



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**CIVIL APPEAL. NO.130 OF 2008**

**DOMINIC GITHAE..... APPELLANT**

**VERSUS**

**SUSAN KANYI..... RESPONDENT**

***CONSOLIDATED WITH***

**HCCA. NO.129 OF 2008**

**DOMINIC GITHAE..... APPELLANT**

**VERSUS**

**SAMSON KANGETHE MWANGI..... RESPONDENT**

**(Being an appeal from the Judgment delivered by the Hon. Mrs. Mwangi Resident Magistrate on the 11<sup>th</sup> June, 2008 in the Civil Suit No.281 of 2006)**

**JUDGMENT**

The two appeals were consolidated by an order of this court dated November, 2011 and arrived at by consent. The appellants were the defendants whereas the respondents were the plaintiffs in the two suits before the Resident Magistrate's court at Kithimani that give rise to the two appeals.

The case for the respondents in the lower court was that on 20<sup>th</sup> March, 2006 whilst travelling as lawful passengers in motor vehicle registration number KAR 846E along Thika-Mwingi road, the appellant, his agent and/or employee drove, managed and controlled the said motor vehicle in such a reckless, dangerous and/or negligent manner that it collided with another motor vehicle registration number KAJ 498T as a result they were injured. The particulars of negligence they attributed to the appellant were given. Similarly the particulars of injuries sustained by each respondent and special damages suffered were similarly given. The respondents prayed for judgment against the appellant for special and general damages, costs of the suit and interest.

The suits were defended. The appellant denied that the respondents were passengers in motor vehicle registration number KAR 856E. Particulars of negligence and injuries sustained by the respondents if at all were all denied. Alternatively, the appellant pleaded that the accident was caused solely and or substantially contributed to by the negligence of the driver of motor vehicle registration number KAJ 498T. Particulars of negligence on the part of the driver of motor vehicle registration number KAJ 498T were duly given.

During the hearing, it was the respondents' case that on 30<sup>th</sup> March, 2006 they were fare paying passengers in motor vehicle registration number KAR 856E travelling along Thika-Garisa road. Along the way at a place known as Landless the said motor vehicle rammed into the back of a school bus vehicle registration number KAJ 498T. As a result the respondents sustained soft tissue injuries. They were taken to Thika Police Station by a good Samaritan and were referred to Thika District Hospital where they were treated. They blamed the driver of the motor vehicle they were travelling in for the accident for having driven at an excessive speed and for failing to slow down in order to allow the bus to turn. They prayed for compensation and costs of this suit.

**Dr. Ikonya** examined both respondents on 17<sup>th</sup> April, 2006. It was her opinion that they all suffered soft tissue injuries and no permanent incapacity was anticipated. She tendered in evidence their respective medical reports and receipt for KShs.1,000/- and KShs.7,000/- for the medical report and court attendance fees respectively.

A clinical officer based at Thika District Hospital, PW.2 produced as exhibit a treatment card from the hospital in respect of the respondents who had been treated there following a road traffic accident.

A police officer based at Thika Police Station confirmed that the said accident occurred and the respondents were indeed in motor vehicle registration number KAR 846E. The respondents were each issued with a Police Abstract and P.3 form which he produced as exhibits.

The appellant called one witness, an officer working with Thika District Hospital as the records and information officer. He denied that the respondents treatment cards were issued by the hospital. He referred the court to the male outpatient register and specifically the one for the period including 21<sup>st</sup> March, 2006, the date that the respondents claim to have been treated there. The respondents' names and their numbers did not appear on that date. Those numbers belonged to patients who had been attended to at the hospital in January and February, 2006 respectively. It was his evidence that the respondents were not treated at that hospital as alleged. The witness produced photocopies of the register as an exhibit.

The learned magistrate having carefully evaluated the evidence on record as well as the written submissions on quantum and liability, came to the conclusion that the respondents had proved their case on balance of probabilities and awarded them KShs.80,000/- and 70,000/- respectively as general damages. Dissatisfied with the learned magistrate's findings both on quantum and liability, the appellant lodged the instant appeal through **Messrs Kairu & McCourt Advocates**. They faulted the learned magistrate on grounds to wit:

***“1. The learned Magistrate erred in fact and in law in making a finding that the plaintiff had proved on a balance of probabilities that she been involved and injured in the accident in view of the following evidence cumulatively:***

**(a) The controversial entries in the Police Records where the Plaintiff's name appeared on the Margin of the OB Book.**

