



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HCCA. NO. 8 OF 2013**

**MUTURI WANGAI KAMAU.....APPELLANT**

**-VERSUS-**

**STANLEY M. GACHUI.....1<sup>ST</sup> RESPONDENT**

**ROBERT NYAGA NJAGI.....2<sup>ND</sup> RESPONDENT**

***(Formerly Milimani Commercial Courts CC 9514 of 2007).***

**JUDGMENT**

**INTRODUCTION**

1. By Plaintiff dated 15/10/2007, the Plaintiff/Appellant filed suit on 30/10/2007 seeking reliefs that General and Special Damages, Costs and Interest.
2. The Appellant pleaded that on 14/03/2007, he was walking along Mfangamano Street Nairobi when 2<sup>nd</sup> Defendant or the 1<sup>st</sup> Defendant driver, agent negligently drove motor vehicle Reg. KAP 008F that it hit him as a result of which he sustained injuries and thus loss and damage.
3. He set out the particulars of negligence of Defendants and particulars of injuries and special damages.
4. The Defendants/Respondents lodged defence dated 13/12/2007 denying the occurrence of the accident and/or attributing the occurrence to the Appellant negligence.
5. They denied the particulars of negligence and instead set out the particulars of negligence to be assigned on Appellant negligence conduct leading into the occurrence of the accident.
6. The matter went to full trial and the trial court found that the liability was not established to be attributed to the Respondents, thus the suit was dismissed.
7. Being aggrieved by the above decision, the Appellant now appeals against the verdict and sets out the following grounds:-

- 1) The Learned Magistrate erred in her appreciation of the evidence adduced by the Appellant on causation hence blameworthiness.***
- 2) The Learned Magistrate erred in failing to keep a proper record of the evidence adduced by the Plaintiff.***
- 3) The Learned Magistrate erred in failing to understand the evidence adduced or to record it in a flowing manner.***
- 4) The Learned Magistrate erred in failing to record that Plaintiff's evidence that he was struck from behind while walking off the motorist's lanes.***
- 5) The Learned Magistrate misapplied the balance and burden of proof in civil cases.***
- 6) The Learned Magistrate made an award which was too low in the circumstances.***

8. The parties filed submissions which they have relied on to canvass the appeal.

### **APPELLANT'S SUBMISSIONS**

9. The Appellant submits that, the trial court should have analyzed the evidence from the perspective of a vehicle hitting a pedestrian off the road. Whether he was then walking or his hand was being held by someone else or he was near the shops was not the determining factor – the fact of being hit off the motorists' lanes was the case put forth by the Appellant. And it raised a presumption of negligence which the defence did not rebut.

10. The Appellant contends that, the court ought to have analyzed the evidence adduced to see if it proved negligence – Appellants burden was to adduce evidence of facts from which negligence could be inferred. The court proceeded as if the Appellant ought to have specifically identified negligence for the court.

11. It is argued that, the court's duty is to evaluate the evidence to find out if negligence was proved.

12. From the adduced and undisputed evidence, the court ought to have found that it was proved by PW2 and PW1 that the Plaintiff/Appellant was hit by the M/V while off the road and upon that proof, which the defence did not disprove (prima facie fact of negligence proved by that fact or inference of negligence) thus the Plaintiff had proved negligence.

13. The Appellant argue that, trial court failed to carefully analyze, evaluate and assess the evidence and used words like passing without considering what they meant in the testified to context.

14. The Appellant urges court to enhance damages regard being given to the Appellant's submissions and cited cases. The Trial Court failed to factor inflation.

### **RESPONDENTS SUBMISSIONS**

15. It is submitted that, Appellate Court, will only interfere with a lower court's judgment if the same is founded on wrong principles of fact by a Trial Court unless it 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 his conclusion.

16. However emphasize this court is not bound to follow the trial court's finding of fact if it appears that either it failed to take into account particular circumstances or probabilities, or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

17. It is the Respondent's submission that the trial court was right in dismissing the Appellants claim.

18. The claim before the court was for damages as a result of an accident whereby the Appellant alleged that the 2<sup>nd</sup> Respondent was negligent in his manner of driving.

