



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL APPEAL NO. 31 OF 2012**

**JACKSON MUTURI NJOROGE .....APPELLANT**

**VERSUS**

**WILLIAM WAWERU MAINA .....RESPONDENT**

**JUDGMENT**

1. On 14/4/1991 the Appellant motor vehicle Reg. No KYC 367 collided with the respondents Motor cycle Registration No KPM 557 along Kitale Kapenguria road. According to the plaint the respondent sustained the following injuries.

- a) **sutured wound on upper hip**
- b) **Wound on left from-temporal area.**
- c) **cut tongue**
- d) **Wound on right knee**
- f) **Fracture on right fibula**
- g) **Dislocated right ankle**

2. In the same breath the respondent motor cycle was damaged and he pleaded for special damages of Ksh 50,428 being the costs of repairs.

3. The Appellant on his part did file a defence denying the allegations as contained in the plaint and he went further to counterclaim for Kshs 167,000 being the costs of repairing the said vehicle as well as Kshs 1000 per day being the loss of user of the vehicle which was then operating as a matatu.

After along false start the suit did proceed to hearing and the parties evidence can be summarised as follows:-

4. **PW1 Dr Samwel Chege Njenga** testified on behalf of the respondent and said that he examined the respondent and enumerated the injuries he sustained. He also produced the medical legal report. This report was prepared 3 years after the accident.

5. **PW2 George Njenga Kuria** the respondent testified that he was riding his motor cycle on the

material day on the left side of the road from Kitale heading to Kapenguria direction at around 7 pm. On nearing the turnoff he put the right hand indicator. However before he turned on the right a speeding vehicle hit him from behind and he was injured and lost consciousness. He was treated at the District Hospital where he was admitted and later at Mt Elgon hospital for 8 days . He blamed the accident on the respondent as he hit him from behind.

**6. PW4 Senior Sergeant Peter Munene** who was the base commander at Kitale Police Station testified on behalf of the traffic police department. According to him the appellant had been charged with the offence of careless driving and driving a defective motor vehicle but the charges were withdrawn under Section 87(a) of the Criminal Procedure Code. He produced the police abstract. He was however unable to explain why the charges were withdrawn against the appellant.

**7. PW5 Dr James Mungua** produced the P3 form on behalf of the respondent which showed the extent of the injuries he sustained.

8. In his defence the appellant testified that his driver one the Late Joseph Njuguna Thiongo was driving the said vehicle on that material day. That he was notified of the accident and he went to take the vehicle for inspection the following day which when assessed showed that the vehicle had no preaccident defects. He also produced the receipt for repairs totalling Kshs 110,000 but was unable to produce any receipt for the spares amounting to Kshs 167,000 as the same according to him were burned during the post-election violence of 1993.

**9. DW2 Richard Mwangi Kamau** testified in favour of the appellant. He said that he was a passenger in the said Matatu on that day and he witnessed the accident as he sat on the front seat. He said that the motorcycle attempted to cross on the right side as the matatu attempted to pass but he rammed into the Matatu. He said that the motorcycle rider did not even indicate as he turned right. He blamed the accident on the motorcycle rider. He said that motor vehicle broke so hard that it had a tyre burst.

10. Both parties closed their cases and the court found that they were equally to blame for the accident. The court apportioned liability at 50:50 basis. The appellant being dissatisfied filed this appeal citing several grounds in his memorandum of appeal. Substantially the grounds of appeal centres on the question of liability namely, that it was erroneous for the trial court to have apportioned liability on 50:50 basis as the facts clearly showed that the accident was occasioned by the respondent. The other issue is on negligence namely, that it was indeed the respondent's driver or agent who was negligent. The other ground is on quantum which according to him was excessive in the circumstances.

11. Both parties have filed their written submissions together with authorities which I have perused.

### **Analysis and Determination**

12. It is trite law that this court will not interfere with the trial courts findings unless the same is founded on wrong principles of Law and or facts as was clearly stated by the Court of Appeal in Nkube Vs Nyamiro (1983) KLR 403 that:

**“ A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”**

13. I propose to start with the question of negligence and through the same answer the question of liability. It is apparent that the only eye witness to the accident were the respondent and DW2 the latter being a fare paying passenger though he did not produce any receipt. The question of the occurrence of the accident, the time and the place is not disputed. The only question is who caused it.

