



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO 201A OF 2011**

**MBATI JOHN ..... 1<sup>ST</sup> APPELLANT**

**COMBO DVD COACH LTD ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**CHINA ZHONGXING CONSTRUCTION CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**NGOLUA MUKURI IMURU..... 2<sup>ND</sup> RESPONDENT**

**(An Appeal arising out of the judgment of Hon. N.N, Njagi PM delivered on 24<sup>th</sup> November 2011 in Makindu Principal Magistrate's Court Civil Case No. 219 of 2010)**

**JUDGMENT**

The Appellants were the original 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in Makindu Principal Magistrate's Court Civil Case No. 219 of 2010, and have appealed against the judgment of the learned trial Magistrate, which was delivered in the said suit on 24<sup>th</sup> November 2011. The 1<sup>st</sup> Respondent was the original 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Respondent the original Plaintiff in the said suit. The learned magistrate in his judgment apportioned liability between the Appellants and the 1<sup>st</sup> Respondent on a 50: 50 ratio, and awarded the 2<sup>nd</sup> Respondent Kshs 75,000/=, as general damages for pain and suffering and Kshs. 3,200/= for special damages subject to the said apportionment.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 8<sup>th</sup> December 2011, wherein their grounds of appeal are as follows:

1. The learned trial magistrate erred in fact and in law in apportioning liability at 50% against the appellants against the weight of evidence.
2. The learned trial magistrate erred in law and in fact in not finding that the plaintiff and the 1<sup>st</sup> defendant had failed to attribute any of the pleaded particulars of negligence to the appellants and/or their agents.
3. The learned trial magistrate erred in law and in fact in failing to make any findings and or basis of apportioning liability at 50% against the appellants.
4. The learned trial magistrate erred in law and in fact when in total disregard of the circumstances of the accident made a wrong finding that the 1<sup>st</sup> and 2<sup>nd</sup> defendants' driver contributed to the accident yet there was no rebutting evidence that he was to blame and the accident occurred on his lane.

5. The learned trial magistrate erred in law and fact in basing his findings on irrelevant issues not supported by evidence adduced or the applicable law.
6. The learned trial magistrate erred in law and fact in holding the appellants' driver liable without evidential basis at all and without critical evaluation of the evidence presented.
7. That the learned trial magistrate erred in law and in fact in finding the appellant's driver liable to the extent of 50% without giving due consideration to the defence evidence or at best by totally misapprehending the defence evidence.
8. That the learned trial magistrate erred in law and in fact in find the appellants' driver liable against overwhelming evidence on record that the 1<sup>st</sup> defendant driver was charged for careless driving and pleaded guilty and admission by the plaintiff, his witness and the police officer, that the 1<sup>st</sup> defendant's driver rammed onto the appellants' motor vehicle while overtaking.
9. That the leaned trial magistrate erred in law and in fat in disregarding the collaborative evidence of the police the plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and the copies of the covering report, situation report and sketch map admitted in evidence, which evidence in totality blames the drive of the 1<sup>st</sup> defendant.
10. That the leaned trial magistrate erred in law and in fact by disregarding the documentary evidence produced particularly the speed governor certificate and still held that the vehicle was being driven at a high speed.
11. That the learned trial magistrate erred in law and in fact in failing to find that the evidence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendant was uncontroverted.
12. That the learned trial magistrate erred in law and in fact totally disregarding the fact that the 1<sup>st</sup> defendant did not tender any evidence, documentary or oral.
13. That the learned trial magistrate erred in law and in fact by totally disregarding the submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants/appellants.
14. That the learned trial magistrate erred in law and in fact by awarding special damages that were not pleaded as by law required.

The Appellants are praying for orders that the appeal be allowed with costs; that the judgment of the Honourable Principal Magistrate be set aside and a proper finding be made; and that the 2<sup>nd</sup> Respondent's suit against the Appellants be dismissed with costs.

### **The Facts and Evidence**

I will proceed with a summary of the facts and evidence given in the trial Court. The brief facts of the case are that the 2<sup>nd</sup> Respondent instituted a suit in the lower court by filling a Complaint dated 7<sup>th</sup> September 2010. He stated therein that at the times material to this suit, the 1<sup>st</sup> Respondent was the registered and/or beneficial owner of motor vehicle registration number KBJ 043D and the same was being driven by its driver, agent and/or servant, while the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were the registered and or beneficial owners of motor vehicle KBH 101 V.

Further, that on 26/6/2010 the 2<sup>nd</sup> Respondent was a passenger along Nairobi-Mombasa road at Machinery in motor vehicle registration number KBH 101V which was driven carelessly and negligently that it caused to crash onto motor vehicle KBJ 043D and injured him. Equally the 2<sup>nd</sup> Respondent blamed the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and/or their driver of motor vehicle registration number KBH 101V for contributing to the accident.

