



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

**CIVIL APPEAL NO.173 OF 2012**

KANJI VAGJIANI .....1<sup>ST</sup> APPELLANT

AFRICAN BANK CORPORATION .....2<sup>ND</sup> APPELLANT

KASHRA & SONS LIMITED.....3<sup>RD</sup> APPELLANT

**VERSUS**

FRANCIS MWANZA MULWA .....RESPONDENT

*(Being an appeal from the judgment of Chief Magistrate's Court at Machakos delivered by **Honourable P. GESORA**, (Senior Principal Magistrate) on 25<sup>th</sup> September, 2012 in **MACHAKOS CM.CC.NO. 1089 OF 2010**)*

**JUDGMENT OF THE COURT**

1. This Appeal herein arose out of a decision delivered on 25/09/2012 by Honourable P. N. Gesora in **Machakos CMCC No.1089 of 2010** wherein the Appellant was held 100% liable for an accident and the Respondent awarded the sum of Khs.1,142,502/= as damages as well as costs of the suit and interest. The Appellant was dissatisfied with the said judgment and filed this appeal. the Memorandum of appeal dated 23/10/20112 raised the following ten grounds of appeal:-

- 1. The learned Magistrate erred in law and in fact in failing to appreciate that the Respondent's suit lacked merit and ought to have been dismissed.***
- 2. The learned Magistrate erred in law and in fact in failing to appreciate that the evidence of the Appellant's witness DW.1 with regard to how the accident occurred.***
- 3. The learned Magistrate erred in law and fact in failing to appreciate that the said DW.1's evidence was corroborated by the police report as read by PW.3 police constable Chacha.***
- 4. The learned Magistrate erred in law and fact in failing to appreciate the evidence of PW.3 who testified that from the police records blame could not be solely attributed to the Appellant's driver.***
- 5. The learned Magistrate erred in law and fact in finding the Appellants 100% liable for the accident.***
- 6. The learned Magistrate erred in law and fact in failing to attach due weight to Appellants evidence and submissions.***

**7. The learned Magistrate erred in law and fact in awarding the Respondent Kshs.550,000/= for use of alternative transport for 90 days.**

**8. The learned Magistrate erred in law and fact in entering judgment in the sum of Kshs.1,142,502/= to the Plaintiff instead of dismissing the subject suit.**

**9. The learned Magistrate erred in law and fact in failing to factor in the salvage value of Motor vehicle registration number KAE 344 D while computing the final award.**

**10. The learned Magistrate erred in law and fact in awarding the suit with interest to the Respondent.**

2. With the leave of the court, parties filed Written Submissions towards canvassing the Appeal herein. It was submitted for the Appellants inter alia that the trial Magistrate erred in finding the Appellants liable yet he had not take into consideration the relevant aspects of the Appellants witnesses specifically DW.1, who was the Appellant's driver who had been in control of Motor vehicle registration Number KAW 533 Y and whose version of events ought to have been believed. It was further submitted for the Appellant that it was the Respondent who should have been held solely liable for the accident for failing to control his Motor Vehicle registration Number KAE 344D and further that in a worst case scenario then liability should have been equally shared. It was also submitted for the Appellant that the trial court should have considered the fact that the Respondent was obliged to mitigate his loss instead of claiming charges for car hire for 90 days which was excessive and unreasonable. The Appellant sought reliance in the case of **MARTHA WANGARI NJOKA =VS= NAIROBI CITY COMMISSION [1992] eKLR** where it was held that damages are not necessarily arrived at by ascertaining what it would have cost to hire alternative transport. It was submitted for the Appellant that the Respondent would have been entitled to costs of alternative transport for only one (1) week at most and not three (3) months as claimed. Finally, it was submitted for the Appellant that the trial Magistrate failed to consider the aspect of the salvage value of the vehicle which is deductible from the pre-accident value in order to give the net value to the Respondent and reliance was sought in the case of **KENYA WILDLIFE CONSERVANCY & GEOFFREY GATOBU JAPHET [2015] eKLR.**

3. The Respondent opposed the Appeal. It was submitted for the Respondent that the Respondent's case was properly proved and that the trial court's decision was sound and ought not to be disturbed. It was further submitted for the Respondent that the Appellant's driver was solely to blame for the accident in that he had overtaken other vehicles and drove onto the lawful lane of the Respondent and this caused the accident. It was further submitted for the Respondent that his vehicle having been damaged to a write off condition, he was entitled to alternative transportation as well as the pre-accident value of his damaged vehicle. Finally it was submitted for the Respondent that the Respondent's case in the lower court was proved as required by law and hence the trial court's decision should stand and this Appeal be dismissed with costs to the Respondent.

4. I have carefully considered the evidence and the rival submissions by the parties. This being a first appeal the court is obligated to analyze and reassess the evidence on record and reach its own conclusion bearing in mind that it neither saw nor heard the witnesses testify (see **SELE =VS= ASSOCIATED MOTOR BOAT COMPANY [1968] EA 123).**

5. From the grounds of Appeal and the evidence tendered as well as the submissions, I find the issues for determination are as follows:

**1. Whether the learned trial Magistrate erred in law and fact in finding the Appellants to be 100% liable for the accident.**

