



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

**Civil Appeal 124 of 2003**

**MICATO SAFARIS.....APPELLANT**

**VERSUS**

**KAMAU GICHANGI MUKORA.....1<sup>ST</sup> RESPONDENT**

**SAMUEL KARIUKI NDEGWA.....2<sup>ND</sup>  
RESPONDENT**

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

1. This appeal arises from a suit which was initiated in the lower court by Kamau Gichangi Mukora (hereinafter referred to as the 1<sup>st</sup> respondent). He had sued Samuel Kariuki Ndegwa (hereinafter referred to as the 2<sup>nd</sup> respondent) and Micato Safaris Ltd (hereinafter referred to as the appellant), claiming general and special damages for personal injuries suffered by him, in a road traffic accident involving motor vehicle Registration No.KAG 934G belonging to the appellant. The 1<sup>st</sup> respondent maintained that the accident was caused by the negligence of the 2<sup>nd</sup> respondent a servant, agent or employee of the appellant who was driving the motor vehicle at the material time.

2. Upon being served with the plaint and summons to enter appearance, a memorandum of appearance was filed on 11<sup>th</sup> July, 1997 on behalf of the appellant and the 2<sup>nd</sup> respondent. On 21<sup>st</sup> November, 1997 interlocutory judgment was entered against both the appellant and the 2<sup>nd</sup> respondent as neither had filed any defence. Formal proof proceeded on 6<sup>th</sup> November 2001 when two witnesses testified in proof of the 1<sup>st</sup> respondent's case. These were the 1<sup>st</sup> respondent and Dr. Peter Maina Kariuki.

3. The 1<sup>st</sup> respondent explained that he was injured in a road traffic accident, and was taken to Thika District Hospital where he was admitted. The 1<sup>st</sup> respondent produced a copy of a P3 form, a police abstract report of the accident and a medical report prepared by Dr. Kariuki who later examined him.

4. Dr. Kariuki testified and confirmed that he examined the 1<sup>st</sup> respondent and found that the 1<sup>st</sup> respondent had suffered bilateral fracture of the superior pubic rami, neck and back. At the time of examination, the 1<sup>st</sup> respondent was walking with the aid of a walking stick, and the lumbosacral region was tender. Dr. Kariuki concluded that the 1<sup>st</sup> respondent suffered multiple soft tissue injuries and stood to suffer post arthritis. Dr. Kariuki was of the opinion that the 1<sup>st</sup> respondent was likely to suffer pain for a long time.

5. In her short judgments, the trial magistrate noted that interlocutory judgment had already been entered in favour of the 1<sup>st</sup> respondent and therefore the issue before her was assessment of quantum of damages. The trial magistrate further took note of the authorities cited to her by counsel for the 1<sup>st</sup> respondent, and awarded the respondent Kshs.200,000/= as general damages.

6. Being dissatisfied with that judgment the appellant lodged this appeal raising 5 grounds as follows:

(i) The magistrate erred on fact and in law in holding that the first defendant was an employee of the second defendant when there was no such evidence.

(ii) The magistrate erred in law and fact in holding that the second defendant was liable for the injuries suffered by the plaintiff when there was no evidence to that effect.

(iii) The trial magistrate erred in holding that the first defendant was the driver of the accident motor vehicle at the material time, and was in the course of his duty for the 2<sup>nd</sup> defendant when there was no evidence to that effect.

(iv) The trial magistrate erred in holding that the first defendant was the driver of the accident motor vehicle at the material time, and was in the course of his duty for the 2<sup>nd</sup> defendant when there was no evidence to that effect.

(v) The decision of the magistrate was totally at variance with the evidence adduced in court and cannot stand.

7. In submissions made in support of the appeal, Mr. Agina stated that the 1<sup>st</sup> respondent did not testify as to who was the driver or owner of the motor vehicle. He maintained that the entire pleadings were brought into doubt by the evidence of the 1<sup>st</sup> respondent. He therefore urged the court to allow the appeal, set aside the judgment of the lower court and dismiss the appellant's suit.

8. Mr. Musyoka who appeared for the 1<sup>st</sup> respondent opposed the appeal, maintaining that the appellant could not raise the issue of liability as there was already interlocutory judgment on record. He maintained that the court could only deal with the issue of quantum. He urged the court to dismiss the appeal as the interlocutory judgment was not challenged.

9. I have carefully reconsidered and evaluated the evidence adduced before the lower court. I have also considered the submissions made before me. It is evident that the hearing of the suit in the lower court proceeded by way of formal proof because there was interlocutory judgment entered against the appellant.

10. The interlocutory judgment settled the issue of liability as against the 1<sup>st</sup> respondent and the appellant, as the 1<sup>st</sup> respondent's claim in that regard was not challenged. As rightly observed by the trial magistrate, the court was only concerned with the issue of quantum of damages. It was therefore not necessary for the 1<sup>st</sup> respondent to call evidence pertaining to the accident vehicle, or the ownership thereof.

11. The appellant has neither challenged the interlocutory judgment nor the quantum of damages. In the circumstances this appeal has no merit. It is accordingly dismissed with costs.

Those shall be the orders of this court.

**Dated and delivered this 15<sup>th</sup> day of May, 2009**

**H. M. OKWENGU**

**JUDGE**

In the absence of both parties.