



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL 17 OF 2005

RAPHAEL NDIWA BUKOSE1st APPELLANT

NYAYO TEA ZONES DEVELOPMENT CORPORATION..... 2nd APPELLANT

VERSUS

SAMUEL K. KINYAI & OTHERS.....RESPONDENT

**(An Appeal from the Judgment of the Senior Principal Magistrate, Eldoret Ms. Kiptoo, in
S.P.M.C.C.C no. 43 of 2000, delivered on 31st January 2001)**

JUDGMENT

On the 26th June 2005 when this appeal came up for hearing, the Court gave an order of consolidation of this Appeal with Eldoret High Court Civil Appeal No. 33, 34 and 35 all of 2001. It was further ordered that No. 25 this Appeal shall be the pilot file.

Counsel for the Appellant in all 4 appeals was Mr. Bw'omote and for the Respondents was Mr. Ngala. All appeals arise from Eldoret SPMCC No. 43 of 2000; 45 of 2000; 153 of 2000 and 156 of 2000 respectively all delivered by Resident Magistrate Kiptoo (Miss) on the 31st January 2001.

I have gone through the record in all the appeals. This Court observed that on the 7th September 2000 when SPMCC 43 of 2000 (C.A 25/2001) came up for hearing before M. J. Kiptoo (RM) the court recorded the parties consent that the issue of liability be determined in that suit and the findings to be applied in SPMCC No. 45 of 2000, 153 of 2000 and 156 of 2000 (the other 3 appeals herein).

It is incumbent upon me to set a background of the proceedings.

On the 12th November 1999, along Ziwa Eldoret road, there is said to be an accident between motor vehicle registration No. KLL 221, 504 Saloon and KAH 397 F, Iveco lorry. The Respondents were in the saloon car which was being driven by Samuel Kipkemboi Kiyai with his two minor brothers Simon Kemei and Henry Kiplimo.

The lorry was said to be driven by one Raphael Bukose Ndiva and was owned by Nyayo Tea Zones Development Corporation, the Appellants herein.

From the evidence of Samuel Kipkemboi Kiyai (Plaintiff in the subordinate court), he was driving along Ziwa Eldoret Road and when he reached Kabenes Trading Centre, he indicated to turn to the right feeder road. He looked out for the on-coming vehicles and also from his drivers mirror and negotiated the turn as the road was clear. As he turned and while he was still in the middle of the road, he

was hit by a lorry from the rear damaging his car extensively. He fell unconscious and only woke up at Moi Teaching & Referral Hospital.

The two minors were also said to have been treated at Kebubo Health Centre and on the same day taken to Moi Referral Hospital.

Arising from the material damage to the saloon car and injuries sustained by the 3 Respondents, they filed 4 suits before the subordinate court. One suit was for material damage to the car while the other three were for the injuries sustained by the three persons respectively.

The Learned Magistrate having heard the oral evidence of the parties and the documents produced as exhibits found the Appellants (Defendants therein) 100% liable for the accident.

The Learned Magistrate proceeded to assess damages and quantum as follows;

In SPMCC 43 of 2000, the court awarded:-

- a) Kshs. 299,000/= for the loss of the motor vehicle (KLL 221) less Kshs. 20,000/= being the salvage value.
- b) Kshs. 5,000/= for the Assessment Report.
- c) Kshs. 12,920/= being towing charges.
- d) Kshs. 100/= being payment for police abstract.

The court found that loss of income was not proved and dismissed this limb.

In SPMCC 45 of 2000, the court was satisfied that the Plaintiff suffered a closed head concussion and soft tissue injuries to the chest lower limbs and awarded general damages for Kshs. 250,000/= and special damages of Kshs. 1,500/= as payment for the medical report.

In SPMCC 153 of 2000, the court found in favour of the Plaintiff and awarded Kshs. 120,000/= as general damages for soft tissue injuries to the chest, back, upper and lower limbs. The Plaintiff was also awarded Kshs. 1,500/= as special damages for payment of the medical report.

Similarly in SPMCC 156 of 2000, the Plaintiff was awarded Kshs. 170,000 for soft tissue injuries to the chest, back hip, upper and lower limbs and a further Kshs. 1,500 as special damages for payment of the medical report.

The Appellants are aggrieved by these awards and challenges the same on both aspects of liability and quantum.

Having heard the respective submissions, read the proceedings, judgment and the authorities produced and the records of appeal, I find as follows in the two limbs.

Liability

The Respondents, through PW1, Samuel Kipkemei Kiyai testified and gave his account of the accident. His testimony has been analysed earlier in this judgment. He produced several documents as exhibits and of relevance being;

Exhibit 1 – Being a log book of his damaged car

Exhibit 2 – Being a Police Abstract for the accident

Exhibit 4 – Being a receipt for the towing charges

Exhibit 6A & 6B – Treatment chit

Exhibit 7 – P3 Form for his injuries

Exhibit 8A – Medical Report

Exhibit 8B – Payment receipt for the Medical Report

Exhibit 11A – Treatment chits for Henry Kiplimo at Kapopo Dispensary

Exhibit 11B – Treatment chits for Henry Kiplimo at Moi Referral

Exhibit 13 – P3 form for Henry Kiplimo

Exhibit 14A & B – Medical report and receipt for the same from Dr Aluda for Henry Kiplimo

Exhibit 17A & B – Treatment chit for Simon Kemei at Kebubo Health Centre and receipt for drugs bought

Exhibit 18 – Treatment chit from Moi Referral Hospital for Simon Kemei

Exhibit 19A & B – Medical Report and receipt from Dr. Aluda for Simon Kemei

Exhibit 20 – P3 form for Simon Kemei

The Respondent's 2nd Witness testified that he was a qualified and licensed motor assessor.

