



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

**CIVIL APPEAL NO. 16 OF 2013**

*(From the Judgment in SRM Court at Mwingi by Hon. V. A. Otieno Civil Suit No. 46 of 2009)*

**KITHEKA SYANDA ..... APPELLANT**

**V E R S U S**

**GARISSA PARCEL SERVICE LTD..... 1<sup>ST</sup> RESPONDENT**

**IMPERIAL BANK.....2<sup>ND</sup> RESPONDENT**

**FIROZ MUHAMED.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

The appellant commenced proceedings in the magistrate's court at Mwingi through a plaint dated 25th February 2009. He alleged in the plaint that he was injured on 27th June 2008 along Kalwa Ngomeni road through an accident involving motor vehicle No. KAR 677B driven by Firoz Mohamed (3<sup>rd</sup> respondent) an authorized agent or driver of Garissa Parcel Services Company Ltd (1<sup>st</sup> respondent) and Imperial Bank Company Ltd (2<sup>nd</sup> respondent). The appellant stated that the defendants in the trial court were liable in negligence.

The appellant sought general damages, costs of the suit, interest at court rates and any further relief that the court may deem proper to grant.

The Garissa Parcel Services Ltd (1<sup>st</sup> respondent) and Firoz Mohamed (3<sup>rd</sup> respondent) filed a joint statement of defence. Imperial Bank Company Ltd however did not enter appearance or file a defence.

In the joint defence, Garissa Parcel Services Company Ltd and Firoz Mohamed denied negligence and stated that the appellant was guilty of contributory negligence. Particulars of contributory negligence of the appellant were listed in the joint defence.

The case went to trial.

After recording evidence from Dr. Wangula Lawrence who testified as PW1 as well as the appellant Kitheka Kyanda who testified as PW2, and Firoz Mohamed who testified as DWI, the trial court delivered a Judgment in which the court found that the appellant had proved negligence against the respondents. The court awarded general damages of Kshs 100,000/= as well as special damages as proved. The court however concluded that the appellant was 70% to blame for the accident, and as such determined the General Damages payable to be Kshs 30,000/-, and special damages as proved alongside costs.

Following the decision of the trial court, the appellant came to this court through the present appeal. His grounds of appeal are as follows:-

1. The learned trial magistrate erred in law and misdirected himself on the facts of the matter before him by holding that the appellant contributed to the cause of accident.
2. The learned trial magistrate erred in law and misdirected himself on the fact of the matter before him when he apportioned contribution to 70/30 which was too high on the part of the appellant.
3. The learned trial magistrate erred in law and in fact when he held that the appellant hit a running vehicle which is impossible for a normal person.
4. The learned trial magistrate erred in law and fact when he held that the injuries sustained by the appellant were not serious.
5. The learned trial magistrate erred in law and fact when he held that the appellant was liable for the accident.
6. The learned magistrate misdirected himself in both law and fact before him by failing to be guided by the appellant's evidence on record.
7. The learned magistrate misdirected himself in both law and fact before him by considering the defendant evidence alone to guide him on apportionment.

When the appeal was served, Garissa Parcel Service Company Ltd 1st respondent and Firoz Muhamed the 3rd respondent, filed a cross appeal. The grounds of appeal of the 1st and 3rd respondent are as follows:-

1. The learned trial magistrate erred in law and in fact in apportioning liability at 70/30 in favour of the respondent. (appellant).
2. The learned trial magistrate erred in law and in fact in finding that the appellant had established a case against the respondents.
3. The learned trial magistrate erred in law and in fact in awarding damages that were grossly excessive and inordinately high.
4. The learned trial magistrate erred in law and in fact in failing to evaluate all the evidence adduced in favour of the respondent's case.
5. The trial magistrate decision is against the weight of the evidence on record.

