



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 262 OF 2017

(FORMERLY MACHAKOS HCCA NO. 109 OF 2010)

DAVID MUENDO.....1ST DEFENDANT/APPELLANT

-VERSUS-

SCHOLASTICA MULUKI NDUNGI.....PLAINTIFF 1ST RESPONDENT

HENRY MULI MASILA.....2ND DEFENDANT/RESPONDENT

(Being an Appeal from the Judgment of Hon. F.M. Nyakundi (PM) in the Principal Magistrate's Court at Makueni, Civil Case No.62 of 2009, delivered on 4th July 2010)

JUDGEMENT

INTRODUCTION

1. The 1st Respondent filed a suit in the lower Court seeking general damages, special damages, cost of the suit and interest for injuries sustained from a road traffic accident on 27/10/2008 along the Machakos-Makueni road.
2. The Appellant and 2nd Respondent filed their respective statements of defence and the matter was eventually slated for hearing. There were several suits arising from the same accident and an order was issued by the High Court in Machakos that this particular matter would be the test suit.
3. Judgment was eventually delivered and the Appellant was found wholly liable for the accident.
4. The 1st Respondent was awarded Kshs 130,000/= as general damages and Kshs 2,700/= as special damages. The Appellant was also to bear the costs of the Respondents herein.
5. Aggrieved by the judgment, the Appellant filed this appeal and listed 12 grounds as follows;
 - i. *The learned magistrate reached a wrong decision in law and in fact, contrary to the weight of the evidence before her.*
 - ii. *The learned magistrate erred in law in failing to find that the 1st Respondent was bound by her pleadings.*
 - iii. *The learned magistrate erred in law and in fact in failing to find that the Plaintiff's testimony and that of her witnesses was contradictory and unreliable.*
 - iv. *The learned magistrate erred in law and in fact in failing to find that the Plaintiff had not discharged her burden of proof.*
 - v. *The learned magistrate erred in fact and in law in finding that the Appellant was solely to blame for the accident.*
 - vi. *The learned magistrate erred in law and in fact in completely disregarding the evidence tendered by the Appellant's witnesses and in failing to find that their testimonies had been duly corroborated.*
 - vii. *The learned magistrate erred in law and in fact in failing to find that the 2nd Respondent solely caused and/or immensely contributed to the accident.*

viii. *The learned magistrate erred in law and fact in failing to find that the 2nd Respondent's driver was reckless and negligent and in failing to consider the traffic convictions against him.*

ix. *The learned magistrate erred in law and fact by relying on extraneous issues neither pleaded nor canvassed at the hearing.*

x. *The learned magistrate erred in law and practice in awarding a manifestly excessive quantum of damages which was not commensurate with the nature of injuries suffered and/or loss proved.*

xi. *The learned magistrate erred in law and fact in awarding the 1st Respondent special damages when the claim had not been proved to the required standards.*

xii. *The learned magistrate erred in law and fact by failing to consider the submissions and authorities made on behalf of the Appellant.*

6. Directions were given on 27/06/2018 that the appeal be canvassed by way of written submissions.

THE SUBMISSIONS

7. The Appellant adopted his submissions in the lower Court and further submits that the evidence of PW1 and PW3 was contradictory hence raising a question as to who was telling the truth.

8. According to him, the evidence of PW3 was more credible because it was corroborated by DW1 and DW2. The evidence of PW3 was to the effect that there was a collision between motor vehicle registration No. KBC 808G (*herein after 'the minibus'*) and motor vehicle registration No. KAA 874V (*herein after 'the tractor'*).

9. Further, the Appellant submits that the tractor driver was charged with the offence of driving an uninsured tractor and fined Kshs 5,000/=. That the abstract does not put any blame on the minibus driver and as such, the learned trial magistrate erred by solely blaming the minibus driver.