**(b) The controversial treatment notes which the authenticity was denied and challenged.**

**(c) The controversial P3 form which (sic) whose authenticity and validity was denied and challenged.**

**2. The learned magistrate erred in law and in fact in finding that the treatment notes produced by the plaintiff were genuine in view of:**

**(a) The defendant's evidence that the treatment cards were not genuine and were not issued at Thika District Hospital.**

**(b) The defendant's evidence that there was no record of the Plaintiff having been treated at Thika District hospital on the date claimed by the plaintiff.**

**(c) The treatment notes produced in court contained a number of discrepancies including the fact that the patient number claimed by the plaintiff did in fact belong to another patient.**

**(d) The treatment notes produced in court contained a number of discrepancies including the fact that the patient number appearing on the plaintiff's card and that of a fellow plaintiff in CMCC No.280 of 2006 – Kithimani were subsequent to each other yet one was male and the other was female and evidence was led that the hospital maintained separate registers for male and female patients.**

**(e) The clinical officer who allegedly treated the plaintiff failed to attend court to testify on the genuineness of the treatment cards she allegedly issued.**

**(f) The clinical officer who attended court to produce the treatment cards never treated the plaintiffs.**

**3. The learned magistrate erred in law and in fact in finding that the defendant had failed to prove on a balance of probabilities that the patient registers produced in court did not belong to Thika District hospital in view of the fact:**

**(a) There was no evidence led to reasonably doubt that the registers did not actually belong to Thika District hospital.**

**(b) There was uncontroverted sworn testimony that the registers in fact did belong to Thika District Hospital.**

**(c) There was no sufficient evidence on record to reasonably doubt that the DW.1 was not a Records Officer from Thika District Hospital.**

**4. The learned magistrate erred in fact and in law in finding that DW1 had failed to prove that he was an employee of the Thika District Hospital because he did not have his work identification card and consequently finding that the registers did not belong to Thika District hospital and on the other hand finding the Plaintiff's treatment notes to be genuine on the strength of the clinical officer who also failed to produce his work identification card.**

**5. The learned magistrate erred in law and in fact in making a finding that there was no law stopping a private practitioner from filling in a P3 form and in so doing failing to appreciate that:**

**(a) The P3 form is specifically addressed to a government institution and can only be filled by a member of that institution namely a medical practitioner practicing in a medical hospital or his equivalent.**

**(b) The P3 form is a government document and can only be filled by a government officer**

**(c) There is no provision for a private practitioner to fill a P3 form.**

**6. The learned Magistrate erred in law and in fact in failing to appreciate that the plaintiff had not proved any of her allegations and the whole case in its entirety on a balance of probabilities.**

**7. The learned magistrate erred in law and in fact in awarding the plaintiff damages for injuries he had not proved in view of:**

**(a) The evidence of the Defendant that the treatment notes were not genuine**

**(b) The P3 form was not valid having been filled by a private practitioner**

**(c) The Medical report based on the fake treatment notes and invalid P3 form could not stand as the plaintiff's doctor was not the treating doctor.**

When the appeals came up for hearing before me on 10<sup>th</sup> November, 2011, parties agreed to canvass the same by way of written submissions. Subsequently, parties filed and exchanged written submissions which I have carefully read and considered.

As a first appellate court, it is my duty to subject the evidence tendered in the trial court to fresh and exhaustive evaluation and re-appraisal so as to reach my own verdict on the judgment of the trial court.

It is common ground that there was an accident on 20<sup>th</sup> September, 2006 involving motor vehicle KAR 846E. It is also common ground that the motor vehicle was owned and or driven by the appellant. This is more so now that the appellant did not himself testify to rebut the averments of the respondents linking him to the motor vehicle. What was in contention however, was whether the respondents were injured in the said accident. The respondents all testified and confirmed that they were indeed passengers in the ill fated motor vehicle on the material day. In the absence of any evidence to the contrary, the respondents must be believed. It was upto the appellant to call evidence to counter the evidence of the respondents as to their presence or otherwise in his vehicle, their involvement in the accident and subsequent injuries. The appellant did neither of the foregoing. The appellant in a bid to show that the respondents were not injured in the accident called one, **Peter Karugo Ndirangu** as a witness. He was the records and Information Officer based at Thika District Hospital. He stated in evidence that his duties included keeping records and safeguarding patients information. He produced an outpatient register for Thika District Hospital for the year 2006. He specifically pointed out that the outpatient numbers assigned to the respondents belonged to different persons who had visited the hospital on different days earlier than when the respondents alleged to have been treated thereat. It is instructive to note that the respondents had called one, **George Maingi**, a Clinical Officer at the same hospital. This

witness confirmed that the cards in dispute were indeed from Thika District Hospital. He also stated that there were many instances when patients were issued with cards and the numbers on those cards would not be recorded in hospital registers. He further conceded that there were various registers in the hospital and the recording could have been done in any of those registers.

