



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal 127 of 2002**

**STANLEY MUGAMBI ..... 1ST APPELLANT**

**ANTONY MUGAMBI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOHN KIRAITHE(NEXT FRIEND OF EVELYN MAKENA) ..... RESPONDENT**

**JUDGMENT**

1. The memorandum of Appeal herein was filed on 20.11.2002 and the Appellants, Stanley and Anthony Mugambi rely on these grounds:

1. That the Learned Magistrate reached a wrong decision in law and fact, contrary to the weight of evidence before him.
2. The Learned Magistrate erred in law and practice in awarding a manifestly excessive quantum of damages which was not commensurate with the nature of injuries suffered and/or loss proved.
3. The Learned Magistrate gravely erred in making a speculative award of damages without proof of loss of earning capacity.
4. That the learned magistrate erred in law and practice in regarding the evidence tendered by the Respondent which was totally contradictory, and which was disproved by Defence evidence, as believable.

2. The Appeal arises from the judgment and decree in CMCC No. 901/2001 (Meru) where the Respondent had sued the Appellants for General and Special Damages arising from injuries that the minor, Everlyne Makena sustained as a result of an accident on 22.4.1999 involving M/V Reg. No. KAG 318V in which the minor was a passenger. It was alleged that the 2<sup>nd</sup> Appellant, Anthony Mugambi was so negligent that he managed and controlled the said motor vehicle in such a manner that the accident occurred. In a judgment delivered on 24.10.2002, N. Ithiga Esq, SPM gave judgment in favour of the Respondent in the sum of Ksh.205,057/- together with interest and costs. That judgment necessitated this Appeal.

3. Miss Bii who appeared for the Appellants argued that the minor subject of the suit had no job and the award of Ksh.200,000/- for loss of earnings was manifestly excessive and was not warranted. That her injuries were minor and did not include any injuries to the back and the award for those injuries was also

unjustified and excessive. Lastly, that the person said in evidence to have been the driver of the motor vehicle was one Bernard Mwenda and not Anthony Mugambi who was pleaded as the driver. Without clear evidence as to the driver of the motor vehicle and his alleged negligence, vicarious liability could not attach to the Appellants as owners of the motor vehicle.

4. Mr. Gikunda for the Respondents was of the view that all particulars as to the accident were admitted by the Appellants and could not be raised as an issue on Appeal. The ownership of the motor vehicle was also admitted and vicarious liability could attach to such owner. It was not denied that the minor was a passenger in the Motor Vehicle and that D.W. 3 admitted in evidence that he lost control of the Motor Vehicle and the same rolled twice. That all evidence including that of P.W.4 indicated that the Motor Vehicle was being driven negligently and at high speed at the time of the accident.

5. As to quantum, counsel for the Respondent submitted that the same was well arrived at and that this court can only interfere with it if it is excessively high or excessively low or unreasonable and unfair which was not the case obtaining in this case. That inflation has affected the quantum and the same should not be interfered with.

6. I have perused the plaint filed in the lower court and I note that it was pleaded at paragraph 4 thereof that the driver of the motor vehicle was said to be the 2<sup>nd</sup> appellant, named clearly as Anthony Mugambi. The 1<sup>st</sup> Appellant is named as the owner of Motor Vehicle registration number KAG 318V.

7. In the Defence filed jointly by the Appellants on 11.1.2001 it is denied that the 1<sup>st</sup> Appellant was the owner of the Motor Vehicle in question or the 2<sup>nd</sup> Appellant was his “**driver and/or agent.**” It was denied at paragraph 5 thereof that the minor Makena was a passenger in KAG 318 V along Meru – Gaitu road on 22.4.1999. Particulars of negligence and injuries of the minor are all denied in that Defence and the Respondent put to strict proof thereof.

