



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. 59 OF 2007**  
**EQUATOR BOTTLERS ..... APPELLANT**  
**VERSUS**  
**JOSEPH IMBWENYA ..... 1<sup>ST</sup> RESPONDENT**  
**ALEA KIHANYA .....2<sup>ND</sup> RESPONDENT**

**RULING**

The appellant Equator Bottlers Limited was the defendant in a personal injury claim filed in the lower Court on the 6<sup>th</sup> December 2000 by the first respondent Joseph Imbwenya who was the plaintiff therein.

The suit arose from a road traffic accident which occurred on the 16<sup>th</sup> October 2000 along the Kisumu – Kakamega road at a junction to Miwani and involved a collision of a matatu Registration number KAM 156P Nissan and the appellant’s motor vehicle Registration number KAG 976C driven at the time by the servant / agent. The first respondent was at the time a fare paying passenger in the former motor vehicle

( matatu). As a result of the accident, the first respondent suffered bodily injuries. He therefore filed civil suit number 1368 of 2000 at the Chief Magistrate’s Court at Kisumu claiming damages against the appellant on the basis that the accident was occasioned by the negligence of its driver/servant/agent who negligently, recklessly and/or carelessly drove, managed and/or controlled his vehicle thereby causing and/or permitting it to collide with an oncoming vehicle.

The appellant filed a statement of defence denying all the allegations of negligence made against itself by the first respondent and contentedly that the accident was occasioned by the negligence of the driver of the motor vehicle Registration number 156P.

Thereafter, the appellant sought and was granted leave to join as a third party the owner of motor vehicle registration number KAM 156 P.

A third party notice was accordingly issued to the third party who is the second respondent Alex Kihanya.

The third party entered appearance through the firm of Kasamani & Company Advocates and filed a defence contending that the accident was solely or wholly occasioned by the appellant. On the 22<sup>nd</sup> May 2007, the court directed that the issue of liability between the defendant and the third party be determined at the end of the trial.

Hearing of the suit commenced on the 27<sup>th</sup> February 2002, before the learned Senior Resident Magistrate F. M. Kinaynjui and ended on 24<sup>th</sup> April 2007 before the learned Principal Magistrate A. C. Onginjo who

delivered the contested judgment, liability was apportioned between the appellant and the second respondent.

A sum of Kshs. 120,000/= was awarded to the first respondent as general damages for pain, suffering and loss of amenities.

Being aggrieved and dissatisfied with the said judgment, the appellant filed this appeal on the basis of the following grounds:-

**(i) That the learned trial magistrate erred in law and fact in finding in favour of the first respondent ( plaintiff) against the appellant (defendant) when there was totally no or no credible evidence or proof of negligence on the part of the defendant or its driver.**

**(ii) That the learned trial magistrate erred in law and fact in relying on the uncorroborated testimony of the first respondent (plaintiff) when his testimony was scanty, incredible and unfounded.**

**(iii) That the learned trial magistrate erred in law in finding against the appellant against the only credible evidence on record which was that the appellant's driver was totally blameless and that it was the second respondent (3<sup>rd</sup> party) who was totally liable, if liability was established.**

**(iv) That the learned trial magistrate erred in law and fact in failing to apportion liability between the appellant and the second respondent (defendant and third party) as directed when third party directions were taken and she ought to have apportioned liability at 0% against 100% against the second respondent (3<sup>rd</sup> party) in view of the evidence on record if liability was established.**

**(v) That the learned trial magistrate erred by awarding damages to the first respondent (plaintiff) in the absence of proof of injuries allegedly suffered by the first respondent and she ignored relevant judicial authorities.**

**(vi) That the award of Kshs. 120,000/= by the learned magistrate was inordinately high, disproportionate, excessive, indefensible and unreasonable given the circumstances of the case the nature of the injuries allegedly suffered and the relevant authorities.**

**(vii) That in arriving at her decision the trial magistrate did so in a cursory manner and failed to identify and address the correct issues properly or at all and considered irrelevant facts or issues in arriving at her findings on liability and quantum which findings were wrong, biased, misguided and unjustified which have occasioned a serious miscarriage of justice and ought to be reversed.**

At the hearing of the appeal, the appellant was represented by learned counsel M/s Watima while the first respondent was represented by learned counsel Mr. Muma.

The second respondent did not appear and was not represented by any counsel.

In her argument, M/s Watima stated that the evidence of the first respondent ought not have been relied upon by the trial magistrate firstly because he did not know the vehicle which hit the Nissan Matatu he was travelling in and secondly because he stated that he did not know how the accident occurred.

Further, M/s Watima argued that the police officer (PW2) was not the investigating officer and was unable to state which driver was on the wrong.

M/s Watima contended that there was no corroboration of the first respondent's evidence in relation to negligence. She said that the trial magistrate held both the appellant and second respondent liable yet the second respondent did not adduce any evidence. She said that the appellant called a witness (PW4) who gave credible evidence and attributed liability to the second respondent. She contended that the second respondent ought to have been passed 100% liable since he did not give evidence. She in relation thereto,

cited two authorities viz **Haji =vs= Marair Freight Agencies Ltd [1984] KLR 139 and Mwangi =vs= Wambugu [1984] KLR 453.** M/s Watima also argued that the learned trial magistrate awarded damage in the absence of proof of injuries. She said that the medical notes providing evidence of the fact were never produced and instead secondary evidence in the form of a medical report was relied upon. She cited in relation thereto the case of **Eastern Produce (K) Ltd =vs= James Kipketer Ngetich Civil Appeal No. 85 of 2002 at Eldoret (Unreported).**

In finally, M/s Watima argued that the award of Kshs. 120,000/= was high and excessive even if the injuries were proved and the authorities cited in the lower court given consideration.

On his part, Mr. Muma supported the judgment of the lower court and stated that the trial magistrate did not misdirect herself in law and fact in arriving at her decision. He said that liability was correctly apportioned and that issues of negligence were proved by the first respondent who was a passenger in one of the two vehicles which collided. He said that the accident was not disputed and that the first respondent called a police officer to corroborate his evidence. Mr. Muma stated that the police file was never produced in court since it had been burnt in a fire accident at the police station. He said that the trial magistrate was confronted with the issue of credibility between the two versions and after considering the entire evidence arrived at a decision, which was not unjust. He said that the trial magistrate decided to blame both drivers for the accident as the first respondent had no control over any of them. He contended that the trial magistrate did not misdirect herself.

On the quantum of damages, Mr. Muma contended that the award was not inordinarily high and was within comparable precedent law. He cited in relation thereto the case of **Bernard Mwangi Omwanza =vs= John Maina Kigundu & Anotehr Civil Suit N. 220 of 1993** at Nakuru (unreported).

He stated further that a P3 form was produced and it provided primary evidence of the injuries suffered by the first respondent which were also confirmed by the appellant's own doctor. He said that the issue of the P3 form and the medical report distinguishes this case with that of **Easter Produce (K) Ltd =vs= James Kipketer Ngetich & Another (supra)**. Mr. Muma urged this court to dismiss the appeal and uphold the decision of the trial court.

Being a first appeal, the duty of this court is to re-evaluate the evidence, assess it and make its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witness (**See Sella =vs= Associated Motor Boat Co Ltd 1968 EA 123 and Ephantus Mwangi & Another =vs= Duncan Mwangi Wambugu (1982-88) 1 KLR 278.**)

The first respondent's case was that on the 16<sup>th</sup> October 2000 he was travelling on board the second respondent's motor vehicle registration number KAM 156 P Nissan Matatu from Kisumu to Majengo. The time was about 1:30 p.m and the vehicle was moving along the Kisumu/Kakamega road but near the junction to Chemelili it collided with the appellant's vehicle registration number KAG 976 C thereby causing the first respondent to suffer injuries. He was rushed to the hospital and thereafter reported the accident to the police. He blamed the appellant's driver for the accident and filed this suit against the appellant praying for damages and costs.

The appellant's case was that its driver was headed to Chemelili driving motor registration number KAG 976 C along the Kisumu /Kakamega road. He reached the Mamboleo junction and signalled his intention to turn right. As he started turning, the second respondent's matatu came from behind at high speed with lights flashed. He was already in the middle of the lane and attempted to avoid a collision but all in vain. The matatu hit his side mirror, lost control and landed on a ditch. The appellant blamed the driver of the second respondent's vehicle for the accident.

The second respondent third party filed a defence denying negligence and contributing the accident to the negligence of the appellant's driver. However, neither the second respondent nor his driver (if any) led any evidence to support to their allegations and/or denials.

The occurrence of the accident was a factor, which was not in dispute as may be deciphered from the

evidence. The involvement in the accident of the appellant's vehicle and that of the second respondent was also an undisputed factor and so was the fact that the first respondent was a fare paying passenger in the second respondent's vehicle. The basic issue arising for determination was whether the accident was as a result of the negligence of the appellant's driver or that of the second respondent or both and if so, whether the first respondent was entitled to damages and to what extent. As regards liability, the first respondent Joseph Imbwenya (PW1) blamed the appellant's driver for the accident. He said that the appellant's driver entered the main road from a nearby petrol station without ensuring that it was safe to do so. He this implied that the appellant's driver entered into the path of the second respondent's vehicle without proper look out thereby causing the collision. This was however incompatible with paragraph 4 of the plaint which implied that the accident was between two vehicles travelling in opposite directions approaching each other (on coming).

This was also incompatible with the evidence of the appellant's driver Wycliffe Ondogo Luvaha (DW1) who implied that the two ill-fated vehicles were travelling in the same direction. Wycliffe (DW1) stated that he signalled his intention to take a right turn when he arrived at the material junction. He started turning and while in the middle lane he saw through his side mirror the second respondent's matatu approaching from the rear at a high speed with headlights flashed. He decided to brake to avoid a collision but it was too late. The matatu came ahead and but his side mirror before losing control and entering a ditch.

