



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

Civil Appeal 37, 38 & 39 of 2009

CAROLINE M. KABAE.....1ST APPELLANT
DAVID GICHARA KAMAU.....2ND APPELLANT
VERSUS
NANCY MUTHONI NJOORA.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL CASE NO. 38 OF 2009

CAROLINE M. KABAE.....1ST APPELLANT
DAVID GICHARA KAMAU.....2ND APPELLANT
VERSUS

SUSAN WAGARIKA KIMANI (Minor suing through father and next friend)
KENNEDY KIMANI MBUTHIA.....RESPONDENT

CIVIL APPEAL CASE NO. 39 OF 2009

CAROLINE M. KABAE.....1ST APPELLANT
DAVID GICHARA KAMAU.....2ND APPELLANT
VERSUS

CAROLINE WANGECHI NJOORA (Minor suing through mother & Next Friend)
NANCY MUTHONI NJOORA.....RESPONDENT

(Being appeal from the Judgment by T. W. Murigi, Senior Resident Magistrate, in Murang'a Senior Principal Magistrate's Court Civil Case Nos. 619 of 2007, 650 of 2007 and 648 of 2007 delivered on 8th April 2009)

JUDGMENT

On the 27th day of February 2007, Motor vehicle registration No. KAT 170L was involved in a road traffic accident along Murang'a-Kangema road. Three compensatory suits were filed at Murang'a Principal Magistrate's Court namely:

1. **Murang'a P.M.C.C.C. NO. 619 of 2007 Nancy Muthoni Njoora =VS= Caroline M. Kabae and David**

Gichara Kamau.

2. Murang'a P.M.C.C.C. NO. 650 of 2007

Susan Wagarika (minor) suing through next friend – Kennedy Kimani Mbutia; =vs= Caroline M.

Kabae and David Gichara Kamau

3. Murang'a P.M.C.C.C. No. 648 of 2007.

Caroline Wangechi Njooora (minor) suing through next friend Nancy Muthoni Njooora =VS= Caroline M.

Kabae David Gichara Kamau.

When the three suits came up for hearing before Hon. T. W.

Murigi, learned Senior Resident Magistrate, on 20th November 2008, learned advocates appearing in the suits recorded a consent order in which Murang'a P.M.C.C.C. No. 619 of 2007 was made as a test case in determining liability in all the other cases i.e. P.M.C.C.C. No. 648 of 2007 and P.M.C.C.C. No. 650 of 2007. The learned Senior Resident Magistrate proceeded for hearing with Murang'a P.M.C.C.C. No. 619 of 2007 and in the end the Defendants were found to be solely liable for the accident. The learned Senior Resident Magistrate made awards on quantum in each case as follows:

(1) P.M.C.C.C. No. 619 of 2007

- (i) Special damages - Ksh. 1,500/=
- (ii) General damages - Kshs.100,000/=
- (iii) Costs and interest.

(2) P.M.C.C.C. 648 of 2007

- (i) Special damages - Kshs. 1,500/=
- (ii) General damages - Kshs.80,000/=
- (iii) Costs and interest.

(3) P.M.C.C.C. 649 of 2007

- (i) Special damages - Kshs. 1,500/=
- (ii) General damages - Kshs.150,000/=
- (iii) Costs and interest

The Defendants in each of the above cases were dissatisfied hence they preferred an appeal against each judgment. Those appeals are: **NYERI H.C.C.C.A NO. 37 OF 2009, NYERI HCCC.A. NO. 38 OF 2009 and NYERI H.C.C.C.A. NO. 39 OF 2009.** The appeals were ordered consolidated and argued together. This court also gave directions to the effect that the appeals be determined by written submissions.

Let me begin by setting out the grounds put forward on appeal. In NYERI H.C.C.C.A. NO. 37 OF 2009 CAROLINE M. KABAE & DAVID GICHARA KAMAU =VS= NANCY MUTHONI NJOORA the appellants stated in their Memorandum of Appeal the following grounds:

