



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO 45 OF 1997**

**BERNARD KIVILA MUNYWOKI .....**  
**APPELLANT**

**VERSUS**

**FAITH MUENI KIMENGELE .....** 1<sup>ST</sup>  
**RESPONDENT**

**VELESI DICKSON KIMENGELE .....** 2<sup>ND</sup> **RESPONDENT**

**(An Appeal arising out of the judgment of E.N. Maina RM delivered on 25<sup>th</sup> April 1997 in Machakos Principal Magistrate's Court Civil Case No. 612 of 1994 consolidated with Civil Case No 605 of 1994)**

**JUDGMENT**

The Appellant was the Defendant in the consolidated Civil Cases No. 612 of 1997 and 605 of 1997 at Machakos Principal Magistrate's Court, which cases arose from the same accident. The 1<sup>st</sup> Respondent was the original 1<sup>st</sup> Plaintiff, and also the mother of the 2<sup>nd</sup> Respondent who was a minor and who was the 2<sup>nd</sup> Plaintiff in the said suits. The Appellant has appealed against the judgment of the learned trial Magistrate in the said consolidated suits, which was delivered on 25<sup>th</sup> April 1997. The learned magistrate found that the said accident was caused by the Appellant's negligence, and awarded the 1<sup>st</sup> Respondent total damages of Kshs 94,100/=, and the 2<sup>nd</sup> Respondent total damages of Ksh 100,100/=.

The Appellant subsequently moved this Court through an Amended Memorandum of Appeal dated 7<sup>th</sup> November 1997, wherein his grounds of appeal are as follows:

1. The learned trial magistrate erred in law and misdirected herself on the facts when she held that the Respondents had established negligence on the part of the Appellant even when the evidence adduced showed that the Appellant was not negligent.
2. The learned trial magistrate erred and misdirected herself on the law when she held the Appellant's evidence that the accident the subject matter of the case was caused by a tyre burst baseless, even when the Appellant had proved the cause of the accident to have been the tyre

- burst.
3. The learned trial magistrate erred and misdirected herself when she awarded damages to the second Respondent even when the evidence before her clearly showed that the second Respondent was not involved in the accident.
  4. The learned trial magistrate erred and misdirected herself when she disregarded the evidence of the mechanic for being hearsay even when the said evidence had been admitted as admissible evidence.
  5. The learned trial magistrate erred and misdirected herself on the application and interpretation of the provisions of Section 34 of the Evidence Act.
  6. The learned trial magistrate erred and misdirected herself when she failed to find that the Respondents had not proved actionable negligence on the part of the Appellant.
  7. The learned trial magistrate erred and misdirected herself when she awarded damages which were manifestly excessive.
  8. The learned trial magistrate erred and misdirected herself when she failed to dismiss the Respondents' claim with costs to the Appellant.

The Appellant is praying for orders that the lower Court's judgment be set aside, quashed, and/or varied, and that this appeal be allowed with costs.

### **The Facts and Evidence**

I will proceed with a summary of the facts and evidence that was given in the trial Court. The brief facts of the case are that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent instituted a suit in the lower court by filing respective complaints dated 17<sup>th</sup> October 1994 and 14<sup>th</sup> October 1994. They stated therein that the Appellant was the registered owner of motor vehicle registration number KYD 031. Further, that on or about 6<sup>th</sup> August 1994, the Respondents were lawfully travelling in the said motor vehicle along the Kitui – Machakos Road, when the Appellant by himself, his driver, servant and/or agent drove, controlled and /or managed the said motor vehicle so negligently that he permitted the same to veer off the road and overturn. The Respondents gave the particulars of the said negligence and also and relied on the doctrine of *res ipsa loquitur*.

The Respondents further claimed that they suffered injuries as a result of the said accident and suffered loss and damage. The particulars of injuries suffered by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were given in their respective complaints. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents claimed special damages of Kshs 4,100/= and Kshs 5,100/= respectively, general damages for pain suffering and loss of amenities, and costs of the suit.

The 1<sup>st</sup> Respondent gave evidence at the trial in the lower Court, wherein she stated that on 6<sup>th</sup> August 1994 she was travelling in a motor vehicle driven by the Appellant on the Machakos- Kitui Road, and that on reaching a place called Mlutu, the motor vehicle which was at high speed reached a bend and swerved from side to side and then overturned. Further, that she was with her two children, but that only the 2<sup>nd</sup> Respondent was injured in the accident, and that they were admitted at Kitui General Hospital for 3 days.

