



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 156 OF 2016**

**WAIGANJO EDWARD ALIAS EDWARD GACHUKIA.....1<sup>ST</sup> APPELLANT**

**PAUL MWAURA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**PATRICK MUIRURI.....1<sup>ST</sup> RESPONDENT**

**MUDAMBA EDGAR ALIAS EDGAR MUSANYI MUDAMBI.....2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment of Hon D.W. Mburu (Mr), Principal Magistrate (PM) at the Chief Magistrate's Court at Milimani in Civil Case No 1691 of 2011 delivered on 4<sup>th</sup> March 2016)**

**BETWEEN**

**PATRICK MUIRURI.....PLAINTIFF**

**VERSUS**

**WAIGANJO EDWARD ALIAS EDWARDGACHUKIA.....1<sup>ST</sup> DEFENDANT**

**MUDAMBA EDGAR ALIAS EDGAR MUSANYI MUDAMBI.....2<sup>ND</sup> DEFENDANT**

**PAUL MWAURA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. In his decision of 4<sup>th</sup> March 2016, the Learned Trial Magistrate, D Mburu (Mr), Principal Magistrate (PM), delivered judgment in favour of the 1<sup>st</sup> Respondent against the Appellant and 2<sup>nd</sup> Respondent jointly and severally for the sum of Kshs 216,300/= made up as follows:-

**General Damages      Kshs 200,000/=**

**Special Damages    Kshs    6,300/=**

**Witness expenses    Kshs 10,000/=**

**Total                  Kshs 216,300/=**

Plus costs and interest at court rates. He apportioned liability at 70% as against the 2<sup>nd</sup> Respondent and thirty (30%) per cent as against the Appellants herein.

2. Being dissatisfied with the said judgment, on 4<sup>th</sup> March 2016, the Appellants filed their Memorandum of Appeal dated and filed on 4<sup>th</sup>

April 2016. They relied on four (4) Grounds of Appeal.

3. The Appellants' Written Submissions were dated 5<sup>th</sup> May 2018 and filed on 15<sup>th</sup> May 2018 while those of the 2<sup>nd</sup> Respondent were dated and filed on 21<sup>st</sup> June 2018. The 1<sup>st</sup> Respondent did not file any Written Submissions because the question was one of apportionment of liability between the Appellants and the 2<sup>nd</sup> Respondents.

4. When the matter came up on 3<sup>rd</sup> October 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

#### **THE APPELLANTS' CASE**

5. The Appellants submitted that they were exonerated from any blame by the 1<sup>st</sup> Respondent but that the Learned Trial Magistrate blamed them on the ground that their driver never testified to tell the court what he did to avoid the accident. They pointed out that they and the 2<sup>nd</sup> Respondent closed their respective cases as they were unable to serve their witnesses to attend court to testify.

6. They were emphatic that the 1<sup>st</sup> Respondent herein blamed the 2<sup>nd</sup> Respondent for having caused the accident because their driver was on their right side of the road and that he did what a reasonable man would have been expected to do in the circumstances.

7. They argued that the 1<sup>st</sup> Respondent linked the 2<sup>nd</sup> Respondent to the injuries that he sustained and in this regard, they relied on the cases of **Brian Muchiri Waihenya vs Jubilee Hauliers Ltd & 2 Others [2017] eKLR** and **Daniel Kimani Karagania vs Ngugi David & 3 Others [2016] eKLR** to buttress their case that evidence must be adduced by a plaintiff to connect a defendant to the injuries that he sustained.

#### **THE RESPONDENT'S CASE**

8. On his part, the 2<sup>nd</sup> Respondent argued that the Appellants' Record of Appeal was incomplete as they had not included the Written Submissions that had been made in the lower court. In this regard, he referred this court to the cases of **Samuel Mathenge Ndiritu vs Martha Wangare Wanjira & Another [2007] eKLR** and **Muchoki Kanyonyo vs Stephen Kuyuka Kanyenye [2012] eKLR** where appeal were dismissed as the Records of Appeal therein were incomplete.

9. He was emphatic that the Appellant did not adduce any evidence to shift the blame to him and that in the absence of any evidence placing blame on either driver in terms of sketch plans, then liability ought to be reviewed so that each driver bears fifty (50%) per cent liability.

10. He placed reliance on the cases of **Caroline Anne Njoki Mwangi vs Paul Ndungu Muroki [2004] eKLR** and **Michael Hubert Kloss & Another vs David Seroney & 5 Others [2009] eKLR** where liability was apportioned at 50% - 50% against each of the defendants therein.

#### **LEGAL ANALYSIS**

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

12. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

13. Having considered the respective parties' Written Submissions, it was clear that the only issue that had been placed before this court was that of apportionment of liability. However, the Respondent had also raised the issue of competence of the Appellants' Record of Appeal. The court therefore found it necessary to consider the competence of the Record of Appeal due to the missing 2<sup>nd</sup> Written Submissions in the said Record as a preliminary issue. The Appellants did not address themselves to the said issue.

#### **I. COMPETENCE OR OTHERWISE OF THE APPELLANTS' RECORD OF APPEAL**

14. Order 42 Rule 13 (4) of the Civil Procedure Rules provides that at the time of admitting the Appeal, the judge must be satisfied that the following documents have been filed and served by and upon either party.