19. The Respondents submitted that, the acts of negligence have to be proved on a balance of probability. Court is therefore invited to analyze the evidence tendered by the Appellant's witnesses.

20. Respondent relies on the case of **Peter Kanithi Kimunya –Vs- Aden Guyo Haro (2014) eKLR** where the court held in page 6 of the judgment that the burden was always on Plaintiff to prove his case on the balance of probabilities even if the case heard on formal proof.

21. It was therefore incumbent upon the Appellant to prove the occurrence of the accident. Whoever desires the 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.

22. It was argued that, the Appellant was aged 70 years. His age was not factor for him to attract sympathy that he could not remember how circumstances of the accident.

23. If he was a foreman as testified by PW3 then he was alert and is bound to remember if not then how did he operate as a foreman? He said he was standing next to the road when the motor vehicle hit him.

24. Based on his age the Appellant called the nephew who testified on his behalf. He was supposed to give clear accounts on how the accident occurred.

25. The witness shifted positions. He had testified and gave different fashions of the happening prior to the accident. Such fashions are;

***1) That he was walking in front of the Appellant while he heard a bang behind him.***

***2) That they were walking hand in hand and he was on the side of the road.***

***3) That the Appellant was standing off the road while he was knocked by the 2<sup>nd</sup> Respondent.***

***4) That the vehicle was speeding on a pavement while it knocked the Appellant.***

26. The witness alleges that the 2<sup>nd</sup> Respondent had told him that he was looking for a parking. It is therefore imperative that the vehicle was not speeding and no acts of negligence was proved by the Appellant. The four different versions given on how the accident occurred shows how the witness was not credible.

27. It is therefore for this reason the Respondent submit that the Appellant failed to discharge his duty to secure judgment against the Appellant.

28. On the other hand, the Appellant would have indeed called the investigating officer to articulate the point of impact or produce a sketch map on how the accident occurred.

29. The testimonies of the Appellant and his nephew who was PW3 did not form reliable evidence and consequently his appeal must fail with costs to the Respondents.

30. It is submitted that, in event element of negligence was to be attributed to the Respondents, then the court award of Kshs. 200,000/= for a compound fracture of the ankle joint proposed by trial court would be adequate.

31. Appellant relies on the case of **John Oluoch Otieno –Vs- Swan Carriers Limited (2016) eKLR** the Plaintiff sustained fracture of the left medial malleolus bone, injury to the chest, injury on the right ankle joint with a cut would, injury on the right knee with would on the right leg. The high court awarded Kshs. 200,000/= for the similar injuries as the ones sustained by the Appellant herein.

### **DUTY OF 1<sup>ST</sup> APPELLATE COURT**

32. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

### **ON EVIDENCE ADDUCED**

33. According to PW1 the consultant surgeon's report on Plaintiff history and state of health, the Plaintiff was injured in an accident and was treated at a private doctor clinic.

34. He was treated in the right leg, had a fracture at the knee joint. He had complained of pain at the ankle as he could not walk with closed shoes. He had a dirty wound. The movement of the ankle was restricted and painful.

35. PW1's opinion was that it was a compound fracture from which he had suffered pain. He had not healed as the same was dirty. The patient though 70 years the age would not have a bearing on the healing. The wounds of this nature take a while to heal.

36. PW2 a construction worker stated;

***“It was at 4.30 p.m. as we were passing. It was not raining. The No. of motor vehicle was KAP 008F. The motor vehicle was being driven by 2<sup>nd</sup> Defendant. We were on our way to bus station, the motor vehicle hit him from behind. We were walking on the side of the road. The accident happen on the split of a second.***

***The assumption that he wanted to cross was a lie. He did not hoot. He did not see the motor vehicle coming. The Plaintiff was injured on his right leg.”***

