



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKUENI**  
**HIGH COURT CIVIL APPEAL NO. 125 OF 2017**

**RAPHAEL MUTINDA MBITHI.....APPELLANT**

**-VERSUS-**

**TIMOTHY THEURI and ANOTHER.....RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. By a plaint dated **13/02/2015**, the Plaintiff/Appellant lodged a claim for General and Special damages costs and interests against the defendant/respondents.
2. He averred that on **08/12/2013** he was a fare paying passenger in motor vehicle **KBD 548W** along Nakuru-Mombasa road when due to negligence driving by the defendants agent/driver at Sultan Hammud he occasioned an accident as a result of which he sustained injuries.
3. Respondents/Defendants No.1 and 2 lodged defence dated **02/10/2015** denying the appellant's claim.
4. The 3<sup>rd</sup> Defendant/Respondent also lodged a defence dated **10/03/015** denying same claim.
5. The 3<sup>rd</sup> Defendant was by consent removed from the proceedings. The matter proceeded into full hearing. The plaintiff/Appellant case called 3 witnesses to prove the claim.
6. The Respondents/Defendant did not call any witness. However the trial court dismissed case on the ground that the Appellant did not prove case on negligence on balance of probabilities.

**APPEAL**

7. Being aggrieved by the said decision, the Appellant lodged the instant appeal and set out the following grounds of appeal.
  - 1) **THAT** the trial court did not comprehend the evidence on liability.
  - 2) **THAT** the trial court failed to properly apply the principles of negligence.
  - 3) **THAT** the trial court failed to note that Respondent never rebutted the Appellant's case by evidence.
  - 4) **THAT** the trial court failed to note that respondent had the burden to disprove on their part the

cause of the accident.

5) **THAT** the trial court failed to note that the respondents never initiated third party proceedings against the registered owner of motor vehicle No. **KBP023J**.

6) **THAT** the trial court failed to note that the 1<sup>st</sup> and 2<sup>nd</sup> respondents never initiated proceedings under Order 1 rule 24 of the Civil Procedure rule, 2010 for contribution or indemnity against themselves.

7) **THAT** the trial court failed to properly evaluate and analyze the Appellant's case.

8) **THAT** the trial court erred in law and fact by relying on the Respondents submissions as evidence and failing to note that submissions cannot take the place of evidence.

9) **THAT** the trial court failed to note that the Appellant had proved his case on a standard of probability.

10) **THAT** the judgement is unreasonable, untenable and contrary to law, principles of negligence and the facts of the case.

## **SUBMISSIONS**

8. The parties agreed to canvass the appeal via written submissions. The parties filed and exchanged the same.

9. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

See the case of **KENYA PORTS AUTHORITY -VS- KUSTON (KENYA) LIMITED (2009) 2EA 212** wherein the Court of Appeal held inter alia that:-

***“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.***

***Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”***

See also **ABOK JAMES ODERA T/A A.J ODERA & ASSOCIATES -VS- JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES [2013] E KLR**

10. The court relooks at the summary of the Plaintiff/Appellant witness. PW1 Raphael Mbithi testified that on 08/12/2013 he was travelling to Mombasa. He boarded **2NK** bus at **Nakuru KBD 548W**. On nearing Sultan Hammud the driver of the bus lost control and collided with another bus thus he was injured in the accident.

11. He stayed in hospital for 7 days and then discharged. He was fixed with K-nails and after one year they were removed. The matter was reported at Sultan Hamud Police Station.

12. On cross examination he stated that he was asleep when the accident occurred and only heard an impact. He was injured and taken to hospital by an ambulance. He had worn a seat belt during the accident.

13. PW2 a police officer produced P3 and indicated that he was not the investigating officer and the matter is pending investigation.

14. PW3 a medical doctor produced medical report to confirm the injuries the Appellant sustained.

15. The Plaintiff closed his case. The defence also closed its case without calling any witness.

## **SUBMISSIONS**

16. The appellant submits that the Respondent did not call any witness to rebut Appellant's claim as framed.

17. He relied on the case of **JANET NJOKI KIGO –VS- DANIEL KARANI GICHUKI eKLR (2016)** which relied on **DT DOBIE & CO(K) LIMITED –VS- CHEBUKATI & OTHERS eKLR** where court in a case where defendant filed defence but did not testify held that:-

***“Plaintiff cases stand unchallenged and further that the claims made by the defendant and counter claims are unsubstantiated.”***

18. In **DT DOBIE** case Supra the court relied on **TRUST BANK –VS- PARAMOUNT UNIVERSAL BANK LIMITED AND 2 OTHERS NAIROBI HCC 1243/01** where it held”

