



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 65 OF 2010

(Being an appeal from the decision of the Principal Magistrate's Court at Naivasha - Hon. Mulwa dated 4th March 2010 in Civil Case No. 399 of 2008)

KENYA PIPELINE CO.

LTD.....APPELLANT

VERSUS

PATRICK MWAURA KIMANI.....1ST RESPONDENT

P. N. CHEGE.....2ND RESPONDENT

JUDGMENT

By a Memorandum of Appeal dated 19th March, 2010 and filed on 24th March 2010 the Appellant herein appealed against the judgment of the court in Naivasha Principal Magistrate's Court Civil Case No. 399 of 2008 delivered on 4th March 2010 on the following grounds -

- (1). *That the learned trial magistrate erred in law and fact in writing a judgement which fails to meet the criteria set out in the Civil Procedure Rules and failing to give reasons for reaching his decision.*
- (2). *That the learned trial magistrate erred in law and in fact in finding the Appellant 100% to blame when it is very clear from the evidence on record that it was indeed the 2nd Respondent's driver who was fully to blame or substantially contributed to the occurrence of the accident.*

(3). That the learned trial magistrate erred in law and in fact, in failing to find that the 1st Respondent had not proved his case on Liability against the appellants on a balance of probabilities.

(4). That the learned trial magistrate erred in law and in fact, in making an award for General Damages and Future Medical expenses that was inordinately high and excessive in the circumstances.

(5). That the learned trial magistrate erred in law and in fact in taking into account extraneous matters which were outside the Pleadings.

(6). That the learned trial magistrate erred in law and in fact in finding that the respondent had proved on a balance of probabilities the degree of injuries sustained by the respondent.

(7). That the learned trial magistrate erred in law and in fact in making an award in damages which was not supported by evidence and was inordinately high in the circumstances.

On those grounds, the Appellant prayed that the appeal be allowed and the Respondents' claim against the Appellants be dismissed with costs to the Appellant.

When this appeal came up for hearing before me on 16th April 2010, I directed counsel for the Appellant, and the Respondents to file written submissions on their respective claims. The Appellant's submissions dated 26th November 2010 were filed on the same day. The 1st Respondent's submissions filed on 23rd November 2010, and are dated 13th November 2010. The 2nd Respondents' submissions are dated 25th November 2010, and were filed on 26th November 2010.

Although there are seven or so grounds of appeal, the appeal herein basically raises two related points of law for determination, **firstly** the question of liability, and **secondly** the question of quantum.

On the question of liability, it is always the duty of this court as well in criminal and civil cases to re-examine and re-evaluate the evidence before the lower court and make its own independent findings, and conclusions.

Liability is established by evidence. I have examined the evidence of both the Appellant's and the Respondents' witnesses who testified. It is clear from the evidence of PW2, a Police Officer who was (a passenger in the ill-fated Toyota Land Cruiser KAV 228E in which he had hitched a lift to his place of work), PW3, a passenger in the equally ill-fated matatu KAK 216Y, PW4, the investigating officer, (*who visited the scene of the accident and carried out the investigations*) that -

Ø the appellant's driver was driving at an excessive speed at night on a rough road which was dusty and with poor visibility;

Ø the appellant's driver was driving under the influence of alcohol;

Ø the appellant's driver was driving on the wrong side of the road, to avoid potholes;

Ø the collision occurred when the appellant's driver moved into the path of the on-coming vehicle to avoid his rugged lane;

Ø the 2nd Respondent's driver upon seeing the appellant's vehicle on his lane dimmed the headlights of

his vehicle to signal the appellant's driver who then put on full lights;

Ø the 2nd Respondent's driver swerved to the right of the road to avoid collision;

Ø the 2nd Respondent's driver could not swerve to the extreme left to avoid the collision as there was a ditch and the road was then under construction;

Ø the 2nd Respondent's driver was driving at a slow speed as he had just dropped some passengers who had alighted;

Ø the 2nd Respondent's driver tried to move to the right and at the same time the appellants' driver moved to the right and hence the collision.

The evidence thus adduced placed the blame squarely on the appellant's driver. PW2 testified -

"I can't blame the matatu for the accident. I boarded the vehicle knowing the driver was drunk. Before we left the restaurant, he had been dancing."

And PW3 testified at p. 8 (33) of the Record of Appeal -

"I blame the driver of the company vehicle KAV 228E for the accident. He was driving on the right side of the road as one faces Narok. He was supposed to drive keeping left. He was also driving with full lights on and driving at high speed."

And on cross-examination by Mr. Nderitu for the Defendant (1st Respondent)- he stated - **"It is not true that the matatu was to blame."**

PW4 described the scene as follows -

"At the scene there was the deceased, the driver of the Land Cruiser who was trapped inside the vehicle. Some of the victims especially the ones who were in the caravan Nissan were pronounced dead upon arrival at Kijabe Mission Hospital. They were Joe Kima Kimani, Amos Munywoki Nzau, John Wamae Njoki."

"The van was in the right side of the road facing Mai Mahiu. The Land Cruiser was directly facing the caravan and was on the centre of the tarmac road, a distance of 3 metres from the van. The point of impact was 2 metres from the Land Cruiser as one heads to the Narok side, in the middle of the tarmac road ..."

