



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 264 of 2007**

**CHRISTINE WAKUTHI MURIUKI.....1<sup>ST</sup> APPELLANT  
MONICAH WANJIRU MURIUKI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HENRY KARIUKI MUNGAI..... RESPONDENT**

*(An appeal from the judgment of Mrs. L. Wachira, Resident Magistrate  
delivered on 23<sup>rd</sup> March, 2007 in Kikuyu  
RMCC No. 205 of 2006)*

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

1. This appeal arises from a suit which was filed in the Resident Magistrate Court at Kikuyu, by Henry Kariuki Mungai hereinafter referred to as the respondent. He had sued, Christine Wakuthi Muriuki and Monicah Wanjiru Muriuki, hereinafter referred to as the appellants. The two were sued as the administrators of the estate of the late Peter Kariuki Muiruri, hereinafter referred to as the deceased. The respondent's claim arose from injuries suffered by him in an accident involving motor vehicle KAU 073F, which was owned by the deceased, and motor vehicle KMJ 526 in which the respondent was traveling as a passenger. The respondent maintained that the accident was caused by the negligence of the deceased.
2. The appellant filed a defence in which it was denied that the deceased was the registered owner of motor vehicle KAU 073F or that the respondent was travelling in motor vehicle No. KMJ 526. The negligence attributed to the deceased was denied and it was contended that the accident was caused or substantially contributed to by the negligence of the respondent, and/or driver of motor vehicle registration No. KMJ 526.
3. During the hearing in the lower Court, the respondent and one Kennedy Otieno, a police officer attached to Kikuyu Police Station, testified in support of the appellant's case. The appellant did not call any evidence. In a nutshell, the respondent's evidence was that he was travelling in motor vehicle registration No. KMJ 526, when the vehicle collided with motor vehicle KAU 073F which was coming from the opposite direction. The respondent blamed the deceased who was driving motor vehicle KAU 073F as the respondent claimed that the deceased was driving very fast, and swerved on to the path of motor vehicle KMJ 526 in an effort to avoid a pothole. Documents including the police abstract report, medical report and insurance were all produced by consent.
4. Each party's counsel filed written submissions urging the trial Magistrate to find in favour of his client. For the appellant, it was submitted that the respondent did not call any evidence to controvert the respondent's allegations that the accident was caused by the negligence of the deceased. Nor did the appellant call any evidence in support of their defence that motor vehicle KMJ 526 was the one to blame for the accident. It was maintained that the appellant's allegation that the respondent was drunk was not supported by any evidence. The Court was therefore urged to find that the respondent had proved his case on a balance of probability, and award the respondent general damages of Kshs.745,000/= for pain and suffering.
5. For the appellant it was submitted that the vehicle in which the respondent was travelling was overloaded with passengers who were drunk. It was noted that the police abstract report produced in evidence did not blame any party for the accident. It was maintained that the police did not do any proper investigations and therefore all the people who were involved in the accident should sort out their issues with their insurances. It was argued that the respondent did not prove any negligence on the part of the appellant and therefore his case should be dismissed.

6. In the alternative, it was submitted that the respondent should be held 40% contributorily negligent for travelling in an overloaded vehicle with drunk men. It was submitted that the driver of the vehicle in which the respondent was travelling should be held 50% contributorily negligent, and therefore the appellant should only be held 10% contributorily negligent. With regard to the award of damages, it was submitted that a sum of Kshs.100,000/= only would be adequate.
7. In her judgment, the trial Magistrate found that although the respondent tried to blame the driver of motor vehicle KMJ 526, that driver was not made a party to the suit nor did the respondent call any evidence to substantiate the allegations of negligence made against that driver. The trial Magistrate noted that the respondent was only a passenger in motor vehicle KMJ 526 and could not therefore be blamed for the accident. She rejected the appellant's allegation of drunkenness. The trial Magistrate therefore found the appellant fully liable for the accident. She awarded the respondent general damages of Kshs.220,000/=, and Kshs.200/= special damages.
8. Being aggrieved by that judgment the appellant has lodged this appeal raising 9 grounds as follows:
- (i) That the learned Resident Magistrate erred in law and in awarding the general damages.
  - (ii) That the learned Resident Magistrate erred in law and in fact in awarding excessive general damages.
  - (iii) That the learned Resident Magistrate erred in law and in fact in failing to appreciate that the plaintiff contributed to the accident as per evidence adduced in Court.
  - (iv) That the learned Resident Magistrate misdirected herself that the defendant herein contributed 100% to the accident.
  - (v) That the learned Resident Magistrate misdirected herself in finding that the defendant has to pay general damages and special damages.
  - (vi) That the learned Resident Magistrate misdirected herself in fact in her finding on liability against the defendant in view of the circumstances of the case and evidence adduced in Court.
  - (vii) That the learned Resident Magistrate failed to appreciate both case law and facts in her finding on the quantum of damages and the award thereof was exaggerated in view of the facts and circumstances of the case.
  - (viii) That the learned Resident Magistrate erred in law and in fact in basing her findings on the wrong premises and ignoring the defendant's evidence.
  - (ix) That the learned Resident Magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the appellant's advocates on record.
9. In support of the appeal, counsel for the appellant has filed written submissions in which she submitted that the evidence which was on record did not prove the particulars of negligence alleged against the appellant. Counsel submitted that if the Court were to find the appellant negligent, then he should only be held 50% liable as the collision involved two motor vehicles and liability should therefore be apportioned on a 50:50 basis. Counsel for the appellant submitted that the award of Kshs.220,200/= for general and special damages was excessive taking into account the injuries suffered by the appellant.
10. For the respondent it was submitted that the respondent gave concrete evidence on how the accident occurred, blaming the deceased for causing the accident. The respondents' witness, PC Otieno also gave evidence which was consistent with that of the respondent. Further the evidence of the respondent was not controverted by the appellant. It was submitted that the trial Court was in the circumstances right in holding the appellant fully liable.
11. With regard to damages awarded, it was maintained that the same were in fact too little and the Court was urged to reconsider the award in the light of the following cases:
- ***HCCC No. 817 of 1983, Mahinder Sembi vs. The Attorney-General***
  - ***HCCC No. 172 of 2001 (Machakos) Jackson M. Ndunda vs. Lochab Transporters Limited.***

