**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 660 2007**

**NIMROD MURIUKI NJOROGE ……APPELLANT**

**VERSUS**

**ROBERT MWANGI MBURU …… RESPONDENT**

***(Being an appeal from the ruling delivered by S.M. Mukua, Senior Resident Magistrate dated 16th May, 2012 in Nairobi Civil Appeal No. 76 of 2004)***

**JUDGMENT**

The respondent was the plaintiff in the lower court. He was injured as a result of a road traffic accident that took place on 22nd October, 2002. He was travelling as a passenger in motor vehicle registration No. KAP 279S which collided with motor vehicle registration No. KUJ 492. Motor vehicle registration No. KUJ 492 was registered in the name of the 1st defendant, while motor vehicle registration No. KAP 279s was registered in the name of the 2nd defendant.

The 1st defendant filed a statement of defence, and subsequently a 3rd party notice to be served upon one Peter Benson Kivuva. There is in the record of appeal a notice of withdrawal of a suit dated 15th March, 2006 whereby the respondent withdrew his claim against the 2nd defendant. After the trial, the trial magistrate found that motor vehicle registration No. KAJ 492 was stationary and there was no warning to that effect. The driver therefore did not take due care for other road users.

Having found so, the trial magistrate held that the respondent had proved his case on a balance of probability and held the 1st defendant liable for the actions of his driver. Liability was assigned to the 1st defendant at 100%. On quantum the respondent produced a P3 Form and the medical report by Dr. Moses Kinuthia. The defence produced a report by Dr. R.P Shah. The magistrate awarded Kshs. 100,000/= general damages for pain and suffering. The respondent was aggrieved by the said Judgment and lodged this appeal.

In the memorandum of appeal, the appellant faulted the trial magistrate for finding that the appellant was liable against the weight of evidence and also awarding excessive general damages considering the nature of injuries and the medical report tendered in evidence.

The appellant also faulted the trial magistrate for failing to find that the respondent's evidence had been materially controverted by the evidence of the appellant's witness and also that he failed to appreciate or consider the evidence in its entirety regarding contributory negligence. Finally, the lower court is said to have not fully considered the submissions tendered by the appellant.

Both parties filed submissions. I must mention at this stage that this appeal was heard in the absence of the respondent by Onyancha J, who delivered his Judgment on 16th March, 2012 and allowed the same for the reason that the responded had failed to prove his case on a balance of probability before the trial court. The respondent then moved the court to set aside the ex parte judgment, which application was heard and by a ruling dated 24th October, 2014 Sergon J set aside the Judgment by Onyancha J and reinstated the appeal.

The matter is before me after the said order. As the appellate court I have perused and evaluated the evidence adduced by the parties in the lower court, with a view to arriving at independent conclusions. The judgment by Onyancha J, was by a court of concurrent jurisdiction and in any case, the same having been set aside has no bearing on the final decision in this appeal.

The evidence on record is that the respondent was a passenger in motor vehicle registration No. KAP 279 S. After the collision with motor vehicle registration No. KUJ 492, there was evidence that the motor vehicle in which the respondent was a passenger, was pulled for a distance of 10 metres. Whereas the respondent told the court that motor vehicle registration No. KUJ 492 was stationary, the driver told the court that he was moving when motor vehicle registration No. KAP 279 S rammed into his motor vehicle on the left rear side.

It is clear that it was the word of the respondent against that of the driver of the lorry, D.W. 1. There was no other independent evidence that was adduced to assist the court to determine the true position. I bear in mind that as the appellate court, I do not have the benefit or advantage of seeing the witnesses testify.

The learned trial magistrate in his judgment said as follows,

> ***"Both parties called no evidence to corroborate what they said. However, it is clear from the evidence herein that the plaintiff was quite consistent in what he said – that is regarding how the accident occurred. At the same time, the plaintiff was a truthful witness.***
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> ***The defendant did not remain consistent in his evidence. The 1st defendant's agent/driver was negligent on how he handled and or managed motor vehicle registration No. KUJ 492. The evidence herein is that the aforesaid vehicle was stationary and there was no warning to that effect. He did not take due care for other road users.***
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> ***In essence the plaintiff has proved his case on a balance of probality that the defendant herein was liable. He is found liable vicariously for the acts of D.W. 1 who confirmed that he was the authorized driver on the material day. The defendant is held liable 100%."***

I have already observed that there was no independent evidence relating to the accident. It is difficult for this court to agree with assessment of the trial court that the respondent was 'consistent' and 'truthful' relating to the accident, while in the same breath saying D.W. 1 was not. The driver of motor vehicle registration No. KAP 279S is said to have died as a result of the accident.

The respondent going by his evidence, was seated on the last seat at the back of that vehicle. His observation as to the occurrence must have been limited. It is not clear why the case against the original 2nd defendant was withdrawn yet he was the owner of the vehicle in which the respondent was a passenger.

Be that as it may, when the court is faced with a situation where it is not easy to determine who is to blame in the accident, like in the instant case, it is left with no alternative but to apportion blame equally. In my judgment, faced with the facts and evidence on record, I find that liability shall be shared equally between the driver of motor vehicle registration No. KAP 279 S and KUJ 492.

The respondent suffered injuries as set out in the medical report produced in evidence. These were essentially soft tissue injuries on the head and knees. The report by Dr. Moses Kinuthia is dated 10th

November, 2003 about one year from the date of the accident, while the report by R.P. Shah is dated 20th September, 2004, about two years after the accident.

His injuries did not require hospitalization and good recovery is expected to have taken place one or two days, and full recovery one week after the accident. The learned trial magistrate awarded a sum of Kshs. 100,000/= general damages. I agree that should be the correct award for the injuries sustained by the respondent. The respondent paid a sum of Kshs. 1,500/= for the medical report by Dr. Kinuthia. He produced a receipt to that effect.

In the end, this appeal is dismissed but the respondent shall be entitled to Kshs. 50,000/= general damages, plus Kshs. 750/= special damages after taking into account 50% liability on the part of the driver in whose vehicle he was a passenger. The respondent is also entitled to costs both in the lower court and in this appeal, plus interest at court rates which shall also be reduced by 50%.

***Dated, signed and delivered at Nairobi this 26th Day of April 2017.***

**A. MBOGHOLI MSAGHA**

**JUDGE**