the year 2012, he opined that the cost would be three times higher in a private facility.

30. After reviewing some authorities and submissions by the parties, the learned trial magistrate awarded the respondent Kshs 800,000 as general damages; Kshs 300,000 for future medical expenses; and, Kshs 14,490 as special damages.

31. I have considered some relevant precedents. In **Antony Mwendu Maina v Samuel Gitau**, Nairobi High Court Civil Case 1150 of 2001 [2006] eKLR the court assessed general damages at Kshs 1,200,000. The injuries there were slightly more severe than in the instant case. In **Muhoro Komu v Mercy Wandegi Ndegwa**, Murang’a High Court Civil Appeal 31 of 2016 [2020] eKLR, the court awarded Kshs 1,000,000.

32. Considering the nature of injuries suffered by the respondent including paralysis to his dominant hand, I cannot say that the award of general damages was *so high* or *inordinately low*; or, founded upon *wrong* principles. I refuse to disturb it.

33. The cost of the future medical expenses of Kshs 300,000 was based on the uncontroverted evidence of Dr. Kimani (PW4). I uphold it. The respondent specifically pleaded for Kshs 30,380 as special damages. However, he only strictly proved the sum of Kshs 14,490.

34. The upshot is that the appeal *partially* succeeds. My final orders shall be as follows:

- a) That the judgment of the lower court on liability for negligence is *set aside*. Liability shall now be shared *equally* between the appellant and the respondent.
- b) That general damages are assessed at Kshs 800,000.
- c) That future medical expenses are assessed at Kshs 300,000.
- d) That special damages are awarded in the sum of Kshs 14,490.

35. That is to say that the appellant shall pay to the respondent the sum of Kshs 1,114,490 *less* 50% liability which is to say Kshs 557,245. I also grant the respondent interest on that sum from the date of the original decree till full payment.

36. Costs follow the event and are at the *discretion* of the court. I grant the respondent costs in the *lower court*. However, each party shall bear its own costs in the *appeal*.

It is so ordered.

**DATED, SIGNED and DELIVERED at MURANG’A this 29<sup>th</sup> day of September 2020.**

**KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. L. Kinuthia holding brief for Mr. Gathiga for the appellant instructed by Gathiga Mwangi & Co. Advocates.

Mr. J. Mbuthia for the respondent instructed by J. N. Mbuthia & Co. Advocates.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.