10. In opposing the appeal, the 1st Respondent submits that she discharged her burden of proof by demonstrating that she was a lawful passenger in the minibus, producing a motor vehicle search to show that the minibus was registered to the Appellant, producing a police abstract to show that the accident occurred, showing that the accident occurred on account of negligence and recklessness of the Appellant's driver and showing that the accident occurred in the manner described by her and her witnesses.

11. Further, she submits that her evidence was unshaken, that the Appellant's witnesses were incoherent and their evidence was not corroborative. That even though DW3, the police officer, gave evidence and blamed the tractor driver, he (*tractor driver*) was never charged with dangerous and/or reckless driving. Further, she contends that the conduct of the investigating officer with regard to the choice of charges demonstrates the true position and supports her evidence.

12. Further, she submits that it was proper for her to sue both the Appellant and the 2nd Respondent so that the issue of liability could be determined. According to her, there is no evidence on record to show that any other party contributed to the accident and therefore, the Appellant was solely to blame.

13. With regard to quantum, she submits that the authorities relied upon by the Appellant were ancient as they dated back to 1988. She supports the award given by the learned trial magistrate and says that it was just and fair in light of the injuries sustained and the rate of inflation.

14. The 2nd Respondent did not participate in this appeal.

PROCEEDINGS BEFORE THE LOWER COURT

15. PW1 was the Plaintiff. She testified that on 27/10/2008 (*herein after 'the material day'*), she was on board 'Katethya' (*the minibus*) heading to Wote from Kilala. That prior to the accident, the vehicle was being driven at a high speed causing it to lose direction.

16. That it went in a zig-zag manner for about 70 metres before it rolled. According to her, that distance was sufficient for the driver to have braked and controlled the vehicle. That she was seated in the middle and did not see any other vehicle ahead. She was not aware that the tractor hit their vehicle.

17. On cross examination, she said that the minibus had two cabins; a front cabin and a rear one where the passengers sit. That she was seated in the rear cabin (*middle*), on the extreme right near the window and all she saw was the vehicle going in a zig-zag manner. She did not see what was happening ahead. She did not see what was in front of their vehicle. She did not see any tractor.

18. That after the accident, the conductor broke the rear windscreen and they were helped out. She did not know the contents of her pleadings. The pleadings say that there was a collision with a tractor. In re-examination, she said that she could neither speak nor read English.

19. PW3 was Jackline Nduku Nzwili. She was also on board the minibus on the material day heading to Wote. She was seated at the driver's

cabin. She testified that the vehicle was being driven at a high speed and in a zig-zag manner. There was an oncoming tractor and the two collided i.e. brushed each other side by side and the minibus overturned at the gate of Kiatine primary school.

20. That it overturned on the right side as one faces Wote direction. The tractor did not overturn. According to her, the speed of the minibus caused it to overturn. That she had also filed suit as a result of the accident.

21. On cross-examination, she reiterated that she was seated at the driver's cabin with another passenger and the driver. She could not recall who the passenger in the middle was. That the accident took place at a sloppy area and they were going downhill.

22. That the tractor was in its lane and was not being driven at a high speed. That the minibus was the one going in a zig-zag manner and not the tractor. That the minibus driver did not do anything to stop the accident. That the minibus was moving from lane to lane until the collision. She did not agree with the proposition that the tractor driver was at fault.

23. On further cross-examination, she said that there were no police officers in the minibus at the time of the accident and that she was better placed to say how the accident took place than the police. That the minibus started going in a zig-zag manner before they saw the tractor and that even after seeing it, the minibus driver did nothing to stop the collision.

24. That the two vehicles brushed each other, the minibus left its lane and went to the tractor's lane, collided with it and went to overturn on the right side.

25. The Plaintiff closed her case at that point.

26. DW1, Festus Kyalo Kinyamasyo testified that he was the conductor on board the minibus on the material day and that on arrival at Kyatini, they met a tractor that was on their lane and was driving in a zig-zag manner.