Faced with those opposite scenarios, the learned magistrate was called upon to decide who between **Ndirangu** and **Maingi** she should believe. She chose the latter and rightly so in my view. First and foremost, the alleged register, **Mr. Ndirangu** relied on had nothing to show that it originated from Thika District Hospital. In any event, **Ndirangu** was not the author of the contents. He admitted under cross-examination that he was only a keeper of records and that the information in the register was filled by different persons at different times depending on when a patient visited the facility. He admitted that indeed there were various persons entrusted with the duty of filling in the information and it was possible that they could have omitted the names of the respondents when they visited the hospital. He went on to say that because of this very problem, the hospital had resorted to retaining the treatment cards of the patients and giving them only attendance cards. He further admitted in cross-examination that there were other registers in the hospital for keeping records like the admission register. However, he did not bring such other registers to court to confirm that indeed the respondents had not been treated at Thika District Hospital.

In my view, **Mr. Maingi** being one of the medical officers who would ordinarily see the patients and record their numbers in whatever register the hospital had was in a better position to tell the court what actually used to happen on the ground rather than **Ndirangu** who only kept records that were brought to him. In any event, in his own testimony, **Ndirangu** admitted that by 21<sup>st</sup> March, 2006 they were not filling records for outpatients and only started doing so when the problem of cards issued from their hospital started coming up for verification but they had no records to refer to.

It is trite law that when it comes to issues of fact, the trial court has the advantage of seeing and hearing witnesses first hand and is always better placed to make a finding on such issues of fact. On the other hand it is upto the appellant to satisfy the appellate court that the trial court's findings of fact cannot be supported on the evidence which was before it. Otherwise, an appellate court will not normally interfere with findings of facts by the trial court unless it is based on no evidence at all, or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. See **Bundi Marube Vs. Joseph Onkoba Nyamuro (1982 – 88) I KAR 108**. The decision by the learned magistrate to believe the evidence of **Maingi** as opposed to that of **Ndirangu** had a factual basis which this court cannot interfere.

Besides the evidence of the respondents and the Clinical Officer on their involvement in the accident, there was also the evidence of the police abstracts as well as a P3 forms. The respondents called a police officer from Thika Police Station who confirmed that the station had issued the police abstract as well the P3 form. He also confirmed that indeed the respondents were among those noted in their records as having been injured in the accident. Ordinarily the police abstract speaks for itself. It is noted therein that the respondents were passengers in the motor vehicle which was involved in the accident and were injured as a result. The appellant has questioned the validity of the police records by alleging that the names of the respondents appeared on the margin of the occurrence book and that the handwriting of the main report and subsequent report are different. Therefore those reports by two respondents were clearly not made on the same day as that of the initial report. However, I believe **P.C. Onesmus Mutuku** offered a perfect explanation. That, there was a likelihood that after the accident some people can go to different hospitals and therefore reports can be made on different dates, time and by different passengers. It also goes without saying that on such occasions such reports would be handled by different police officers.

Then there was the issue of the P.3 form being filled by a private practitioner as opposed to a medical officer of health. As correctly observed by the learned magistrate, there is no law barring a private practitioner from filling a P3 form. In this case, **Dr. Ikonya** filled the P3 forms based on examination and history of the patient and she relied on the treatment notes from Thika District hospital. **Dr. Ikonya** was availed as witness and no objection was taken by the appellant as to her capacity to fill a P3 form then. It cannot be the subject of the appeal.

After anxious and careful consideration of the recorded evidence, I am unable to find that, the factual findings of the learned magistrate cannot be supported by the evidence that was before her. Accordingly, I am satisfied that the learned magistrate was right in finding that the respondents were injured as a result of an accident involving the appellant's motor vehicle.

There is no appeal on quantum. I take it that the appellant was happy with the awards made and does not call for determination in this appeal.

On the whole, I am satisfied on my own consideration and re-evaluation of the material on record that the learned magistrate came to the correct decision on the dispute before her and the appellant has not satisfied me that I should disturb the findings of the honourable magistrate. That being my view of the appeal, the same is dismissed with costs to the respondents.

**Judgment dated and delivered at Machakos, this 16<sup>th</sup> day of January, 2012.**

**ASIKE-MAKHANDIA**

**JUDGE**