8. In evidence, P.W.1 Evelyne Makena said that on 22.4.1999 while then a 17 year old young lady, she was a passenger in M/V reg. KAG 318 V when the driver lost control of that vehicle, a pick-up. The driver was identified as Anthony Mugambi and she said that the said person was driving the Motor Vehicle at high speed causing it to lose control and crash on the left side of the road. The minor said that she suffered the following injuries;

- (a) fracture of the right hand
- (b) cut on the ring finger and bruises on other fingers
- (c) injuries to the back

9. I should note that these injuries were also pleaded at paragraph 5(b) –(d) of the Plaint save that the witness said nothing of injuries to the right cheek (para. 5(a)] of the Plaint.

10.The witness produced receipts for various payments made for treatment at Nkubu Hospital and Meru District Hospital (P.Exh.2, P.Exh.3) totaling Ksh.1,727/- as well as treatment notes (P.Exh.1 and P.Exh.4) and x-ray card (P.Exh.5) The police abstract was also produced (P.Exh.6) P.Exh.8 was the search showing that the motor vehicle belonged to Stanley Mugambi, the 2<sup>nd</sup> Respondent.

11.In cross-examination Makena said that she was unemployed and was “**just at home**”. That the driver of the Motor Vehicle started over speeding when the motor vehicle joined the tarmac road and she did not know the exact speed but it left the road and crashed into a shamba on the left side of the tarmac road. She admitted that the treatment notes did not indicate any injuries to her back as pleaded.

12.P.W.2 John Kiraithe guardian of P.W.1 testified that he saw the minor 3 days after she left home, later took her for X-ray of the fractured hand and reported to the police and obtained the Police Abstract.

13.P.W.3 Dr. Jonathan Barasa examined P.W.1 on 7.5.2002, reviewed her medical history, noted her injuries as a fracture of the right humerus and dislocation of the 4<sup>th</sup> middle finger. Although he examined her after 3 years, she still had chest pains, pain on the right scapular region as well as occasional loss of balance. He produced the medical report and receipt for Ksh.3,000 (P.Exh.9 and 10)

14.P.W.4 Fransen Muriithi, a police officer produced the Police Abstract (P.Exh6) which reflected records at Meru Traffic Base. The witness said in cross-examination that the police abstract showed that the driver of the motor vehicle was Bernard Mwenda and the owner, one Evangeline Mugambi.

15.The witness for the Appellants were D.W.1 Elias Mwiti who said that on 22.11.1999 he was a passenger in M/V reg. No. KAG 318 V driven by Bernard Mwenda and it overturned at Kariene Market. He was injured and was taken to Nkubu Hospital and that the minor, Makena was not one of the passengers.

16.In cross-examination he said that he was employed by the Appellants and he saw the front of the vehicle and did not know who else was at the back of it. He knew the vehicle as belonging to the 1<sup>st</sup> Appellant. He also said that the Motor Vehicle had luggage at the back of it and that it had no space for any passengers.

17.D.W.2 Stanley Mugambi Muketha the 1<sup>st</sup> appellant admitted to be the owner of motor vehicle registration number KAG 318 V Toyota Pick-Up. On 22.4.1999 it was involved in an accident while being driven by his son Bernard Mwenda but it also had his wife and the 2<sup>nd</sup> Appellant as passengers. He did not authorize the said Anthony 2<sup>nd</sup> Appellant to drive the motor vehicle but he drove it to the Police Station after the accident. D.W. 3 Anthony Mugambi admitted that he was in the motor vehicle at the time of the accident.

18.In cross-examination he said that he drove the motor vehicle to the Police Station after the accident and that prior to that only Bernard and D.W.1 got injured as they were the only passengers. His mother came after the accident and instructed him to drive the motor vehicle.

19.D.W. 4 Bernard Mwenda stated that he was driving the Motor Vehicle on the instructions of his mother who had been left at her store in Gakoromone. Like his brother, he said that the vehicle had a tyre burst which caused it to roll while being driven at 40 kph. He produced his treatment notes for the injuries he sustained and he admitted that the Police Abstract showed him to be the driver of the motor vehicle.

20.D.W. 4 in cross –examination denied that the minor was in the car at the time of the accident.

