



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**HCCA NO. 19 OF 2015**  
**(FORMERLY MERU HCCA NO. 18 OF 2012)**

**JAMES MURITHI IRERI.....APPELLANT**

**-VERSUS-**

**CYPRIAN MUGENDI IGONGA.....1ST RESPONDENT**

**IGNATIUS GITARI.....2ND RESPONDENT**

**DUNCAN MWANGI.....3RD RESPONDENT**

***(Being an appeal from the Judgment and decree of the Principal Magistrate's Court at Chuka (HON. N.N. Murage S.R.M) delivered on 14/2/2012 in Chuka PMCC No. 63 of 2010)***

**J U D G M E N T**

1. James Murithi Ireri ("the Appellant") was the Plaintiff in the Chuka PMCC No.63 of 2010. In that suit, the Appellant sued the Respondents claiming damages for an accident which occurred on 12th August, 2007 along Meru- Chuka road as a result of which he was injured. The accident involved motor vehicle registration No. KAG 241 T (hereinafter "the subject vehicle") driven by the 1st Respondent with the 2nd and 3rd Respondent being beneficial owners and the registered owner, respectively. The 1st and 2nd Respondent opposed the suit and claimed contributory negligence. By a judgment delivered on 14th February, 2012, the trial court allowed the suit but held the Appellant to be 50% liable for the accident and assessed the damages at Kshs.403, 500/-.

2. Aggrieved by the said decision, the Appellant has appealed to this court setting out eight (8) grounds of appeal which can be summarised into three (3) namely; that the trial court misapprehended the evidence and erred in apportioning liability at 50: 50; that the trial court erred in failing to award the amount required for the removal of the metal implant from the Appellant's leg and that the trial court erred in assessing damages that was excessively low in the circumstances. This being a first appellate court, it is incumbent upon it to review and re-evaluate the facts afresh and re assess the case and make its own independent findings and conclusions. See ***Selle .v. Associated Motor Boat Co. Ltd [1968] EA 123***. However, the court must bear in mind that it did not see the witnesses testify.

3. At the trial, the Appellant told the court that on the material date, he and his sister one Lilian Wanja were walking towards Chuka town on the pedestrian foot path along Embu-Chuka road when they were knocked down at Naka bridge by the subject vehicle which was being driven by the 1<sup>st</sup> Appellant at the time. As a result of the accident, the Appellant sustained various injuries for which he was admitted to and treated at Chuka District Hospital, Aga Khan, Cotelongo and Wamba Hospitals. He produced discharge summaries and a medical report in support of his case. He told the court that the 1st Respondent

was charged with various offences of which he was convicted and fined accordingly. The Appellant blamed the 1st Respondent for the accident. In cross-examination, he told the court that he was on the right lane when he and his sister were knocked down by the vehicle. He testified further that the vehicle came from behind and he did not see it as a result of which he could not have done anything to avoid the accident.

4. Dr. John Macharia (PW2) was the doctor who reviewed the Appellant and prepared a medical report (PEXh 4 (a)). He examined the Appellant on 13th March, 2010 and found that the Appellant had suffered a compound comminuted fracture of the left tibia and fibula bone, soft tissue injuries over the left fore arm, upper back and face. At the time the Appellant consulted him, the Appellant complained of pain over the fracture site with difficulties in walking and he was walking with a stick. The fracture had healed with slight mal-alignment and that the Appellant will require removal of the plate at Kshs.50,000/-. He charged Kshs.3,000/- for the examination and report. The examination of the Appellant was three (3) years after the accident. In cross-examination, he told the court that he expected the Appellant to have full recovery/healing.

5. PW3 was P.C John Manyara from the Chuka Police Station. He produced the P3 form (PEXh 5) and told the court that the accident occurred on 12<sup>th</sup> August, 2007. That the 1<sup>st</sup> Respondent was charged with 10 counts and convicted on all of them. That on the material day, there was construction going on at the scene of the accident and that only one lane, the left one when facing Chuka from Embu direction, that was in use. That the construction company had put a warning to that effect. That the 1<sup>st</sup> Respondent failed to take heed and crashed into a crowd of people near Naka river. He confirmed that the Appellant was at the time of the accident a pedestrian. In cross-examination, PW3 told the court that the subject vehicle veered off the road and plunged into the crowd of people. Those injured included people walking to and those at the scene.

6. Since the evidence was similar as in Chuka PMCC No. 62 of 2010, by the consent of parties, the court adopted the 1st Respondent's defence in that case. The defence was that on the material day, the 1<sup>st</sup> Respondent was driving the subject vehicle along Embu-Chuka road. The road was under construction and one lane was dug up and only one lane was in use. That when the 1st Respondent was driving down Naka bridge, he saw a crowd of people on the road, he tried to hoot but the people did not move. That there was a corner and a CID vehicle was parked there. That he could not do anything as on either side of the road there was a river. That he stepped on the brakes but he still hit the people. He denied being careless. That there were signs on the road and that he knew that there was only one lane that was in use. He denied being careless.

7. At the hearing of the appeal, Mr. Mwanzia and Mr. Thangicia, learned counsels for the Appellant and Respondents respectively applied, which application was allowed. that the proceedings in **Civil Appeal No. 24 of 2015 Lilian Wanja .v. Cyprian Mugendi and 2 Others** do apply to this appeal. Mr. Mwanzia argued ground Nos. 1, 2 and 3 together and ground Nos. 4, 5, 6 and 7 together. He submitted that since the evidence on record showed that the vehicle veered off the road and crashed into the crowd, injuring the Appellant in the process, the assessment of liability at 50: 50 was erroneous. That from the seriousness of the injuries suffered, the assessment of Kshs. 400,000/- as damages was erroneous.