The 1<sup>st</sup> Respondent further testified that after discharge from hospital they reported the accident at Kitui Police station and were issued with P3 forms. Further, that they were also examined by a medical doctor. She produced the P3 forms as her exhibit 1A and 1B, a police abstract as her exhibit 2 and medical reports as exhibit 3A and 3B.

The Appellant filed Defences to the said suit which were both dated 28<sup>th</sup> October 1994, wherein he stated that if the Respondents were minors, then their suits were incompetent as a minor can only sue through a next friend, who in turn ought to sign and file a written authority to the effect. The Appellant denied that the Respondents were lawful passengers as alleged, and also denied the allegations of negligence, special damages and injuries.

The Appellant gave evidence during the hearing in the trial Court as DW1, and testified that he is the

owner of motor vehicle registration number KYD 031 which was involved in a road accident on 6<sup>th</sup> August 1994. He stated that he had serviced his motor vehicle before the accident, which was caused by a tyre burst. He denied that he was driving in high speed and that he was driving between 40-50 kilometres per hour. He also stated that the 1<sup>st</sup> Respondent was in the said motor vehicle at the time of the accident, but not the 2<sup>nd</sup> Respondent, and that the 1<sup>st</sup> Respondent had exaggerated the injuries she incurred as a result.

### **The Submissions**

The Appeal herein was canvassed by way of written submissions. The Appellant's Advocate, Kinyua Musyoki Advocates, filed submissions dated 22<sup>nd</sup> October 2015. It was argued therein that the element of negligence was not proved by the Respondent, and that the only element of negligence the Respondents attributed to the Appellant was that the vehicle was driven at high speed. However, that they did not state at what speed the vehicle was being driven at.

Further, that the Appellant explained in his defence that the swaying of the vehicle from side to side was due to a tyre burst, and that the mechanic who had serviced the vehicle, one Munyoki Musembi, sued him in Kitui Law courts and testified that the accident was caused by a tyre burst at the rear and that the vehicle was misfiring. It was also submitted that the Appellant tried to control the vehicle, and that this proves that he was not to blame for the accident and was not negligent.

The Appellant contended that the Respondents did not observe the motor vehicle after the accident, and cannot be heard to refute the fact that the accident occurred as a result of a rear tyre burst. It was also contended that the evidence of the mechanic who testified in the Kitui court were produced without any objection as a defence exhibit in the lower court. That it was therefore in error of law that the trial magistrate dismissed the evidence of the said mechanic as hearsay, alleging the Appellant had not produced the proceedings in the Kitui Law Courts under section 34 of the law of Evidence Act.

On quantum, the Appellant submitted that the 1<sup>st</sup> Respondent did not sustain any injuries arising from the accident, and that she testified that she did not return the P3 from to Kitui Police Station. Further, that records from Kitui District Hospital which were produced as defence exhibit 1 show that she was admitted to hospital for 1 day under observation at the maternity ward as she was heavy with a child, and a medical report by Dr. Maundu showed that she did not sustain any injuries.

The Appellant also stated that the second respondent was admitted to Kitui District Hospital on the date of the accident for a single day, and discharged without any complaints. Further, that the P3 forms for both the Respondent were issued on 12/9/1994, 38 days after the accident, and that instead of the same being presented to Kitui District Hospital, they presented it to one Dr. Z. P. Kibore at Machakos on 13.9.1994 for filling. Therefore, that since no injuries had been detected at Kitui District Hospital on the 2<sup>nd</sup> Respondent, then the injuries indicated in the P3 form for the 2<sup>nd</sup> Respondent were not attributable to the accident of 6.8.1994. It was submitted that the award of damages of Kshs.100,100 ought not to have been awarded to the 2<sup>nd</sup> Respondent.

The Appellant also submitted that the 1<sup>st</sup> Respondent should not have been awarded Kshs.95,000.00 as general damages as she was not a passenger in the Appellant's vehicle. The Appellant submitted in this regard that the 1<sup>st</sup> Respondent's name was not in the police abstract produced as an exhibit by the Respondents.

