



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Appeal 55 of 1999**

**MAFUKO INDUSTRIES LTD.....APPELLANT**

**V E R S U S**

**ALFRED RINTARI M'MUTHURI.....RESPONDENT**

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

1. The Appeal herein is premised on these grounds:

(1) That the learned trial magistrate erred in law and fact in holding that the Appellant's motor vehicle KAB 666W Toyota Hiance was involved in an accident with the Respondent on the 20<sup>th</sup> October, 1991 along Meru/Ruiri/Kianjai road in the absence of a police abstract or evidence from the police and on the face of the Appellant's driver's evidence that motor vehicle KAB 666W was away at Nairobi at the material time.

2 That the Learned Trial Magistrate erred in law in relying on a Police Abstract not produced in evidence during the trial.

3 That the learned Trial Magistrate erred in law in shifting the burden of proving that motor vehicle KAB 666W was along Meru-Ruiri-Kianjai road upon the Appellant by holding that the appellant did not prove that the motor vehicle was at Nairobi.

4 That the Learned Trial Magistrate erred in law in finding the Appellant liable for torts commissions and/or omission of an undisclosed agent.

5 That the learned trial magistrate's judgment is against the weight of evidence.

6 That the learned trial magistrate erred in law in failing to find and hold that the Respondent had not proved his case on a balance of probability.

7 That the learned trial magistrate erred in law in awarding the respondent Kenya shillings three hundred and fifty thousand (Ksh.350,000) only plus costs and interest which was too excessive regard being had to the injuries sustained by the respondent.

2. The suit in the subordinate court arose out of an accident on 20/10/1991 along Meru-Ruiri Road involving the Respondent and motor vehicle registration number KAB 666W. The case was that the Respondent was lawfully cycling along the said road when the said motor vehicle which was

allegedly being driven carelessly and negligently knocked him down and occasioned him serious bodily injuries to the parietal region, right ear, right shoulder and right palm.

3. The Appellant in its Defence filed on 11/11/1992 denied that its motor vehicle registration number KAB 666W was at the scene of the accident on the material date and time. The same claim was repeated at the hearing.
4. The trial magistrate having heard both parties and upon analyzing the evidence presented came to the conclusion that the evidence favoured the Respondent, entered judgment in his favour and awarded Ksh.350,000/= as general damages plus costs and interest thereon.
5. Counsel for the appellant submitted that there was no evidence placed before the lower court to show that the accident in question occurred at all and the evidence of P.W.2 was inconclusive yet he was the only eye witness. Further that without production of the Police Abstract the evidence of an accident having occurred remained suspect and could not be relied on.
6. Counsel also argued that the award in damages was excessively high and the injuries even if sustained could not attract such an award. In this regard I was asked to be guided by the decision in Stanley Maore vs Mwenda C.A. 147/2002 (unreported) in which Ksh.100,000/= was awarded as general damages for similar injuries as in this case.
7. The Respondent's response to the Appeal was that P.W.1 and P.W.2 narrated candidly how the accident occurred and their evidence was unchallenged. That the Appellant's sole witness in defence was unreliable and contradicted the defence filed by the Appellant and that judgment on liability was justified.
8. On quantum, the Respondent's counsel stated that the medical evidence presented justified it and in any event where overwhelmingly persuasive evidence of the medical type was given, there was no need to produce a Police Abstract. Reliance was thereby placed on;
  - i) Mwanasokoni vs KBS Ltd C.A. 35/85
  - ii) Mwanzia Nzauni vs KBS Ltd C.A. 202/2002
9. It was the further argument of the Respondent that the award was fair and reasonable in the circumstance.
10. When the Respondent testified as the plaintiff before the subordinate court, it was his evidence

that he was riding his bicycle when a vehicle hit him from behind and he fell down and lost consciousness. The said vehicle did not stop and he said that he could “**not identify the vehicle**”. It was his evidence further that Nathan Meme who was P.W.2 in the case collected the bicycle and kept it and the Respondent taken to hospital for treatment. He made a report to the police on the next day. He produced his treatment notes and P.W.3 form as Exhibit 1 and 2. He narrated the injuries suffered and his claim for damages as a result thereof.

