



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

**Civil Appeal 883 of 2003**

**RAPHAEL MUTHIANI MAITHYA.....APPELLANT**

**VERSUS**

**SIMON NZIOKI MWANZIA.....RESPONDENT**

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

Raphael Muthiani Maithya (hereinafter referred to as the appellant), was the 2<sup>nd</sup> defendant in a suit filed by Simon Nzioki Mwanzia (hereinafter referred to as the respondent), against the appellants and one Benson Musyoki Musembi (hereinafter referred to as the 1<sup>st</sup> defendant). The respondent claimed general and special damages from the 1<sup>st</sup> defendant and the appellant, jointly and severally, for personal injuries. The claim arose from an accident involving the appellant's motor vehicle Reg. No. KYD 366 and the 1<sup>st</sup> defendant's motor vehicle a Nissan matatu, Reg. No. KZJ 648, in which the respondent was lawfully traveling as a fare paying passenger. The respondent contended that the accident was caused by the negligence of the appellant and the 1<sup>st</sup> defendant.

The appellant and the 1<sup>st</sup> defendant each filed a defence denying the particulars of negligence attributed to them, and in the alternative blaming each other for the accident.

The trial magistrate having heard the evidence for the plaintiff and the 2<sup>nd</sup> defendant delivered a judgment in which she found the defendants jointly and severally liable to the plaintiff and assessed liability at 60% as against the 1<sup>st</sup> defendant and 40% as against the appellant. The trial magistrate further awarded general damages of Kshs.350,000/= to the respondent.

The appellant is aggrieved by this judgment and has raised 5 grounds in his memorandum of appeal. The grounds were argued under two headings, i.e. liability and quantum. The appellant maintained that the trial magistrate was wrong in finding that he contributed to the accident when no sufficient evidence was adduced to prove any negligence against him.

It was submitted that the accident having occurred at night, and the court having found that the 1<sup>st</sup> defendant's driver stopped at a dangerous position, and further, the 1<sup>st</sup> defendant having failed to offer any evidence, the court was wrong in finding the appellant liable for the accident. With regard to quantum, it was submitted that the amount of Kshs.350,000/= awarded as general damages was excessive and not comparable with awards involving similar injuries.

For the respondent it was submitted that the judgment of the lower court was fully anchored in law. It was maintained that the respondent having been a passive passenger in the motor vehicle owned by 1<sup>st</sup> defendant, sued both the 1<sup>st</sup> defendant and the appellant. It was maintained that the court had apportioned liability as between the 1<sup>st</sup> defendant and the appellant based on the evidence that was before it. Regarding quantum, it was submitted that the evidence of the doctor who examined the respondent was unchallenged and that the award was based on the injuries suffered.

I have reconsidered and evaluated the evidence which was adduced before the lower court. It is clear that the respondent was a passive passenger in Motor Vehicle KZJ 648 a Nissan matatu, owned by the 1<sup>st</sup> defendant. It was evident from the testimony of the appellant and the respondent that the motor vehicle

KZJ 648 was parked on the wrong side of the road and that the appellant's motor vehicle swerved and hit onto the parked Nissan matatu.

In apportioning liability the trial magistrate noted that the matatu was parked too close to the edge of the road in a manner that was dangerous. She also found that the appellant swerved and hit the matatu. Essentially, the appellant is aggrieved by the apportionment of liability as he believes that the accident was caused by the negligence of the driver of the 1<sup>st</sup> defendant. However, the appellant has not joined the 1<sup>st</sup> defendant in this appeal. The court cannot make orders adverse to the 1<sup>st</sup> defendant without his having been given an opportunity to defend the appeal. As far as the respondent is concerned, the 1<sup>st</sup> defendant and the appellant are jointly and severally liable to him. The issue of apportionment is as between the 1<sup>st</sup> defendant and the appellant and cannot be revisited in the absence of the other. To this extent, the appeal against liability cannot succeed.

On quantum, the respondent suffered a dislocation on the left elbow and a fracture of the left humerus and left ulna. As at the time of examination by the doctor, the respondent's injuries had healed but there was a definite risk of developing post traumatic Osteo arthritis.

Taking note of the comparative awards of the cases which were cited before the trial magistrate I find that the award of Kshs.350,000/= was not so excessive, nor was it based on wrong principles, as to justify the intervention of this court. For these reasons, I find no just cause to interfere with the awards. The upshot of the above is that this appeal fails. It is accordingly dismissed. I make no orders as to costs.

**Dated and delivered this 21<sup>st</sup> day of May, 2008**

**H. M. OKWENGU**

**JUDGE**