



Editorial Summary

1. *Civil Appeal*
2. *Subject of Main Subordinate Court Case*

TORT

- 2.1 *Running down cause*
- 2.2 *Collision between two motor vehicles*
M.V KUT 460 Datsun pick up
M.V KWZ 623 matatu P.S.V
- 2.3 *Two passengers sustained soft tissue injuries*
- 2.4 *Two passengers sue appellant original defendant*
KUT 460 Datsun pick up
- 2.5 *Hon. Magistrates judgment*
Liability 100% against the appellant/original defendant
Quantum- special damages
Pain and suffering
Plaintiff No. 1 Ksh.70,000
Plaintiff No.. 2 Ksh.60,000
Special Damages
Plaintiff No. 1 2,500
Plaintiff No. 2 2,000

3. *Appeal Filed 18th May 2001*

Appellant original defendant

- approved.*
- a) *Liability questioned*
 - b) *Continuously negligence required to be*
 - c) *Appellant charged for driving with defective hand brake. No contention to accident.*
 - d) *3rd and 4th respondent failed to come to court.*
 - e) *Appeal be allowed and suit*

dismissed.

4. *In reply :*
Case had been proved on a balance of probability.

5. *Held:*
Appeal dismissed
Decision of the magistrate be upheld
That special damages be dismissed.

6. *Case Law*

(a) Benkley – Steward Ltd and 2 others

V

Lewis Kimani Waiyaki

1982-1985 IKAR

Nyarangi Platt and Gachuchi JJA

7. *Advocates:*

i) *Hon. Mr justice (Rtd) Shah instructed by M/s Shah & Parekh & Co Advocates for appellant/original defendant*

ii) *J.M. Kimathi instructed by Kiogora Mutai & Co Advocates for respondent/ original plaintiffs*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 246 OF 2001

IBRAHIM MWANGI MACHARIA APPELLANT/ORIGINAL DEFENDANT

VERSUS

HENRY CHEGE

LUCY NYAMBURA KIARIA

DANSON CHEGE KAMAU

KABERA MWANGI RESPONDENTS/ORIGINAL PLAINTIFF

*(Being an appeal from the Judgment and Decree of Hon. C.O. Kanyangi Esq
Senior Principal Magistrate in Civil Case No. 3902 of 1992 dated 23rd April 2001 at
Milimani Commercial Courts, Nairobi)*

J U D G M E N T

I. INTRODUCTION

1. In this Running Down cause, a collision occurred involving two matatu vehicles. Motor vehicle registration KVT 460 Datsun pick up belonging to the appellant original defendant and motor vehicle KWZ 623 a matatu (Public Service Vehicle) belonging to the first and third party owner and driver respectively.

2. An attempt to enjoin the insurance company as a second third party was abandoned due to the fact that under Section 10(1) of the Insurance (motor vehicle third party rules) Act Cap 405, an insurance company becomes liable only after judgment in a suit has been passed.

3. The trial magistrate upon hearing the suit in which the original plaintiff 1 and 2 (now respondent one and two) were lawful passengers in the motor vehicle KWZ 623, a matatu vehicle, and who sustained soft tissue injuries, sued the appellant for negligence and prayed for damages, their prayers were granted. The trial magistrate found the appellant liable for the accident at 100%. He awarded the original plaintiff's quantum for general damages

Pain and suffering

Plaintiff No. 1 Ksh.70,000

Plaintiff No. 2 Ksh.60, 000

And award of special damages,

Plaintiff No. 1 Ksh.2,500

Plaintiff No. 2 Ksh.2,000.

4. Being aggrieved on the issue of liability the original defendant appealed to this court on 18th May 2001. The appeal was admitted to hearing on 27th July 2010 (Okwengu J). Directions on the appeal were taken on 4th June 2010 (Sitati J) and 26th September 2011 (Ang'awa J).

II APPEAL

5. The main contention of the appeal was the issue of liability. The appellant was of the view that liability should have been approved between the parties. There was an element of contributory negligence.

