

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 24 OF 2015

PETER MBURU.....APPELLANT

VERSUS

1. DENIS AGEGA NYAMAGWA.....1ST RESPONDENT

2. DAVY MISUSE OMAE.....2ND RESPONDENT

{Being an Appeal from the Judgement and Decree of Hon. J. Njoroge – CM dated and delivered on the 16th day of June 2014 in the original Nyamira Chief Magistrate’s Court Civil Case No. 60 of 2010}

JUDGEMENT

This appeal is on all fours with HCCA 22 OF 2015 and HCCA 23 OF 2015. The three appeals arise from a judgement wherein the 1st respondent sued the appellant and the 2nd respondent for compensation for personal injuries sustained in an accident/collision involving a lorry KBH 182Q belonging to the appellant and a matatu KAW 915B belonging to the 2nd respondent. The trial magistrate treated CMCC 58 of 2010 (Appeal No. 22 of 2015) as a test suit on the issue of liability and in the end found the appellant wholly to blame for the accident thereby entering judgement on liability against him at 100%.

The appellant was aggrieved and hence this appeal. His grounds of appeal and the submissions by counsel for the parties are identical in all the three appeals and I therefore see no reason to reproduce them here as I have summarized them in the other two appeals. Suffice it to state that as in those two other appeals it is my finding that the trial magistrate’s finding on liability was based on a misapprehension of the evidence as clearly the drivers of both vehicles were to blame for the collision. The appellant’s driver must however shoulder the bigger blame because he was driving in a zig zag manner in a road that had other traffic. Although he claimed not to have been in control of the vehicle as he had been carjacked, he did not prove that allegation and so the 1st respondent’s evidence was not rebutted. However, it is my finding that the driver of the matatu was also to blame for failing to take any action to avoid the collision. The court heard that this was because he was at a high speed. As in **HCC Appeals 22/2015** and **23/2015** I hereby apportion liability between the appellant and the 2nd respondent in the ratio 70%:30% - the appellant to shoulder 70% and the 2nd respondent 30%.

On the quantum of damages, the plaintiff sustained soft tissue injuries – a dislocation of the left ankle joint, cuts on the upper hand and forearm, blunt injury to the head and blunt trauma to the head. It is my finding that the award of damages was not inordinately excessive as to warrant interference by this court. The appeal on the quantum of damages therefore fails but that on liability succeeds and the general and special damages shall be apportioned between the appellant and the 2nd respondent in the ratio 70%:30%. The same applies to the costs of the suit in the lower court.

As for the costs of this appeal, the same shall be borne by the respondents. Interest on damages shall be calculated in the usual manner. Orders accordingly.

Signed, dated and delivered in Nyamira this 14th day of February 2019.

E. N. MAINA

JUDGE