



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

Civil Appeal 693 of 2002

JOSEPH MUTURI KOIMBURI APPELLANT

VERSUS

MERCY WAHAKI MUGO RESPONDENT

**(An Appeal from the Judgment and Decree of Hon. (Mrs) Tripsisa W. Wamae, SRM in Nairobi
CMCC No. 9976 of 2001 delivered on 8th November, 2002).**

JUDGMENT

By a Plaint dated 7th November, 2001, the Respondent (Plaintiff in the lower Court) claimed damages arising out of a motor vehicle accident involving her and the Appellant's motor vehicle reg. no. KTP 257 on the night of 18th December, 2000 along Jogoo Road in Nairobi.

The lower Court, in its Judgment delivered on 8th November, 2002 found the Appellant 70% to blame for the accident, and awarded the Respondent the sum of Kshs.211,750/=. It is against that Judgment that the Appellant has preferred this Appeal, citing the following seven grounds of appeal:

- 1. THAT the trial Magistrate erred in Law and fact in not considering the evidence in support of the Defence or at all.**
- 2. THAT the learned trial Magistrate erred in Law and in fact in not considering the Defendants submissions or at all.**
- 3. THAT the learned trial Magistrate erred in Law and in fact in apportioning liability between the Plaintiff and the Defendant at 30:70 respectively while the evidence produced before the Court did not support such a finding and the Defendant contends that the Plaintiff was 100% liable.**
- 4. THAT the learned trial Magistrate erred in Law and in fact in finding that the Plaintiff sustained any injuries or that any such injuries sustained were serious which finding was not supported by evidence produced before the Court.**
- 5. THAT the learned trial Magistrate erred in Law and fact in finding that the injuries as pleaded were at variance with the evidence adduced.**
- 6. THAT the learned trial Magistrate erred in Law and in fact in awarding general damages that were manifestly excessive.**

7. ***THAT the learned trial Magistrate erred in Law and in fact in finding that ownership of the motor vehicle which was expressly denied by the Defendant in his pleadings and otherwise was proved without any evidence or records from the registrar of motor vehicles or at all.***

The Appellant's argument is essentially that the lower Court came to the wrong conclusion in finding the Appellant 70% to blame. The evidence, according to Mr Wachira, Counsel for the Appellant, points quite the opposite. The accident took place at 10.00 pm when visibility was poor. Jogoo Road is a dual carriage way, with a foot-bridge not far from the accident, which according to Counsel, the Respondent failed to use, and instead attempted to cross the road which is actually blocked in the centre to prevent pedestrians from crossing the road. Mr Wachira submitted that the Respondent was crossing the dual carriage way unlawfully when she was hit by the Appellant's motor vehicle. He argues that the damage to the motor vehicle on its right side, plus the blood stains that were found on the right of the road, are consistent with the theory that the accident occurred as the Respondent was attempting to cross the road. In addition, two witnesses, the Respondent and Inspector Charles Kamau Chege, (PW 3) both testified that the accident took place on the right of the road.

On the other hand, Mr Mwangi, Counsel for the Respondent, argued that the Respondent was standing on the left side of the road when the Appellant who was driving at an excessive speed, lost control of the motor vehicle, and hit her on the left side of the road.

This being a first appeal, it is my duty to assess and re evaluate the evidence before the lower court, bearing in mind that this court has neither seen nor heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before her and that she has not acted on wrong principles in reaching her conclusion. Now, having warned myself of that, let me examine the relevant evidence before the lower court.

The evidence before the lower court is consistent with the fact that this accident happened when the Respondent was attempting to cross the dual carriage way unlawfully. The point of impact is the right side of the road where blood stains were found, and the undisputed evidence that it was the right side of the motor vehicle that was damaged in the process. This could not have possibly happened if the Respondent was hit on the left side of the road while "standing" there. Besides, what was she doing "standing" on that

part of the road at 10 pm, when in fact the only way to cross the road was by a foot-bridge in her close proximity? On a balance of probability, I find, as indeed did the learned Magistrate, that the Respondent was hit when trying to cross the road. This is what the lower Court said in its Judgment:

"The evidence of the defendant and PW 3 is that Plaintiff was crossing the road when the accident occurred. Defendant said he saw Plaintiff crossing the road but he was unable to avoid her. This means defendant was driving so fast to brake abruptly. There was a fly over which Plaintiff failed to use in order to cross the road. I apportion liability at 70:30% in favour of Plaintiff."

Having found that the Respondent was hit while crossing the road, the lower court then was wrong in apportioning liability, and finding the Appellant 70% to blame. In my view the Respondent was fully to blame for her reckless behaviour in attempting to cross a busy dual carriage way at that time of the night, when in fact the foot-bridge was available for that purpose, in fairly close proximity. Any driver of ordinary prudence is not expected to find pedestrians on that part of the road, at that hour of the night, and the Appellant could not possibly be blamed for that accident. I adopt the reasons of the Court in a similar situation – in the case of ***Waindi vs Pharmaceutical Manufacturing Co. Ltd (1986) KLR 506.***

Accordingly, and for reasons outlined, this appeal is allowed with costs to the Appellant both here and in the lower Court, and the decision of the lower Court is set aside, and substituted with the Order dismissing the Respondent's suit in the lower Court with costs to the Appellant.

Dated and delivered at Nairobi this 30th day of November, 2006.

ALNASHIR VISRAM

JUDGE