27. That the minibus driver braked and swerved to the right to avoid hitting the tractor. That the tractor hit the minibus on the left tyre which burst. The minibus went to rest on the right side as one faces Wote and the tractor remained in the middle of the road.

28. That he could see all what was happening as he was seated on the first row of seats immediately after the driver's cabin. That the minibus has two sections i.e. the driver's cabin and the rear cabin. That the driver's cabin is enclosed but has a mirror at the back. That after the accident, he broke the rear window and started rescuing passengers.

29. That the tractor driver escaped after the accident. That the police went to the scene and said that the tractor driver was to blame. According to him, the tractor driver was completely to blame for the accident. That he recorded a statement at the police station. That the minibus was going at 80kph and that the witnesses who had testified about how the accident took place had lied.

30. On cross-examination, he confirmed that the minibus was involved in an accident on the material day and that he was an employee of David Muendo Kimanthi, the owner of the minibus. That he started working for him in 2007. That the driver who had started work at 6.00 a.m. on the material day was the same one driving it at 3.00 p.m. when the accident took place. He agreed that the conductor sits in the rear cabin.

31. Further, he said that the minibus had a TV set mounted at the front of the rear cabin so that everyone could see. That the TV was off as it was spoilt.

32. That the conductor's seat is on the right side immediately one boards but on the material day, he sat right behind the driver's cabin. That the accident was at Kyatini, the road was tarmacked and there was a small corner which they had passed.

33. That after the corner, the road is straight and the driver could see ahead. That there was a tractor ahead of them. That the tractor's left tyre burst and their vehicle overturned to the right side. That they were trying to avoid the tractor.

34. On further cross examination, he denied being coached on how to testify and said that the minibus had no writings on the body. That the TV is meant to entertain passengers but it had broken down. He had nothing to prove that it was spoilt. That the minibus was new.

35. That at Kiatine, they negotiated a corner and the driver applied the brakes when he saw the tractor. That the minibus had a speed governor and the maximum speed was 80 kph.

36. That the vehicles collided on the left side of the road as one faces Machakos and the minibus stopped on the right side as one faces Wote. That the tractor driver was charged with driving an uninsured motor vehicle but was not charged with causing the accident.

37. In re-examination, he said that the minibus driver started swerving at 40 metres away and the tractor was also swerving.

38. DW2, Jackson Mutie Mutiso testified that he was the manager of Katethya Usu Investments Co. Ltd belonging to David Muendo Kimanthi. That on the material day, he had some work to attend to in Makueni. He boarded the minibus and sat in the driver's cabin between the driver and a passenger.

39. That before Kiatine, just after negotiating a corner, he saw a tractor on the left lane, facing Makueni, but it was being driven towards Machakos. That the minibus swerved to the right, facing Makueni, to avoid the tractor but the tractor swerved to the same direction. The two vehicles collided. The front left tyre of the tractor burst and the right rear tyre of the minibus burst.