**2. Whether the award of Kshs.1,142,502/= is inordinately high.**

6. From the record evidence as was captured by the trial Magistrate, it is not in dispute that an accident occurred on the 25/09/2009 along Mombasa – Nairobi highway involving two motor vehicles KAE 344 D

belonging to the Respondent and KAW 533 Y belonging to the Appellants as a result of which the Respondents Motor vehicle was completely written off. It was the evidence of the Respondent (PW.1) that he was driving his Motor vehicle KAE 344 D make Land Rover discovery along Nairobi – Mombasa road when at Lukenya Hills the Appellant’s truck Registration KAW 533 Y overtook other vehicles and moved onto his lane and hit it head on. He stated that his vehicle was extensively damaged and a report made to Machakos Police Station and his vehicle was later inspected by Fred G. Ngatiri (PW.3) who assessed the vehicle as a write off. The Respondent further stated that he was forced to hire a vehicle of similar make at a cost of Kshs.6,000/= per day for 90 days which cost him Kshs.540,000/=. He blamed the Appellants driver for the accident. The assessor put the pre-accident value of the vehicle at Kshs.570,000/= and produced the Assessment Report PC. Daniel Chacha (PW.3) of Machakos Police Station testified and produced the police abstract and blamed the Appellant’s driver who was then driving KAW 533 Y.

7. The Appellant’s driver (DW.1) stated that he was driving from Mombasa towards Nairobi when at Lukenya Hills a police vehicle passed him as it appeared to be chasing a certain Canter ahead of him but that the Canter sped off. According to the Appellant’s Driver the Respondent’s vehicle was hit by a hit and run bus. He further stated that he moved to the opposite lane to avoid hitting the Canter but nonetheless his truck overturned. He blamed the driver of the Canter.

8. From the evidence of the Respondent, the Police Officer, the Motor Vehicle Assessor and the Appellant’s driver, it is quite clear that there was a head on collision between Motor vehicles KAE 344 D and KAW 533 Y since Motor vehicle KAE 344 D was extensively damaged on the front. The Appellant’s driver confirmed in his evidence that he had driven on the opposite side which was the lane of the Respondent hence the accident. The Appellant’s driver seemed to suggest that there was another vehicle involved yet the same is not indicated on the police abstract. In fact the Appellant’s driver stated that there was a police vehicle around at the time and it could not have been easy for any other motorist to cause an accident and escape. The Police Officer who testified herein blamed the Appellant’s driver for driving on the opposite lane where there were oncoming traffic. Hence, I find the Appellant’s driver to have solely caused the accident. The learned Magistrate carefully examined and analyzed the evidence and gave clear and detailed reasons as to why he found the Appellant’s driver 100% liable for the accident. The Appellant’s driver was to blame for the accident as he left his lane and encroached onto the opposite lane without having a proper lookout and hence caused the accident. Consequently, I find that the trial Magistrate was correct in finding the Appellant’s driver solely at fault. I therefore dismiss the grounds in relation to that point and uphold the decision of the trial court on liability.

9. As regards the remaining issue namely whether the awards were inordinately high, there is need to refer to the lower court record. The Respondent had pleaded for both special and general damages. However, the trial court rejected the claim for general damages and only awarded special damages. Indeed special damages must be specifically be pleaded and proved. The Respondent vide paragraph 6 of his Complaint dated 31/08/2010 had specifically pleaded five items which included: ***pre-accident value of Motor vehicle KAE 344 D, Assessor’s charges, towing charges, Police Abstract, alternative transport at Kshs. 6,000/=per day for 90 days and search certificate all totaling the sum of Kshs.1,142, 502/=***. The trial Magistrate received the evidence of the Respondent who produced the requisite receipts and documents and in the end allowed the Respondent’s claim for Kshs.1,142,502/=. The Appellant has urged this court to interfere with the said award as it is excessive in the circumstances. The Appellant contends that the pre-accident value should attract a deduction of the salvage value and also that the charges on alternative transportation should only be allowed only for one week at most. Indeed an Appellate Court has discretion to interfere with an award of damages if the same is inordinately high or low. This was stated in the case of **BUTT =VS= KHAN [1977] I KAR** where the court held thus:-

***“An Appellant court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was either inordinately high or low.”***

I have perused the record and the evidence presented as well as the submissions. I take the following

view of the matter as regards the items that were specifically pleaded by the Respondent. As regards the claim for Kshs.570,000/= being pre-accident value, the assessor noted that the vehicle was completely written off and therefore I find that the Respondent's Insurer is entitled to the salvage upon compensating the Respondent's claim of Kshs.570,000/= being the value of the vehicle prior to the accident is legitimate. As regards the claim for alternative transport, I find the Respondent who is an advocate of the High Court could not be expected to use public transport as it would hamper his movements. The Respondent hired a vehicle of similar make costing Kshs.6,000/= per day for 90 days before he was able to obtain another car. He produced the hire agreement and receipts as proof that same had been incurred. The Respondent therefore specifically proved the same sum. All the other items appear not to be contested as there are also receipts in support thereof. The learned Magistrate did consider the period for loss of user and I am satisfied that he exercised his discretion judicially and judiciously and therefore the award for loss of user was reasonable. Suffice here to add that the usual practice in accident cases is for an insured to report to Insurer about the accident and the Insurer organizes for the loss assessors and investigators to take up the matter before the Insurer decides what cause of action to take regarding compensation and hence in such circumstances the delay or otherwise to assess an accident vehicle depends on the Insurer. The Magistrate therefore did not use wrong principle or irrelevant matters. I therefore see no need to interfere or disturb these awards.

10. In the result, I find all the Appellants' grounds of Appeal must fail. The Appellants Appeal herein is hereby dismissed with costs to the Respondents

It is so ordered.

**Dated, signed and delivered at Machakos this 10<sup>TH</sup> day of MAY 2017.**

**D. K. KEMEI**

**JUDGE**

**In the Presence of:-**

F. M. Mulwa for Respondent

Miss Mavindia for Mushila for Appellant

C/A: Kituva