



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

**CIVIL APPEAL NO 72 OF 2013**

**MAITHYA MUSANGO .....APPELLANT**

**VERSUS**

**JACKSON MAINGI MAILU.....RESPONDENT**

**(An Appeal arising out of the judgment of Hon. L. Simiyu Ag. SRM delivered on 28<sup>th</sup> March 2013  
in Machakos Chief Magistrate's Court Civil Case No. 173 of 2012)**

**JUDGMENT**

**Introduction**

The Appellant was the original Defendant in Machakos Chief Magistrate's Court Civil Case No. 173 of 2012, and has appealed against the judgment of the learned trial Magistrate which was delivered in the said suit on 28<sup>th</sup> March 2013. The Respondent was the original Plaintiff in the said suit, and he sued the Appellant for injuries he suffered arising out of an accident that occurred on 29<sup>th</sup> August 2011 involving motor vehicle registration number KBQ 623. The learned magistrate in her judgment found the Appellant 100% liable for the said accident, and awarded the Respondent a total award of Kshs 254,305/= as general and special damages.

The Appellant has appealed against the said judgment and moved this Court through a Memorandum of Appeal dated 15<sup>th</sup> April 2013. His grounds of appeal are as follows:

- The learned trial magistrate erred in law in finding in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law.
- The learned trial magistrate erred in fact and in law in shifting the burden of proof from the plaintiff to the defendant.
- The learned trial magistrate erred in fact and in law in not considering the case had not been proved by the plaintiff on a balance of probabilities.
- The learned trial magistrate erred in apportioning liability at 100 per cent against the defendant yet the respondent owed other road users road sense.
- The learned trial magistrate erred in law and in fact in arbitrarily awarding quantum at Kshs. 254,305/= plus costs at the court rates which quantum commensurate with the nature of injuries sustained.
- The learned trial magistrate erred in law and in not following the law relating to award general damages and liability.

The Appellant is praying that the appeal be allowed; that the judgment of the Honourable Senior Resident Magistrate delivered on 28<sup>th</sup> March 2013 be set aside and a proper finding be made; and that the Respondent's suit against the Appellant be dismissed with costs to the Appellant.

### **The Facts and Evidence**

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

I will therefore firstly proceed with a summary of the facts and evidence given in the trial Court. The Respondent instituted a suit in the lower court by filing a Plaint dated 6<sup>th</sup> March 2012, wherein he claimed that on or about 29<sup>th</sup> August 2011, he was standing lawfully way off the road at Machakos Junction, when the Appellant's driver, servant and or agent negligently drove motor vehicle registration number KBQ 623C and caused it to lose control, veer off the road and which knocked him down, as a result of which he sustained severe injuries. The Respondent claimed for general damages for pain and suffering and special damages of Kshs. 4,305/=.

In response, the Appellant filed a defence dated 4<sup>th</sup> April 2012 wherein he denied the allegations of an accident having occurred, and put the Respondent to strict proof. He averred that if any injury had been suffered by the Respondent, then it was solely by his own negligence. It was his defence that whilst the driver of the motor vehicle registration KBQ 623C was slowly driving the said motor vehicle properly and with due care on the proper side of the road, the Respondent was selling his merchandise carelessly standing next to the said motor vehicle. Further, that the driver of the said motor vehicle had exercised all due care and skill to avoid the said occurrence.

From the record of the trial court proceedings, the suit proceeded to full hearing on 11<sup>th</sup> July 2012, when two witnesses gave evidence for the Respondent. PW1 was the Respondent, Jackson Maingi, who testified that on 29<sup>th</sup> August 2011, he was standing beside his kiosk when he was knocked by a motor vehicle. Further, that he was standing 3 meters off the tarmac and that the said motor vehicle was KBQ 623C. He was as a result injured on his leg near the ankle joint. PW2 was Dr. John Mutunga, who testified that he had filled the P3 form issued to the Respondent. Further, that the Respondent had been hit by a motor vehicle on his left ankle joint which fractured. He confirmed the fracture upon examination. He opined that the fracture was healed but COULD be exposed to arthritis.

The Defence also called two witnesses to testify. DW 1 was PC Robert Tumno, who stated that the accident was reported on 29<sup>th</sup> August 2011 by the Respondent. Further, that the traffic accident occurred at Kyumbi trading centre along Mombasa-Nairobi road when the Respondent was selling goods to the passengers in KBQ 623C, when the vehicle ran over his leg. He stated that the driver was not charged with an offence. He however stated on cross examination that he did not record a statement from the Respondent, and only recorded the evidence of the driver, neither did he draw a sketch at the accident scene.

DW2 was Duncan Muthoka, the driver of the said motor vehicle, who testified that on 29<sup>th</sup> August 2011 he was driving towards Mtito Andei, and he stopped at the Makutano stage where vendors went selling wares to passengers. A man jumped into the vehicle when it was stationary, and missed a step on the ladder and started claiming that he had been run over. He claimed that the vehicle did not run him over. He examined the man and found that he had no injuries. He then left the conductor to deal with him as he ferried the passengers to their destination. DW2 also testified that he had been charged with a traffic offence which was still pending in court, and that he had reported the matter to the Machakos police station.