1. *The Learned Magistrate erred in law and fact in finding the Defendants 100% liable in view of the evidence produced before Court.*
2. *The Learned magistrate erred in law and fact in finding that the said Judgement in CMCC 619 of 2007 applied to CMCC 648 of 2007 and CMCC 650 of 2007 with regard to liability.*
3. *The Learned Magistrate erred in law and fact in finding that Susan Wagarika Kimani, Caroline Wangechi Njoora and Nancy Muthoni Njoora, the Plaintiffs in CMCC 650, 648 and 619 all of 2007 were involved in the accident and were injured in view of the evidence before Court.*
4. *The Learned Magistrate erred in law and in fact in failing to finding that Susan Wagarika Kimani, Caroline Wangechi Njoora and Nancy Muthoni Njoora, the Plaintiffs in CMCC 650, 648 and 619 all of 2007 had not proved their cases and consequently their involvement in the accident on a balance of probability.*
5. *The Learned Magistrate erred in law and in fact in failing to discredit and disregard the evidence of P.W. 2, P.C. John Kamau.*
6. *The Learned Magistrate erred in law and in fact in finding the Defendants 100% liable in view of the evidence of Caroline Wangechi Njoora and Nancy Muthoni Njoora, who testified and confirmed that they did not see each other, or any of the other Plaintiffs, being hit by the motor vehicle.*
7. *The Learned Magistrate erred in law and fact in finding that Susan Wagarika Kimani, the Plaintiff in CMCC 650 of 2007, when there was no evidence of her involvement in the accident and when there was evidence from Caroline Wangechi Njoora and Nancy Muthoni Njoora that she might have ran across the road and that they did not see her being hit by the motor vehicle and that it was possible she fell on her own.*
8. *The Learned Magistrate erred in assessing general damages at an amount inordinately high that it is a wholly erroneous estimate of the loss and damage suffered by the Respondent. The Learned Magistrate erred in misdirecting herself in coming up with the quantum of damages with regard to the Respondent herein, Nancy Muthoni Njoora.*
9. *The Learned Magistrate erred in arriving at such a high amount that would result in injustice on the part of the Appellant.*
10. *The Learned Magistrate erred in awarding an excessive sum for the injuries suffered in the face of the evidence adduced and submissions made by Defence counsel.*

WAGARIKA KIMANI (MINOR SUING THROUGH HER FATHER AND NEXT FRIEND) KENNEDY

KIMANI MBUTHIA, listed the following grounds on appeal:

1. *The Learned Magistrate erred in law and fact in finding the Defendants 100% liable in view of the evidence produced before Court.*
2. *The Learned Magistrate erred in law and fact in finding that the said Judgement entered in CMCC 619, 2007 – Muranga applied to 650 of 2007 with regard to Liability.*
3. *The Learned Magistrate erred in law and fact in finding that Susan Wagarika Kimani, the Plaintiffs in CMCC 650, 2007 was involved in the accident and was injured in view of the evidence before Court.*
4. *The Learned Magistrate erred in law and in fact in failing to find that Susan Wagarika Kimani, the Plaintiff in CMCC 650, of 2007 had not proved her cases and consequently her involvement in the accident on a balance of probability.*
5. *The Learned Magistrate erred in law and fact in finding that Susan Wagarika Kimani, the Plaintiff in CMCC 650 of 2007, when there was no evidence of her involvement in the accident and when there was evidence from Caroline Wangechi Njooora and Nancy Muthoni Njooora that she might have ran across the road and that they did not see her being hit by the motor vehicle and that it was possible she fell on her own.*
6. *The Learned Magistrate erred in assessing general damages at an amount inordinately high that it is a wholly erroneous estimate of the loss and damage suffered by the Respondent. The Learned Magistrate erred in misdirecting herself in coming up with the quantum of damages Respondent herein, Susan Wagarika Kimani.*
7. *The Learned Magistrate erred in arriving at such a high amount that would result in injustice on the part of the Appellant.*
8. *The Learned Magistrate erred in awarding an excessive sum for the injuries suffered in the fact of the evidence adduced and submissions made by Defendant counsel.*

Finally in NYERI H.C.C.C.A. NO. 39 of 2009, the Appellants put forward the following grounds:

1. *The Learned Magistrate erred in law and fact in finding the Defendants 100% liable in view of the evidence produced before Court.*
2. *That Learned Magistrate erred in law and fact in finding that the said Judgment entered in CMCC 619 of 2007 – Muranga applied to CMCC 648 of 2007 with regard to liability.*
3. *The Learned Magistrate erred in law and fact in finding that Caroline Wangechi Njooora the Plaintiff in CMCC 648 of 2007 was involved in the accident and were injured in view of the evidence before Court.*
4. *The Learned Magistrate erred in law and in fact in failing to finding that Caroline Wangechi Njooora*

had not proved her case and consequently her involvement in the accident on a balance of probability.

