



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

Civil Appeal 5 of 2005

JOSEPH MUTURI KINUTHIA.....APPELLANT

VERSUS

MT. KENYA PETROLEUM DISTRIBUTORS LTD.....RESPONDENT

JUDGMENT

This appeal arises from for the decision of Hon. Senior Principal Magistrate in CMC Case No. 262 of 2003 at Embu.

The grounds of appeal are listed in the memorandum of Appeal dated at Nairobi on 17th day of January 2005. At trial the Appellant gave evidence himself and called no witnesses. The Respondent also gave evidence and called one witness who was not present at the time of accident. The record shows that there were other cases filed arising out of the accident and the trial Magistrate was able to consider those proceedings.

Firstly, on ground one and two there is no recorded evidence that the trial Magistrate conducted the trial as alleged. This court takes consideration of what is on record only. It is not possible to see unrecorded matters. These grounds of appeal are without merit. Regarding grounds 3 and 4 of Appeal the Trial Magistrate considered evidence as offered by the witnesses. Both parties said how the road was and there was a bridge. Both parties described the road and the two bends which did not interfere with visibility. The Plaintiff said his matatu was hit by lorry which swerved and swayed towards plaintiff's vehicle and hit the plaintiff on the front. The other party said he saw the two small bends and the slope, there was on coming donkey cart and also a oncoming matatu speeding. Matatu hit lorry on rear tyres. The trial Magistrate considered this evidence and found that matatu did not collide head on with the lorry. The plaintiff said he had stopped. It is not clear for what reason. But it is clear that if the Respondent's vehicle had its right rear tyres ripped and that the matatu was hit on front side it is the matatu which hit the lorry and it is to be said that the plaintiff was pressed to admit that there was a donkey cart involved. He only admitted on cross examination. Regarding ground 5 of the police abstract was produced without any objection it is a statutory document and can be relied on. What was recorded therein was evidence which was not challenged by the plaintiff. This ground is also found to be without merit.

On ground number six it is not automatic to find contributory negligence. It has to be proved. The fact that two vehicles were involved in an accident it is not for both must have been negligent. In this case the Trial Magistrate correctly found that the plaintiff is the one who caused accident. She believed the evidence of the Respondent. Concerning grounds 7,8, 9, and 10. It was the opinion formed by the Trial Magistrate on evidence on record that the Appellant was not truthful see the evidence of the donkey cart, the Appellant did not displace that he was not trying to pass between lorry and the cart, the fact is that

Respondent was not blamed in other suits. The impact to cause the tyres of the lorry to be ripped indicates such a force that would only have been caused by excessive speed. Regarding grounds 11, 12, 13, 14 the Trial Magistrates found the other two cases were decided by other Trial Magistrate. Those Magistrates had expressed their opinions which were not binding on the Trial Magistrate here. However the Trial Magistrate was entitled not to ignore those opinions. Regarding ground 14 the trial Magistrate made no contradictory finding but following the evidence before her.

On issue of assessment of quantum of damages an appellate court can only interfere on the assessment on the ground the assessment is too high or too low that it would amount to injustice.

In this case. I find the proposed assessment to be reasonable I would not interfere. I also find the trial Magistrate applied the correct principles in dealing with this case and failure to give notice and failure to deliver Judgment within 45 days does not prejudice the Appellant's case and is not the law of the land but administrative rule. For the above reasons I find no reason to interfere with the Judgment of the learned Trial Magistrate. The appeal is dismissed with costs.

Dated this 16th day of January, 2008.

J. N. KHAMINWA

JUDGE

16/1/2008

Khaminwa – Judge

Njue – Clerk

Mr. Kariuki HB for Mr. Njagi for Appellant.

Read in open court.

J. N. KHAMINWA

JUDGE