



REPUBLIC OF KENYA

High Court at Machakos

Civil Appeal 157 of 2007

MASH BUS SERVICE LIMITED APPELLANT

VERSUS

KEPHER KISIANGANI LUMAKHANDA RESPONDENT

J U D G M E N T

Following a judgment of the subordinate court in **RMCC No. 793 of 2004** at Machakos delivered on 3rd August 2007, the appellant **Mash Bus Services Ltd** who was the defendant in the lower court filed this appeal. The grounds of appeal are seven (7) as follows:-

- 1. THAT the learned magistrate erred in fact and in law in applying an erroneous standard of proof and failed to appreciate that the respondent had failed to discharge the burden of proof as a matter of law.**
- 2. THAT the learned magistrate erred in fact and in law by reaching a conclusion that was contrary to the evidence that was before him and the law.**
- 3. THAT the learned magistrate erred in law by not appreciating the submissions filed by the appellant.**
- 4. THAT the learned magistrate erred in fact and in law in awarding general damages that are inordinately high and not commensurate with the injuries sustained by the respondent.**
- 5. THAT the learned magistrate erred in law and in fact in holding the defendant to be 100% liable for the accident.**
- 6. THAT the learned magistrate erred in law and in fact by failing to appreciate that the incident in question could not have been foreseen by the appellant.**
- 7. THAT the learned magistrate erred in law and in fact by failing to appreciate that the evidence on record does not establish a case in negligence against the appellant.**

Counsel for the parties, **Julia Kariuki & Company** for the appellant, and **Mulu & Company** for the respondent filed written submissions. On the hearing date, only counsel for the respondent **Mr Mulu** was present in court. Counsel for the appellant was absent. **Mr Mulu** highlighted the written submissions. I have considered both the written and oral submissions filed.

This being a first appeal, I am bound to re-evaluate the evidence on record afresh and come to my own conclusions – See **Ziporah Wambui Wambaira & Others –vs- Gachuru Kiogora & Others 2004**

eKLR. It is also important for this court to direct itself on the principles applicable with regard to interfering with awards of damages. In **Butt –vs- Khan (1977) 1KLR1** the court stated:

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge (magistrate) proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

I have perused the evidence on record. The respondent was a passenger in the bus of the appellant. The bus rolled, and the respondent who was an employee of the appellant was injured. He was treated both at **Kenyatta** National Hospital and **Coast** General Hospital. The P3 form was filled at **Machakos** Hospital.

In my view, the evidence of the respondent on how the accident occurred and the nature of injuries suffered was not shaken. The appellant did not call the driver or anybody who was at the scene to give evidence. Instead they called an employee who worked in the office to testify. His evidence was a matter of opinion and hearsay. Though the appellant was their employee at the time of accident, they never bothered to take the appellant for medical examination or produce a medical report on his injuries. In my view, therefore, the learned trial magistrate was right in finding the appellant 100% liable for the accident and also finding that the respondent had suffered the injuries he alleged to have suffered.

On the quantum of damages awarded, I find no misdirection or error committed by the trial magistrate. Award of general damages is exercise of discretion by a trial court. The case of **Thomas S Lemalon –vs- James Muhuhi Githinji Machakos HCCC No. 268 of 1994** relied upon by counsel for the appellant does not deal with the quantum of damages. It deals with negligence. It is not helpful with regard to quantum of damages. The appellant having sustained:-

- (a) **Loss of consciousness for approximately 1 ½ hours.**
- (b) **Cut wound on the left temporal region.**
- (c) **Deep wound on the forehead.**
- (d) **Cut wound on the chin.**
- (e) **Closed fracture of the spinus process of the right scapula.**
- (f) **Closed fracture and dislocation of the right anke joint.**
- (g) **Deep cut wound right dorsum of the foot.**

In my view, the award by the learned magistrate of general damages in the sum of **Kshs.422,926/=** was not excessive.

In the result, I find no merits in the appeal. I dismiss the appeal and uphold the decision of the trial court. Costs of the appeal are to the respondent.

Dated and delivered at Machakos this **11th** day of **December** 2012.

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George Dulu
Judge

In the presence of:
N/A for Appellants

Ms. Kabuu holding brief for Mr Mulu for Respondent

Mutinda – Court clerk