REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 51 OF 2010

JOHN MARUBU WACHUKA …….....…….. APPELLANT

VERSUS

GEOFFREY GIKONYO MUCHERU….....……1ST RESPONDENT
STEPHEN KUNGU KAMAU…....….....……2ND RESPONDENT

(Appeal arising from the judgment of Murang'a PMCC No. 93 of 2009 by Principal Magistrate Hon. A.K. Kaniaru)

JUDGMENT

By a plaint dated 23rd March 2009, John Marubu Wachuka, the appellant herein, sued Geoffrey Gikonyo Mucheru, Stephen Kungu Kamau and Henry Nyabuto for compensation for the injuries he sustained as a result of a road traffic accident which occurred on 8th July 2008 where motor vehicle registration no. KDX 193 Isuzu lorry knocked the Appellant down while he was lawfully walking on the pedestrian path on the road next to Mathioya river near Murang'a township. The plaint was later amended to delete the name of Henry Nyabuto on 24th April 2007 thus leaving Geoffrey Gikonyo Mucheru and Stephen Kungu Kamau as the only defendants, being the 1st and 2nd Respondents respectively. The Respondent filed a joint statement of defence in which they denied the plaintiff's claim. After hearing the case. A.K. Kaniaru, learned Principal Magistrate, proceeded to dismiss the case. The Appellant was aggrieved hence this appeal.

On appeal, The Appellant put forward the following grounds in his memorandum of Appeal:

1. The Learned Principal Magistrate erred in fact and in law in finding that the first respondent did not drive without due care and skill and was thus not negligent. In so doing the learned Principal Magistrate wrongly dismissed the evidence of the plaintiff and his eye witness and arrived at an unjust decision.

2. The Learned Principal Magistrate allowed himself to be unduly swayed by the evidence of the police officer who claimed that the appellant had tried to steal a ride despite his statement having been a quotation from the statements of the river and the conductor ad there having been no other independent evidence to support the allegation of stealing a ride.

3. The Learned Principal Magistrate further erred in fact by allowing himself to be unduly

swayed by the fact that it was the appellant who had summoned the said police officer and the fact that there was no prosecution for a traffic offence while well aware that the appellant could not avoid the police witness to produce the police abstract and that the appellant had no control over a decision to prosecutor or not.

4. The Learned Principal Magistrate made a fundamental error of law in not analyzing the implication of the defendant's complete departure from their pleadings in that after pleading the following in paragraph 5 of the statement of the defence.

a. Failing to keep a proper lookout while walking
b. Failing to adhere to warnings given by the driver of motor vehicle registration number KDX 193.
c. Failing to take due regard to other road users by abstracting motor vehicle registration number KDX 193.
d. Allowing himself to be hit by motor vehicle registration number KDX 193.
e. Allowing the accident to happen.
f. Failing to observe traffic rules and regulations.

When the appeal came up for interpartes hearing, learned counsels appearing in the appeal recorded a consent order to have the appeal determined by written submissions. I have re-evaluated the evidence on record plus the written submissions. It is convenient at this stage to set out in brief the case that was before the trial court. Dr. Julius Kimanio (P.W.1) tendered medical evidence showing that the Appellant suffered a fracture on the left femur and a deep cut on the left popliteral fossa. It is also indicated in the report that the Appellant was admitted at Murang'a District Hospital for a month. A Kitschier nail was inserted at the theatre where the appellant had undergone an operation. The doctor stated that a sum of Kshs. 30,000/= would be required for surgery to remove the nail. P.c. Peter Kaboi (P.W.2) stated that there was no sufficient evidence to prosecute the driver nor the owner of motor vehicle registration no. KDX 193. P.W.3 further stated that the Appellant got injured when he attempted to steal a ride on the aforesaid vehicle. The appellant who testified as P.W3 stated that the lorry veered off the road to the left side where it hit him thus fracturing his leg. P.W.3 blamed the driver for the accident. James Wanderi (P.W.4) said that he witnessed the lorry hit the Appellant who was digging some soil at the side of the road. He claimed the lorry was in high speed. The Defence (Respondents) presented the evidence of three witnesses. Geoffrey Gikonyo Mucheru (D.W.1) admitted that the accident occurred. He blamed the Appellant for it. He alleged that the appellant attempted to steal a ride on the lorry and in the process he slipped and fell down and got injured. Benson Mwangi Irungu (D.W.2) said he was turn-boy on board KDX 193. He said he saw the Appellant attempt to board the lorry after it was loaded with sand. It is said he missed it and fell down thus getting injured. D.W.2 said he rushed to stop the lorry when he saw what happened. After taking into consideration the evidence presented, the learned Principal Magistrate did not believe the plaintiff and his witness (PW.4). He also believed the evidence of PW.2 that the Appellant actually attempted to hike a lift from the moving lorry. He also concluded that the Appellant had failed to prove ownership of the motor vehicle.

