



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

**CIVIL APPEAL NO 135 OF 2012**

**JOHN THEURI KIBAGE.....APPELLANT**

**VERSUS**

**UNIKEN ENTERPRISES.....RESPONDENT**

**(An Appeal arising out of the judgment of Hon. P.A.Oleng'ee PM delivered on 19<sup>th</sup> July 2012 in Kajiado Principal Magistrate's Court Civil Suit No. 303 of 2009)**

**JUDGMENT**

**Introduction**

The Appellant was the original Plaintiff, and the Respondent the original Defendant in Kajiado Principal Magistrate's Court Civil Suit No. 303 of 2009. The Appellant has appealed against the judgment of the learned trial Magistrate, which was delivered in the said suit on 19<sup>th</sup> July 2012, wherein the learned magistrate apportioned liability for an accident that occurred on 8<sup>th</sup> January 2009 along the Kajiado-Isinya Road involving the Appellant's and Respondent's motor vehicles on the basis of 60:40 in favour of the Appellant. The trial Court awarded the Appellant a total award of Kshs 151,800/= as general and special damages after deduction of the 40% contribution.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 15<sup>th</sup> August 2012 in appealing against the said judgment. The grounds of appeal raised by the Appellants are that the learned Magistrate erred in law and fact by apportioning liability in the ratio of 40:60 in the absence of any evidence to support any contribution to the accident on the part of the Appellant; when the evidence by the Appellant on record remained uncontroverted; and when there was no other evidence before the Court giving a different version as to how the accident occurred. Further, that the learned Magistrate erred in law and fact by failing to find that road users are at all times under a duty and obligation to adhere to the highway code and other traffic rules.

The Appellant is praying that the appeal be allowed; that the judgment on liability in the lower court dated 19<sup>th</sup> July 2012 be set aside and the Respondent be found wholly liable; and for such further costs or other orders as this Court may deem fit to grant. The Appellant also prayed that he be awarded the costs of this appeal.

**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 Appellant instituted a suit in the lower court by filing a Complaint dated 15<sup>th</sup> September 2009 which was amended on 14<sup>th</sup> October 2019, wherein he claimed that on or about 8<sup>th</sup> January 2009, he was lawfully driving motor vehicle registration number KYH 799 along the Kajiado-Isinya Road near the AIC junction, when the Respondents' driver, servant and/or agent, one Peter Wanjau negligently and/or carelessly drove, managed and /or controlled the Defendant's motor vehicle registration number KAY 729A/ZC 1852 along the said road, that he caused it to ram into motor vehicle registration number KYH 799 causing an accident. Further, that the Appellant as a consequence suffered injuries which he particularized as a fracture of the right radius and ulna bones, bruises on the left hand and a blunt head injury.

The Appellant gave particulars of the Respondent's negligence in the said Complaint, and claimed special damages of Kshs 3,700/= and general damages.

The Respondent filed a defence dated 25<sup>th</sup> November 2009, wherein it denied the allegations of the date and place where the accident occurred, or that motor vehicle registration number KAY 729A was negligently driven by its driver, servant and/or agent causing the Appellant injuries and damage, and put the Appellant to strict proof. The Respondent also denied that it caused the accident of 8<sup>th</sup> January 2009 by its negligence or was vicariously liable for the accident, and averred that in the alternative, if the accident occurred then it was wholly and substantially due to the Appellant's negligence in the manner in which he drove, controlled and/or managed motor vehicle registration number KYH 799.

From the record of the trial court proceedings, it appears that interlocutory judgment was entered against the Respondent on 11<sup>th</sup> December 2009 for failing to file its defence within the stipulated period. Full hearing commenced on 26<sup>th</sup> May 2011 and three witnesses gave evidence for the Appellant. The first witness (PW1) was Dr. Titus Nzina Ndeti, who testified that the Appellant after the accident suffered a head injury, bruises on the left hand, and a fracture of the right radius and ulna bones. He produced his medical report as an exhibit.

The Respondent testified as PW2, and testified as to the events of 3<sup>rd</sup> July 2009 when the accident occurred, and produced the receipts for the police abstract, medical report and search at the registrar of motor vehicles, as well as his treatment card and P3 form as exhibits.

