



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO. 44 OF 2009**

**JAMES GACHANJA WANGECHI.....APPELLANT**

**VERSUS**

**JOHN MUROKI MWANGI.....1<sup>ST</sup> RESPONDENT**  
**EAST AFRICAN PORTLAND CEMENT**  
**COMPANY LIMITED.....2<sup>ND</sup> RESPONDENT**

*(Being appeal against the judgment of D. A. Orimba, Senior Resident Magistrate in Chief Magistrate's Court at Kangema in Civil Case No. 86 of 2006 delivered on 15<sup>th</sup> April 2009)*

**JUDGMENT**

On 26<sup>th</sup> November 2005, **James Gachanja Wangechi**, the appellant herein, was involved in a road traffic accident along Kahuti-Koimbi road, while on board motor vehicle registration No. KAN 781 D. As a result of the accident, the appellant suffered soft tissue injuries on the ear, left shoulder, hands and the right ankle. The Appellant filed a compensatory suit before the Kangema resident Magistrate's Court against John Muroki Mwangi and East African Portland Cement co. Ltd., being the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein. The Respondents filed a defence denying the Plaintiff's claim. The suit was heard by honourable Orimba, learned Senior Resident Magistrate. On 15<sup>th</sup> April 2009, the learned Senior Resident Magistrate found the appellant and 1<sup>st</sup> respondent to be 30% and 70% liable for the accident respectively. On quantum, the learned Senior Resident Magistrate made an award of Ksh.100,000/= representing both special and general damages. The 2<sup>nd</sup> Respondent was found blameless. The Appellant was aggrieved hence this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum of appeal:

1. ***That the learned Magistrate erred in law and in fact in finding that the plaintiff was 30% liable for the said accident when there was no evidence to support such a finding.***
2. ***That the learned Magistrate erred in law and in fact in awarding the Plaintiff Kshs.120,000/= which was too small in the circumstances of case compared to previous awards on similar injuries.***
3. ***That the learned Magistrate erred in law and in fact in failing to find the 2<sup>nd</sup> defendant liable despite the evidence and the law available in this case.***
4. ***That the learned Magistrate erred in law and in fact in interpreting the doctrine of vicarious liability and thus arrived at an erroneous decision.***
5. ***that the learned Magistrate erred in law and in fact in interpreting the principles of rebuttal presumptions and misapplying the same in this case thus arriving at a wrong and erroneous***

*decision.*

6. ***That the learned Magistrate erred in law and in fact in failing to find that the 2<sup>nd</sup> Appellant had proprietary interest in the motor vehicle that caused the accident which was the subject matter of the suit in the lower court.***
7. ***That the learned Magistrate erred in law and in fact in finding that the 1<sup>st</sup> defendant had left the employment of the 2<sup>nd</sup> defendant when there was evidence on record to the contrary and therefore arrived at a wrong decision.***
8. ***That the learned Magistrate erred in law and in fact in failing to distinguish the authorities cited in his judgment with the facts of the case before him leading him to arrive at a wrong decision.***
9. ***That the learned Magistrate erred in law and in fact in failing to direct himself properly to the law of the land.***

When the appeal came up for hearing, learned counsels appearing herein recorded a consent order to have the appeal disposed of by written submissions. This being the first appellate court, the parties are entitled to a re-evaluation of the evidence. The Appellant's case before the trial court was supported by the evidence of three witnesses. James Gachanja Wangechi (P.W. 1), told that court that on 26<sup>th</sup> November 2005 he attended a wedding ceremony at Wethaga A.C.K. Church and went for a reception party at Mukangu by boarding a pick-up i.e. motor vehicle registration No. KAN 781D. It is said the driver of the aforesaid motor vehicle drove at high speed and on the way he lost control of the motor vehicle. P.W. 1 said that the motor vehicle overturned in the process thus injuring its passengers. P.W.1 said he suffered injuries on the leg. Dr. Kanyi Gitau (P.W.2) said he examined P.W.1 and prepared a report which he produced as an exhibit in evidence. In the medical report P.W.2 noted that P.W.1 suffered soft tissue injuries on the left ear, left shoulder and on the left hand. P.W. 2 further produced receipts he issued to acknowledge receipt of payments to the tune of Ksh.4,500/= for the report and for attending court. P.C. Francis Erot (P.W.3) produced as an exhibit in evidence the Police Abstract form issued and filled by Kahuti Police Patrol Base.