Having given the brief facts of the case, let me now deal with the grounds of appeal. On the first, second and third grounds of appeal, the Appellant is challenging the many in which the learned Principal Magistrate dismissed the Appellant's evidence. I have already stated that the trial magistrate did not believe the evidence of the Appellant to be true. He came to the conclusion that there was no evidence to prosecutor the driver nor the owner of the motor vehicle. The learned magistrate inferred that since there was no evidence to prosecutor then the story given by the Appellant was false. He also stated that P.W.2 contradicted the evidence of the Appellant. I have re-examined the evidence and I think the learned Principal Magistrate fell into error- when dismissing the Appellant's evidence. To begin with, p.c. Peter Kaboi (P.W.2) was not the investigating officer of the accident. It would appear he went to court to only produce the police abstract forms. His evidence which was to the effect that the Appellant attempted to steal a ride had not basis. He was not at the scene of the accident. Perhaps the evidence which indicted the Appellant was that of the turn-boy (D.W.2) who said he saw the Appellant attempt to board the lorry while it was moving. It is the evidence of the driver (D.W.1) that the Appellant board the lorry in a place not permitted. It is important to note that D.W.1 did not see the Appellant attempt to board. He merely relied on the evidence of D.W.2. D.W.2 claimed the Appellant had not touched the lorry when he

fell. D.W.2 claimed the Appellant got injured when he fell into a hole. D.W.2 further contradicted himself when he said in cross-examination that the Appellant was running after the lorry when he fell down. With great respect, such evidence cannot be believed. I believe the evidence of the Appellant, who was hit while digging sand. The evidence of the Appellant was corroborated by P.W.4 a fellow sand harvester . The evidence of P.W.3 and P.W.4 appeared more consistent. It is therefore obvious that the driver of the lorry is wholly to blame for the accident. The other ground which closely grounds 1 and 3 is ground no. 5. According to the trial magistrate, the Appellant had failed to establish ownership of the motor vehicle. He stated that the only credible evidence was the production of an official search from the register of motor vehicles. With respect that is not the correct position. Under the Traffic Act, the certificate of search from the Registrar of motor vehicles is only prima facie evidence of ownership. The law is clear that other forms of evidence can still be tendered to prove otherwise. In this appeal, the Appellant was able to show that KDX 193 was the property of the 2nd Respondent by producing a sale agreement. That agreement was not contested.

Having concluded the issues relating to liability let me turn my attention to quantum. The learned Principal Magistrate proposed an award of Kshs, 300,000/= as general damages, Kshs, 320,000/= for future medical expenses and Kshs. 12,700/= as special damages. I have also re-evaluated those awards vis-à-vis comparable awards for similar injuries and I do not think I should disturb the award.

In the end for the above reasons I allow the appeal. The order dismissing the suit is set aside and is substituted with an order entering judgment against the Respondents solely on liability. I make the following awards on quantum.

(i) Ksh. 12,700 special damages.
(ii) Kshs. 30,000/= for future medication.
(iii) Kshs. 300,000/= general damages for paid and suffering.
(iv) Costs of the suit

I also award the Appellant costs of the appeal.

Dated and delivered this 23rd day of September 2011.

J.K. SERGON
JUDGE

In open court in the presence of Miss Mwai h/b Mbuthia for Appellant N/A for Respondent.

J.K. SERGON
JUDGE