37. Upon cross examination PW2 stated;

***“I had not seen the motor vehicle before he hit him. I saw the motor vehicle that hit him. My testimony is true. I was not ahead, I was ahead by a stop. I was on his side. Mfangano Street is a one way road. Motor vehicles come from behind. The Plaintiff was right next to the road. The driver told me that he was looking for a parking. There were other people on the road. It was being driven at a slow pace as it was looking for parking.”***

38. PW3 a construction worker stated;

***“I was hit by motor vehicle at OTC. I don't remember the name of the road. I was on my way home at Wangige. I was injured on my ankle, on both my legs. I was standing next to the road, the motor vehicle hit me and I fell down. I saw the car that hit me. I was on the side of the road. My leg has not healed. It pains at intervals. When it pains I take medication.”***

39. Upon cross examination PW3 stated that he was standing and not walking.

### **ISSUES, ANALYSIS AND DETERMINATION**

40. After going through the evidence on record and the submissions, I find the issues are:-

***1) Whether the Appellant proved his case on balance of probabilities?***

2) *If above in affirmative, what is the reasonable award to be made in the circumstances?*

3) *What is the order as to costs?*

41. In **Salmon & Heuston** on the law of Torts 9<sup>th</sup> Edition, it describe negligence thus;

***“Negligence is the omission to do something which a reasonable man, guided upon considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.....”***

42. The Plaintiff/Appellant testified that he was hit by motor vehicle while standing next to the road. He also said that he was hit while he was on the side of the road.

43. On cross examination, he said he was not walking. His witness PW2 said PW3 was hit while on road side passing.

44. He also said he was with PW3 holding his hand and also he was on his side.

45. The driver did not testify or call a witness. The trial court held that elements of negligence were not proved.

46. This is because there are discrepancies as to whether PW3 was walking or was standing by the road side when he was hit.

47. The bottom line was that the Appellant was beside the road whether stood or walking. He may have been too close to the road near where the driver was said to have been looking for a parking vide PW2 testimony.

48. The driver ought to have rebutted the PW2 and PW3 evidence that he hit the PW3 while besides the road. Thus the pleaded particulars of negligence were un-rebutted.

49. Thus the driver failed to keep any proper look out and that had he done so the accident would not have happened, in the circumstances the question is, if the driver was seeing PW3, what did he do to avoid hitting the Appellant?

50. On the other hand, the PW3 ought also to have explained what he did to avoid being hit while standing or walking by the roadside or next to the road. Thus the court finds that both the driver and the PW3 are to blame but at a varying degrees.

51. The driver being in-charge of a lethal machine bears a higher responsibility thus court apportions liability 60:40 in favour of the PW3.

52. On quantum, the trial court held that if it found same liability on drivers side, she would have awarded Kshs. 200,000/= and relied on;

Ø **EMC Muthma Mulise & Another –Vs- Boniface Njoroge Ngoovi (2012 eKLR)**; injuries – fracture tibia & right femor; award – Kshs. 450,000/= and

Ø **Coast Bus Ltd –Vs- Ann Awiti Orege (2012) eKLR**; injuries – compound fracture, right femor, soft tissue injuries where in appeal award of Kshs. 650,000/- has reduced to Kshs. 350,000/=.

53. The PW3 sustained compound fracture of the ankle joint permanent in capacity, was 8%.

54. In the circumstances, this court finds a fair award in Kshs. 450,000/= as general damages.

55. The special damages pleaded and proved were Kshs. 3,800/= for police abstract, medical costs, medical report, and copy of records.

56. There was also Kshs. 5,000/= for doctor who testified. All totaling Kshs. 8,808/=.

57. Therefore the court makes the following orders.

- ***The appeal is allowed on the following terms;***

**a) General damages - Kshs. 450,000/=**

**Special damages - Kshs. 8,808/=**

**Total - Kshs. 458,808/=**

**Less 40% liability - Kshs. 183,523/=**

**Balance - Kshs. 275,285/=**

b) Since the Respondent never participated in the appeal, there will be no orders as to costs.

c) Interest at court rates from the date of this judgment.

SIGNED, DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE