



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

Civil Appeal 6 of 2005

DANIEL KAGONGANGA.....APPELLANT

VERSUS

WILSON MUTHIKE GITHINJI.....1ST RESPONDENT

JOHN MURIITHI GICHUKI.....2ND RESPONDENT

JUDGMENT

This Appeal arises from decision of Senior Principal Magistrate in SPM. CC. No. 104 of 2003 in which case the suit was dismissed.

The appellant suit as pleaded in the plaint was for damages arising out of Traffic Accident.

The grounds of Appeal are set out as follows:-

1. The Trial Magistrate took consideration extraneous matters disregarding the evidence given by Appellant and his witnesses.
2. The Trial Magistrate erred in making a finding that the Appellant was not hit by the 2nd Respondent motor vehicle.
3. The Trial Magistrate erred in finding that the Appellant's injuries were caused by Appellant's motor vehicle.
4. The Trial Magistrate erred in finding that the appellant was to blame for the accident for riding his motor cycle without a valid licence.
5. The Trial Magistrate erred in finding the appellant in truthful and his evidence contradictory.
6. The Trial Magistrate earned in believing that the first Respondent was truthful.
7. And that the first Respondent rebutted the appellant's evidence
8. And that the Trial Magistrate made a finding that the appellant did not prove negligence.

There is a principle of law that no liability arises without proof of negligence. The Appellant pleaded that "the first Defendant so negligently drove, managed and controlled motor vehicle registration

number KAL 698 B that he overtook when it was unsafe to do so and caused the motor vehicle number KAL 698 B to collide into the plaintiff who was riding on the opposite lane.” The particulars of negligence are set out:-

1. Driving at excessive speed in the circumstances.
2. Failure to keep any or any proper control of the said motor vehicle NO. KAL 698 B.
3. Driving on wrong lane.
4. Overtaking other motorists when it was grossly unsafe to do so.
5. Caring or permitting the said motor vehicle to collide into the plaintiff who was riding Honda Motor cycle registration No. KSZ 655 and or failing to take any adequate measure to avert the Accident.
6. Failure to stop or slow down, to swerve or in any other way so to manage or control the said motor vehicle number KAL 698B so as to avoid the accident..
7. Driving in a manner contrary to Highway Code.

The evidence as given by plaintiff is that he was riding a motorbike KSZ 665 from Kagio to Ngurubani on 29/4/2000. He was driving at the speed of 30 KM per hour on an earth road. On reaching Gitooini he saw a vehicle coming from the opposite direction. He said the motor vehicle was driving at high speed. He stopped at the roadside on his left as the vehicle raised a lot of dust. The vehicle he saw was racing the first vehicle. It started overtaking in the dust it then hit him (the plaintiff) as he was stationary. The driver was overtaking in the dust without seeing him as it was dusty. It left its lane and came to the plaintiff's lane. After the plaintiff was hit on his right leg he fell at the side of the road where he had stopped stationary because of the dust. His motor bike was damaged on the front wheel. The driver of KAL 698 B took the plaintiff and his motor bike to Wanguru Police Station and thereafter to hospital. He added that he stopped his bike because it was very dusty and he could not see ahead. He also said that the vehicle ahead was a Toyota and was not to blame. He was not seeing the vehicle which hit him as it was dusty but he could see and hear the sound of first vehicle. Thereafter the vehicle which hit him is the one which was overtaking. The plaintiff's witness PW2 was in his garden which was near the roadside where the accident occurred. He saw plaintiff riding a motor bike from Kagio and from the opposite direction there were two motor vehicles from the opposite direction. The vehicles were at a high speed. The road was narrow. It was dusty and the vehicle behind started overtaking the other. It was then that he heard a bang. The vehicle which was overtaking went to plaintiff side and hit him. Then he rushed to the scene and raised alarm the vehicle stopped. Plaintiff and his bike were knocked down. Plaintiff was injured on the right leg. The plaintiff was stationary when he was hit. PW2 said that his home is about 2 KM from that of plaintiff. He was a friend of the plaintiff. This does not show the witness not to be an independent witness. He would have had to be deaf and blind not to witness what was happening on the narrow earth road near his garden. He said he could see because he was standing on his land which was on a raised ground. The Defendant in his testimony said he was travelling towards Kagio and there was a vehicle overtaking him. This is not true. It was the Defendant who was overtaking the first vehicle a Toyota which the plaintiff saw pass before the accident. It is the one which hit the plaintiff because the driver could not see him through the dust. The defendant said in the traffic trial "There was a vehicle in front of me which was raising a lot of dust. I did not see the motor cyclist, I was in the midst of dust" Whether the plaintiff was licenced or not it was defendant duty not to hit anyone as he was driving his motor vehicle on that road. It is clear that the plaintiff saw the vehicles coming from the opposite direction. He says the first vehicle pass and the second vehicle driven by the Defendant was overtaking through the dust. The road was narrow. The evidence of the Appellant is more reliable as to the facts of what happened. The first vehicle did not hit the Appellant because he had stopped by roadside on his side of road. He was not trying to join the road. But the second vehicle (of Respondent) drove amidst dust and was speeding and did not see the Appellant and the accident occurred. The Trial Magistrate did not give due consideration to the evidence offered by the Appellant. It appears the Appellant had been seen riding the motor bike for a period of 4 months but even if he was not riding the bike the Respondent was

not relieved of liability in negligence for hitting him as he was standing on the roadside. There is no evidence whatsoever that he was on motion when the accident occurred. The Respondent did not see him as he was in midst of dust and only heard a bang after driving a distance ahead. The evidence of the Appellant is credible and I find that the accident was caused by the Respondent who was driving in the dust so that he could not see the road at all.

I have perused the authorities relied upon by the appellant:-

1. In Nakuru HCA No. 167/2003 Care Estate Ltd and another vs Agnes Wanjiku & Others in which the court emphasized the importance of the first Appellant court to re-evaluate the evidence and reach its own decision.
2. In Nairobi Court of Appeal Civil Appeal 206/2002 Richard Kanyango & Others vs David Mukii Mareka in which the court discussed the doctrine of res ipsa loquitur.
3. HCC at Nakuru No.239 of 1998 Lucy Njoki Chege vs James Macharia Kungu & another. In this authority the court stated what is now trite law in this county that “a claim based on the tort of negligence must be strictly proved before a court of law can hold a party to be liable. Perhaps the only exception would be where the plaintiff is relying on the doctrine of res ipsa loquitur.” Perusal of the pleadings in this case fails to disclose any mention of the doctrine of res ipsa loquitur.

However the particulars of contributory negligence pleaded against Appellant stands unproved. There is no evidence that the Appellant was on the move when the vehicle hit him or that he collided with the Respondents motor. Appellant was in a better to see what was happening since the two vehicles were approaching him. In the circumstances it is my finding that the Respondent was liable in negligence and the Trial Magistrate was n error in dismissing his case.

In accordance with my finding this court is in a position to assess the quantum since all the evidence is in the record. The Trial Magistrate awarded by way of general damages Shs.900,000 noting that no special damages was pleaded. Nevertheless there is an amended plaint at page 50 of the record where it is pleaded special damages as:-

Police Abstract	100/=
Medical Report	1500/=
Future medical Expenses	<u>100,000/=</u>
TOTAL	<u>101,600/=</u>

These items are not proved by receipts of payment. Therefore the Trial Magistrate was right in failing to allow the same.

After considering the above I allow this appeal and set aside the Judgment of dismissal entered by Trial Magistrate.

On the issue of damages I find that with the evidence before her the Trial Magistrate made a fair assessment of General damages in the sum of shs.900,000/=. I enter Judgment for Appellant the Respondent in the sum of shs.900,000/-, General damages plus interest from 23/12/2004 and costs thereof.

Dated this 23rd April, 2008.

J. N. KHAMINWA

JUDGE

23/4/2008

Khaminwa – Judge

Njue –Clerk

Mr. Kenneth Githinji HB for Wangeri Manzia

Read in open court.

J. N. KHAMINWA

JUDGE