



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL APPEAL NO. 38 OF 2013**

ANN MWIKALI MAINGI.....APPELLANT

VERSUS

BOB MORGAN SERVICES.....1<sup>ST</sup> RESPONDENT

MOSES IDENA ODIKOK.....2<sup>ND</sup> RESPONDENT

*(Being an appeal from the judgement of Chief Magistrate's Court at Machakos delivered by Honourable L. SIMIYU, (Resident Magistrate) on 6<sup>th</sup> February, 2013 in MACHAKOS CMCC. NO. 300 of 2009)*

**JUDGEMENT**

1. The Appeal arises from the judgment of Hon L. Simiyu – Resident Magistrate in **Machakos CMCC No. 300 of 2009** delivered on the 6/2/2013 where she held that **JOSEPH KIILU** a Third Party was 100% liable for an accident that occurred on 18/12/2008 in which the Appellant who was a pillion passenger in Motor Cycle Registration No. KBA 156 D was injured and sustained injuries and proceeded to award the Appellant Kshs.151,300/= for general and special damages plus costs.

2. The Appellant was dissatisfied with the judgement and filed 12 grounds of Appeal as follows:-

*(i) That the learned Magistrate erred in law and fact in failing to hold the Respondent wholly liable for the accident.*

*(ii) The learned Magistrate erred in law and in fact in disregarding the overwhelming evidence tendered by the Appellant and her witnesses and believing the 2<sup>nd</sup> Respondent's testimony which was no corroboration at all.*

*(iii) The learned Magistrate erred in law and in fact in failing to appreciate the Respondents did not request for interlocutory judgment to be entered against the 3<sup>rd</sup> party who did not enter appearance and file defence.*

*(iv) The learned Magistrate erred in law and in fact in failing to appreciate the Respondents did not file and prosecute an Application for directions on how the issue of liability between one Appellant, Respondents and the 3<sup>rd</sup> Party was to be determined by the court.*

*(v) The learned Magistrate erred in law and fact in concluding in her judgment that there was a lorry at the scene of the accident when the evidence of the Appellant and police officer was clear that no such lorry existed and its registration numbers were unknown even to the 2<sup>nd</sup>*

**Respondent.**

**(vi) The learned Magistrate erred in law and fact in shifting the burden of calling the third party as a witness to the Appellant's case when the third party had been joined in the suit by the Respondents and no such obligation existed in law on the part of the Appellant to do so.**

**(vii) The learned Magistrate erred in law and in fact in failing to appreciate that the investigations carried out, the evidence of the police officer (PW.2) and the Police abstract issued to the Appellant clearly indicate the 2<sup>nd</sup> Respondent who was the driver of the motor vehicle registration number KBC 378 was to blame for the accident.**

**(viii) The learned Magistrate erred in law and in fact in arriving at a skewed and contradictory judgment based on assumptions and conjectures contrary to the evidence on record.**

**(ix) The learned Magistrate erred in law and in fact in awarding general damages of Kshs.150,000/= which were manifestly low as the Appellant sustained severe multiple injuries which warranted a higher award.**

**(x) The learned Magistrate erred in law and in fact in absolving the 2<sup>nd</sup> Respondent of liability and shifting blame on the 3<sup>rd</sup> Party when the 2<sup>nd</sup> Respondent was absolutely to blame for he failed to stop and give way to the vehicles on the main road before exiting to a feeder road.**

**(xi) The learned Magistrate erred in law and in fact in failing to find that the Appellant had proved her case on a balance of probabilities against the Respondents.**

**(xii) The learned Magistrate erred in law and in fact in failing to appreciate that the Respondents did not discharge the burden of proof shifted onto them as to how the accident occurred.**

3. The Appellant therefore prays that the Appeal be allowed with costs and that the lower court judgement be set aside and the Respondents be held 100% liable and finally that the damages of Kshs.150,000/= awarded be enhanced to such sum as the court may deem reasonable in the circumstances taking into consideration the injuries sustained by the Appellant.

4. Parties agreed to canvass the Appeal by way of written submissions. The submissions mainly revolved around the two issues of liability and quantum of damages. Counsel for the Appellant faulted the trial magistrate for shifting liability to the third party whereas the evidence clearly pointed to the culpability of the Respondents for the accident and further faulted the trial court for awarding the Appellant low damages despite the serious injuries suffered. On the other hand, counsel for the Respondent supported the decision of the trial court and urged this court to uphold it.