***“Where a party fails to call evidence in support of its case the party's pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings. Further that failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.”***

19. In the defence the Respondent blamed 3<sup>rd</sup> party driver of KBP 023J but failed to join same in the suit. See **KITHINI –VS- ALMICDAD SERVICES LTD & ANOTHER 2014 eKLR** and also **JANE NJOKI KIJOO –VS- DANIEL KARANI GICHUKI Eklr (2016) REHAB MICERE MURAGE –VS- ATTORNEY GENERAL & OTHER (2015) . e KLR.**

20. In **DI –VS- ZENT ROSES LTD & ANOTHER (2015)** the court held:-

***“The doctrine of RES IPSA LOQUITUR is one which Plaintiff relies on by proving that an accident occurred, in the circumstances in which an accident should not have occurred.***

***Thereby discharges in the absence of any other explanation by defendant, the original burden showing negligence on the part of the person who caused the accident.”***

21. The Appellant thus submits that the only version of the accident occurred was that of the appellant. The respondent did not rebut the same.

22. **MICERE MURAGE** case supra opined that:-

***“Well driven motor vehicles do not just get involved in accidents”***

23. In **PI –VS- ZENA ROSES** supra court held that:-

***“Where an accident occurs and no other explanation is given by the defendant which could exonerate him from liability then court would be at liberty to apply the doctrine of res IPSa LOQUITUR and hold defendant liable in negligence.”***

24. It is submitted that the trial court erred in not evaluating the evidence. The court only pinned its decision on the lack of the evidence of the investigation officer testimony.

25. In **ANTHONY MUSITA & ANOTHER –VS- PURITY GATAKAA & 2 OTHERS HCA MERU 2/2009.** The judge held that: -

***“Evidence of investigation officer was not binding to court as the same contained an opinion of a police officer.”***

26. The Appellant thus prays for appeal to be allowed and proposed damages in the trial court be upheld.
27. The Respondent rejoinder is that the Appellant failed to prove his case. It is trite law that he who alleges must prove. The Appellant never attributed any of his particulars of negligence to anybody.
28. The respondent relies on **NGUTHIRU –VS- DAVID DENY (2013) eKLR**. Where it held to the effect that he who avers must prove.
29. The respondents contend that the Appellant could not tell circumstance surrounding the occurrence of the accident nor tell the speed the motor vehicle was being driven when the accident occurred. No prove the motor vehicle was over speeding.
30. The Respondents reminds court its statutory duty as a first Appellant court and relied on **OLUOCH ERIC GOGO –VS- UNIVERSAL COMPANY LIMITED eKLR**.
31. The Respondent also relied on provision of **Section 107, 108, and 109 evidence Act Cap 80 Laws of Kenya** and submitted that the Appellant failed to prove negligence as pleaded. See also **EASTERN PRODUCE (K) LIMITED –VS- CHRISTOPHER ATIADO -VS- KENYA OSIRO (2006) EKLR** **MUTUKU CARGO HAULING SERVICES LIMITED 2KAR 258** and **KPACK INDUSTRIES -VS- JAMES MBITHI MUNYAO C. A 152/2003**.
32. On quantum the Respondents submitted that the appropriate award would be **Kshs.200,000/=** and cited various authorities to support the same proposal.
33. The court has gone through the pleadings, evidence on record and the parties’ submissions. The emerging issues are:-
- ***Whether in the circumstances of the case the court could infer and attribute negligence on the part of driver motor vehicle KBD 548 W?***
  - ***What is the judgement as to the quantum of damages?***
  - ***What is the order as to costs?***
34. It is not disputed that the Appellant was involved in the accident on **08/12/2013** while travelling as fare paying passenger in motor vehicle **KBD 548 W**. Neither is it disputed that he sustained injuries as pleaded vide paragraph 7 of the plaint and as shown in medical report dated **22/01/2015** i.e. open fracture left tibia and multiple soft tissue injuries.
35. What the parties contest is who is to blame for the occurrence of the accident?
36. **PW1** testified that driver lost control and collided with another bus. However on cross examination he stated that he was asleep and that he only heard an impact.
37. The police report via **PW2** is that as at the time of the hearing the suit the matter was pending investigation.
38. In the defence, the Defendants/Respondents blamed the Appellant and the driver **KBP 023J** which collided with **KBD 548 W**.
39. However the driver or owner of **KBP 023J** was never joined as a party nor was evidence tendered to establish that the same driver was to blame for the accident.