L.M. Wambua Advocates for the Respondents filed written submissions dated 7<sup>th</sup> October 2015. They submitted that the Respondents pleaded negligence in their pleadings and proceeded to prove them during the trial, and that it was the duty of the Appellant to rebut and to counter the Respondents' evidence but failed to do so. Further, that the allegation of the tyre burst which was brought up during the defence case was an afterthought and was never proved by the Appellants.

The Respondents contended that any allegations that they were not involved in the accident were refuted

during the cross-examination of the Appellant, who admitted that exhibit D3(b) which was the Police Abstract produced by the Appellant mentioned the name of Pelesi Dickson who was the minor in the suit.

On the issue of quantum, the Respondents submitted that the 1<sup>st</sup> Respondent (PW 1) testified in the trial that after the said accident, she was treated and admitted at Kitui District hospital for a period of three days, and that she also saw Dr. Kibore who filed P3 forms and prepared Medical Reports (Exhibit 3A and 3B).

Further, that in all the above mentioned exhibits, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent sustained injuries that were similar to the injuries indicated in the Appellant's Exhibit 1, and that it was therefore false to allege that the 1<sup>st</sup> Respondent had not sustained any injuries, was admitted due to pregnancy related issues after the accident, and/or that she had exaggerated her injuries.

It was the Respondents' submissions that the sum awarded by the trial magistrate of Kshs.90,000 for pain and suffering and loss of amenities to the 1<sup>st</sup> Respondent and Kshs.95,000 to the 2<sup>nd</sup> Respondent was not manifestly high in the circumstances, as the doctor had indicated the Respondents had not fully recovered. Reliance was placed in this regard on the decision in **Douglas Mwirigi Francis & 2 others vs Andrew Miriti, Meru HCCA No. 34 of 2005** where the plaintiff sustained injuries of cuts on the face and head; cuts on the hands; and cuts on the lower limbs, and was awarded Kshs.150,000/=.

Therefore, that in the circumstances, there are no good reasons or reasonable grounds for disturbing the finds of the trial court on the award of damages, because it was not inordinately high as to represent an entirely erroneous estimate. On the head of special damages it was urged by the Respondents that they testified and produced into evidence exhibits for Kshs.4,100/= for the 1<sup>st</sup> Respondent and Kshs.5,100/= for the 2<sup>nd</sup> Respondent. Further, that the Appellant never called any evidence on the issue of special damages, and that this limb should be left undisturbed.

### **The Issues and Determination**

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are contesting the issues of liability and quantum of damages. The fact that an accident occurred on 6<sup>th</sup> August 1994 is not disputed by the parties. The issues in dispute and for determination are firstly, whether the said accident was caused by the negligence of the Appellant, and secondly if so, whether the Respondents are entitled to damages and the quantum.

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**. The duty of this court as the first appellate court is therefore to examine and re-evaluate the evidence in, and findings of the trial Court, and to reach its own independent conclusion as to whether or not the findings of the trial Court as to liability and quantum of damages should stand.

I have considered the evidence given in the trial Court and the arguments made by the parties. On the issue of liability, the central feature for one to be liable for negligence is that one has to breach a duty to take care, and it is upon the claimant to lead either direct or circumstantial evidence to establish the facts of a breach of duty of care. In the present appeal the Respondents claimed that the Appellant was driving in high speed and therefore as a result did not take care. The Appellant on the other hand has argued that he was not to blame for the accident as it was caused by a burst tyre.

The facts as stated by the Respondents that are not in dispute in this appeal are that the motor vehicle registration number KYD 031 which was owned by and being driven by the Appellant, swerved side to side and overturned. The only inference that can be drawn in the circumstances is that either the Appellant was not able to control the said motor vehicle, and/or that the said motor vehicle was in a state of disrepair. The Respondents have alleged the latter, due to the speed the vehicle was being driven,

which is a likely possibility, since if it had been driven in low speed the Appellant would most likely have been able to control the vehicle even in the event of a tyre burst.