It was submitted that a sum of Kshs.450,000/= would have been more appropriate as general damages, and that a further sum of

Kshs.50,000/= ought to have been awarded for future medical expenses. The Court was therefore urged to dismiss the appellant's appeal and allow the respondent's cross appeal.

12. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower Court. I have also considered the submissions which were made before the lower Court and the submissions filed before me. On the issue of liability I find that the respondent established that there was a collision involving motor vehicle KAU 073F and motor vehicle KMJ 526, and that the respondent who was travelling in motor vehicle KMJ 526 was injured in the accident. The copy of records from the Registrar of Motor Vehicles which was produced in evidence confirmed that motor vehicle KAU 073F was owned by the deceased.
13. The respondent adduced evidence showing that the accident was caused by the negligence of the deceased in driving motor vehicle KAU 073F. The respondent's evidence was not controverted. Therefore, although the appellant alleged in his statement of defence that the accident was caused by the negligence of the plaintiff and or driver of motor vehicle KMJ 526, there was no evidence to substantiate the allegations of negligence alleged by the appellant either against the plaintiff or against the driver of motor vehicle KMJ 526.
14. The fact that the accident involved two vehicles, was not sufficient to lead to a conclusion that both drivers were equally to blame. Moreover, the appellant having failed to bring third party proceedings, against the driver of motor vehicle KMJ 526, he cannot shift blame to that driver as that driver is not party to this suit. The allegation that the respondent and other passengers in motor vehicle KMJ 526 were all drunk was neither pleaded in the defence, nor was any evidence adduced to support it. In the circumstances, I find that the trial Magistrate was right in holding the appellant fully liable for the accident.
15. With regard to the award of damages, the two medical reports which were produced by consent of both parties, showed that the respondent suffered the following injuries:
  - (i) Lacerations on the right temple
  - (ii) Blunt chest injuries
  - (iii) Comminuted fracture of femur bone on the left thigh

The residual effects included – a permanent disfiguring scar of 4 cm on the right temple and a shortening of the left lower limb. The degree of permanent incapacity was assessed by one doctor at 20% and by the other at 5%.

16. In awarding the appellant damages of Kshs.220,000/= the trial Magistrate took into account the three authorities which were cited. The trial Magistrate found the injuries in *HCCC No. 3183 of 1988 Kibuchi Githae vs. Stanley Mwangi & Another* which was cited by respondent's counsel not comparable with the respondent's injuries as it involved much more serious injuries. Having considered that authority I cannot but agree, as the injuries in the cited case included head injuries, and fracture of both tibia and fibula.
17. I find that the cases of *Rehema Hassan Mwangi vs. Kenya Bus Services Limited HCCC No. 1943 of 1985* and *Peter Kinyanjui Mwangi vs. Nairobi City Commission & Another, HCCC No.4427 of 1986*, which were cited by the appellant's counsel, both of which involved fracture of the femur provided an appropriate comparable guide to the trial Magistrate. The trial Magistrate also appears to have taken into account the element of inflation. Although the respondent now urges the Court to award a further sum of Kshs.50,000/= in respect of future operation, there was no such claim raised before the trial Magistrate and the same cannot be entertained at this stage.
18. As was held in *Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & Another (No.2) [1988] KLR 30:*

***“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held to be that; it must be satisfied that either that judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”***

In this case, the trial Magistrate took into account all relevant factors and the award was not so inordinately low or high as to justify intervention by this Court.

19. The upshot of the above is that I find no merit in this appeal, and do therefore dismiss it in its entirety. I further find no merit in the cross appeal and do therefore dismiss it. I award costs of the main appeal to the respondents.  
Orders accordingly.

**Dated and delivered this 26<sup>th</sup> day of February, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Onyancha H/B for Otieno for the appellant

Muindi for the respondent

Eric - Court clerk