**a. the memorandum of appeal;**

**b. the pleadings;**

**c. the notes of the trial magistrate made at the hearing;**

- d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;**
- e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;**
- f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.**
- g. a translation into English of any document not in English.**

15. Further, Order 42 Rule 2 of the Civil Procedure Rules provides that the court will not consider whether or not to reject or allow an appeal until a certified copy of the decree or order appealed from has been filed. The said Order stipulates as follows:-

**“Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed”.**

16. Notably, the Appeal herein was admitted on 1<sup>st</sup> December 2017 by Mwongo J. This court gave directions on the disposal of the Appeal herein. When the matter came up on 28<sup>th</sup> June 2018, the 2<sup>nd</sup> Respondent’s counsel raised the question of the missing record from the lower court.

17. Subsequently, the Appellants counsel filed a Supplementary Record of Appeal on 30<sup>th</sup> July 2018 enclosing certified copies of the proceedings. The 2<sup>nd</sup> Respondent did not object to the said Record of Appeal as filed or file submissions to address the issue of the missing record. This court therefore took the view that the 2<sup>nd</sup> Respondent was no longer pursuing the question of competency or otherwise of the Appeal herein.

18. Be that as it may, in the event the 2<sup>nd</sup> Respondent was still intent on pursuing the issue, this court took the view that it could only strike out the Record of Appeal if it did not have a certified copy of the decree or order that was being appealed from. The 2<sup>nd</sup> Respondent also had liberty to file and served a Supplementary Record of Appeal attaching his Written Submissions. He did not do so.

19. It would therefore be against the interests of justice to strike out the Record of Appeal merely because the 2<sup>nd</sup> Respondent’s Written Submissions were not attached to the Record of Appeal and to look at the merits of the case.

## **I. LIABILITY**

20. A perusal of the proceedings shows that the 1<sup>st</sup> Respondent was travelling in Motor Vehicle Registration No KAW 512J along Magadi Road when the driver of Motor Vehicle Registration No KBJ 412T started overlapping and came onto the lane of the Motor Vehicle he was travelling in. He was emphatic that the driver of Motor Vehicle Registration No KBJ 412T was to blame for the accident. Motor Vehicle Registration No KAW 512J was registered in the name of the 1<sup>st</sup> Appellant and driven by the 2<sup>nd</sup> Defendant. Motor Vehicle Registration No KBJ 412T was registered in the name of the 2<sup>nd</sup> Respondent.

21. No CPL 58299 Wycliffe Muhonja (hereinafter referred to as “PW 2”) testified that the driver of Motor Vehicle Registration No KBJ 412J was overtaking when he collided with Motor Vehicle No KAW 512J which was in its lane. He pointed out that both the Police Abstract Report and the Occurrence Book (OB) showed that the driver of KBJ 412T was the one who was to blame for the accident.

22. The Learned Trial Magistrate observed that the driver or owner of KAW 512J did not come to testify in court to explain what evasive action he took to avoid the accident. It was on the basis of that that he found the Appellants to have been thirty (30%) per cent to blame.

23. It was evident from the Appeal that the Appellants case was that they ought not to have been found to blame because the 1<sup>st</sup> Respondent was clear that the accident herein had been caused by the 2<sup>nd</sup> Respondent and that it was irrespective that the 2<sup>nd</sup> Appellant did not testify in court.

24. While it was true as the Appellants had argued that the 2<sup>nd</sup> Respondent was the one who was said to have been to blame for the accident herein, the Appellants ought to have demonstrated what evasive action the 2<sup>nd</sup> Respondent took to avoid the accident as was rightly observed by the Learned Trial Magistrate. The 2<sup>nd</sup> Appellant or any other witness could have testified if the 2<sup>nd</sup> Appellant slowed down and swerved to avoid a collision. This is because every road user must have due regard to other road users. In the absence of such evidence, the Appellants could not escape liability entirely.

25. Notably, the 2<sup>nd</sup> Respondent submitted that liability ought to have been apportioned equally as against him and the Appellants. This could not have been so because his driver was on the wrong side of the road. He had to take the higher portion of blame.

26. Doing the best that this court could do, it was the considered view that apportionment of liability at 85%-15% as against the 2<sup>nd</sup> Respondent and the Appellants herein respectively was more reasonable as opposed to 70% liability against the 2<sup>nd</sup> Respondent and 30% against the Appellants herein.

## **DISPOSITION**

27. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4<sup>th</sup> March 2016 was partly successful and is hereby allowed in the following terms:-

**1. Judgment be and is hereby entered against the Appellants and the 2<sup>nd</sup> Respondent jointly and severally for Kshs 216,300/= made up as follows:-**

**General Damages Kshs 200,000/=**

**Special Damages Kshs 6,300/=**

**Kshs 216,300/=**

**2. The apportionment of liability at 70% - 30% against the Appellant and the Respondents respectively as was apportioned by the Learned Trial Magistrate on 4<sup>th</sup> March 2016 is hereby set aside and/or vacated instead, liability be and is hereby apportioned at 85% - 15% as against the 2<sup>nd</sup> Respondent and Appellants respectively. For the avoidance of doubt, the 2<sup>nd</sup> Respondent and the Appellants shall bear 85% and 15% of the 1<sup>st</sup> Respondent's claim respectively.**

**Plus costs and interest thereon at court rates.**

28. Each party to bear its own costs of this Appeal.

29. It is so ordered.

**DATED and DELIVERED at NAIROBI this 11<sup>th</sup> day of December 2018**

**J. KAMAU**

**JUDGE**