5. *The Learned Magistrate erred in assessing general damages at an amount inordinately high that it is a wholly erroneous estimate of the loss and damage suffered by the Respondent. The Learned Magistrate erred in misdirecting herself in coming up with the quantum of damages Respondent herein, Caroline Wangechi Njooa.*
6. *The Learned Magistrate erred in arriving at such a high amount that would result in injustice on the part of the Appellant.*
7. *The Learned Magistrate erred in awarding an excessive sum for the injuries suffered in the fact of the evidence adduced and submissions made by Defence counsel.*

A careful perusal of the aforesaid grounds will reveal that the Appellants have complained in all the appeals to the effect that the trial court erred when it found the appellants/Defendants 100% liable for the accident yet the evidence states otherwise. The record indicates that learned advocates appearing in the case before the trial court recorded a consent order to make **MURANG'A P.M.C.C.C. NO. 619 OF 2007, NANCY MUTHONI NJOORA =VS= CAROLINE M. KABAE & ANOTHER** a test case on liability. The Appellants are now before this Court complaining that they were unfairly found to be solely liable for the accident. The Appellants are of the view that there is no cogent evidence that the Respondents were hit by their motor vehicle. It is said that the Police did not carry out investigations to establish who was to blame for the accident. The Respondents are of the view that they tendered evidence which put the blame squarely against the Appellants. It is argued that the Appellants did not offer any evidence to discount the evidence tendered by the Respondents. This being the first appellate court, I am enjoined by law to re-evaluate the evidence tendered before the trial court in respect of liability. I have carefully re-considered the evidence. Two crucial witnesses testified namely: Nancy Muthoni Njooa (P. W. 3) and her daughter Caroline Wangechi Njooa (P.W. 5). The evidence of Nancy Muthoni Njooa (P. W. 3) is to the effect that on 27th February 2007 she walked with her daughter Caroline Wangechi Njooa (P.W. 5) along Kangema-Murang'a road. The duo were headed for Kahuhia Girls High School where P. W. 5 was a student. They walked on the pedestrian path on the left hand side of the road. P. W. 3 said that as they walked she heard some noise behind her. She turned back, saw a motor vehicle which hit her. She fell down on the thicket. Before the accident occurred, P.W. 3 said, she saw a small child walking ahead of her. P. W. 3 said she later came to learn that that child is called Susan Wagarika Kimani. P. W. 3 told the trial court that the motor vehicle gave no warning as it drove on the pedestrian path. Caroline Wangechi Njooa (P.W. 5) corroborated the evidence of her mother (P. W. 3). P. W. 5 told the trial court that she walked behind her mother in a file on the pedestrian path. She told the trial court that the motor vehicle crossed from the right hand side of the road to the pedestrian walk path on the left hand side whereupon it knocked them down. P. W. 5 said she had seen a small school girl (Susan Wagarika) who was walking ahead of them cross the road between 5 to 10 minutes before the accident occurred. She said the motor vehicle did not hoot nor give any warning before hitting them. The evidence of P. W. 3 and P. W. 5 are consistent in several

aspects. First, is that the victims were knocked down on the left hand side of the road on the pedestrian walk. Secondly, that the motor vehicle did not give them any warning like hooting. Thirdly that the motor vehicle hit the trio from behind as they walked. Fourthly, that the motor vehicle veered off the road and hit the victims on the walk path. Finally that the aforesaid evidence were never controverted by the appellants through any other witness. After re-evaluating the aforesaid evidence, I am convinced that the Appellants' driver was solely to blame for the accident. I therefore see no reason why I should interfere with the order on liability. Let me restate that learned counsels appearing in the suit before the trial court recorded a consent order making Murang'a P.M.C.C.C. NO. 619 of 2007 as the test case on liability. It would appear the Appellants as indirectly alleging that the learned trial magistrate should have apportioned liability according to each case. Unfortunately I do not buy the idea because of the consent order on record. The consent order cannot be set aside on appeal unless it is shown that the same was obtained by mistake, fraud or by misrepresentation. There was no evidence that either party was tricked into signing the agreement.

Having disposed of the appeal as against liability, let me now turn to the appeal as against quantum. It is the argument of the Appellants that the award given to each of the Respondents is inordinately high that the award is wholly erroneous. The best I can do is to consider the award given to each Respondent. In H.C.C.A NO. 27 of 2009 the Respondent i.e. NANCY MUTHONI NJOORA was awarded:

- (i) Special damages - Ksh. 1,500
- (ii) General damages - Ksh.100,000
- (iii) Costs and interest - _____

It is not in dispute that the Respondent herein tendered medical evidence showing that she suffered the following injuries as a result of the road traffic accident.

