



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

**CIVIL APPEAL NO. 13A OF 2012**

**BENJO TRANSPORTERS LIMITED.....**  
**APPELLANT**

**VERSUS**

**PETER KITHUNGA NDONE.....**  
**RESPONDENT**

*(Being an appeal from the judgment of the Judgment of the Principal Magistrate's Court at Kithimani delivered on 18-1-2012 by Hon. A.W. Mwangi-PM in PMCCC No. 181 of 2008)*

**J U D G M E N T**

- 1). In the suit before the lower court, the respondent had sued the appellant for damages arising out of the Road Traffic Accident that the respondent was involved in on 14-3-2008 while the respondent was a passenger in motor vehicle registration No. KAX 968U. The respondent was injured in the accident. The respondent blamed the accident on the alleged negligence in the manner in which the motor vehicle was being driven at the material time by the appellant's driver.
- 2). The appellant filed a defence and denied the claim. The amended defence is dated 25-1-2010. The defence blamed the accident on a tyre burst.
- 3). When the case proceeded for hearing the respondent called four witnesses. The respondent, Peter Kithunge (PW3) testified that he was a passenger in the motor vehicle. He blamed the accident on excessive speed and loss of control of the motor vehicle. The respondent's evidence was that he was injured on the head, neck and back and was treated at Matuu District Hospital. The accident was reported at Matuu police station. Investigations were carried out and the respondent was issued with a police abstract.
- 4). The appellant's side called two witnesses. The driver, DW1 Joseph Mutua Kaleli testified. His evidence was that the motor vehicle had a tyre burst and veered off the road to its right and hit a stone and ended up in the forest. DW2 the appellant's managing director, DW3 Atenus Kabaire a motor vehicle inspector, DW4 Sgt Charles Lekursai and DW3 James Ndungu Taku all testified on the motor vehicle's roadworthiness and blamed the accident on the tyre burst.
- 5). The trial court found the plaintiff's case proved on a balance of probability. Judgment was entered for the respondent on a 100% liability basis for Kshs. 80,000/= general damages, Kshs. 2,000/= special damages, costs and interest.
- 6). The appellant was dissatisfied with the said judgment and appealed to this court. The grounds of the appeal can be broadly summarized into three as follows:

- a. **That the respondent's case was not proved on a balance of probabilities.**
- b. **That the appellant's submissions on quantum were not considered.**
- c. **That conventional awards for similar injuries were not considered.**

7). The appellants did not turn up for the hearing of the appeal. The respondent filed written submissions which I have duly considered.

8). This being the first appellate court, the court is duty bound to re-evaluate the evidence on record and come to its own findings. **See Selle –VS- Associated Boat Co. Ltd [1968] EA 123.**

9). It is not in dispute that the respondent was a passenger in the motor vehicle in question on the material time. It is also not in dispute that the motor vehicle was owned by the appellant and was being driven by the appellant's driver.

10). The respondent in his evidence blamed the accident on the excessive speed and the driver's loss of control. The appellant's evidence that the motor vehicle veered off the road was corroborated by that of PW2 PC Enock Wanyonyi. According to PW2, the accident case is still pending under investigation and he could not tell who was to blame for the accident. It was the evidence of PW2 that the initial police report did not mention any tyre burst.

11). The appellant's contention is that the tyre burst is the one to blame for the accident. According to DW2 whose evidence was that he was the one managing the motor vehicle, the motor vehicle was maintained in a good condition and was serviced regularly. DW4 Sgt Charles Kariuki produced an OB extract which reflects that the motor vehicle sustained a left front tyre burst. DW3 Ateus Kabaire an inspector of motor vehicle testified that he inspected the motor vehicle and found it with a front left tyre burst. Although the evidence of PW was that the initial report to the police did not reflect any tyre burst, the defence evidence has proved on a balance of probability that indeed the motor vehicle had a tyre burst. The corroborative evidence is quite convincing on that aspect.

12). Having found that there was a tyre burst, what does that portend for the respondent's case? DW5 James Ndumia Taiku a motor vehicle valuer and technician with 30 years experience gave his views as follows:

**“Tyre bursts are caused by overloading of the motor vehicle, a worn out tyre, over heating of tyres, over speeding, the road conditions, incorrect tyre pressure, faulty manufactures tyres or manufacturer's fault”.**

Thus the question of negligence cannot be ruled out when a tyre bursts. The question of over speeding also comes in. According to the driver (DW1), after the tyre burst the motor vehicle veered off the road and hit a stone and rested in the bushes. The driver gave the speed at which he was driving as 60 KPH. At 60 KPH, if the motor vehicle was being properly controlled, then one would not expect the motor vehicle to veer off the road and into the bushes. Infact the appellant's evidence as adduced by PW4 the base commander was that speed contributes to the driver's ability to control the motor vehicle in case of tyre burst. The defence evidence thus tends to agree with the respondent's evidence on the excessive speed and lack of control of the motor vehicle. The respondent was a passenger and could not have contributed to the accident. I agree with the trial court's finding on liability at 100% against the appellant.

13). On quantum, the respondent's evidence on the injuries he sustained was corroborated by that of PW1 Dr. Charles Kasuki and the records officer from Matuu District Hospital, PW4 James Kilunda. PW4 produced the respondent's treatment cards. The doctor (PW1) examined the respondent and prepared a medical report which was produced as exhibit. The medical report established that the respondent sustained soft tissue injuries on the forehead, neck and back. The respondent recovered well according to the doctor's evidence.

14). The award of Kshs. 80,000/= is reasonable as stated by the Court of Appeal: **Kemfro Africa Limited t/a Meru Express Services & Another vs A.M. Lubia and Another (No.2) (1982-88) L KAR**

727 at page 703 that:-

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below, simply because it would have awarded a different figure if it had tried the case at first instance.**

**The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

**15).** The Kshs. 2,000/= awarded as special damages was pleaded and proved a receipt was produced for the Kshs. 8,000/= for the preparation of medical report.

**16).** With the foregoing, I find no merit in the appeal and dismiss the same with costs.

**Dated, signed and delivered at Machakos this 15<sup>th</sup> day of December, 2015.**

**B. THURANIRA JADEN**

**JUDGE**