



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL APPEAL NO. 176 OF 2012**  
**STEPHEN MUTUKU.....APPELLANT**  
**VERSUS**  
**P K I ALIAS P M K (*a minor suing thro'***  
***father and next friend D K I).....RESPONDENT***  
***(Being an appeal against Judgment of the Chief Magistrate's***  
***Court at Machakos by Hon. P.N. Gesora (SPM)) in***  
***Civil Suit No. 1085 of 2011 dated 2<sup>nd</sup> October, 2012)***

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***(Before E. Ogola J)***

**JUDGMENT OF THE COURT**

1. The respondent sued the appellant due to the injuries she suffered as a result of an accident that occurred on 22<sup>nd</sup> April, 2011 along the Tawa-Masii road. The accident involved the respondent and motor vehicle registration number KBJ 460V being driven by the appellant's authorized driver. After conclusion of the hearing, the trial court held that the appellant was 100% liable for the accident and awarded the plaintiff Kshs. 900,000/= as damages for pain and suffering, Kshs. 21,495/= as special damages and Kshs. 100,000/= for future medical expenses. Being aggrieved by the lower court's award, the appellant has filed this appeal against the entire judgment.

2. In their Memorandum of Appeal filed on 25<sup>th</sup> October, 2012 the appellant has put forth several grounds of appeal, the gist of which are that the learned trial magistrate erred in holding the appellant 100% liable and in awarding excessive damages and also making provision of future medical expenses of Kshs. 100,000/= which was not supported by medical evidence.

3. The appeal is opposed. Parties filed submissions which I have carefully considered. In my view the following are the issues for determination;

*i. Who was liable for the accident?*

*ii. Was quantum of damages excessive?*

4. This being the first appeal I understand it as the duty of the court to review and to re-evaluate the evidence given in the trial court and to interpret that vis-a-vis the law. Rarely is it the duty of the appellate court to interfere with the facts of the case unless on the face of the record there appears to have been a serious miscarriage of justice.

5. At the hearing of this matter, the respondent testified that motor vehicle registration number KBJ 460V knocked her down from behind while she was walking off the road on the pedestrian path. The respondent testified that she did not see the said motor vehicle when it knocked her down.

6. The respondent's evidence was corroborated by an eye witness PW3 who testified that the plaintiff was walking on the left side of the road while facing the direction of Masii when the accident happened. PW3 testified that he was seated outside a shop also on the same side of the road when he saw the said motor vehicle veer off the road and knock down the respondent. He testified that the motor vehicle was coming from the Tawa direction and heading towards Masii.

7. According to DW1's statement (page 46-47 of the Record of Appeal) and her evidence in Court, on the ill-fated day, she was driving from Tawa heading towards the Masii direction. She came upon a matatu that had stopped on her right. (PW3 also testified that there was a matatu on the opposite side of the road heading towards the Tawa direction). Suddenly, the respondent ran across the road from behind the said matatu. According to DW1, the respondent was crossing from her right hand side to her left. DW1 attempted to veer to her left to avoid an accident but unfortunately due to the short proximity between the two parties, an accident occurred.

8. The appellant's version of events was supported by DW2. DW2 testified that she was on the left side of the road when facing Masii having come from church. DW2 testified that there was a matatu that had stopped on the opposite side of the road. DW2 further testified that she saw the respondent emerge from behind the matatu and cross the road and that is when she was knocked down by the appellant's driver. The same is also corroborated by the type of injuries the respondent suffered. According to the Medical Reports produced at trial, the plaintiff suffered injuries to her left shoulder and arm and her right hip.

9. The above injuries are consistent with one being knocked from the side as opposed to one's back. The respondent did not suffer any injuries to the back of her body or her front which would have been indicative of having been knocked down from the back as alleged. The injuries suffered by the respondent support the appellant's contention that she was hit while crossing the road.

10. The Certificate of Examination and Test of Vehicle – (page 50 of the Record of Appeal) indicates that motor vehicle's windscreen was broken on the nearside on impact. If the respondent was indeed walking off the road on the left side facing Masii then the point of impact with the motor vehicle would have been on the left side and not its right. DW1's statement indicates that when she saw the respondent she swerved to her left to avoid an impact. The damage to the nearside of the motor vehicle proves this. The respondent was therefore crossing the road from the right side of DW1 to her left when the accident occurred.

11. The evidence of the minor PW2, the victim of the accident does not show clearly how the accident took place since she said she was hit from behind and did not see anything. On this issue the more reliable evidence is that of PW3 David Kioko Mutu, who testified that he was outside one of the shops on a bench when he witnesses the accident. According to him the Respondent was crossing the road when she was hit by the appellant's motor vehicle as she was about to be off the road. This testimony appears to corroborate appears the appellant's DW1 testimony that the Respondent minor ran across the road from behind a matatu. If that is true, then it means that the Respondent minor was not hit from behind, but from the side. It also means that the minor had an opportunity to see the appellant's motor vehicle. Before crossing the road also the Respondent ought to have taken care that it was safe to cross the road. The respondent was a minor of 16 years at the time of the accident. There is consistent evident that the respondent contributed to the injuries she suffered. Given the evidence on record, I would assess that

contribution at 20%. It is therefore the finding of this court that the appellant was only 20% liable for the accident.

12. On the issue of damages, it is the law that an appellate court should not interfere with assessment of damages unless the same is manifestly too low or too high. The minor sustained the following injuries.

*a. Fracture of the left shoulder.*

*b. Deep cut wound on the left forearm.*

*c. Stable pelvic fracture.*

*d. Blunt head trauma*

13. These are serious injuries. The trial court awarded Shs. 900,000 as general damages for pain and suffering. I think the trial court was very reasonable in that award.

14. The appellant also objects to the award of Shs. 100,000 for future medical expenses. The appellant also submitted that the element of future expenses was not proved and that a Dr. Emmanuel Loiposho testified as a medical expert on behalf of Dr. Mutuku who prepared the medical report and so Dr. Emanuel's evidence could not suffice to prove future medical expenses. In my view, the testimony of Dr. Emmanuel was not objected to, and if the same was acceptable for other injuries then why not for the future medical expenses? What is to note, however, is that the amount of Shs. 100,000= slated for the future medical expenses appears too little for the said injuries which requires future medication. That amount can only go high and I will not belabour the issue.

15. In the upshot, the appeal herein partially succeeds to the extent that the Respondent is found to be 20% liable for the said accident.

16. Each party to bear own costs of the Appeal.

That is the judgment of the court.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF OCTOBER, 2016**

**E.K.O. OGOLA**

**JUDGE**

**In the presence of;**

M/S Kavita for Respondent

M/S Mbuvi holding brief for M/S Mshila for Appellant

Court Assistant – Mr. Munyao