40. According to DW2, the tractor driver was either drunk or wanted to enter a junction.
41. That he recorded his statement at Makueni police station and the police told him that their vehicle was not at fault.
42. On cross-examination, he said that the female passenger in the driver's cabin was on the side where the vehicle overturned. That the minibus's rear left tyre collided with the tractor's left front tyre. That the conductor's seat is immediately on the left after the door but the conductor was not seated there.
43. He was on the seat directly behind the front cabin. That he (DW2) looked through the window between the cabin and saw him. That they saw the tractor after negotiating a corner. That the police arrived at the scene after about 30 minutes.
44. On further cross-examination he said that, at the time of the accident, the minibus was about 3 months old and passengers were being entertained by the TV at the rear. That the minibus had a speed governor but he had not carried a certificate to confirm. That in the area separating the front and rear cabins, there was a clear window.
45. That the tractor driver was stable on the road and did not want to leave their lane. That the minibus left rear tyre was hit and for the tractor, it was the right front tyre. The impact was on the left side of the road, facing Machakos. That he recorded his statement at the police station the following day at 10.00 a.m. That Scholastica, the Plaintiff was seated at the front with him.
46. DW3, Cpl David Korir was attached to the Traffic department of Makueni Police station at the time of testifying. He stated that on the material day, the station received a report of a road accident along the Wote-Machakos road involving the minibus and tractor.
47. That they carried out investigations and found that the tractor was branching from Wote direction and on reaching Kiatini, there was a minibus coming from the opposite direction i.e. Machakos. That the minibus driver applied emergency brakes and swerved to the right. The tractor stopped in the middle of the road.
48. There was no collision but the minibus landed in a ditch and rolled. That the findings of the police were that the tractor was to blame for taking the improper lane and confusing the minibus driver.
49. On cross-examination, he said that he had been at the Makueni police station for about 3 months. He agreed that he was not the investigating officer but a records officer at the station. That from the abstract, the tractor driver was only charged with driving an uninsured motor vehicle and no one was charged with careless driving. That from the sketch plan; the left side of the tractor was on the left side of the road.
50. Further, he said that he had not visited the scene and could not give estimates of distance. He agreed that he could not give clear details of what happened.
51. That according to records, there were no other vehicles on the road and the minibus did not go in a zig-zag manner. That there was no statement from DW2 and he was not aware whether DW2 was in the minibus. Further, he said that DW1 did not record a statement with the police and there was no record of his statement in the file.
52. On further cross-examination, he said that he was in Court as a private witness. He agreed that he had not produced an inspection report to show that the tractor was defective. He also agreed that the charge sheet did not indicate that the defects contributed to the accident.
53. That the investigating officer did not indicate that either driver was careless. That his evidence was strictly as a records officer and could not explain how the accident took place. That from the sketch plan, the tractor was going from Wote to Machakos and the minibus from Machakos to Wote. *(at that point, he dissociated himself from the sketch plan)*. He said that he needed more time to go through it in order to answer questions.
54. Further, that from the sketch plan, the possible point of impact to where the minibus stopped was 70 metres but the tractor stopped very near, although the distance was not given. DW3 proceeded to identify a signal in the police file which stated that the minibus driver was speeding, lost control, swerved to the right and hit an oncoming tractor.
55. In re-examination, he said that the signal was a transmission to traffic head quarters, from their station, within 24 hours. Further he said that when a driver drives a class of motor vehicle which he is not authorized to and gets involved in an accident, they form the opinion that he may not be in control of the vehicle.
56. He was shown exhibit 4 *(abstract)* and said that it did not reflect all the charges that the tractor driver was charged with. He did not know whether that was deliberate.
57. Further, he said that the findings of the Investigating officer were that, the tractor driver seemed to have taken the improper lane, confused the minibus driver and caused him to swerve to the right to avoid it but by that time, the tractor had gone back to its lane.
58. The defendants closed their case at that point.

DUTY OF COURT

59. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own

conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

60. I have looked at the record of appeal, the grounds of appeal as well as the rival submissions and it is my view that the following two issues arise for determination;

a) Who was to blame for the accident?

b) What is the quantum of damages, if any, payable to the Appellant?

LIABILITY

61. From the evidence on record, there is no doubt that the minibus was moving towards Wote and the tractor was moving towards Machakos. In my view, there was nothing contradictory about PW1 saying that she did not see the tractor.

62. The evidence shows that the driver's cabin was enclosed and that there was a TV which had been mounted at the front of the rear cabin to entertain the passengers. Clearly, the set up of the minibus and her sitting position could not afford her an opportunity to see what was happening ahead.

63. With regard to the manner in which the accident happened, the evidence of PW3 was credible. Her evidence remained consistent even on cross-examination. In my view, she was the independent witness and was seated in the driver's cabin from where she could clearly see what was happening unlike DW1 who was seated in the rear cabin but claimed to have witnessed through the mirror.

