



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL 601 OF 2008

BUSIA STEEL ENTERPRISES LTD APPELLANT/ORIGINAL 2ND
DEFENDANT

VERSUS

RICHARD NYAKUNDI 1ST RESPONDENT/ORIGINAL
PLAINTIFF

SAMWEL ORINDA OMUKAYA 2ND RESPONDENT/ ORIGINAL 1ST
DEFENDANT

(Being an appeal arising from the judgment of Hon. A. Aminga Resident Magistrate in Civil Case No. 250 of 2003 dated 7th October 2008 at

Limuru Courts)

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J U D G M E N T

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I. **BACKGROUND**

1. This is a Running down appeal coming to this court from the Senior Principal Magistrate's court at Limuru.

2. A motor vehicle collision occurred between a bus registration No. KAN 098R owned and or driven by the original 1st defendant/2nd respondent and a lorry registration No. KAK 554K owned by the original 2nd defendant appellant.
3. Richard Nyakundi was a passenger in the said bus that was owned by the original 1st defendant. He was aged at the time 27 years old.
4. Upon the vehicle colliding, he sustained injuries being
 - a) deep cut on the occiput area mastoid area
 - b) a cut to the pinna right ear
 - c) a blunt trauma to the neck chest, right hip
 - d) laceration to the 1/3 of the shin
5. The Hon. Trial Magistrate on hearing the evidence gave judgment on 7th October 2008 as follows:
 - 5.1 **Liability**
100% against the 2nd defendant.
 - 5.2 **Quantum**
General damages
 - i) Pain and suffering Ksh. 180,000/-
Special damages
 - ii) Ksh. 5,100/-
6. It will be noted that the 2nd original defendant/appellant had been sued together with the 1st original defendant/respondent No. 2. There was interlocutory judgment entered against the said respondent. There was no participation from them. It appears from the P3 form that they had been insured by an insurance company who may have been insolvent. It is unclear on the issue of whether a moratorium existed or not.
7. Being aggrieved with the decision of the Hon. Trial Magistrate, the original 2nd defendant filed appeal to this High Court.

II APPEAL

8. The appellant stated in their memorandum of appeal that the Hon. Trial Magistrate erred in law and facts:
 - 8.1 ... in holding that the appellant was 100% liable ...
 - 8.2 ... in holding that the evidence of the appellant's driver needed corroboration.
 - 8.3 ... in failing to hold that the 1st defendant/2nd respondent contributed to the accident wholly not withstanding that interlocutory judgment had been entered against the 2nd respondent ... and not evidence called to controvert appellant's driver's evidence.
 - 8.4 ... by refusing to allow/offer appellant an opportunity to call the base commander Tigoni police station to produce sketch map of accident.
 - 8.5 ... arriving at a decision that is wholly against the weight of the evidence and pleadings.

8.6 ... in awarding Ksh. 180,000/- in general damages in respect of minor soft tissue injuries ... manifestly excessive and contrary to principle and previous award in comparable cases.

8.7 prayed appeal be allowed, the judgment of the subordinate court be set aside and suit on appeal be dismissed.

III SUBMISSIONS

9. The arguments in submissions put forward by the appellant was that subordinate court's judgment be set aside and or reviewed. That the award given was excessive.

10. The version of facts given by the original plaintiff/passenger is that whilst travelling in the bus along main Nairobi road, the two vehicles collided. Whereas in his pleadings, the original plaintiff passenger did not state who of the two was negligent, the court held that the appellant was liable for the accident.

11. The accident is said to have occurred at a corner. When the appellant wished to call the police base commander to produce the sketch map of the scene, the said trial magistrate declined to call this crucial evidence.

12. The findings that the appellant was liable was erroneous. It shows now the plaintiff may not have been a witness of truth.

13. In reply to this, the original plaintiff advocate stated in submissions that there were two versions that had been taken up. The first being the story of the plaintiff. He was seated two rows behind the bus driver. He saw the oncoming vehicle leave its lane and collide into their vehicle as they travelled uphill.

14. The second version was of the 2nd defendant appellant. The respondent No. 1 alleged that he was travelling downhill and collided into the

1st defendant's bus.

15. From the evidence this court found that the appellant stated the road was flat. That it was the bus which was over speeding, left its lane and collided into him.

16. It was therefore, argued the respondent No. 1, that the trial magistrate believed the evidence of the original plaintiff 1st respondent.

17. The opinion of this High Court on liability and bearing in mind that if the trial magistrate acted on wrong principles on reaching her findings, this court may interfere with the said findings.

18. Where there is a collision between two vehicles, the said passengers are not to be blamed but the blame lies wholly between the two drivers. Negligence is proved when the collision actually occurs. Where between the two parties, this is denied and the two drivers and or owners of the vehicles have been sued, a notice under former

Order 1 r 21 Civil Procedure Rules has to be served upon the other party and thereafter the said notice is an indication to the trial magistrate to apportion liability.

19. In this case, the driver of the other vehicle did not participate. An interlocutory judgment had been entered. Liability upon the said bus owner is final.

20. Where there is proof of collision but the impact is not known who of the two is to be blamed, the apportionment is made.

21. The advocate for appellant prays that the appeal be allowed and judgment be set aside or that the apportionment be at 90% against the bus owner and 10% against the appellant.

22. I would find that the apportionment be held at 50% between the parties.

23. As to quantum the injuries that were sustained, it was submitted by the appellant was not in keeping with the award given. That the damages of Ksh. 180,000/= was so high. This should be at Ksh. 80,000/- as per various court cases relied on.

24. The respondent argued that the award of Ksh. 180,000/- was not manifestly high.

25. I have noted the injuries sustained by the original plaintiff. This is as stated above.

- a) deep cut on the occiput area mastoid area
- b) a cut to the pinna right ear
- c) a blunt trauma to the neck chest, right hip
- d) laceration to the 1/3 of the shin

26. It is further shown that the original plaintiff may have had several stitches. He has since fully recovered.

27. I would agree with the appellant that this is manifestly high award. An award of Ksh. 80,000/- is appropriate as from the comparable authorities cited to this court.

28. On special damages, I find that interest was pleaded was Ksh. 2,100/-. This is made up of police abstract of 100/- and Ksh. 2000/- for the medical report. A party is bound by their pleadings. As such, the special damages claim is accordingly reduced to read Ksh. 2,100/-

IN CONCLUSION

29. To this extent this appeal is allowed on the following terms.

29.1 Liability

100% against the defendant

Approved 50% against 1st original defendant

50% against 2nd original defendant/appellant herein

29.2 Quantum

General damages

a) pain and suffering Ksh. 80,000/-

Special damages

a) Police abstract Ksh. 100/-

b) Medical report Ksh. 2,000/-

total Ksh. 82,100/-

50% Ksh. 41,050/-

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30. There would be interest on general damages from the 7th October 2008 being the date of subordinate court judgment. Interest on special damages from the date of filing suit.

31. That the costs of this appeal be borne by the 1st respondent/original plaintiff, 2nd respondent/original 1st defendant jointly and severally.

32. The costs of the subordinate court case be borne by the 1st respondent/1st original defendant and

appellant/2nd original defendant.

DATED THIS 19TH DAY OF MARCH 2012 AT NAIROBI

M.A. ANG'AWA

JUDGE

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Advocates :

- i) *B M Kairaria instructed by M/s Gitonga Kamiti, Kairaria & Co Advocates for
appellant/original 2nd defendant*

- ii) *B M Kamau instructed by Mwaura Kamau & Co Advocates for
respondent/original plaintiff*