The Appellant alleged that the fact of the tyre burst causing the accident was established by the evidence of his mechanic known as Musembi Munywoki in proceedings in **Kitui Principal Magistrate's Case No 203 of 1995**, and sought to rely on section 34 of the Evidence Act as to the admissibility of the said proceedings. Section 34 of the Evidence Act provides as follows:

**“ (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—**

**(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers**

**unreasonable, and where, in the case of a subsequent proceeding—**

**(b) the proceeding is between the same parties or their representatives in interest; and**

**(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and**

**(d) the questions in issue were substantially the same in the first as in the second proceeding.”**

The Appellant did not make any application and/or lay the basis for the admission of the proceeding in the **Kitui Principal Magistrate's Case No 203 of 1995**, in terms of the circumstances listed in section 34 of the Evidence Act being present. These circumstances would have explained why the said mechanic was not able to give evidence in the proceedings in the trial court. In addition it must be noted that the conditions to be met for section 34 of the Evidence Act to apply are cumulative and not mutually exclusive, and it was not shown by the Appellant in this respect that the Respondents were parties in, or had representatives in **Kitui Principal Magistrate's Case No 203 of 1995**, or that they had the opportunity to cross examine the said mechanic in the said suit.

In any event, the allegation that it was the tyre burst that caused the accident is also consistent with negligence on the part of the Appellant, as the duty was upon him to ensure that the motor vehicle was in a good and road worthy condition, which was evidently not the case. I therefore find that the Appellant was negligent and wholly liable for the said accident.

On the issue of quantum of damages, it is an established principle of law that that the appellate court will only interfere where the trial court either took into account an irrelevant factor or left out a relevant factor, or that the award was too high or too low as to amount to an erroneous estimate, or that 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 Appellant has in this regard contested the injuries suffered by the Respondents. He also alleges that the 2<sup>nd</sup> Respondent was not involved in the accident. I have perused the police abstracts produced by the Respondents as Exhibit IIA and by the Appellant as Exhibit 3B. Both contain the names of Mueni Dickson Kimengele and Periss Dickson Kimengele as persons involved in the accident that occurred on 6<sup>th</sup> August 1994, involving motor vehicle registration number KYD 031. It was also admitted by the Appellant during his cross-examination that the said Perris Kimengele was the minor Respondent.

I have also perused the medical reports produced in evidence by both the Respondents and Appellant, and it is apparent from the said reports that injuries were suffered by the Respondents. It is indicated in the medical reports dated 12 and 14<sup>th</sup> October 1994 by Dr. Zachary P. Kibore that the 1<sup>st</sup> Respondent

suffered the following injuries as a result of the accident:

- a. Crush injury to the chest;
- b. Contusion to the back;
- c. Severe contusion to the hip; and
- d. Crush injury to the hip;

In addition, that the 2<sup>nd</sup> Respondent sustained the following injuries from the said accident:-

- a. Cut on the forearm;
- b. Concussion of the brain;
- c. Severe injuries to the trunk; and
- d. Multiple superficial bruises

Furthermore, the medical report by Dr. Maundu of Kitui District Hospital dated 4<sup>th</sup> March 1997 produced by the Appellant, showed that the 1<sup>st</sup> Respondent suffered blunt injury to the sacral region with pain radiating to the left loin and to the inferior border of the scapular after the accident. It is also noteworthy that the Appellant did not deem it fit to produce any medical report from Kitui Hospital for the 2<sup>nd</sup> Respondent as he did for the 1<sup>st</sup> Respondent.

The Respondents have relied upon the decision in **Douglas Mwirigi Francis & 2 others vs Andrew Miriti, Meru HCCA No. 34 of 2005** where the plaintiff sustained injuries of cuts on the face and head; cuts on the hands; and cuts on the lower limbs, and was awarded Kshs.150,000/=. The injuries in the said decision are similar to those suffered by the Respondents in this appeal. However the award therein was made in 2002, some 5 years after the accident in this appeal, and inflationary factors must therefore be taken into account.

In the circumstances I find that the award by the trial magistrate of Kshs 90,000/= as general damages for the 1<sup>st</sup> Respondent and Kshs 95,000/= as general damages for the 2<sup>nd</sup> Respondent was reasonable, and was not too high or too low given the award granted in the case cited in the foregoing.

I accordingly dismiss this appeal for the above reasons and uphold the decision of the learned trial magistrate.

I award the costs of the appeal to the Respondents.

It is so ordered.

**DATED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF NOVEMBER 2015.**

**P. NYAMWEYA**

**JUDGE**