6. Whereas, the appellant had been charged in the traffic court case for careless driving, this in fact was a fine imposed upon him for a defective "hand brake" that would not affect the issue of liability and the accident in general.

7. The appellant had enjoined the respondent three and four, the owner and driver of the motor vehicle to the case but none of them appeared to court to give evidence.

8. The appellant took issues as to the special damage claim. That this was never proved. No mention was made of the general damages claim for pain and suffering.

9. The end result was that the appeal he allowed and the subordinate court case he dismissed.

IN REPLY

10. The respondents opposed the appeal. The appellant had been charged in the subordinate traffic court case, found guilty and committed for careless driving. The proof before court was on a balance of probability.

11. The respondents one and two were actually passive players. They were in a vehicle, an accident occurred and they blamed the appellant for that accident and injuries sustained.

12. The appeal lacked merits and should be dismissed, argued the respondents.

II OPINION

13. On the issue of liability the two plaintiffs/respondents one and two had given evidence in which both of them were consistent in their evidence. Respondent No. 1 stated whilst travelling as a passenger in the said vehicle, the appellant's vehicle came from the minor side road and knocked/ collided with the vehicle they were travelling in. This was corroborated by respondent No. 2

14. The appellant on the other hand stated he was travelling along the same road, indicated to the left when the vehicle owned and driven by the first and third party collided into his vehicle.

15. The trial magistrate was convinced by the evidence of the appellant being charged in a traffic court case and fined Kshs.4,000. The appellant admitted he was fined but stated all along that the fine was in connection with driving a motor vehicle with a defective hand brake. It was not due to careless driving.

16. The proceedings of the traffic court case had never been made the records to be admitted before the trial magistrate. All the magistrate had was a police abstract that indicated the appellant had been fined for careless driving. There was an argument by the appellant, which is correct that this was no proof of liability.

17. The appellant had asked some contribution be awarded to him on liability against the first third parties.

18. My opinion would be that the evidence shows the appellant emerged from a minor road to a major road and caused the collision whereby the respondents one and two/original plaintiffs one and two sustained injuries. I do not think to interfere with the trial magistrate's findings on this, I would uphold the issue of liability at 100%.

19. On the issue of quantum, the appellant did not make mention of the quantum awarded on general damages for pain and suffering for the two respondents one and two. I would therefore not interfere with this award.

20. There was a challenge to the award of special damages. That this was not specifically proved as pleaded. The Hon. Magistrate awarded

Ksh. 2,500/= and Ksh. 2,000/= respectively. What was pleaded was Ksh. 1,000/= each for medical report and 100/= for a police abstract. This claim had not been specifically proved. I would accordingly allow the claim on special damages to be dismissed.

21. Accordingly, this court would dismiss this appeal on the issue of liability and quantum on general damages. It allows the appeal on special damages to be dismissed.

IN SUMMARY

21.1 Motor vehicle collision between two vehicles.

21.2 two passengers in motor vehicle KWS 623 Matatu PSV sustain soft tissue injuries.

21.3 Liability – trial magistrate award upheld 100% against the appellant original defendant

21.4 Quantum – trial magistrate award not challenged Special damages and injury Plaintiff No. 1 Ksh. 70,000/= Plaintiff No. 2 Ksh. 60,000/=

**21.5 Special damages claim – appeal allowed.
Claim set aside and dismissed.**

22. There will be interest on general damages from the date of the judgement of the subordinate court.
23. There will be costs of this appeal to the respondents one and two. Costs of the subordinate court case to the respondent one and two.

DATED THIS 2ND DAY OF NOVEMBER 2011 AT NAIROBI

**M.A. ANG'AWA
JUDGE**

Advocates :

iii) *Hon. Mr justice (Rtd) Shah instructed by M/s Shah & Parekh & Co Advocates for appellant/original defendant*

iv) *J.M. Kimathi instructed by Kiogora Mutai & Co Advocates for respondent/ original plaintiffs*