REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL 660 OF 2007

NIMROD MURIOKI …….. PLAINTIFF

VERSUS

MICHAEL NGANGA GICHUKI.……..……... DEFENDANT

(*From the judgment and orders of S M MUKUA, SRM in KIGUMO SRMCC NO. 76 of 2004)*

JUDGMENT

This appeal arises from the judgment of S.M. Mokua, Senior Resident Magistrate in Kigumo RMCC No. 76 of 2007 in which the trial court awarded the Respondent/Plaintiff, general damages of Kshs.100,000/- arising from injuries sustained in a motor vehicle Reg. No. KUJ 492 and No. KAP 279S. The result of this appeal will apply to High Court Civil Appeal Number 661 of 2007.

The evidence on record shows that the Plaintiff/Respondent was a fare-paying passenger in a matatu registration No. KAP 279S along Kenol – Nairobi road on 22/10/2002 about 6.00 a.m. He was sitting at the back seat but it is not clear which side of the vehicle. It was the Plaintiff's evidence that the vehicle was not in high speed but reasonable speed. It was as the vehicle was approaching a corner that it suddenly crashed into another vehicle, a truck carrying sand registration No. KUJ 492 which he believed, was stationary on the road. He testified further that the matatu's driver's side crashed into the left side of the stationary truck. He also testified that it was when he got out of the matatu after the accident when he realized that the other vehicle was stationary. He finally testified that the road was dual lane and he could not know whether or not the matatu driver was in the act of overtaking the truck when the accident occurred. He blamed the driver of the truck, KUJ 492 for the accident. He was the only witness in his case.

The driver of KUJ 492 also gave evidence for the defence. He said that on the material date at about 5.30 a.m. he was driving his employer's lorry registration No. KUJ 492, carrying sand and heading to Kenol. Near Kenol, a Nissan matatu registration No. KAP 279S following him crashed into his vehicle's left rear side. The impact was so strong that the matatu stuck onto lorry and was dragged along for a distance of about 10 metres until he stopped the lorry. That the matatu was in high speed with its lights on

and was trying to overtake his lorry which was driving slowly at about 40 KPH. He denied that his vehicle was stationary. That the police later visited the scene of the accident but did not know whom they blamed. The witness was also the only witness who testified for the defence.

During the hearing of the suit in the court below, a police abstract was admitted into evidence from the Plaintiff. No evidence was recorded from the traffic police officers who were said to have visited the scene of the accident. The police abstract did not indicate who was to blame and while the matatu KAP 279S' driver died during the two vehicle's crash, the driver of the lorry was not charged for any traffic offence.

After the honourable trial magistrate evaluated the parties' evidence, he came to the conclusion that neither side's evidence was corroborated but he felt that the Plaintiff's evidence was more consistent concerning the manner the accident happened. He also felt that the Plaintiff was a truthful witness and that the defence witness was not consistent in his evidence. He did not say why he found the Plaintiff consistent and truthful nor did he explain why he found the defence witness inconsistent. He concluded that it was the Defendant's driver at the material time, who was driving the Defendant's motor vehicle registration KUJ 492, who was negligent in the manner he handled or managed or drove his vehicle before he caused the accident. He did not explain or point to the evidence that enabled him to come to the above conclusion. Thereafter, he proceeded to assess general damages which he fixed at Kshs.100,000/-. He awarded no special damages.

The appeal grounds challenged both liability and quantum of damages.

I have carefully considered the evidence on record. There was no traffic police's evidence concerning the manner the accident might have happened. The police did not blame either driver in the police abstract that was produced in evidence. The police could not charge the driver of the matatu for any traffic offence, particularly of negligence because he did not survive the accident. This left the trial court to rely on the evidence of the Plaintiff and that of the driver of the Defendant's lorry.

The Plaintiff said that he was sitting at one of the back seats. He did not testify that he could see beyond the front seats of the matatu. He did not say that he saw the stationary lorry before the accident. What he said is that when he got out of the crashing matatu he realized that the lorry the matatu had crashed into, was stationary. He could not even say whether or not the matatu carrying was trying to overtake the lorry it crashed into. He however, stated that the road was a dual carriage.

On the other hand, the lorry driver agreed that the matatu driver crashed into the rear left side of the lorry. This would suggest that the matatu driver was driving on the left lane. That is supported also by the fact that it was the matatu driver's right side bonnet of right front part of the matatu that crashed into the left rear part of the lorry. That also ties well with the evidence of the lorry's driver, that the matatu was trying to overtake the lorry on the left side or lane.

The trial court did not specifically rule out the lorry's driver's explanation as false or unbelievable. He also did not rule out the fact that the matatu driver was overtaking the lorry on the left lane when he crashed into the left rear side of the lorry which was not denied. The honourable magistrate's sweeping and unsupported statements on conclusions that the lorry driver was inconsistent or untruthful, lack reasoned logic expected in a judgment of court. It cannot therefore be supported by this court. The conclusions of the trial court are accordingly not supported by the evidence on the record and are inconsistent thereto.

Furthermore, only two witnesses testified and did so on opposed sides. In the view and finding of this court, the evidence of the lorry driver KUJ 492, who testified for and on behalf of the Defendant, gave better, more cogent and consistent evidence which finally, is more reasonable and logical in the circumstances of the case.

In conclusion, the Plaintiff who had pleaded the facts of his case, in this court's view and finding, failed to prove his case on the balance of probability. With great respect to the trial magistrate, his conclusions

are not supported by evidence on the record and are therefore erroneous. In the circumstances, this appeal has merit and is hereby allowed.

In case I am wrong in my conclusions and if indeed the Plaintiff rightly proved his case, the general damages awarded by the lower court of Ksh.100,000/- would be sufficient. Otherwise the appeal is allowed and the judgment of the lower court is hereby set aside and the suit stands dismissed with costs to the Appellant, here and below. Orders accordingly.

Dated and delivered at Nairobi this 16th day of May 2012.

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D A ONYANCHA

JUDGE