And at p. 12 (37) of the Record of Appeal, PW4 testified as follows -

"I established that the accident occurred as a result of over speeding and the driver of motor vehicle KAK 216Y was driving under the influence of alcohol. The driver of motor vehicle KAV 228E tried to evade the collision when he saw the other at high speed on the right side of the road as one faces Narok. This was on the path of the other vehicle. The driver of the van tried to swerve to the other lane"

and the deceased driver tried to go to that lane, hence a collision. My conclusion was that the deceased driver of KAV 228E was the one to blame for the accident.

I have also examined the evidence of DW1 and DW2, and both confirm the occurrence of the accident but give different interpretations as to causation thereof. For instance DW1 says he cannot blame their driver (of the Land Cruiser) for the accident, and DW2 follows suit, that - before the collision, the driver was avoiding a pot hole .. the other vehicle appeared, and-

"by then our vehicle was on the right lane. The Nissan also went to our lane and the collision occurred. The road was dusty ... I can blame the matatu driver. He should have stayed put to his lane."

DW3, the driver of the matatu KAK 216Y testified that the driver of the Land Cruiser was driving at high speed with full lights on. He was on his left side of the road. He would not go further to his left. There was a ditch, the road was under construction. There was no room to manoeuvre. He was driving at low speed, he had dropped passengers about 30 metres behind ... I blame the driver of the other vehicle, a Land Cruiser for the accident. **"It was as if he was driving in a zig zag manner. I thought he was drunk."**

The condition of the road and scene described by both the Appellant's and the Respondents' witnesses is well-captured in **CHARLES WORTH & PERCY ON NEGLIGENCE 9th Edn. at p. 226, para. 9-201**

"The rule of the road is no doubt that if there is no other traffic on the road, the driver of a vehicle may drive on the crown of the road, or even on his offside but, were he to do so, he must keep a better look out and use more care than otherwise is necessary. While he is driving elsewhere on the road than on his near side, should traffic approach and he is put in a position of having to act quickly in an emergency, and as a result a collision occurs, he will be liable. This is because of his negligence in driving on the wrong side of the road."

The evidence adduced fully supports the learned magistrate's findings on the issue of liability. In the words of the learned magistrate at p. 6 (96) of the judgment -

"On liability, I find that it has been proved on the balance of probabilities that the driver of the motor vehicle Registration Number KAV 228E was wholly to blame for the accident. It is unfortunate that he died in the accident. There is no evidence that DW3, the driver of motor vehicle KAK 296Y caused or contributed to the accident. Consequently the Defendant is 100% liable for the accident." The case against the 3rd party is dismissed with costs to be borne by the Defendant."

It is not an every day case that one driver is found 100% liable for an accident. In this case, I do not see any reasonable ground for impugning the learned magistrate's finding on liability. I confirm and endorse the said finding.

The next issue is the question of quantum. Having made the above finding the learned magistrate awarded

- | | | |
|-----|-----------------|--------------|
| (a) | General Damages | Shs. 400,000 |
| (b) | Special Damages | Shs. 24,500 |

(c)	Future Medical Expenses	Shs. 70,000
	Total	Shs <u>494,500</u>

The law and precedent holds-

"that an appellate court cannot interfere with the assessment of damages by a trial court unless it is satisfied that the trial court acted on wrong principles of law, or took into account an irrelevant factor or that it left out a relevant factor or has misapprehended the facts or that due to any of the above reasons or any other reason awarded damages that were so inordinately high or so inordinately low as to represent a wholly erroneous estimate of the damage suffered."

In making the award for general damages, the learned magistrate took into account as a guide, decided cases set out in the judgment, for similar injuries.

I am satisfied that the learned trial magistrate applied the correct principles and arrived at a reasonable estimate of general damages.

In regard to award of future medical expenses I am also satisfied that the learned trial magistrate took into consideration the evidence of Dr. Theophilis Wangata (PW1). The Doctor's evidence showed that the 1st Respondent would require Ksh 70,000/= to remove the internal fixation plate. The appellant offered no evidence to controvert the evidence of PW3. Furthermore the appellant in its submissions before the trial magistrate conceded to the Ksh 70,000/= for future medical expenses.

I am also satisfied that the learned magistrate did not err in finding that the 1st Respondent had proved the injuries sustained as a result of the road traffic accident. The Appellant offered no evidence to controvert either the evidence of 1st Respondent, or that of PW1 (*Dr. Theophilis Wangata*) who examined the 1st Respondent, and produced a medical report which was not rebutted at all. There is no basis for a claim otherwise.

Lastly, there was one procedural ground, that the learned trial magistrate judgment did not meet the criteria set out in the Order XX rule 4 of the Civil Procedure. The said order (*now Order 21 rule 4 of the Civil Procedure Rules 2010*) requires that judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

Having examined the judgment of the learned Senior Resident Magistrate I am satisfied that the same conforms to the requirements of the former Order XX, rule 4 of the Civil Procedure Rules.

In summary therefore I confirm the judgment of the lower court. This appeal has no merit at all, and in light of the very clear evidence against the appellant, the appeal is an abuse of the process of court. I dismiss it with costs against the Appellant.

Dated, signed and delivered at Nakuru this 20th day of May 2011

M. J. ANYARA EMUKULE
JUDGE