- (i) Blunt injury on the forehead
- (ii) Blunt injury on the interior chest.
- (iii) Blunt injury on the lower back.
- (iv) Blunt injury on the left hip.
- (v) Blunt injury on the left leg.

The aforesaid injuries were noted in the medical report prepared and produced in evidence by Dr. Kanyi Gitau (P. W. 1). There is no evidence that the Appellants subjected the Respondent to a second medical examination by another doctor. The aforesaid injuries are basically soft tissue injuries. I have examined the previous decisions of this court on quantum for near similar injuries. In the case of **PAMELA OMBIYO OKINDA =VS= KENYA BUS SERVICES LTD NAIROBI H.C.C.C. NO. 1309 OF 2004** this Court awarded Ksh.50,000 for general damages. In the appeal between **MOSES GERALD ODONGO =VS= JULIUS BIRUNDU MOKOYA KISII H.C.C.A. NO. 32 OF 2002** this Court gave an award of a sum of Ksh.50,000/= for similar injuries. The Appellants' counsel had submitted before the

trial Court that an award of Ksh.50,000/= would have been sufficient. The Respondent's advocate had asked for Ksh.150,000/=. The Respondent's advocate relied on the case of **JANE NJOKI MWOYA & ANOTHER =VS- ALICE KIMANI NAIROBI H.C.C.C. NO. 2886 OF 1995.** With respect, the aforesaid case was in respect of more serious injuries requiring above elbow amputation. The record shows that the trial magistrate did not consider the authorities supplied by the parties before making the assessment on quantum. After a careful re-assessment of the evidence, the submissions and the past decisions, I am convinced that the award on general damages is on the higher side *vis-à-vis* the injuries suffered. With respect, I agree with the Appellants that the award on general damages was a bit exorbitant hence erroneous. I allow the appeal by setting aside the award of Ksh.100,000/= in respect of general damages and substitute it with an award Ksh.80,000/=. In arriving at the above figure, I took into account the past decisions and the inflationary trends which took place since the time those past awards were made. The award on special damages shall remain undisturbed. With regard to **NYERI H.C.C.A. NO. 39 OF 2009,** the Respondent, i.e. **CAROLINE WANGECHI** suffered blunt injuries to the scalp, right upper arm, right knee and shin. It is also obvious that the Respondent suffered soft tissue injuries. Her injuries in my view are near similar to those suffered by Nancy Muthoni Njooora. I will apply similar treatment to this Respondent as that of Nancy Muthoni Njooora. Consequently the award of Ksh.80,000/= in respect of general damages is set aside and substituted with an award of Ksh.70,000/=. The award on special damages shall remain undisturbed.

With regard to Nyeri **H.C.C.A. NO. 38, SUSAN WAGARIKA KIMANI,** the Respondent therein is said to have suffered head injury and blunt injury to the posterior back. Dr. Gitau (P. W. 1) stated that the Respondent is likely to be predisposed to complications and epilepsy. The learned trial magistrate gave an award of Ksh.150,000/= as general damages. In the judgment, the learned Senior Resident Magistrate merely considered the nature of injuries. There was no consideration of the awards in past decisions. In her submissions before the trial court, the Appellants had prayed for the Respondent to be given Ksh.80,000/= as general damages. The Respondent on her part asked to be paid Ksh.250,000/=. I have re-considered the authorities cited by the parties. I think the most relevant authority is the case of **MOSES GERALD ODONGO =VS= JULIUS BIRUNDU KISII H.C.C.A. NO. 32 OF 2002** in which this Court confirmed an award of the trial Court of Ksh.50,000/= made in 1999. I will take into account the inflationary trends which have taken place for the last ten years. I think an award of Ksh.100,000/= will be sufficient. In the end I set aside the award of Ksh.150,000/= and substitute it with an award of Ksh.100,000/=.

In the end the appeals are allowed as proposed hereinabove. A fair award on costs is that each party should bear his or her own costs in the appeals. The Respondents shall, however, have costs of the suit.

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

J. K. SERGON

JUDGE

In open court in the presence of Mr. Mbutia holding brief Ndumia for Appellant. No appearance Ndungu Kimani for the Respondent.

MBUTHIA: I pray for stay of execution for 30 days.

COURT: Let the Applicant file a formal application.

J. K. SERGON

JUDGE