5. This being a first Appellant Court, its duty is to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify but to give an allowance for the same. (see **SELE =VS= ASSOCIATED MOTOR BOAT CO.LTD [1968] EA 123.**

6. The Appellant testified that she was a pillion passenger on motor cycle registration number KBA 156D when motor vehicle KBC 378 M turned to enter a feeder road leading to SAJ CERAMISC and an accident took place. She further stated that there was no other vehicle at the time of the accident and blamed the driver of motor vehicle KBC 378 M.

7. **PW.2 (Moses Osuro Nyaisis)** was a police officer from Athi River police station. He testified that from the police abstract regarding the accident the driver of motor vehicle KBC 378 M was to blame for the accident as he failed to give way to the motor cycle rider under the traffic Rules. He further stated that the rider had a right of way at the time of accident.

8. **Moses Odikor Idewa** who is the 2<sup>nd</sup> Respondent testified that he was the driver of Motor vehicle KBC 378 pick-up and heading to SAJ CERAMICS and before he entered a vehicle from the opposite direction stopped to give him way to enter into SAJ CERAMICS. He stated that the rider emerged from behind the stationery lorry and hit his vehicle on the left side and he blamed the rider. However on being cross-examined he admitted that the rider had a right of way and that from the police abstract the motor vehicle which he drove was to blame for the accident.

### **9. Determination:**

After analyzing the submissions of the counsels for the parties as well as the evidence tendered before the trial court, I find the following issues necessary for determination:-

***(a) Who as between the 2<sup>nd</sup> Respondent and the motor cycle rider (third party) was responsible for the accident that occurred on the 18/12/2008?***

***(b) Whether the Appellant has proved her case based on her grounds of Appeal on the issue of liability.***

***(c) Whether damages awarded merits interference.***

As regards the first issue, the same will be resolved upon an analysis of evidence of the Appellant, the 2<sup>nd</sup> Respondent and the police officer from Athi River. The Appellant in her testimony stated that she was a pillion passenger in the third party's motor cycle registration No. KBA 156 D on its lawful lane when the 2<sup>nd</sup> Respondent who was driving a pickup registration No. KBC 378M suddenly branched onto the rider's direction without stopping and giving way whereupon the rider rammed onto the said pick up and tossed off the Appellant. She further stated that the 2<sup>nd</sup> Respondent did not indicate his intention to branch onto the path of the rider. She blamed the driver of motor vehicle KBC 378 M for the accident. The police officer from Athi River police station PC. Moses Osuro Nyaisis testified that even though he was not the investigating officer the police abstract that had been prepared clearly blamed the driver of motor vehicle KBC 378 M for the accident because he failed to give way to the rider who had a right of way. The 2<sup>nd</sup> Respondent testified and stated that he was branching off to Saj Ceramic and a certain lorry from the opposite direction had stopped to give him way to branch to Saj Ceramics only for the rider to emerge from beside the lorry and hit it on the left. He admitted on cross – examination that the rider had a right of way. He further admitted that from the police abstract his motor vehicle KBC 378 M was to blame.

10. From the above evidence it is quite clear that the driver of motor vehicle KBC 378 M (2<sup>nd</sup> Respondent) was to blame for the accident as he did not give way to the rider who was on his lawful lane. Indeed the 2<sup>nd</sup> Respondent admitted that the rider had a right of way and he therefore agreed with the police officer and the contents of the police abstract that he (2<sup>nd</sup> Respondent) was to blame for the accident. The introduction of a certain lorry at the scene by the 2<sup>nd</sup> Respondent does not sound convincing in that even his claim that the rider had hit it is obviously false because the police did visit the scene and there is no record of any lorry having been involved in the said accident apart from the 2<sup>nd</sup> Respondent's pick up and the motor cycle whose details were aptly captured in the police abstract.