The 2<sup>nd</sup> Respondent averred that the 1<sup>st</sup> Respondent and Appellants were vicariously liable for the negligence of their authorised driver, servant and/or agent, and gave the particulars of negligence on the part of the said Respondent and Appellants. He also stated that as a consequence of the accident he sustained severe injuries, suffered pain, loss and damage and gave the particulars of injury as follows:

- a. Blunt trauma to the occipital region of the head.
- b. Bruises of the right shoulder girdle.
- c. Blunt trauma to the anterior chest.

- d. Cut wounds on the lumber region of the back.
- e. Bruises of the knuckles of the left hand.

The 2<sup>nd</sup> Respondent sought special damages of Ksh 1,000/=, general damages and costs of the suit.

The 1<sup>st</sup> and 2<sup>nd</sup> Appellants filed a Defence in the trial Court dated 19<sup>th</sup> January 2013, wherein they denied ownership of motor vehicle registration number KBJ 043D and that the 2<sup>nd</sup> Respondent was a lawful passenger in motor vehicle KBH 101V. They also denied the occurrence of any accident and in the alternative, averred that any such occurrence was caused solely and/or substantially contributed to by the negligence of the 2<sup>nd</sup> Respondent or by the negligence of the 1<sup>st</sup> Respondent's driver, servant and / or agent.

The Appellants further denied the application of the doctrine of *res-ipsa Loquitor*, and the injuries, loss and damages particularized in the 2<sup>nd</sup> Respondent's Plaint.

From the record of the trial court proceedings, the suit proceeded to full hearing on 4<sup>th</sup> August 2011, when five witnesses gave evidence for the 2<sup>nd</sup> Respondent. The first witness (PW1) was the 2<sup>nd</sup> Respondent who stated that he was in a bus registration number KBH 101V on 21<sup>st</sup> June 2010 along Nairobi-Mombasa Road, when it collided with a lorry registration number KBJ 043D. Further, that the lorry was trying to overtake and came to the lane of the bus. PW1 testified that he was treated at, and discharged from Makindu hospital. He produced receipts for the medical report for Kshs 3,000/= and Kshs 500/- for the search conducted on the 1<sup>st</sup> Respondent's and Appellants' motor vehicles

PW2 was Dr. Dino Aroon Kyalo who examined the 2<sup>nd</sup> Respondent at Makindu hospital and who produced a medical report showing the injuries suffered by the 2<sup>nd</sup> Respondent. PW3 was PC Evanson Muriithi Munyaka who testified that he was attached to Mtito Andei police station. He clarified that he was not the investigator of the accident but stated that he had the police file on the accident. He testified that his evidence was to confirm that the accident happened between lorry registration number KBJ 043D and motor vehicle registration number KBH 101V, and that the driver of the lorry was charged with the offence of careless driving contrary to section 49 of the Traffic Act and fined Kshs 5,000/=. It was his evidence that motor vehicle registration KBH 101V was fitted with a speed governor.

An additional medical witness testified for the 2<sup>nd</sup> Respondent, being Patrick Musyoki Kibwana who was PW4, and who stated that he is a medical officer based at Makindu Hospital. PW4 confirmed that the 2<sup>nd</sup> Respondent was seen at the facility on the night of 25<sup>th</sup> and 26<sup>th</sup> June 2010 and had been involved in a road accident. He described the 2<sup>nd</sup> Respondent's injuries as cuts on the back, hand and soft tissue injuries on the left shoulder. He produced the treatment card for the 2<sup>nd</sup> Respondent as an exhibit.

PW5 was John Kobia Mailuki who testified that he was travelling from Meru to Mombasa on the night of 25<sup>th</sup> and 26<sup>th</sup> June 2010 in the bus registration number KBH 101V, and that the bus had an accident on the way to Mombasa at a place called Machinery.

The Appellants called two witnesses. DW1 was Mogako Anyona who stated that he is a motor vehicle inspector and that he inspected motor vehicles KBJ 043D and KBH 101V on 27/6/2010 for pre-accident defects. He gave an account of the damage he noted with respect to motor vehicle to KBH 101V which he testified was all caused as a result of the impact during the accident. He stated that the vehicle had a speed governor, valid sticker and no pre-accident defects. He produced the inspection sticker as an exhibit.

DW2 was David Mureithi Stephen, the driver of motor vehicle registration KBH 101V, and he described the happenings of 26/6/2010 and stated that at 3.00 am he was driving down a hill at Machinery on the Nairobi-Mombasa road at a corner, when he met with a lorry overtaking another, Further, that he tried to avoid the lorry but could not do so as they were on a bridge, and that the lorry hit the bus on the driver's side. He testified that the accident was on his lane, and that the bus had a speed governor and was not

going beyond 80 km per hour. DW2 blamed the accident on the driver of the lorry as he overtook on a yellow line and on a sharp corner.

