



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL APPEAL NO. 103 OF 2008

ERICK MUTHUMA MUTISE.....1ST
APPELLANT
NDUGU TRANSPORT2ND
APPELLANT
VERSUS
BONIFACE NJOROGE NGUURI.....
DEFENDANT

J U D G M E N T

The appellants have filed seven (7) grounds of appeal herein:-

- 1. The award of general damages awarded by the learned trial magistrate was manifestly and punitive considering the nature of the injuries suffered by the respondent.**
- 2. The learned magistrate erred in law and in fact in awarding general damages for fatal injuries while there was insufficient evidence to support the same.**
- 3. The learned magistrate erred in law and in fact by ignoring the authorities submitted by the appellant in its submissions when arriving at the figure for general damages in the judgment.**
- 4. The learned magistrate erred in law and in fact in finding that the appellant was 100% liable for the fatal injuries of the deceased while it is apparent that the respondent failed to prove any negligence on the part of the appellant.**
- 5. The learned magistrate erred in law and in fact in failing to appreciate that the respondent was the sole and/or substantial author of his own misfortune.**
- 6. The learned magistrate erred in law and in fact in disbelieving the submission of the appellants without affording sufficient reasons while believing that of the respondent against the weight of evidence in arriving at her decision.**
- 7. The learned magistrate disregarded totally the evidence from the respondent as it emanated from the cross-examination.**

The substance of its appeal is that the trial court didn't consider in arriving at its decision the fact that the

appellant's driver was not wholly to blame for the accident and that the award of Kshs. 450,000/= was excessive.

The brief summary of the facts herein are that on 4-6-2004 the respondent who was a matatu driver was driving motor vehicle Reg. No. KAG 053A Toyota along Kisumu -Kakmega road. The 1st appellant was driving motor vehicle Reg. No. KAM 373M a vehicle which was owned by the 2nd appellant. The two vehicles collided and the respondent sustained injuries. The respondent filed suit claiming damages as a consequence of the said accident. At the trial the appellant didn't call any witness whereas the plaintiff testified and called PW2 the police officer who produced a police abstract. The trial magistrate (as she then was) awarded the respondent Kshs. 450,000/= as general damages hence provoking this appeal.

I have perused the proceedings on record. It is not in dispute that the accident occurred on 4-6-2004 involving the parties herein. It is however the evidence of the respondent that the accident was caused by the 1st appellant's negligence. It was the appellant's evidence that the accident occurred at a corner. It was raining and because of this he had reduced his speed. The appellant vehicle though came towards his side and it hit his vehicle from the right side. He further on cross examination said **"yes the lorry driver tried to apply emergency brake and swerved towards his side making the hind part of his lorry hit me"**.

This evidence is obviously one sided. The appellants did not call the 1st appellant or any other party to rebut. The police officer PW2 produced the police abstract. From the details therein it shows that there was an intention to arrest the 1st applicant and charge him for causing the accident. I do agree with the appellant's submission that this intention doesn't necessarily mean that the 1st appellant was to blame for the accident. However, in the absence of them not presenting any evidence in rebuttal one can assume correctly that they were negligent and thus the cause of the accident.

I have read the reasoning of the trial court in respect to the question of negligence and I am unable to disagree with it. Had the appellants offered any plausible explanation by way of evidence then I would have interfered with the question of liability. For this reason I shall uphold the court's finding on liability at 100% against the appellant.

Turning now to the issue of injuries and damages awarded, the respondent suffered the following injuries as per the medical report prepared by Dr. Dickson O. Nyamogo:-

"He sustained a fracture of the right tibia in the distal 1/3 which was confirmed by X-ray and POP applied. He suffered a fracture of the right femur which was confirmed by X-ray, K-nail and POP applied".

The major injuries suffered by the respondent were fracture in nature. I have perused the authorities by the parties herein and what was relied on by the trial court. I don't think the trial court award of Kshs.450,000/= was excessive. The injuries suffered were not soft tissue in nature. Besides the inflationary trends being experienced in our current dispensation has to be taken into consideration.

For the above reasons, I shall disallow the appeal with costs to the respondent.

Orders accordingly.

Dated, signed and delivered at Kisumu this 20th day of January 2012.

**H.K. CHEMITEI
JUDGE**

HCK/va