64. Further, DW1 and DW2 were employees of the Appellant and it was only natural for them to give testimonies which were favorable to their employer.

65. According to DW1 and DW2, the tractor was driving on the wrong lane and that confused the minibus driver causing him to swerve to the right, however, that version was dislodged by the sketch plan and the signal. There were other inconsistencies in the evidence of DW1 and DW2 which only compounded their incredibility.

66. On one hand, DW1 said that the tractor was going in a zig-zag manner and swerving. On the other hand, DW2 said that the tractor was stable on the road and did not want to leave the minibus's lane. If indeed the tractor was going in a zig-zag manner, it would not have escaped DW2 because he was the one seated in the driver's cabin.

67. Further, DW1 said that the TV was not working which in my view was highly improbable for a vehicle that was only three months old. On the other hand, DW2 said that the TV was working. There was also the issue of statements. DW1 and DW2 claimed to have recorded statements with the police however; it was clear that there were no such statements in the police file.

68. Then there was the evidence of DW3 which in my view did more harm than good to the Appellant's case. In examination in chief, his evidence was that the tractor was to blame because it was driving on the wrong lane, however, his evidence crumbled totally on cross examination.

69. When confronted with questions about the sketch plan which was in the police file, he dissociated himself with it. Evidently, it was not in support of his version. All over sudden, DW3 was now strictly giving evidence as a records officer and could not explain how the accident took place. All over sudden, he realized that only the investigating officer could explain many issues about the accident.

70. It is actually interesting that despite the Appellant and his witnesses heaping all the blame on the tractor driver, he was never charged with careless driving. The only charge was that of driving an uninsured motor vehicle which in my view is irrelevant and which was rightly disregarded by the learned trial magistrate.

71. The signal in the police file corroborated PW3's evidence and sealed the Appellant's fate. It painted the correct picture of what actually happened i.e. that the minibus driver was speeding, lost control, swerved to the right and hit an oncoming tractor.

72. I dare say that I detected a desperate attempt by the Appellant's witnesses to cover up what actually happened.

73. The upshot of the foregoing is that there was no error by the learned trial magistrate in finding that the Appellant was solely to blame for the accident.

QUANTUM

74. Award of damages is largely a question of discretion and the principles which should guide an appellate Court in deciding whether to interfere with such an award are well settled. The Appellate Court should be satisfied that in assessing the damages, the Trial Magistrate took into account an irrelevant factor or left out a relevant one or that the award was so inordinately low/high as to amount to a wholly erroneous estimate.

75. According to the Appellant, the damages awarded were excessive.

76. According to PW2's medical report, the 1st Respondent sustained the following injuries.

- a) Injury to the head with tenderness.
- b) Injury to the neck with tenderness.
- c) Blunt chest injury.
- d) Blunt abdominal injury.
- e) Blunt injury on both upper and lower limbs.

77. The Learned Trial Magistrate relied on **NAIROBI HCCC NO. 2886 OF 1995 JANE NJOKI MURAYA & ANOR. –VS- ALICE .W. KIMANI & ANOR** where the Plaintiff was awarded Kshs 150,000/= as general damages for sustaining soft tissue injuries to the left shoulder, left anterior chest wall and left hip.

78. My considered view is that the authority was a good guide. The injuries in that case are comparable and it was about 9 years old when the judgment in the instant case was delivered.

79. Further and as rightly submitted by the 1st Respondent, the authorities relied on by the Appellant were ancient hence not comparable. The award of Kshs.130,000/= as general damages was fair in the circumstances and I find no reason to disturb it.

80. With regard to special damages, the amount pleaded was Kshs. 5,500/=. The amount proved and awarded was Kshs. 2,700/=. The Appellant's complaint has no basis.

81. As for costs, I do not see why they should not follow the event.

CONCLUSION

82. Thus the court finds that the appeal has no merit and makes the following orders;

- i. The Appeal is dismissed.**
- ii. Costs to the Respondent.**

SIGNED, DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE