



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

**Civil Appeal 274 of 2004**

**A. O. BAYUSUF & SONS LIMITED.....APPELANTS**

**VERSUS**

**SAMUEL NJOROGE KAMAU.....RESPONDENT**

**JUDGEMENT**

This is an appeal from a judgement of the Hon. Madam A.B.M. Mongare, Senior Resident Magistrate Nakuru, which appeal is said in the Memorandum filed herein, to have been delivered on 26<sup>th</sup> November, 2005. The suit was in respect of an accident claim filed by the Respondent against the Appellant which was allowed by the lower court, liability being found against the Appellant and an award made in favour of the Respondent at a contributory ratio of 60:40. The lower court then proceeded to award the respondent a sum of Kshs.252,000/-, comprising of Kshs.250,000/= as general damages and Kshs.2,000/= as special damages to which the 60:40 ratio was applied resulting in a final award of Kshs.141,400/=.

The judgment produced in the record of appeal is not dated although the typed proceedings indicate that the same had been scheduled for delivery on 25<sup>th</sup> November, 2004. The handwritten copies of proceedings and judgment of the lower court were not made available to this court for scrutiny. However a decree was extracted in respect of the award. The same was issued on 20<sup>th</sup> November, 2004.

Being dissatisfied with the judgment and decree, the appellant filed this appeal raising seven grounds of appeal which are hereby summarised/paraphrased as follows:

1. That the learned trial magistrate erred in law and fact in finding the appellant liable in negligence in the absence of factual or legal basis particularly since according to the appellant the evidence on record proved the respondent wholly to blame for the accident.
2. That the apportionment of liability at the ratio of 60:40 was done without any factual findings being made to support the same.
3. That the defence case imputed blame on the respondent and was supported by the ordinary course of events and the evidence adduced at the hearing.
4. That the learned trial magistrate erred in law and fact in basing her findings on liability merely on the fact that the respondent was knocked by the appellant's trailer without addressing herself to the respondent's probable contribution to the accident.

5. That the learned trial magistrate erred in fact in failing to find that the respondent was the sole author of his misfortune as demonstrated by the circumstance surrounding the accident.
6. That the learned trial magistrate erred in law as regards quantum and her assessment of damages thereby awarding respondent an award which was manifestly excessive and totally unrelated to the events and the nature of injuries sustained.

From the pleadings filed by the parties in the lower court, it is clear to me that the plaintiff/respondent relied mainly on the common law principle of *Res ipsa loquitor* in forging his claim while the defendant/appellant relied mainly on the doctrine of *volenti non fit injuria* and contributory negligence in defending the respondent's claim. The submissions made in the course of the appeal tended to lean in the same direction. Principally however, counsel for the appellant Mr. Murimi submitted that the trial court did not evaluate the evidence before it, before arriving at its judgment and also that the judgment, having failed to set out the reasons and findings behind it contravenes the provisions Order XX Rule 4. Counsel submitted that, based on the persuasive authority of **MENENGAI SOAP FACTORY VS. RICHARD KIAGO MARIBA NKU.H.C.C.A.NO.131/2001**, a copy of which was submitted as part of his list of authorities, the appeal is fit for dismissal on that ground alone. He submitted that no concrete evidence was adduced to prove causation or to prove the particulars of negligence as stated in the plaint. He submitted further that the trial court ought to have considered the totality of the evidence adduced before it and give reasons as to why the learned trial magistrate believed the evidence of the respondent and disbelieved that of the appellant. Counsel submitted further that the evidence in support of the respondent's case was too scanty to support the finding that the appellant was wholly to blame for the accident. That the court, having been confronted with two different versions of the accident, ought, at the very least, to have found the parties to have been equally to blame. Counsel cited several authorities to support his submissions. He urged the court to pay particular attention to the case of **JIMNAH MUNENE MACHARIA VS. JOHN KAMAU ERERA NBI.C.A.C.A.NO.218/1998** a copy of which was also produced. Mr. Murimi submitted finally that the award of Kshs.250,000/= was excessive since the injuries suffered by the respondent appeared to have been soft tissue injuries only.

Opposing the appeal, Mr. Juma submitted that the judgment and decree of the lower court were proper and that the evidence tendered before the lower court proved the respondent's case as against the appellant's. He submitted that there cannot be said to have been two versions of the accident when the respondent's evidence was not rebutted. He submitted further that the injuries were proved by the medical evidence adduced at the trial which disclosed severe injuries that caused the respondent to be admitted in hospital for three days. He urged this court to consider the holding in the case of **BUTLER VS. BUTLER [1984] K.L.R. 225** that an appellate court should be slow to interfere or reverse an award of a lower court and should only do so if it is proved that the trial court was either very wrong in its findings, took account of matters that ought not to have been taken into account or ignored those which ought to have been taken into account.

My study of the record of appeal has revealed that the judgment under challenge was a two page judgment wherein after considering the evidence adduced by both sides, the learned trial magistrate recorded her findings as follows:

***“I have considered the evidence on record, I find it was not the front side that hit the plaintiff's bicycle but the trailer side.***

***Section 50 of the Traffic Act each person has a duty of care on the road, I apportion liability at 60/40 in favour of the plaintiff.***

***On quantum the plaintiff sustained the following injuries.....”***

After listing the injuries as disclosed in the P.3 form, hospital treatment notes and the medical doctor's report which classified the same as harm, the learned trial magistrate proceeded to award the damages as earlier stated in this judgment.

Mr. Murimi complained that the learned magistrate did not consider the evidence as related to liability but only the evidence in support of the quantum. Even without the benefit of the handwritten notes, the repetition of the word quantum in the above quoted recording clearly shows that the earlier finding was on liability and therefore the reference to “**having considered the evidence on record on quantum**” clearly appears to be an error on the face of the record which I believe I have the power to rectify. The first part of the learned trial magistrate’s findings did relate to liability while the second part, which touched on the injuries, related to quantum.

My evaluation of the evidence shows that the Respondent called only two witnesses, that is, the respondent (P.W.1) and one Inspector Joseph Kendui (P.W.2), who was neither an eye witness nor an investigating officer. P.W.1 testified that on the material day, that is 20<sup>th</sup> June, 2001 while riding his bicycle along Bahati-Subukia road, the appellant’s motor vehicle No. KAL 561R approached him from behind while towing a trailer KZD 748. As the motor vehicle made to overtake P.W.1, the trailer hit him causing him to fall down beside the road. He said he was hit by the trailer’s left hand side. He was injured and taken to Subukia dispensary where he was treated and then referred to Provincial General Hospital where he was admitted for three days. P.W.1 said that the motor vehicle was avoiding pothole when it hit him. Under cross-examination the respondent denied having been hanging on to the trailer to make his riding easier. He testified further that the lorry and trailer did not stop after hitting him. He accepted that the inspection carried on the motor vehicle and trailer did not show the point of impact between himself and the trailer.

P.W.2’s role appeared to have been only for the production of police records and nothing more. He based his evidence regarding the accident on the report made at Kirengero police station as recorded in Occurrence Book No.13/01. He said he was not present when the entry was made but introduced some evidence that was not given by P.W.1 to the effect that after the collision the trailer rolled several times. Under cross-examination he said that he did not know who was to blame for the accident.

The defence only called one witness Mr. Musyoki Kyengo (D.W.1) who was a turn-boy in the appellant’s motor vehicle. He testified that indeed on the material day he and the driver of the appellant’s vehicle one Juma Oguyo (who was not called to testify), had left Nakuru for Nyahururu via Subukia. Upon reaching Subukia they were stopped and informed that they had hit somebody along the road. He confirmed that they had passed several people riding bicycles on the left side of the road. Under cross-examination he confirmed that the motor vehicle was indeed inspected and that one Salim must have obtained a police abstract. He told the court, however, that he did not know anything to do with the accident. Despite the defence asking for an adjournment to call a police officer to testify on the events and the circumstances surrounding accident, they did not do so but closed their case without calling further evidence. The abstract allegedly obtained by the appellants was therefore not tendered in evidence.

Faced with this kind of evidence, the learned trial magistrate was duty bound to evaluate the same and come up with a reasoned judgment. It is not in dispute that an accident did occur on the material date involving the respondent and the appellant’s motor vehicle. He was injured and there is medical evidence to prove that. Although the respondent had no permanent disablement he was hospitalised for three days after sustaining deep cut wounds, lacerations and soft tissue injuries as were shown in the medical records produced before court. The medical examination conducted at the request of defence disclosed that although he had cured completely, the respondent had visible permanent scars.

I accept the respondent’s submission regarding the principles upon which this court can interfere with a lower court’s finding in damages and/or vary the award awarded thereat. It is not clear from the judgment of the lower court on what basis the learned trial magistrate arrived at the conclusion that it is the trailer’s side which hit the respondent since the motor vehicle inspection did not disclose the point of impact. The learned trial magistrate’s reliance on Section 50 of the Traffic Act (Chapter 403 of the Laws of Kenya), which provision deals with matters to be considered and/or conditions to be fulfilled before a conviction of a person prosecuted under the provision of the Act (save under Section 46), is not understood. In my view such reliance cannot form a basis for a finding on liability and is on my view an irrelevant fact giving this court reason enough to interfere with the lower court’s judgment. The lower court clearly had

two versions of the accident with the respondent blaming the appellant and vice versa. There is ample authority, part of which was tendered before this court, to the effect that in the absence of concrete evidence between two parties to an accident both should be held equally to blame. Such was the case in the Court of Appeal decision of **JIMNAH MUNENE MACHARIA** (Supra) which I consider binding upon this court. Basing reliance on the same, I find that a ratio of 50:50 finding on liability ought to be the case herein. Nonetheless, I have considered the award of the lower court and the authorities cited in support of the parties opposing positions as regards the award. Considering the injuries suffered which according to the evidence were serious enough to warrant hospitalization, I do not find the award of Kshs.250,000/= to have been too excessive or too low as to warrant any interference by this court.

On the ratio of 50:50 contributory negligence I therefore award the Respondent a sum of Kshs.125,000/= plus the proved special damages of Kshs.2,400/= which in my view ought not be subjected to a reduction based on the apportionment of liability. Accordingly, the appeal succeeds in part and is hereby allowed with an award of Kshs.127,400/= being made in favour of the respondent.

The appellant shall have the costs of the appeal but each party will bear its own costs in the original suit.

**DATED, SIGNED and DELIVERED** at **NAKURU** this 20<sup>th</sup> day of November, 2008.

**M. G. MUGO**

**JUDGE**