



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI

CIVIL APPEAL NO 621 OF 2002

JAMES KARIUKI MURAYA ..... APPELLANT

VERSUS

DAVID MUTURI MWANGI ..... RESPONDENT

JUDGMENT

This appeal emanates from the Judgment of the Lower Court delivered on the 3rd day of October, 2002 in Thika PMCC No 1188 of 1999. The case proceeded in the absence of the Respondent who, despite service, chose not to be present.

Briefly the facts of the case according to the Appellant are that, on the 4th of April, 1999 at about 4.30 am he was walking by the road side along the Gacharaga-Githumu road, when he heard a sound of a motor vehicle from behind and saw its headlights. He quickly moved away to the side of the road. Suddenly the motor vehicle left the main road and knocked him down on the side walk. The vehicle did not stop.

According to the Respondent, it was foggy and misty on the material night and the visibility was poor. As he drove he heard a sudden bang on the left side of his motor vehicle. He knew he had hit something or someone, but decided not to stop.

Having heard and evaluated the evidence before him, the learned trial Magistrate found both parties responsible for the accident, and apportioned 40% blame on the Appellant (Plaintiff). Aggrieved by that decision, the Appellant has appealed, on the following grounds of Appeal:

- 1. THAT the Honourable Trial Magistrate misdirected himself and erred in law and in fact in holding that the Plaintiff was guilty of contributory negligence to the extent of 40%.***
- 2. THAT the Honourable Trial Magistrate misdirected himself and erred in law and in fact in failing to apply the relevant principles in apportioning liability based on the evidence before the trial court.***
- 3. THAT the Honourable Trial Magistrate further misdirected himself and erred in law and in fact in awarding the Plaintiff an inordinately low sum of Kshs.70,000/= in general damages considering the seriousness of the Plaintiff's injuries.***
- 4. THAT the Honourable Trial Magistrate erred in law and misdirected himself by failing to appreciate the submissions tendered on the Plaintiff's behalf regarding both liability and quantum.***

Both liability and quantum are in issue in this appeal.

On the issue of liability, Counsel argued that the Appellant was walking along the road one metre away from the road when the Respondent knocked him down. From the evidence the Respondent admits that he did not stop despite having heard a bang suggesting he could have knocked someone down. Evidence also shows that the Respondent was charged with and convicted of driving a defective motor vehicle at the material time. Mr Munge, Counsel for the Appellant, quoted a section in the *Halsbury's Law of England 4th Edition, Volume 34* and the Traffic Act Cap 403 Laws of Kenya to support his submission that the Respondent should be held 100% liable. At page 41, paragraph 50, *Halsbury's* says that ... "driving a defective vehicle where the defect might reasonably have been discovered is a negligent act."

In finding the Appellant 40% to blame, the Magistrate said that "the Plaintiff ought to have taken care by wearing bright and luminous clothes so that the Defendant would have seen him."

It is an unfair expectation to have every pedestrian wear luminous clothes, so that they can be seen by drivers. In any event, this Appellant was walking on the side of the road when the left front of the Respondent's motor vehicle hit him. The Respondent was not keeping a proper look-out, and given that the weather conditions were poor, he had a greater duty to keep a proper look-out. In my evaluation of the evidence before the lower court, the Respondent was 100% to blame for this accident, and I so hold.

On the issue of quantum, medical evidence before the lower court shows that the Appellant suffered from a cut over right upper eyelid, fractures of radius and ulna bones of left forearm and a cut over left shoulder. He could not work for eight (8) months and had a permanent disability of up to 15 degrees.

I have carefully gone through all the authorities quoted by the Counsel for the Appellant and have this to say.

In the case of *Caleb Omunga Namboya vs J V Strabag – Bau – Lima Limited HCCC No 2660 of 1994*, the Plaintiff suffered from badly minuted fractures of the centre of the shaft of his right radius ulna with displacement which the doctor described as "nasty". The court awarded Kshs.300,000/= for pain, suffering and loss of amenities.

In the case of *Pamela A Adero vs Victor O Otiato HCCC No 1750 of 1994*, the Plaintiff sustained two fractures of right arm, spinal injury and injury to the chest and abdomen. The court awarded Kshs.175,000/= for pain and suffering.

In all of the above cases permanent disability was assessed between 35% to 65% and the court awarded between Kshs.175,000/= to Kshs.300,000/=

That being so, and noting that both of those cases are about 10 years old, I believe the proper award here should have been Kshs.150,000/= for general damages.

Accordingly, I set aside the Judgment of the Lower Court and enter Judgment in favour of the Appellant in the amount of Kshs.150,000/= for general damages, and uphold the lower court's award of Kshs.1,500/= for special damages, making a total award for damages of Kshs.151,500/= in favour of the Appellant, together with costs both in the lower court and here.

Dated and delivered at Nairobi this 5th day of October, 2004.

**ALNASHIR VISRAM**

**JUDGE**