The respondents' case before the trial court was supported by the evidence of two witnesses. John Muchoki mangy (D.W.1) said on 26<sup>th</sup> November 2005 he drove his motor vehicle registration No. KAN 781 D which he co-owned with East African Portland Cement Ltd. D.W.1 also admitted that the aforesaid motor vehicle was involved in a road traffic accident on 26<sup>th</sup> November 2005. D.W.1 said he was in the middle of a convoy of 20 motor vehicles hence it was not possible for him to drive recklessly. He claimed he did not authorize the Appellant and other passengers to board his motor vehicle. D.W. 1 admitted in cross-examination that he was aware passengers who boarded his motor vehicle were injured and that the aforesaid motor vehicle was not a public service vehicle. He stated that the motor vehicle lost control and overturned when he applied brakes. D.W.1 was of the view that the motor vehicle lost control because the people on board numbering 20 were heavy. Erick Chelule (D.W.2) testified in support of the case of the 2<sup>nd</sup> Respondent. D.W.2 told the trial Court that motor vehicle registration No. KAN 781 D was co-owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It is said the 2<sup>nd</sup> Respondent gave financial accommodation to the 1<sup>st</sup> Respondent to purchase motor vehicle registration No.KAN 781 D. It is said that the 2<sup>nd</sup> Respondent had no control over the motor vehicle. The 2<sup>nd</sup> Respondent's name had to be indicated in the log-book to take care of its interest as a financier. The motor vehicle was fully transferred to the 1<sup>st</sup> Respondent when he fully repaid the loan in May 2006. D.W.2 also said that the vehicle was in total control of the 1<sup>st</sup> Respondent at the time of the accident. Upon considering the aforesaid evidence, the learned Senior Resident Magistrate found the 1<sup>st</sup> Respondent to be 70% liable for the accident whereas the Appellant was found to be 30% liable.

I will re-evaluate the aforesaid evidence while dealing with the grounds of appeal. I have already stated that learned counsels appearing in this matter recorded a consent order to dispose of the appeal by written submissions. At the time of writing this judgment, the 2<sup>nd</sup> Respondent and the Appellant were the only parties who had filed their submissions. I have reconsidered the case that was before the trial court plus the submissions received. Though the appellant had put forward nine (9) grounds of appeal, I think those grounds may be summarized to four. The first ground is to the effect that the trial Magistrate erred

when he found the Appellant 30% liable yet there was no evidence to support that finding. It is the Appellant's submission that he and other passengers were permitted by the 1<sup>st</sup> respondent to board motor vehicle registration No. KAN 781 D. It is his submission that the 1<sup>st</sup> Respondent was solely to blame because he was the only party who was in control of the motor vehicle in question. The 2<sup>nd</sup> respondent on the other hand, is of the view that the Appellant voluntarily assumed the risk hence he should bear responsibility of contributory negligence in application of the principle of *volenti non fit injuria*. The record does not show what role the appellant played in controlling the motor vehicle in question save for the fact that he boarded the same. The 1<sup>st</sup> Respondent denied that he permitted the Appellant and the other passengers to board his motor vehicle. I do not believe him. It is not possible for over twenty people to board someone's motor vehicle without him protesting. I think the 1<sup>st</sup> Respondent was not candid when he alleged he did not allow them to board. The 1<sup>st</sup> Respondent has also denied the allegation that he drove the motor vehicle at high speed. He however, concedes that the motor vehicle lost control and overturned when he braked. It is obvious from the 1<sup>st</sup> Respondent's evidence that the motor vehicle was overloaded and was equally moving at high speed. After a careful re-evaluation of the evidence, I am convinced that the 1<sup>st</sup> Respondent was solely to blame for the accident. The learned Senior Resident Magistrate erred when he found the Appellant to be 30% liable yet there was no iota of evidence to establish that finding. I allow the appeal on liability.

The second ground of appeal is to the effect that the trial Magistrate erred when he failed to find the 2<sup>nd</sup> Respondent vicariously liable for the acts of the 1<sup>st</sup> Respondent. It is the Appellant's submission that since KAN 781 D was jointly owned between the respondents, then the 2<sup>nd</sup> Respondent should have been found vicariously liable. The 2<sup>nd</sup> Respondent was of the view that it had tendered evidence to show that it merely provided funds to finance the 1<sup>st</sup> Respondent to purchase the motor vehicle and that the motor vehicle was solely under the control of the 1<sup>st</sup> Respondent while the name of the 2<sup>nd</sup> Respondent was entered into the log book to safeguard its interest as a financier. With respect, I agree with the 2<sup>nd</sup> respondent on this aspect. In other words, the 2<sup>nd</sup> Respondent cannot be faulted. The 1<sup>st</sup> Respondent was solely to blame as the person who exclusively controlled the subject motor vehicle.

The third and final ground is to the effect that the award on quantum was inordinately low. I have anxiously considered this ground. I have further looked at the comparable awards for such injuries and I am unable to find any fault on the award on quantum.

In the end the appeal partially succeeds. The appeal as against liability is allowed. I set aside the order directing the Appellant to be 30% liable and substitute it with an order finding the 1<sup>st</sup> Respondent (1<sup>st</sup> Defendant) solely liable. The appeal against quantum is dismissed. Costs of the appeal to be met by the 1<sup>st</sup> Respondent.

***Dated and delivered at Nyeri this 14<sup>th</sup> day of October 2011.***

**J. K. SERGON  
JUDGE**

In open court in the presence of Mr. Gitibi holding brief Malepe for the 2<sup>nd</sup> respondent and no appearance for the Appellant.

**Gitibi:** I apply for a stay of execution for 30 days.

**Court:** I grant an order for stay of execution for thirty (30) days. the Respondent to be supplied with copies of the proceedings and judgment upon payment of the required fees.

**J. K. SERGON  
JUDGE**