11.P.W.2 Nathan Meme stated that he was walking towards Kianjai on 20.11.1991 at 5.30 p.m. when he became the witness to an accident involving the Respondent. He said that the cyclist who turned out to be the Respondent was riding ahead of the motor vehicle which hit him from behind and spend off but not before he took its registration number and noted that it was a Toyota.Hiace with a built up body. He did not know who its owner was or who was driving it. He helped the cyclist, and took him home and later recorded his statement with the police.

12.During cross-examination, the witness said that he saw the same motor vehicle on the same road 2 months after the accident and noted that it belonged to Mafuko Industries, the Appellant.

13.For the Appellant one James Mukira testified and it was his evidence that on the material date he was in Nairobi and was driving M/V Registration number KAB 666W, a Toyota Hiance, That he could not and was not on the Meru-Ruiru Road and was not involved in any accident in that day. He said that he was in the company of his employer Mr. Reru who had since passed away.

14.Under cross-examination the witness said that on 4/2/1999 the hearing was adjourned to enable him produce a work ticket for the subject motor vehicle showing where it was on 20/10/1991 but when he testified on 5/2/1999 he said that the work ticket for the material date was unavailable. He also said that he had nothing to show that he was in Nairobi 20/10/1991.

15.As I said earlier the defence raised was dismissed and judgment entered in the terms elsewhere above for the Respondent.

16.I have carefully studied the record in this matter. What is in issue is firstly whether an accident as claimed by the Respondent did occur. Secondly, was the appellant to blame for it vicariously and thirdly what quantum damages is payable if at all.

17.I have seen the Defence filed by the appellant. It denies that its M/V KAB 666 was used on 20<sup>th</sup> October 1991 because that day was a Public Holiday (Para 2 thereof) in the same breathe its witness and driver of the said motor vehicle stated on oath that it was indeed used but in Nairobi only and later he said that he returned to Meru at 10.00 p.m. on the material day. Clearly that evidence as compared to the Defence on record is suspicious. The suspicious heightens when it occurs that the same witness asked court to adjourn to produce a work ticket for the material day and the next day he says, “**We do not have a work ticket for the vehicle for the date in question.**” (Page 41 of the record of appeal)

18. My considered view is that the Defence was a sham and an attempt at avoiding liability. This poor attempt is sharply contrasting with the lucid clear and believable evidence of the Respondent and P.W.2. The Respondent did not say that he saw the motor vehicle that hit him but P.W.2 did and he also said that he came to know 2 months after the accident that the same belonged to the Appellant. Little was done in cross examination to shake the evidence of those two witnesses and I am satisfied that an accident occurred in the way that they described and that the motor vehicle belonging to the Appellant caused it because of high speed (as per both witnesses) and also because although the Respondent was cycling lawfully it veered to his side and hit him. That it failed to stop after the accident does not assist the Appellant in any way. Vicarious liability must attach to it for the acts of its servants as pleaded at paragraph 4 of the plaint see the decision in Samuel Gikuru Ndungu vs Coast Bus Company Ltd C.A. 177/99 (unreported) (page 3 of the record of appeal).

19. This being my finding, the judgment on liability must be held. Before leaving the subject however, my considered view is that reliance on a document that was into produced namely the Police Abstract was erroneous on the part of the trial magistrate but with or without it there is overwhelming independent evidence to show that the accident did occur and the Respondent suffered the injuries he pleaded.

20. Turning to the question of damages, the evidence available shows that the Respondent suffered bleeding in the right ear, a deformed right shoulder, deformity on the palm and has unsightly scars not to mention that he has loss of hearing on the right ear. The evidence comes out from the P.3 form and the medical report of Dr Kwena which were produced as exhibits without objection by the Appellant.

21. An appellate court can only interfere with an award in damages if the same is excessively high or inordinately low and also where the court took into account an irrelevant factor or failed to take into account a relevant factor. None of these matters have been cited in this Appeal and in any event I have seen no abuse of discretion on the part of the trial court. The authorities relied upon were in my view relevant to reasonable award in damages.

22. As the Appeal is unmerited in the eyes of this court the same is hereby dismissed with costs to the Respondent

23. Orders accordingly.

**Dated, signed and delivered in open court at Meru this 14th Day of February 2006**

**ISAAC LENAOLA**

JUDGE