21.D.W.5 Stephen Kamande a retired Police Officer received a report while still at Meru Traffic Base in April 1999 of an accident at Kariene. He Proceeded there and found the motor vehicle subject of the accident on the right side of the road. There were members of the public at the scene and one person told the officer that the driver had been taken to hospital. At the hospital the driver said that he hit a pot hole and lost control. Later, a brother of the deceased drove the Motor Vehicle to the Police Station. The driver was one Bernard Mwenda.

22.In Cross-examination, the witness said that the accident truly occurred but he did not fill out the Police Abstract but he believed that the entries were correct as the information in it came out of the records held at the Police Station.

23.In his Judgment the learned trial magistrate having analyzed the evidence found for the plaintiff having reached the conclusion that all the allegations in the Plaint had been sufficiently proved against both Defendants (now Appellants). He awarded Ksh.200,000/= as General Damages and Ksh.5057/= as special damages making a total of Ksh.205,057/- plus costs and interest. That judgment is the subject of this Appeal.

24.I should, I think, divide my evaluation of the case in the lower court into two generally acceptable areas;

- (i) was liability against the Appellants sufficiently proved?
- (ii) If so, was the award in damages reasonable and fair?

### Liability

25.The parties herein in their pleadings presented two contrary positions as regards the accident on 22/4/1999; the Respondent said it happened while the Appellants said that it did not. The appellants went further to deny anything to do with the Motor Vehicle KAG 318V including denying its ownership or any relationship between them as pleaded by the Respondent in paragraphs 3 and 6 of the Plaint. It has been said on very many occasions by our courts that a party must be held to its pleadings and an inconsistent pleader is not an honest party.

26.In evidence , the Respondent remained consistent and true to her pleadings but the Appellants changed tact. They admitted that the accident took place on the date, time and place stated by the Respondent but denied that she was in the motor vehicle. They admitted also that the motor vehicle was in fact owned by the 1<sup>st</sup> Appellant since a copy of the records held at the office of the Registrar of Motor Vehicles conclusively disproved any other person being the owner thereof. They even admitted that the 2<sup>nd</sup> Appellant was in the motor vehicle.

27.Having admitted all these matters the Appellants retreated into denial of the fact that the 2<sup>nd</sup> Appellant was driving the motor vehicle. It was their case that Bernard Mwenda was in fact the driver of the said motor vehicle and that the minor Makena was not in it at the time of the accident.

28.I have elsewhere above reproduced the evidence for both parties and with that background I am satisfied that.

- (a) The accident occurred as stated by the parties in evidence.
- (b) Since both parties called evidence in support of the particulars contained in the Police Abstract and especially noting the evidence of D.W.5, Sgt. Kamande, I am convinced that the minor Makena was a passenger in the motor vehicle at the time of the accident and suffered serious injuries as did Bernard Mwenda (D.W.3) and Godfrey Mwiti (D.W.1) This is contrary to the evidence by the Appellants which in any event I find in view of their earlier denials also part of their ruse to avoid accepting that the minor was in the car as they earlier did in their claim of general denials contained in their statement of Defence.
- (c) Stanley Mugambi is the owner of the Motor Vehicle a matter he had earlier denied in the Defence but admitted in evidence.
- (d) Anthony Mugambi was in the Motor Vehicle at the time of the accident as admitted by him and stated by the minor Makena and Bernard Mwenda and Godfrey Mwiti. The question that should be asked is whether he was driving the Motor Vehicle at the time of the Accident.