### **The Issues and Determination**

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, Kairu & McCourt Advocates, filed submissions dated 4<sup>th</sup> January 2016, while the Respondent's learned counsel, Sila & Company Advocates filed submissions dated 8<sup>th</sup> March 2016.

On the issue of liability, it was submitted by the Appellant that the Respondent's claim was based on negligence, and he ought to have proved that the Appellant was negligent and that he himself did not have a hand in his misfortune. Further, that the court ought to be guided by section 107 and 109 of the Evidence Act as regards the burden of proof. Reliance was placed on various judicial authorities in this regard, including the Court of Appeal decision in **Oluoch Eric Gogo vs Universal Corporation Limited (2015) eKLR.**

The Respondent on the other hand submitted that the trial court had found the evidence of DW1 and DW2 to be contradictory and not truthful.

On the issue of quantum it was the Appellant's contention that the award was unreasonably high since the medical report classified the injury as harm, and the Plaintiff has since healed with no further physical disability. They therefore prayed for the award to be reduced to Kshs. 150,000/=.

The Respondent on his part argued that the award of Kshs. 250,000/= for a fracture of left ankle joint was moderate, and in consonance with awards for similar injuries. Further, that the trial court had considered the rival submissions and authorities relied on by both parties, differentiated them and did not take into account any extraneous issues not canvassed by parties in arriving at its decision.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that there are two issues raised that require determination. The first is whether there was a basis for finding the Appellant 100% liable for the accident that occurred on 29<sup>th</sup> August 2011. The second issue is whether the damages awarded against the Appellant were justified, if he is found to be liable.

On the first issue of liability, I have evaluated the evidence given in the trial Court, and note that evidence was given by both the Appellant and the Respondent, to the effect that the Respondent was undertaking some business next to the road. The Respondent in this respect in his testimony stated that he had a kiosk which was located 3 metres from the road, and was standing outside his kiosk when he was knocked down.

No evidence was brought by the Respondent to show that he was licenced to operate a kiosk next to a busy highway and therefore standing lawfully by the roadside as he claimed, and he must therefore take part of the blame for the accident. In addition it is the view of this Court that a reasonable person would have taken more care in undertaking a kiosk business very close to a busy highway, and thereby putting themselves at risk.

The trial magistrate therefore erred in finding the Appellant wholly liable for the accident, and I find that the Respondent was negligent and did contribute to the accident and apportion liability at the ratio of 60:40 in favour of the Respondent.

As regards the issue of damages, It is an established principle of law that the Appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor; or where the award was too high or too low as to amount to an erroneous estimate; or where the assessment is not based on any evidence. (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727, Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR** and **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5.**)

The Appellants in this respect did not contest that the Respondent suffered a fracture to the left ankle joint, and the medical report Dr. John Mutunga produced in the trial Court as the Plaintiff's exhibit 4 indicated that although the fracture would heal, it would predispose the Respondent to early development of osteoarthritis. The decision in **Charles Ndirangu vs John Ndiritu Mgiri, Nairobi HCCC No 1051**

of 1989 relied upon by the Respondent in the trial Court where general damages of Kshs 450,000/= were awarded were for more serious injuries suffered in addition to an ankle fracture , including a fracture of the hip joint.

I find the judicial authority relied upon by the Appellant in the trial Court to be more comparable, where general damages for pain and suffering of Kshs 100,000/= was awarded for fractured ribs and a dislocated shoulder in Elizabeth Wanjira Ngure & Another vs Nyaka Agencies Limited & Another (2008) e KLR, arising out of a road accident that occurred on 12<sup>th</sup> April 2003.

Taking into account inflationary factors, and the long term effects of the injuries suffered by the Respondent, I find that the trial magistrate did not err in noting that the judicial authorities relied upon by the Appellant were dated, and in awarding a sum of Kshs 250,000/= as general damages. The award of Kshs 4305/= as special damages is also not disputed and was proved by production of corresponding receipts in the trial court.

I accordingly allow the appeal only to the extent of finding the Respondent 40% liable for contributory negligence, and revise the award by the learned trial magistrate as follows:-

a) General damages for pain

suffering and loss of amenities .....Kshs. 250,000/=

b) Special damages as pleaded and

proved and as awarded by trial court.....Kshs. 4,305/=

Total damages.....Kshs 254,305/=

Less 40% contribution .....Kshs. 101,722/=

**TOTAL AWARD**

**Kshs. 152,583/=**

I accordingly aside the award of total damages of Kshs 254,305/= and substitute it with an award of total damages of Kshs 152,583/= .

Each party shall bear their costs of the appeal.

It is so ordered.

**DATED AT MACHAKOS THIS 19<sup>TH</sup> SEPTEMBER 2016.**

**P. NYAMWEYA**

**JUDGE**