Both counsel for the appellant M/s Mulinga Baluka and Company, and Counsel for the 1st and 3rd respondent M/s Musyoka and Muigai Advocate, filed written submissions to their appeal. Counsel for the respondent relied on **Nairobi High Court Civil Case No. 518 of 1991 Joseph Njuguna -vs- Cyrus Njathi (1999) eKLR** on proof of negligence.

Mr. Nzili who appeared at the hearing of the appeal, holding brief for Muigai for the respondents, relied on the written submissions filed. Mr. Mbaluka for the appellant also relied on the written submissions filed.

I have considered the evidence before the trial court, the Judgment of the trial court, the grounds of appeal and the submissions of counsels on both sides. This being a first appeal, it is my duty to reconsider the evidence on record and come to my own conclusions – see **Selle -vs- Associated Boat Co. Ltd (1968) EA 123**.

The main issue herein is the proof of negligence. The other issue is the quantum of damages.

Under Section 107 of the Evidence Act,(cap.80) it is provided that he who alleges has the responsibility or burden to prove the allegation. In civil cases, the standard of proof is on the balance of probabilities. That burden of proof has to be discharged by the plaintiff even where the hearing of the case proceeds by way of formal proof see the case of **Kirugi & Another -vs- Kabiya & 3 Others (1987) KLR 347**.

In the present case the appellant said very little in the trial court. He stated as follows **“on 27th July 2008 at about 7.00 am I was heading to Mombasa. I saw a vehicle behind me. I attempted to cross**

***before it would come. It was a lorry carrying cows. I was injured. Some good Samaritans came and took me to Mwingi hospital.”***

In cross examination he stated as follows:- ***“I was walking on the side of the road. I was walking on the left and the car came from behind.”***

From the above evidence, the learned magistrate found that the appellant had proved a case of negligence against the driver and vicariously against the owner of the motor vehicle. The magistrate however found that the appellant was 70% to blame for the accident. It is clear to me that from the evidence on record the driver of the motor vehicle was not charged in any traffic case.

Though the driver of the lorry was not charged in a traffic case, that would not be a reason to say that he could not be liable in negligence in a civil case. The standard of proof in criminal and civil cases are different.

The driver of the lorry (3<sup>rd</sup> appellant) who testified as DW I, gave his own side of the story that the appellant suddenly emerged from bushes and ran to the road apparently following cows. No question regarding rushing after cows were put to the appellant during cross examination. The appellant however talked of cows being carried in the lorry.

In those circumstances, I am of the view that the learned magistrate was not out of his way when he found from the evidence on record, that the accident did occur and that there was contributory negligence of the appellant.

Though the appellant counsel contends that the appellant was wrongly condemned as having been found 70% liable in negligence, my view is that the magistrate was justified in making that finding, due to the scanty evidence tendered by the appellant on how the accident occurred. In my view therefore the finding of the trial court was based on the evidence on record and was justified. In my view both the appellant and respondents have no basis to challenge the learned magistrates findings on negligence.

With regard to the quantum of damages, I should state firstly that the assessment of quantum of damages is an exercise of discretion by a trial court. An appellate court will not interfere unless the assessment of the trial court was inordinately high or inordinately low as to constitute an injustice or it was based on taking into account extraneous matter or failing to take into account relevant matters see the case of *Ephantus Mwangi –vs- Duncan Wambugu (1982-88) 1 KLR 278*.

In the circumstances of the present case, I find nothing wrong with what the magistrate assessed as damages. The evidence of the doctor PWI was that the appellant suffered head and Pelvis injuries, but there was no indication of permanent incapacity I will thus uphold the assessment of damages made by the trial court.

The result of the above findings, is that I find both the appeal of the appellant and the cross appeal of the 1st and 3rd respondents, to be without merits. Both the appeal and the cross appeal are hereby dismissed.

Since a cross appeal is also an appeal, I order that each side will bear their respective costs of the appeal and cross appeal.

**Dated and delivered at Garissa this 24th February 2016.**

**GEORGE DULU**

**JUDGE**