He testified that the pre-accident value of the car was 299,000/= and had a salvage value after the accident for Kshs. 20,000/=. He produced;

Exhibit 3A – Assessment report

Exhibit 3B – Receipt for the report

On their part, the appellant challenged the Respondents case and called two witnesses. DW1 was Margaret Wanjiru who is a police officer attached to Eldoret Police station. She testified that the accident report was made by the 1st Defendant and she attended the scene subsequently. When she reached the scene she found both vehicles and passengers. She never mentioned which passengers, but she was told there was nobody who was injured. She clarified that whether the Respondents were not injured or not was not for her to tell but the Doctor. She gave the Respondent's P3 Forms.

On cross-examination, she said the lorry (driven by the 1st Appellant) was defective and the driver was to be charged with careless driving and driving a defective motor vehicle. She concluded by saying that the saloon car was extensively damaged. In re-examination she said that the lorry driver was summoned but he had gone underground.

DW2, Jared Wigwe, a private investigator gave interesting evidence. He was instructed to carry out investigation on the accident and verify the documentation. He testified that in his findings and according to the police it was indicated that it was an oncoming accident. He testified at length on the authenticity of the documents produced in regard to Moi Referral Hospital and referred to a letter from Dr. Parklea concluding that the Respondents were never treated in that hospital from the documents availed to him.

In my assessment, the weight of the Appellants appeal was based on the evidence by DW2. Mr.

Bw'omote was very analytical in his presentation before me. He challenged the special damages claim. He emphasized that the said vehicle was bought for only Kshs. 150,000/= four years prior to the accident and that it could only depreciate. He challenged the valuation report and the inconsistency of evidence on whether the vehicles were driven or towed to the police station.

Quantum

I have analysed and set the documentary evidence that was produced by the Respondents. The Appellants great contention is whether the Respondents were indeed injured. The Appellants analysed the Respondents' documents and relied on the contents of the investigation report produced as an exhibit with the letter from Moi Referral Hospital.

The Police Abstract attached to the Investigation report reported the accident as Non-Injury. The Appellants urged this court not to uphold a decision that was influenced by forged documents.

I purposely took time to analyse and peruse the documents produced as exhibits. The Respondents produced a Police Abstract as an exhibit without any objection from the Appellants. This is particularly interesting as the Police Abstract attached to the Appellants' investigation report is marked "non-injury" unlike what was produced as the Respondents exhibit. I fail to understand why the Appellants freely allowed the Respondent to produce such a material exhibit without calling the maker.

The Appellant's witness, Margaret Wanjiru, who is the police officer and who went to the scene did not help much with this. She simply said she found both vehicles and passengers who said no one was injured. It would have been so important to tell the court who or which passengers she found at the scene. Could it be passengers only from the lorry? Had she been categorical that the driver to the saloon was present, then that would have contradicted the testimony that he was unconscious and taken to Moi Referral Hospital.

Her evidence that the driver to the lorry was to be charged for driving a defective vehicle for careless driving does not and did not help the Appellants' case.

The Appellants' investigator's evidence that the accident could have been by oncoming vehicle was also unsupported. He testified that Constable Wanjiru (DW1) informed him that the vehicles were not inspected quite the opposite of what DW1 testified.

Again I fail to understand why with all the doubts the Appellants had over the injuries, they freely allowed the Respondents to produce P3 Forms, medical reports and treatment chits without calling the makers. They Appellants had what could have been a final shot if they called a witness from Moi Teaching Referral Hospital. All the doubts or alleged forgeries of hospital records would have been established.

For a witness who testified that Constable Wanjiru told him that no investigations were carried on the file, that in a non-injury they do not open investigation files and that none of the vehicles were inspected because the accident was minor, I would not fault the learned trial magistrate. Constable Wanjiru's sworn testimony was everything to the contrary.

Could this be a case of too much too late by the Appellants? I think so. With all due respect, the Appellants have raised in their submissions issues that I believe if they challenged when evidence was being adduced, especially production of documentary evidence, perhaps things would have been different. The investigator's findings should have been a good lead for the Appellants to elect their witnesses.

The Appellants did not do much to challenge the issue of assessment of quantum before the subordinate court. They have equally failed to before me. In any case I do not find that the assessment of general damages by the Learned Magistrate was so excessive as to warrant interference by this Court.

It is not disputed that the Respondent bought the car for Kshs. 150,000/= four years before the accident. I agree with the Appellants that the value of a car generally depreciates. The motor assessor readily accepted this. However the court was not told what condition the vehicle was at the point of purchase. The Respondent testimony that he repaired the vehicle after purchase and put it to a good condition is unchallenged. I shall therefore accept the assessors report and valuation at Kshs. 299,000/= with a salvage value of Kshs. 20,000. All the other limbs of special damages were specifically pleaded and specifically proved.

This appeal is therefore for dismissal which I hereby do with costs to the Respondents.

Dated and signed at Nairobi on this 21st day of AUGUST 2012.

M. K. Ibrahim
Judge

dated and Delivered at Eldoret on this 19th day of SEPTEMBER 2012.

F. AZANGALALA
Judge

In the presence of: Mr. Kwambai for the Respondent.