No evidence was led by the third party to establish the appellant's driver alleged negligence and thereby uphold the first respondent's contention that the appellant's driver was to blame for the accident. It is doubtful whether the first respondent was in a position to say how the accident occurred and who between the appellant's driver and the second respondent was the cause. His defence with regard to liability could not have been relied upon considering that he heaped blame on the appellant's driver on the basis of unproven facts and that he clearly indicated that he did not know how the accident occurred.

In the absence of evidence to challenge the appellant's version of the circumstances leading to the accident, the court would be left with no other evidence but that of the appellant's driver (DW1) to hold that most likely than not, the cause of the accident was the negligent manner in which the second respondent's vehicle was driven. There was no evidence to show that the appellant's vehicle had emerged from a petrol station and abruptly entered the path of the second respondent's vehicle thereby causing the accident. There was also no evidence to show that the appellant's driver took a right turn without necessary indications and caused the accident.

Police investigations on the cause of the accident appear not to have been completed as depicted in the police abstract (PEX 2) produced in custody by P. C. Emmanuel Ngeywa (PW2) who indicated that the investigations file got burnt in the first accident at the Kisumu Police Station.

In her finding on liability, the trial magistrate remarked:-

***“ It is not disputed there was an accident and that plaintiff was a fare passenger in the 3<sup>rd</sup> party's motor vehicle which collided with the defendant's motor vehicle at the Mamboleo junction. If any of the parties is to be blamed then it is defendant and 3<sup>rd</sup> party. Plaintiff didn't have control of the two vehicles as he was merely a passenger in one of them”.***

The foregoing approach was correct. However, the trial magistrate departed from the correctness when she proceeded to state as follows:-

***“The 3<sup>rd</sup> party didn't call any evidence to refute evidence that his driver was negligent and contributed to the occurrence of the accident. If the police file was traced then the court would have reached a certain conclusion that either matatu driver or Isuzu lorry driver caused accident either party or wholly. However in the absence of that will did that the defendant and the third party are jointly and severally liable for the accident and as such are obliged to compensate the plaintiff for injuries suffered”.***

With respect to the learned trial magistrate, there was to basis for a finding that the defendant (appellant) and 3<sup>rd</sup> party (second respondent) were jointly liable for the accident. If at all they were liability between them ought to have been apportioned in percentage. The trial magistrate ought not have taken refuge in the fact that the police file was not availed and hold both drivers liable yet the third party did not offer any evidence to refute the negligence attributed to him. She was clearly misdirected herself and was in error by holding both drivers liable.

The party fully liable in the circumstances was the second respondent. The appellant's negligence was never credibly established even on a balance of probabilities. The second respondent led no evidence against the appellant. There was here a lack of evidence and not in conflict of evidence. Therefore, any finding of the appellant's culpability vis-à-vis that of the second respondent was speculative. **(See Haji =vs= Morair Freight Agencies Ltd (Supra)**. Grounds one, two, three and four of the appeal are sustainable.

The first respondent was entitled to damages from the second respondent rather than the appellant. He did establish by way of the P3 form (PEX 1) and the medical reports (PEX 5) and D. EX 1) that he suffered bodily injuries due to the accident.

The medical report by Dr. Otieno (PEX 5) and that of Dr. Olima (DEX 1) established that the first respondent suffered softy tissue injuries. The report by Dr. Otieno (PEX5) shows that he relied on treatment notes from the Provincial General Hospital Nyanza and the history given to him by the first respondent to compile the report. The P3 form (PEX 1) was issued by the police to the first respondent. It confirmed that he was injured and received initial treatment at the Provincial General Nyanza.

Even in the absence of the production of the actual medical notes, the P3 form provided primary evidence to establish the injuries suffered by the first respondent. The case is easily distinguishable from that of Eastern Produce (K) Ltd =vs= James Kipketer Ngetich (supra) where no form of primary evidence was adduced to establish the injuries suffered. It may as well be noted that the two medical reports (PEX 5) and (DEX 1) including the P3 form (PEX 1) were all tendered in evidence by the consent of the parties.

The learned trial magistrate was not in error in considering and holding that the injuries suffered by the first respondent were established and proved by necessary evidence. Ground five of the appeal is unsustainable and so is ground six.

The award of Kshs. 120,000/= general damages was reasonable considering the injuries suffered and the authorities cited in the lower court by the appellant most of which were decided in the 1980's and 1990's when the standard of living was much lower compared to the year 2007.

In the end result, the appeal is allowed to the extent that the judgment entered against the appellant be and is hereby set aside. Judgment against the second respondent remains intact on the basis of full liability. He shall thus compensate the first respondent in the sum of Kshs. 120,000/=, general damages fro pain, suffering and loss of amenities plus costs and interest. The suit against the appellant stands dismissed with costs.

The appellant shall also be entitled to the costs of this appeal.

It is accordingly ordered.

**Dated, signed and delivered at Kisumu this 24<sup>th</sup> day of September 2008.**

**J. R. KARANJA**

**JUDGE**

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