40. The only evidence on record is that of the Appellant which stands unrebutted. The prove of the accident occurred by the plaintiff calls for the driver **KBD 548 W** to explain the cause but he failed to offer any explanation. In **PI –VS- ZENA ROSES** supra court held that:-

*“Where an accident occurs and no other explanation is given by the defendant which could exonerate him from liability then court would be at liberty to apply the doctrine of **res IPSA LOQUITUR** and hold defendant liable in negligence.”*

*“Well driven motor vehicles do not just get involved in accidents” see **MICERE MURASE** case supra.*

41. Thus the court finds that in the circumstances of this case, the doctrine of **RES IPSA LOQUITUR** comes into play. The trial magistrate erred for not applying same doctrine in the instant case.

42. The court therefore finds that the driver **KBD 548W** was to blame for the accident and is therefore held **100%** to blame. The appellant relied on his lower court submissions on quantifications.

43. The appellant proposed an award of **Kshs.2millions** and relied on the cases of **MUIRURI VS SUERA FLOWERS LTD AND ANOTHER (2014) E KLR** and **GITHIRI –VS- NDUATI N NGUGI (2012) E KLR.**

44. On quantum the defendants submitted that **Kshs.200,000/=** would be adequate under this head.

45. They relied on:-

- 1) Medical report by Dr. Wainaina dated 10/10/2015.**
- 2) Simon Mutisya Kavii Vs Simon Kigutu mwangi (2013) eKLR.**
- 3) Kennedy Okongo Odhiambo Vs James Kariuki 2011Eklr.**
- 4) Hassan Noor Mohammed Vs. Tae Youn Ann eKLR.**

46. I have considered authorities cited in the principles for awarding of damages were enunciated in the case of Mohammed **JABANE –VS- HIGHSTONE OTONYI OLENJA VOLUME 1 KAR 982.**

47. Kneller JA stated that the current approach towards awards of damages is:-

- 1) Each case depends on its own facts.**
- 2) Awards should not be excessive.**
- 3) Comparable injuries should attract comparable awards.**
- 4) Inflation should be taken into account.**

48. The trial court considered the two medical reports and did note that the fractures healed. The court found the plaintiff’s figure inordinately high for such fractures. It also found the defendants estimates to be inordinately low.

49. So doing the its best and in consideration of “**Olenja**” case above, It was convinced that **Kshs.700,000/=** would be adequate in this case.

50. I agree with the trial court that the award above is fair in all the circumstances of the case and the court used sound reasoning supported by the authorities.

## **SPECIAL DAMAGES**

51. The trial court observed that, the defendants argued that the plaintiff was only able to prove costs of:-

<b>1) External fixators</b>	<b>Kshs.22,000/=</b>
<b>2) Payment to Machakos Hospital</b>	<b><u>Kshs. 1,455/=</u></b>
<b>All totaling to</b>	<b><u>Kshs.23,445/=</u></b>

52. The plaintiff submitted that he proved the following:-

<b>1) Medical expenses</b>	<b>Kshs. 32,375/=</b>
<b>2) Medical report</b>	<b>Kshs. 1,600/=</b>
<b>3) Police abstract</b>	<b>Kshs. 500/=</b>
<b>4) Search fees</b>	<b>Kshs. 500/=</b>
<b>5) Police officer's attendance</b>	<b>Kshs. 5,000/=</b>
<b>6) Doctor's attendance</b>	<b><u>Kshs. 15,000/=</u></b>
<b>Totaling to</b>	<b><u>Kshs. 55,975/=</u></b>

53. The records showed that the same were proved and I thus enter judgment **Kshs.55, 975/=** under this head.

54. I have perused the record and do agree that the plaintiff/ appellant proved the amount as upheld by the trial court.

## **LOSS OF AMENITIES**

55. The evidence on record showed that no prove was provided under this head and thus trial court was justified in declining to grant it.

## **FUTURE MEDICAL EXPENSES**

56. Also the trial court was justified in rejecting the claim under this heading as no evidence was produced to support it. The 2<sup>nd</sup> medical examination showed a fully healed fracture.

57. Also the appellant stated that he was fully healed. Thus I would awarded and enter judgement for the appellant against the respondents as follows:-

<b>General damages</b>	<b>Kshs.700, 000/=</b>
<b>Special damages</b>	<b><u>Kshs. 55,975/=</u></b>
<b>Total</b>	<b><u>Kshs.755, 975/=</u></b>

**The appellant will also get costs in this court and the trial court plus interest from the date of this judgement to date of payment.**

**DATED AND DELIVERED THIS 12<sup>TH</sup> DAY OF JULY, 2017.**

**C. KARIUKI**

**JUDGE**

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