



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 22 OF 2015

PETER MBURU.....APPELLANT

=VRS=

1. JOSEPH ONDORA MAKINA.....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. 98 of 2011}

JUDGEMENT

This appeal is on all fours with HCC Appeal No. 23 of 2015. Here as in that appeal the 1st respondent had sued the appellant and the 2nd respondent for compensation for injuries he sustained in a collision involving a motor vehicle Registration No. KBH 182Q Mitsubishi lorry belonging to the appellant and a matatu Registration No. KAW 915B belonging to the 2nd respondent in which he was travelling as a fare paying passenger. The trial magistrate after considering and evaluating the evidence of the parties found the appellant wholly liable for the accident. He then awarded the 1st respondent general damages of Kshs. 400,000/= and special damages of Kshs. 7,700/=. Being aggrieved the appellant filed this appeal. The appeal is premised on grounds that: -

- “1. The Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.**
- 2. The Learned Trial Magistrate misdirected himself in ignoring the written submissions presented and filed by the Appellant in their entirety.**
- 3. The Learned Trial Magistrate erred in not taking into account the evidence presented before him in totality and in particular the evidence presented on behalf of the Appellant.**
- 4. The Learned Trial Magistrate erred in failing to hold that the 1st Respondent failed to prove negligence on the part of the Appellant while the onus of proof lay with the 1st Respondent.**
- 5. The analysis of the evidence as per the judgement is extremely wanting in material respects.**
- 6. The Learned Trial Magistrate misapprehended the evidence on record to a material degree resulting in his arriving at a wrong conclusion.**
- 7. The Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.”**

The appeal was canvassed by way of written submissions. I have considered those submissions and also considered and re-evaluated the evidence in the court below so as to arrive at my own conclusion – (**Selle V. Associated Motor Boat Co. Ltd [1968] EA 123.**)

In **HCCA 23 OF 2015 (Peter Mburu Vs. Evans Masese Maranga & Another)** I made reference to this appeal and the proceedings of the lower court from whence the appeal arises and it was my finding that the trial magistrate’s finding on liability is based on a misapprehension of the evidence given that the 1st respondent blamed both the appellant and the 2nd respondent for the collision. He blamed the driver of the appellant’s vehicle for driving in a zig zag fashion and in the path of the matatu but also blames the driver of the matatu for driving at such a high speed that he could not take any action to avoid the collision. The 1st respondent testified that had the driver of the matatu driven at a

moderate speed he could have avoided the collision. It was also his evidence that he could not apportion blame. The evidence adduced by the 1st respondent places blame for the collision on both drivers. However, it is evident that the appellant's driver was more negligent as he was driving in a zig zag fashion on a road that had other road users a fact he admitted albeit blaming it on a carjacking which as the trial magistrate correctly found he did not prove. I shall therefore disturb the trial magistrate's finding on liability as it is not supported by evidence and substitute it by apportioning liability between the appellant and the 2nd respondent in the ratio 70%:30%.

As for the quantum of damages I have considered the injuries sustained by the 2nd respondent, the authorities cited by counsel for the parties and all other factors including the passage of time and it is my finding that the award is not inordinately excessive as to warrant this court to disturb it.

Accordingly the appeal on quantum fails but that on liability succeeds and the damages awarded shall now be apportioned between the appellant and the 2nd respondent in the ratio 70%:30%. The costs of this appeal shall be borne by the respondents but those in the lower court shall be borne by the appellant and the 2nd respondent to the extent of their liability. Interest shall be at court rates with that on specials being computed from the date of filing suit and that on the general damages from the date of the judgement in the court below. It is so ordered.

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

E. N. MAINA

JUDGE