### **The Issues and Determination**

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellant's Advocates, Kairu & McCourt Advocates filed submissions dated 21<sup>st</sup> September 2015. It was argued therein that the Respondent failed to prove negligence on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants and thus his claim for liability ought to have been dismissed in its entirety with costs. The Appellants stated that the law on the burden of proof is provided in section 107, 108 and 109 of the Evidence Act, and reliance was also placed on the decision in **Eastern Produce (K) Limited vs Christopher Otiado Osiro, Eldoret H.C Civil Appeal No. 43 of 2001** and **Statpack Industries vs James Mbithi Munyao, Civil Appeal Case No. 152 of 2003**

Further, that the learned magistrate did not give an indication as to whether he disbelieved DW 1 or the grounds for such disbelief, yet DW 1 was the only credible witness in terms of the working condition of the motor vehicle registration KBH 101V prior to the accident. Reliance was in this regard placed on **Sammy Ngigi Mwaura vs John Mbugua Kagai & Another, Eldoret HCC No. 44 of 1997**, where the Court held that a mere collusion of two vehicles or a vehicle and a person by itself without proof of negligence is insufficient to establish liability.

It was also the Appellants' submission that the learned trial magistrate erred in law and in fact by apportioning 50% liability against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, even though by all accounts the driver of motor vehicle Reg. KBJ 043D was charged for the offence of careless driving.

On the issue of quantum, it was submitted that arising from the failure of the 2<sup>nd</sup> Respondent to prove his case, the issue remained a matter of academic discourse. In addition, that the Respondent pleaded minor soft tissue injuries which have since healed.

MS Mutunga & Muindi Advocates, the 2<sup>nd</sup> Respondent's Advocates, filed submissions dated 28<sup>th</sup> August 2015 and adopted the submissions they had made in the lower Court. The counsel reiterated that the certificate of examination and test of motor vehicle did not indicate that the Appellants' motor vehicle had a speed governor.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellants are mainly contesting the apportion of liability at the ration of 50: 50 between them and the 1<sup>st</sup> Respondent. The Appellants have also raised the ground that the special damages awarded were not pleaded.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts, and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661**, **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

I have evaluated the evidence on liability and will have to agree with the Appellants that there was sufficient evidence that showed on a balance of probability the driver of lorry registration KBJ 043D was largely to blame for the accident that occurred between his vehicle and KBH 101V on 26/6/2010. In the first instance the said driver was charged with and convicted of the offence of careless driving contrary to section 49 of the Traffic Act. Secondly the evidence by DW2 that the said driver was overtaking on a yellow line and at a corner was not controverted. Lastly, there was evidence brought that the motor vehicle registration number KBH 101V had no pre-accidents defects.

The only allegation of liability on the part of the driver of motor vehicle registration number KBH 101V was that of speeding. It was in this regard disputed by the 2<sup>nd</sup> Respondent that the said motor vehicle had a speed governor. However PW3, DW1 and DW2 all testified that the said motor vehicle did have a speed

governor. The 2<sup>nd</sup> Respondent did not bring any evidence to controvert this position. I however note on the issue of liability that DW2 did testify that he did not brake or slow down on seeing the oncoming lorry on his lane.

I therefore find that the trial magistrate did err in finding that the evidence pointed to equal apportionment of liability as between the 1<sup>st</sup> Respondent and Appellants, and apportion liability as between the 1<sup>st</sup> Respondent and Appellants at the ratio of 80:20 for the above reasons.

On the issue raised on the award of special damages of Kshs 3,200/=, I note that the sum that was awarded by the trial Court was not specifically pleaded, and that the sum that was pleaded in the 2<sup>nd</sup> Respondent's Plea was Kshs 1,000/=. The principle of law in this regard is that special damages must first be specifically pleaded, and then strictly proved. See in this regard the decisions in **Kampala City Council vs. Nakaye [1972] E.A 446** and **Hahn vs. Singh [1985] KLR 716**.

The trial magistrate therefore erred in awarding special damages that were not specifically pleaded. This finding notwithstanding, the 2<sup>nd</sup> Respondent did produce evidence of receipts showing payment of Kshs 3,500/= for the medical report and official searches on the accident vehicles, and is therefore entitled to the Kshs 1,000/= special damages that were pleaded

In the premises the Appellants' appeal is allowed only to the extent that the award of the trial Court of special damages of Kshs 3,200/= is set aside and substituted with an award of Kshs 1,000/=; and to the extent that the apportioning of liability of 50:50 between the 1<sup>st</sup> Respondent and Appellants and is also set aside and substituted with apportionment of liability at the ratio of 80:20 as between the 1<sup>st</sup> Respondent and Appellants. The award by the trial Court of Kshs 75, 000/= as general damages is however upheld, and shall be subject to the substituted apportionment of liability as between the 1<sup>st</sup> Respondent and Appellants at the ratio of 80:20.

Each party shall bear their costs of the appeal.

It is so ordered.

**DATED AT MACHAKOS THIS 1<sup>ST</sup> FEBRUARY 2016.**

**P. NYAMWEYA**

**JUDGE**