



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL APPEAL NO. 680 OF 2005**

**M.H. SHAW ..... APPELLANT/ ORIGINAL  
DEFENDANT**

**VERSUS**

**STEPHEN NGARI ..... RESPONDENT/ ORIGINAL  
PLAINTIFF**

*(Being an appeal from The Judgment and Decree of Hon. M.W. Mwai Esq Senior Resident Magistrate in Civil Case No. 30 of 2004 dated 9<sup>th</sup> August 2005 at Limuru)*

**J U D G M E N T**

**I.        LIABILITY**

1. An accident is alleged to have occurred between a motor vehicle and a cyclist on the 29<sup>th</sup> September 2003 along the Limuru Road/Nazareth Road. The cyclist, a male adult aged 25 years old in 2003 sued the motorist on the 27<sup>th</sup> January 2004, for negligence and prayed he be paid damages.
2. The subordinate court upon hearing the case found judgment on 9<sup>th</sup> August 2005 in favour of the plaintiff on liability at 70% against the ratio of 30%.
3. That there was an award on general damages, for pain and suffering and loss of amenities at Ksh 80,000/= . Special damages was awarded at Ksh. 3,000/= for damage to the bicycle, Ksh. 1,500/= for the medical report and Ksh. 100/= for police abstract.
4. Being dissatisfied with this decision, the original defendant/appellant then appealed to this High Court on the 7<sup>th</sup> September 2005.

**II        APPEAL**

5. The grounds of appeal being that the learned Hon. Magistrate erred in:-
  - i) *Noting that the particulars of negligence were not proved.*
  - ii) *The evidence of the defence witness was ignored.*
  - iii) *The burden of proof was on the plaintiff.*
  - iv) *The material evidence and fact of the case was not considered.*

- v) *The case was decided on irrelevant matters.*
- vi) *The Hon. Magistrate failed to keep accurate and complete record. Failed to note the claim was not on strict charity.*
- vii) *The costs should not be awarded.*
- viii) *The general damages were excessive.*
- x) *That the appeal be allowed with costs.*

6. In the argument before this appeal court, the appellant stated that the respondent failed to prove its case before court. The evidence of the appellant was disregarded. The burden of proof was shifted to the appellant by the trial magistrate.

7. The respondent argued that there was opportunity given to both witnesses. An accident was shown to have been committed. The magistrate was fair in the judgment. The question of the sketch plan was valid as to its authenticity. As to the quantum, this was fair and not excessive.

8. The main issue herein is that of liability and quantum.

9. What the trial magistrate should have noted are the parties to the suit. The defendant sued is M.H. Shaw T/a King Ford & Partners. This was denied by the defendant. No findings as to this was done by the trial magistrate.

10. The person alleged to have been purportedly driving the vehicle was Ms Shaw and not M.H. Shaw. The reasons that M. H. Shaw may have proceeded with this defence was Ms Shaw may have been considered his agent. If this is so, the question of liability as opposed by defense should have been taken into account.

11. Parties should have made use of the admission of documents under the Civil Procedure Rules before trial. This permits a party to know whether they are to prove a case or not before court.

12. In this appeal, the evidence showed two vehicles were travelling on the opposite side. The cyclist/respondent overtook a vehicle at a junction that appeared stationary and collided with the respondent's vehicle. The respondents stated that they were not overspeeding. There was no skid marks and therefore the vehicle was almost at a stand still. The respondent was of the view that the appellant was avoiding a pot hole.

13. It is of the court's opinion that the issue of liability herein must fail. The reasons being that the particulars of negligence as pleaded had not been proved. The respondent alleged that the appellant had encroached on the plaintiff's/respondent's lane. That the appellant failed to stop or swerve.

14. The evidence shows otherwise. The said vehicle had in fact slowed down that it was the cyclist who knocked and collided into the vehicle.

15. I would find that another vehicle at a junction caused the cyclist respondent to come out the appellant's lane. The respondent herein should not have overtaken at an intersection.

16. The Hon. Magistrate erred in her findings. The said issue of liability is found not to have been proved. The judgment on liability is hereby set aside.

17. As to quantum, this indeed is excessive. This was soft tissue injuries described as blunt trauma injury to the back (post traumatic neurongalgia), blunt trauma to both knees, blunt trauma to the left elbow. There was no evidence of any serious injury.

18. A possible award would have been Ksh. 10,000/=

19. As to special damages, the proceedings were changed by hand on 7<sup>th</sup> June 2005 when the plaint dated 15<sup>th</sup> January 2004 was filed on the 27<sup>th</sup> January 2004.

20. It is then that this court notices that no formal application for leave to amend was made. If per chance it was done before pleading are closed, the striking out with a red biro pen was required to be done.

21. This court herein would accordingly find that the items pleaded were irregularly reflected.

22. I would find that no special damages award should have been awarded. For instance, the claim for the bicycle was never particularized. There was no record for the Ksh. 100/- abstract report. There was no receipt, but an invoice for the medical report that had been given. A receipt required to be put in for proof of that payment.

23. I hereby would have dismissed the special damage claim.

24. This appeal is allowed. The subordinate court judgment be and is hereby set aside on both liability and quantum. The judgment is to read that the case is dismissed with costs to the appellant in this appeal and costs in the subordinate court.

DATED THIS 26<sup>TH</sup> DAY OF OCTOBER 2011 AT NAIROBI

M.A. ANG'AWA  
JUDGE

*Advocates* :

i) *P.M. Njeru instructed by M/s Kaplan & Stratton & Co Advocates for appellant/original defendant*

ii) *V.W. Wachanga instructed by J.M. Njenga & Co Advocates for respondent /original plaintiff*