



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 11 OF 2013**

**MARY MUATHE MUTHIKWA .....APPELLANT**

**VERSUS**

**STEPHEN NZUKI KYANYI .....1<sup>ST</sup> RESPONDENT**

**ISAAC MAINA THOMBA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT OF THE COURT**

**Introduction**

**Background of the appeal**

1. The appellant herein was involved in a Road Traffic Accident on the **12<sup>th</sup> October, 2010** along the Tala – Kangundo road. She was a fare paying passenger aboard motor vehicle registration number KAM 141W when either the 1<sup>st</sup> and/or 2<sup>nd</sup> defendant by themselves or by their employee, servant, agent and/or authorized driver allegedly negligently drove the said motor vehicle that the same veered off the road, rolled and landed into a ditch causing the appellant to suffer severe personal injuries. The Appellant filed a personal injury claim against the respondents in the lower court.

2. The matter was heard and was dismissed with the trial court holding that the plaintiff had failed to prove his case on a balance of probabilities. The plaintiff being aggrieved by the judgment of the lower court lodged this appeal, against the entire judgment. The appeal is opposed by the respondent who filed submissions to that end.

**Issues for determination**

3. In the appellants' Memorandum of Appeal (at pages 1-2 of the record of appeal) dated **30<sup>th</sup> June, 2010** and filed on **25<sup>th</sup> January, 2013**, the appellant raises eight (8) grounds of appeal. The grounds can be coalesced to two; whether the plaintiff was a fraudulent complainant as alleged and whether the plaintiff had proved his case.

**Submissions**

4. In brief, it is the appellant's submission that the respondents did not prove that the plaintiff was a fraudulent complainant. Therefore, the dismissal of the suit by the trial court was not only erroneous but also flawed.

5. The appellant submitted that from the record of appeal the main issue was that the appellant was a

fraudulent complainant. The respondents in their defence and through their witness (**Mr. Bernard Rotich (DW1)**) alleged that the plaintiff then, was not amongst those injured since her name was not in the Occurrence Book produced by DW1. However, it was the appellant's contention that she was amongst those injured in the said accident and as a result of which a Police Abstract and P3 Form was issued in her favour. The said documents were subsequently revoked by the said DW1 on the reasoning that the appellant's name was not in the Occurrence Book as **Mary Muthikwe Muathe** but as **Mary Mueni**.

6. The evidence adduced by the said defence witness was challenged through the testimony of (**PW4**), **PC Antony Irauka** the investigating officer. He stated that on the said date of the accident he visited the scene of the accident and assisted in taking the injured patients to the hospital and he further booked the said accident in the Occurrence Book, therefore the appellant herein was known to him as he was able to positively identify her in court. The witness also explained the process of filing the abstract and the P3 Form before the trial court. It was his testimony that the particulars or information filed in the abstract emanate from the Occurrence Book the same view which was echoed by the defence witness.

7. The point of departure from the defendant's theme of fraud is found on the DW1 testimony. The witness testified that the plaintiff was not among those who were injured in the said accident. **PW1 – Dominic Mbindyo** was the clinical officer attached to Kangundo District Hospital. He treated the claimant on **12<sup>th</sup> October, 2012**. He filed the P3 Form and his production of the discharge summary was objected to on the basis that he was not the maker. **PW2 was the appellant (plaintiff)**, she opted to rely on her sole evidence as the defence mounted a vigorous denial of her involvement in the accident. Further, **PW2 (Dr. Okere)**, was the doctor who was invited to produce the P3 and Medical Report. He gave secondary evidence since he neither treated nor prescribed medicine for the appellant. He further admitted that he could not confirm as to which accident the appellant was talking about and the cause of the accident and the injuries thereof since he was not the maker of the P3 form as stated and hence he could not support the appellant's involvement.

**8. DW1 – Bernard Rotich**, was the Base Commander at Kangundo police station. He stated that the plaintiff was not among those injured and that her name was not in the Occurrence Book. DW1 testified on the basis of the Actual Occurrence Book, and extract of the said Occurrence Book was certified and produced as D. Exht. 2. DW1 led the court through the Occurrence Book which had ten (10) names, none of the names belonged to the plaintiff. Further the name of the plaintiff **Mary Muthikwa** did not appear at all in the four (4) police records and DW1 categorically confirmed that **Mary Mueni** and **Mary Muthikwa Muathe** are two different persons. DW1 produced a Revocation letter as D.Exht. 1 recalling and nullifying the police abstract that had been issued to the appellant allegedly unprocedurally. DW1 led the trial through the procedure that is normally followed by the police officers once an accident had been reported, he stated as follows;

***In case of an accident the police officers are called to visit the scene and on arrival they ensure that all the people involved in the accident are rushed to the hospital and all their names are taken. This is reflected in the occurrence book and a copy is forwarded to the headquarters at vigilance house, later the injured person records a statement and a P3 issued.***

9. In this case the appellant's name did not feature anywhere in the police file, the Situation Report (SITREP), List of injured persons and the Occurrence Book. Therefore DW1 testified the claim was fraudulent and the appellant herein was not involved in the said accident.

10. On cross-examination DW1 admitted that he was not the investigating officer, however, he has the Base Commander at Kangundo Police Station and the investigating officer (PW4) was under him and received instructions under him. DW1 further stated that whichever date someone reports must be entered in the Occurrence Book. It was DW1's testimony that the appellants name was not entered in the OB of 05/12/10/2010.

11. However, on cross-examination it was evident that DW1 did not visit the scene of the accident, he did not prepare the abstract or fill its contents and further he did not carry out investigation to prove whether the plaintiff was a fraudulent complainant as alleged. He categorically stated that he relied entirely on the

records availed to him to arrive at the said conclusion. On further cross-examination he stated that he was not aware of any errors in the particulars of the plaintiff as entered in the Occurrence Book. The appellant submitted, correctly in the view of this court, that DW1's testimony was hearsay as he never carried out his own independent investigations to prove that the plaintiff was not amongst those injured on the said date of the accident. The appellant submitted that such allegations must be strictly investigated before arriving at the conclusion that one is a fraudulent complainant as such act constitutes a penal offence. In this case however no investigations were carried out before revoking the plaintiff's P3 Form and police abstract, hence denial of a constitutional right to justice. The appellant further submitted that the rules of natural justice require that a person exercising powers which in one way or the other curtails the rights and freedom of another person should afford such affected party an opportunity to be heard and a defence raised against such allegation. DW1 revoked the plaintiff's police abstract and P3 Form without affording her an opportunity to either defend herself or concede to the said allegations. For a police abstract to be declared fraudulent the investigating officer and the officer who prepared the police abstract must all be involved in the revocation process and where there is fraud the officer involved must face disciplinary action since fraud is criminal in nature.

12. The appellant submitted, again with concurrence by this court, that no proper mechanism was followed and that unilateral decision to revoke the said documents by DW1 then as the Base Commander of Kangundo Police Station was unlawful and malicious as no proper investigation was carried out to ascertain the facts in issue nor was the investigating officer consulted with regard to the same.

13. In dismissing the plaintiff's suit, the learned magistrate held that the plaintiff was the author of her misfortune (at page 113 line 15 and 16 of the record of appeal). On an analysis of the evidence on record, the learned magistrate found that the plaintiff's claim was fraudulent. From the judgment it appears the learned magistrate placed a lot of reliance on the testimony of DW1, on how the accident occurred.

14. The appellants in their submissions argue that **(PW4), PC Anthony Irauka** visited the scene and assisted in taking the names of the injured person and took them to the hospital, however during cross-examination he confirmed that he did not have any clarifications on the two names and it was not possible for a victim's name to be absent from the Occurrence Book unless one seeks treatment far away which was not the case herein.

### **Determination**

15. I have carefully considered the submissions. I understand it is the duty of this court to reevaluating and re-analyze the evidence so that this court can make its own independent view on the matter. In ***Oluoch Erick Gogo vs. Universal Corporation Limited [2015] eKLR***, the Court restated the duty of an appellant court as follows:

***“As a first appellate court the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of Selle & Another vs. Associated Motor Boat Co. Ltd & Another (1968) E.A 123, my duty is to evaluate and re-examine the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect...”***

16. I have carefully re-evaluated the evidence before the trial court. A finding of fraud on the part of the plaintiff was without proper analysis of evidence. There was obvious contradiction between the plaintiff's evidence and that of DW1. It was not the duty of DW1 to make entries on the O.B. His decision to revoke the Police Abstract and P3 was *ultra vires*. In any event, he could not revoke a document which had conferred certain rights to the appellant without hearing the applicant on the issue. Further, fraud is a criminal offence, and before a court declares a process fraudulent, cogent and non conflicting evidence must be placed before the court. So, on the issue of liability this court upholds the appeal and finds the respondent liable.

### **Damages**

17. From the treatment notes, the plaintiff suffered deep cut on the right forehead, torn lateral collateral ligament of the left knee joint and retroperitoneal bleedings. For these injuries the plaintiff proposed a sum of Kshs. 250,000= by way of general damages. They relied on the case of **Joseph Were Ouma vs. Peter O. Sigwilli & Another** where for soft tissue injuries a sum of Shs. 180,000= was awarded in 1993.

18. The respondent proposed a sum of Shs. 50,000= for general damages, submitting that the injuries were soft injuries

19. I have considered these submissions. In my view the injuries suffered by the plaintiff were fairly serious. The trial court did not indicate what it could have awarded by way of general damages had the court found for the appellant. In my assessment a sum of Kshs. 200,000= is adequate as general damages. Specials shall be Shs. 11,500=.

20. In the end, judgment is entered for the appellant against the respondent as follows;

***a. appeal herein succeeds.***

***b. damages Shs. 200,000=***

***c. Special damages Shs. 11,500=***

***d. Costs of the appeal and of the trial court shall be for the appellant.***

**That** is the judgment of the court.

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**E.K.O. OGOLA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 7<sup>TH</sup> DAY OF MARCH, 2017**

.....

**DAVID KEMEI**

**JUDGE**

**In the presence of:**

Serem – for Ngare for Appellant

Kariuki for Respondent

Court Assistant - Munyao