11. The Respondent did take out third party proceedings and obtained an order to join the owner of the motor cycle registration No. KBA 156 D as a third party who was duly served with the requisite third party notice but who failed to enter appearance or file defence. The lower court record reveals that the Respondents did not seek to apply to enter judgment against the third party and further failed to move the court for third party directions. Indeed the trial Magistrate in her judgment at pages 76 and 77 confirms that there was indeed an error in the proceedings as judgment was not entered against the said third party in default of defence but still went ahead to hold the third party liable at 100%. The trial Magistrate further noted in her judgement that the Appellant knew the third party very well but had avoided calling the rider whom she knew. Definitely the trial Magistrate appeared to have misdirected herself in that regard since there was no obligation imposed upon the Appellant to call the third party as a witness who

had already been enjoined as a party by the Respondent. It was also erroneous for the trial court to have apportioned liability upon the third party who had not entered appearance or filed defence and further no judgment had been entered against him on default of defence. The evidence that had been adduced before the trial court had clearly established on a balance of probability that the 2<sup>nd</sup> Respondent who was the driver of motor vehicle KBC 378 M was solely responsible for the responsible for the accident and therefore the learned trial Magistrate had misdirected herself in law and in fact when she held the third party to be 100% liable for the accident whereas the evidence clearly established that it was the 2<sup>nd</sup> Respondent who was to blame for the accident. The 2<sup>nd</sup> Respondent being a servant of the 1<sup>st</sup> Respondent made the 1<sup>st</sup> Respondent vicariously liable in damages to the Appellant for the torts or negligence of the 2<sup>nd</sup> Respondent who was its servant or agent.

12. The Above analysis leads me to find that the Appellant has proved her case on her grounds of appeal as regards the issue of liability.

13. As regards the issue of quantum of damages it is trite law that an Appellate Court will not be inclined to interfere with the findings of a trial court as to the award of damages unless the trial court acted upon some wrong principle of law or that the amount awarded was so extremely high or low as to make it an entirely an erroneous estimate of the damages to which the plaintiff is entitled. The Appellant was examined by both her doctor and that of the Respondent and both formed the opinion that she sustained soft issue injuries with no permanent disability. The trial Court awarded the Appellant Kshs.150,000/= as general damages for pain and suffering after receiving medical reports by Dr. Musau Virginia and Dr. Ashwin Madhiwala. The two doctors in their reports concur that the Appellant suffered soft tissue injuries which healed well and left no permanent disability. Counsel for the Appellant has urged this court to enhance the said sum taking into consideration the injuries sustained by the Appellant. On the other hand counsel for the Respondents urged this court to uphold the award of the trial court. The case of **PATRICK MWITI MA'IMANENE & ANOTHER =VS= KEVIN MUGAMBI NKUNJA [2013] eKLR** where the sum of Kshs.170,000/= was awarded to a Plaintiff who sustained swollen scalp, swollen and bruises shoulders, bruised knee tender neck and tender back.

14. The Appellant herein had sustained the following injuries:-

- **blunt injury to the chest with resultant bloody sputum.**
- **blunt injury to the head .**
- **blunt injury to the shoulder joint.**
- **blunt wound to the lower lip.**
- **blunt injury to left ankle joint**
- **blunt injury to right ankle joint**

15. Looking at the injuries sustained by the Appellant. I find the authority cited by the Respondents counsels relevant as the injuries sustained by the Appellant are more or less similar in nature to those of the appellant. The authority is fairly recent and that awarding of damages calls for comparable awards. The sums awarded by the trial court is reasonable for the Appellants injuries. Hence I am unable to fault the learned trial Magistrate since there is no evidence that she considered irrelevant factors so as to arrive at the award of Kshs.150,000/=. I uphold the said sum as well as the sum of 1,300/= being special damages.

16. In the result, the Appellant's appeal partly succeeds. The trial court's judgment on liability is hereby set aside and substituted therefor with an order that the Respondents are held 100% liable in damages to the Appellant. The judgment on award of damages is upheld.

17. As the Appellants appeal has partly succeeded, the Appellant is award half costs of the Appeal and full costs in the lower court.

It is so ordered.

**Dates, signed and Delivered at MACHAKOS this 29<sup>th</sup> day of September, 2017.**

**D.K. KEMEI**

**JUDGE**

**In the presence of:-**

Kamolo for Sila for Appellant

Mutune for Mulwa for Respondent

C/A: Kituva