14. In his evidence in chief the respondent stated as follows;

**“On nearing 100 metres from turn off, I put my right hand indicator. I have been riding on**

**the left lane. I stood down and the right side was clear so I turned off. Before I left the tarmac, a speeding vehicle behind me came and hit me ..... The accident occurred because that driver was careless. I showed one indicator and even pointed out with the hand”**

15. On cross-examination he said;

**“ I was injured at about 7.15 pm. It was about dark. I was on the tarmac from Kitale heading towards Kapenguria. The road was two lanes. I was in the lane heading to Kapenguria. The vehicle hit me was behind me. Same lane. I was hit on the right. I had crossed over to the right lane which is used by vehicles from Kapenguria which hit me left his lane for the other lane. It is not true that the driver was trying to avoid me when he moved its where I moved. The motor vehicle slowed behind me he was too fast.”**

16. On his part DW2 stated that;

**“ The motorcycle was a head of us riding on the left side of the road. Our driver attempted to overtake him but the motorcyclist crossed to the right side of the road abruptly. The driver swerved to the right side of the road in abid to avoiding the accident but the motorcyclist rammed into us. The cyclist did not even indicate as he turned right.”**

17. On cross-examination he stated;

**“The driver of the motor vehicle had started overtaking before the motorcyclist turned to the right abruptly but the rider still hit him since he was on high speed. The motor cyclist hit the side of the motor vehicle. I saw well since he hit my side of the motorvehicle.”**

18. From the above evidence by both parties, it is clear that the accident occurred on the right hand side of the road. It is alleged that the respondent was attempting to turn on the right side yet at the same time the appellant was overtaking. Is it possible that the motorcycle rider failed to indicate? Is it possible that the matatu driver failed to see the signal as a result of overspeeding?

There is no traffic police report to indicate the spot where the accident occurred and the extend of the breaking and other features on the road. This perhaps would have explained whether there were skit marks or any form of breaking. Unfortunately the Matatu driver died before testifying.

19. None of the parties explained the extend of the darkness prevailing at that moment. It was agreed that the accident occurred around 7.30 pm. Was there still some light from the sunlight? Had any of the parties put on their respective lights as expected?

20. The appellant stated that there was no indication from the respondent that he was going to turn to the right. This was disputed by the respondent. However this Could be difficult to tell as each party held its position. Further if the matatu was attempting to overtake is it possible that it was in such a high speed that he was unable to see the rider? Is it possible that the matatu driver failed to keep a reasonable distance from the motorcyclist as expected?

21. These unanswered question leads to one irresistible conclusion that both parties were to blame. I find that the motorcyclist ought to have been careful to have been reasonable enough that there was a probability that the vehicle which was according to him 200 metres away could have attempted to overtake. The Matatu driver on the other hand prior to overtaking ought to have kept a reasonable distance from the motorcyclist and ensure that his lane was safe when overtaking. I find that the point of impact was on the right lane meaning that there was every possibility that both parties meet on that side as the rider tried to turn off and the matatu attempted to overtake.

In the premises I find the holding by the trial court that both parties were to blame for the accident probable especially in the absence of any other details from the traffic police . The question of liability and negligence being shared in my view was sound except that the matatu being behind ought to have

kept such a reasonable distance to ensure that even as it overtakes the lane was clear to do that. Consequently I shall not disturb the lower courts findings on liability as in any event it heard primary evidence from the parties.

22. On the question of quantum I have perused the nature of the injuries viz a viz the award by the trial court and the related authorities parties relied on. I do not think the same was excessive in the circumstances. The doctor opined that the injuries were of soft tissue in nature and that he had already healed.

The trial court in my view did not misdirect itself in the award granted. In any case the authorities cited were not very new and considering affluxion of time and other vagaries and taking into account the contributory negligence the award of Kshs 800,000/- was in my view sufficient.

23. The only area which I find the appeal being meritorious is on the issue of the repairs of the motorcycle. I agree with the appellant that there was no proof of kshs 50,428 awarded to the respondent. The receipt so far presented amounted to Kshs 16,346 which I shall proceed to allow and set aside the award of Kshs 50,428.

### **Conclusion**

24. The appeal only succeed to the extend that the special damages is reduced from Kshs 50,428 to Kshs 16,346.

The liability as found by the trial court is left undisturbed.

Each party shall bear its own costs on this appeal.

**Delivered this 14<sup>th</sup> day of February 2017.**

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Kiarie for the Appellant**

**No appearance for the Respondent**

**Court Assistant - Kirong**