The last witness (PW3) was Cpl. Mohamed Yusuf who was attached to the Kajiado traffic base, and he also testified as to the accident that occurred on 3<sup>rd</sup> July 2009, and that the vehicles involved in the accident were detained at the police station for inspection, and the driver of the lorry called Peter Njau was charged with careless driving in Kajiado court on 8<sup>th</sup> July 2009 where he pleaded guilty and was fined Kshs 10,000/=. Further, that the saloon car was defective prior to the accident. He produced the police abstract as an exhibit.

The Respondent did not call any witnesses to testify.

**The Issues and Determination**

The Appellants and Respondent canvassed this appeal by way of written submissions. The Appellants' learned counsel, Wahito & Co. Advocates, filed submissions dated 27<sup>th</sup> August 2015, while the Respondent's counsel, Ombonya & Company Advocates filed submissions dated 5<sup>th</sup> April 2016. The Appellant's counsel reiterated that the contribution allocated to the Appellant of 40% was arbitrary and not justified by the evidence, and pointed out that in another appeal, **Gerald Kibage Theuri vs Uniken Enterprises**, MKS HCCA 134 of 2012 relating to the same accident, judgment on liability was entered by this Court in the ratio of 20:80 on 6<sup>th</sup> May 2015.

The Respondent's counsel on the other hand argued that this appeal should be decided on the basis of the pleadings and submissions filed herein and independently of **MKS HCCA 134 of 2012**. He urged the Court to uphold the apportionment of liability at 40:60 as the evidence before the trial court showed that the Appellant's motor vehicle was defective and unroadworthy and ought not have been on the road, and there was no need for the Respondent to rebut this evidence.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that it is only the issue of liability that is contested, and particularly the whether there was a basis for finding the Appellants 40% liable for the accident that occurred on 3<sup>rd</sup> July 2009. I must in this regard put it on record that I am in agreement with the Respondent's submissions that this appeal must be determined on its own merits without regard to the findings in **MKS HCCA 134 of 2012**.

I have evaluated the evidence given in the trial Court, and note that the Appellant testified that he was driving on the left side of the road on the way to Isinya from Kajiado, when he slowed down and indicated that he was turning right. He then started to turn which is when his vehicle was hit by the Respondent's vehicle which was coming from behind. This evidence was corroborated by the account given by PW3.

It is my view that this evidence was sufficient to prove negligence on the part of the Respondent's driver, and the particulars thereof alleged in the Appellant's Amended Plaintiff of driving too fast in the circumstances, failing to keep any or proper look out, failing to control his motor vehicle, failing to stop or slow down, or take any measures to prevent the accident and of colliding with motor vehicle registration number KYH 799.

On the evidence by PW3 that the Appellant's motor vehicle was defective, no inspection report on the details of the said defect was provided, nor of the effect of the said defect on the accident that occurred. This Court also takes cognizance of the fact that the plea of contributory negligence on the part of the Appellant was raised by the Respondent, who therefore had both the legal and evidentiary burden of proof in this regard. No evidence was brought on the part of the Respondent of the Appellant's negligence, and in particular as regards the allegation that the Appellant was driving a defective motor vehicle. This Court therefore finds that it can only attribute minimal contributory negligence to the Appellant arising from the evidence by PW3, which it does at the ration of 10:90.

Lastly, while the issue in contest was only that of liability, I noted that the general damages awarded of Kshs 250,000/= was in line with awards made for similar injuries in previous cases relied on by the both the Appellant and Respondent in the trial Court, and was therefore not excessive or unreasonable in the circumstances. The special damages awarded of Kshs 3,000/- was however less the amount of Kshs 3,700/= pleaded in the Plaintiff which was supported by receipts produced by the Appellant in the trial Court.

This appeal therefore succeeds on the issue of apportionment of liability which is apportioned at the ration of 10:90 in favour of the Appellant, and also on the issue of the award of special damages. I consequently set aside the award in the trial court in this respect, and substitute it with a total award of Kshs 228,330/= which has been computed as follows arising from the findings in the foregoing:

(a) General Damages	250,000.00
(b) Special damages	<u>3,700.00</u>
	<u>253,700.00</u>
Less 10% contribution	25,370.00
<b>Total</b>	<b><u>228,330.00</u></b>

The Appellant is awarded 90% of the costs of the Appeal.

It is so ordered.

**DATED AT MACHAKOS THIS 12<sup>TH</sup> OCTOBER 2016.**

**P. NYAMWEYA**

**JUDGE**