The minor in her evidence said this:

**“The driver is Antony Mugambi (2<sup>nd</sup> Defendant. I blame the accident on the driver.”**

Later in cross-examination, she states as follows:

**“I can identify Antony before this court.”**

She was therefore clear and directly pointed fingers at him. She also knew Bernard Mwenda quite well

and did not mistake him for Antony, his brother. Of him she said;

**“It is Ben who paid the hospital expenses for me.”** And in cross examination she added;

**“Bernard Mwenda paid for my hospital expenses at Nkubu Hospital. I was given the receipt for Ksh. 517/- and nothing else.”**

29. Whereas the minor was consistent in her evidence, I have said that the Appellants were shifting positions at will and between the two parties, and like the trial magistrate I am of the view that the evidence of the minor is truthful and I shall hold that the 2<sup>nd</sup> Appellant Anthony Mugambi was indeed driving Motor Vehicle KAG 318 V at all material times and Bernard Mwenda as shown by all evidence was only a passenger and sustained injuries as a result of the accident.

e) All evidence points to the fact that the driver was controlling the motor vehicle negligently and drove it at high speed. The minor could not tell the speed but note what the Appellants and their witnesses said;

D.W. 3 Antony Mugambi said that it had a tyre burst before the accident. D.W.4 Bernard Mwenda said that he was driving at 40kph when he had a tyre burst and the motor vehicle fell on its side. D.W.5 Stephen Kamande said that the driver told him that he lost control after he hit a pot hole. D.W.5 was the independent witness who arrived at the scene and interviewed witnesses when memories were still fresh. D.W.3 and D.W.4 at that time said nothing of a tyre burst and in fact said that D.W.3 drove the Motor Vehicle the Police Station after the accident. Clearly and true to their inconsistent evidence, the tyre burst story was an after thought to justify the accident. If control was lost after hitting the pot hole, the only conclusion that can be reached and in line with the minor's evidence was that, the motor vehicle was in high speed once it entered the tarmac road. That explains the accident and also explains sufficiently the negligence on the part of the 2<sup>nd</sup> Appellant.

f)the 1<sup>st</sup> Appellant admitted that the 2<sup>nd</sup> Appellant was his son who had a valid driving licence at the time of the accident. That he did not authorize him to drive the motor vehicle on the material date but added that **“he only drove the vehicle to the Police Station”** To my mind the 2<sup>nd</sup> Appellant ordinarily drove the motor vehicle and had his father's authority. I have said that contrary to the Appellant's protestations he also drove it on the material date with that authority. Vicarious liability for the action of the 2<sup>nd</sup> Appellant must necessarily attach to the 1<sup>st</sup> Appellant.

### 30. Quantum

I agree with submissions by the advocate for the Respondent that a court sitting on appeal can only interfere with an award in damages by the lower court if the award is excessively high or manifestly low. In Shaban vs City Council of Nairobi for example it was clearly held that:

**“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence.”**

In this case, the minor suffered the injuries set out elsewhere above. I have seen the authorities of

Stephen Ngunga Mbandi vs Dismas Kiatine HCCC 138/87 and Loise Wangari vs Joseph Githinji Kaniu HCCC 765/89 relied on by the trial magistrate. In both cases, the main injury as was the case here involved a fracture of the humerus. In the former case Githinji J.(as he then was) awarded Ksh.270,000/= to a 15 year old minor who had a supra-cadular fracture of the humerus while in the latter Mbogholi Msagha J. awarded Ksh.150,000/- to a 48 year old who had a fracture of the right humerus and bruises to the head, chest, knees, right elbow and both legs. Both these decisions were rendered on 22.2.1994 and 3.5.1993 respectively.

31. It has been argued that a sum of Ksh.200,000/- was awarded as loss of earnings. I see no such award

on record. The award is Ksh.200,000/- as general damages for the injuries sustained.

32. I see no reason to interfere with this award as it is both reasonable and fair in the circumstances of this case. The decisions relied on are relevant and useful in reaching that reasonable decision. I see nothing excessive about it. Nothing has been said about the award for Special Damages and I see no reason to interfere with it.

33. In effect and for the reasons given, I see no basis for interfering in any way with the Judgment and decree of the lower court. I see no merit in the Appeal.

34. The said Appeal is hereby dismissed with costs to the Respondent.

35. Orders Accordingly.

Dated, signed and delivered in open court at Meru this 3<sup>rd</sup> Day of May 2006

**ISAAC LENAOLA**

JUDGE