



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

Civil Appeal 131 of 2007

DAVID MAINA KINYUA APPELLANT

VERSUS

FRANCIS GATHEKIA.....RESPONDENT
(Appeal against the judgment of L. W. Gitari, Senior Principal Magistrate, Nyeri, in Chief Magistrate's Civil Case No. 737 of 2003 delivered on 21st November 2007)

JUDGMENT

This is an appeal against the judgment of L. W. Gitari, the then Senior Principal Magistrate, Nyeri, vide Nyeri C.M.C.C. No. 737 of 2003 delivered on 21st November 2007. **DAVID MAINA KINYUA**, the appellant herein, had filed a suit against **FRANCIS GATHEKIA**, the Respondent herein, before the Chief Magistrate's Court Nyeri, in which he sought for both special and general damages for the injuries he sustained in an accident involving motor vehicle registration number KAG 002M in which the Appellant claimed he was a fare paying passenger. The accident is said to have occurred along Nyeri-Nyahururu road on 29th July 2002. The suit, in the end was dismissed. Being aggrieved, the Appellant filed this appeal.

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

1. ***The Learned trial Magistrate erred in law and in fact by holding that the plaintiff had not proved his case on a balance of probabilities.***

2. ***The Learned trial Magistrate erred both in law and in fact in failing to consider the evidence on record and hence arrived at an erroneous finding on liability.***

3. ***The Learned trial Magistrate erred in law and in fact by failing to consider the plaintiff's evidence on record though the same was uncontroverted.***

4. ***The Learned trial Magistrate erred in law and in fact by failing to consider the plaintiff's submissions thus arrived at an erroneous finding on liability.***

5. ***The Learned trial Magistrate erred in law and in fact by failing to find that the defendant's driver was in breach of duty of care in the way he drove the defendant's motor vehicle and thus***

the defendant was vicariously liable.

6. ***The Learned trial Magistrate erred in law and in fact by considering extraneous matters and going out of the ambit of the proceedings and evidence before him and hence arrived at erroneous decision.***

7. ***The Learned trial Magistrate erred in law and in fact by calling for higher degree of proof than that required in civil cases.***

8. ***The Learned trial Magistrate erred in law and in fact by failing to consider the medical report on record and injuries sustained by the plaintiff thus proposing that she would have awarded damages that are so low as to be erroneous.***

The case that was before the trial Court was fairly straight forward. The Plaintiff (appellant) testified alone in support of his case. He told the trial Court that on 29th July 2002, he boarded motor vehicle registration KAG 002M, a Nissan Matatu from Nyeri to Mweiga to sell newspapers. At Muringato it is said there was mist and the motor vehicle lost control and plunged into Muringato river. It is the evidence of the Appellant that the Matatu was moving at a speed of 100 Km per hour whereas the road had sharp corners. He was of the opinion that the cause of the accident was high speed. As a result of the accident, the Appellant said he sustained serious injuries, that is,

- (i) fracture of the pelvis
- (ii) Injury to the urethra.

He was admitted to Nyeri Provincial General Hospital for 30 days. He said that as a result of the accident he is unable to properly pass urine and that he cannot lift heavy objects. On cross-examination the Appellant said that he was not a passenger but an employee of the owner of the motor vehicle which caused the accident. He said he knew the motor vehicle left Karatina at 5.00 p.m. and that he had permission to be in the motor vehicle. The Appellant said the Respondent (defendant) knew him very well since he had worked for him for over six years.

The Defendant (respondent) on his part denied knowledge of the Appellant. He said on the material day his three employees namely Wambugu, Munene and Githui left his shop at Karatina for Nyeri to distribute newspapers. At 9.00 a.m. on 29th July 2002, the Respondent said he received a call informing him that his motor vehicle had overturned at Muringato. He rushed to check and found Githui at Nyeri Provincial General Hospital. He said Githui, told him that they had given a lift to two people on the way. The Respondent said he had not authorized the Plaintiff to be in his motor vehicle. The Defendant said the Nissan Van was meant to transport newspapers and not passengers. In fact the motor vehicle only had the front seat.

At the conclusion of the case, the learned Senior Principal Magistrate dismissed the case on the basis that he did not prove on a balance of probabilities that he was an employee of the Defendant. The learned Senior Principal Magistrate further found that the Plaintiff was not lawfully traveling in the aforesaid motor vehicle. The learned Senior Principal Magistrate also found as a fact that the Defendant was not the driver of the motor vehicle at the time of the accident. She also found as a matter of fact that the Appellant was injured as pleaded.

When this appeal came up for hearing, the learned counsels appearing in the matter recorded a consent order to have the appeal disposed by written submissions. Miss Mwai was the only party who had submitted her submissions by the time of writing this judgment. I have considered those submissions and the grounds of appeal. The Appellant had alleged that he was an employee of the Respondent. He also claimed that the Appellant was lawfully traveling on motor vehicle registration No. KAG 002M. He further produced a Police abstract form showing that the aforesaid motor vehicle was a Public Service Vehicle, that is, a Matatu. However, when the Respondent testified it turned out that the motor vehicle

was a van used to transport newspapers. It also became apparent that the Appellant was not an employee of the Respondent. In fact the Respondent was not the driver of the motor vehicle at the time of the accident. It is obvious therefore that the Appellant had told blatant lies. After a careful reconsideration of the evidence, I am of the view that the learned Senior Principal Magistrate cannot be faulted. It is clear that the Appellant had failed to prove his case to the required standards in civil cases. He only established the particulars of injuries he sustained. He failed to prove that he was an authorized passenger. He failed to prove the particulars of negligence on the Respondent's part. There was evidence to show that there were clear instructions indicating that the motor vehicle could not carry unauthorized passengers. My findings hereinabove disposes of grounds 1 and 3. In ground 2 and 4, the Appellant alleges that the trial Magistrate did not consider the Appellant's evidence and submissions. I have carefully looked at the judgment and it is clear that the learned Senior Principal Magistrate considered the Appellant's evidence, submissions and the authorities cited. In ground 5 it is alleged that the Respondent was vicariously liable for the mistakes of his employees. I do not think that the Respondent can be held vicariously liable for such acts. He did not authorize the driver to give a lift to the Appellant. The Appellant ought to have read the warning inscribed on the van. In ground six it is alleged the trial Magistrate considered extraneous matters. The Appellant did not specifically point out what extraneous evidence the learned Senior Principal Magistrate had considered. Therefore there is nothing which turned out on this ground. I have no difficulty in disposing of ground 7. It is obvious the trial Magistrate applied the standard of proof in civil cases, that is, on a balance of probabilities hence she cannot be faulted.

I have re-examined the nature of injuries the Appellant suffered. I have also considered awards made by this court in near similar injuries. I am convinced that the award given by the trial Senior Principal Magistrate is neither low nor high.

In the end I see no merit in the Appeal. It is dismissed in its entirety with costs to the Respondent.

Dated and delivered at Nyeri this 19th day of February 2010.

J. K. SERGON
JUDGE

In open court in the presence of Wambugu holding brief for Lucy Mwai for Respondent. No appearance for Appellant.