Finally, counsel submitted that on the authority of **Simon Javeta .v. Mutitu Njeru [2014] eKLR**, the claim for Kshs.50,000/- in respect of the removal of the implant had been wrongly disallowed. On his part, Mr. Thangicia submitted that the fact that the 1st Respondent was convicted in the traffic case did not perse exonerate the Plaintiff from blame. He cited the case of **Robinson .v. Oluoch [1971] EA 397** in support of that submission. Counsel further submitted that the suit should have been dismissed as the Appellant did not prove his case. As regards damages, Counsel submitted that on the authority of **Francis Mwangi Muchine .v. Francis Kimani Mbugu [2004] eKLR**, an award of Kshs.100,000/- would have been adequate damages.

8. The first issue to determine is Mr. Thangicia's submissions that the suit be dismissed and/or that the damages should be reduced to Kshs.100,000/-. I inquired from Mr. Thangicia if there was a cross-appeal but he admitted that there was none. I have also perused the record and I have confirmed that there was no

such cross-appeal. Where there is no cross-appeal, the jurisdiction of this court is limited either to allowing or dismissing an appeal. Where a Respondent wishes to urge an appellate court to arrive at a different decision than that of the trial court, he must file a cross appeal or reasons to affirm the decision of the lower court, if there be other reasons than those relied on by the trial court. Since there was no cross-appeal in this matter, Mr. Thangicia's invitation is therefore rejected.

9. The first ground was that the trial court misapprehended the evidence and erred in apportioning liability at 50: 50. The evidence before the trial court was that the Appellant was walking on the pedestrian path when the 1st Respondent veered off the road, hit him and his sister and then plunged into the crowd killing other people. There was evidence that the road was under construction at the time and that there were warnings on the road by the construction company. That there was only one lane in use at the time. These facts were admitted by the 1st Respondent who testified for himself and the 2nd Respondent. The 1<sup>st</sup> Respondent further told the court that the accident occurred as he went down towards the bridge of Naka River. That on both sides of the bridge was the river. That the crowd was on the road and the CID vehicle was packed at a corner. He also admitted that he had pleaded guilty to traffic offences in respect of which he had been convicted accordingly.

10. On the basis of the foregoing and as admitted by the 1st Respondent, a driver of a motor vehicle in the circumstances of this case should have been more careful. This is because, there was only one lane in use at the time, there was ongoing construction was obvious and the likelihood of the presence of people undertaking the construction was high. The 1st Respondent told the court that he tried to brake but the vehicle still plunged unto the crowd. The question that arises is, was the Appellant and the crowd on the road as contended by the 1st Respondent? Did both the Appellant and 1st Respondent do enough to avoid the accident? Firstly, since there was only one lane in use at the time and there were police at the scene, it is unlikely that the Appellant and the crowd of people were on the road as suggested by the 1st Respondent. The 1st Respondent himself testified that there was a CID vehicle packed on the road. If that vehicle was on the road and one lane was closed, how else would the crowd have been on the road for him have to plunged into it.

PW3, who was an independent witness gave unchallenged evidence that the driver of the subject vehicle did not heed the warning signs; that he was driving at a speed with which he could not control the vehicle and that the vehicle veered off the road, hit the Appellant and plunged into the crowd. That those injured included people walking to and those at the shooting site. It is clear from the record that the Appellant's testimony that he was walking towards the shooting site was not displaced.

11. From the foregoing, it is clear that if the 1<sup>st</sup> Respondent was careful and had taken proper look out, he would have heeded to the warning signs and driven at a speed in which he would have been able to control the subject vehicle. It is clear that the subject vehicle lost control and hit the Appellant and his sister before plunging into the crowd where it killed others. The Appellant's evidence was that he and his sister were walking on the pedestrian lane/path. Taking all the foregoing into consideration, it was not correct for the trial court to hold that the Appellant was on the road, a busy body looking at the dead body. There was no evidence that the Appellant was part of that crowd looking at the body. He was only walking towards the general direction of that scene. Clearly the finding of the trial court was contrary to the evidence on record.

12. Under Sections 107 and 108 of the Evidence Act, it is he who alleges that must prove. In their defence, the 1st and 2nd Respondents alleged that the Appellant was walking on the middle of the road; was attempting to cross the road without ascertaining if it was safe to do so; refused to walk on the pedestrian path; declined to heed the warning of motor vehicle Registration No. KAG 24 T and was walking drunkenly on a busy highway. A review of the evidence shows that none of the said particulars of negligence alleged against the Appellant was ever proved by the 1st and 2nd Respondent. However, there was one particular of negligence that of failing to observe personal safety measures while using the Meru-Chuka Road that was in my view proved. The Appellant admitted in cross-examination that he did not see the vehicle coming from behind and that he might have been walking on the tarmac.

13. On the other hand, the Appellant was able to prove that; the 1st Respondent was driving at a speed

which was too fast in the circumstances; that the 1st Respondent never kept any or any proper lookout or regard to other users of the road; failed to control the motor vehicle permitting the said vehicle to veer off the road and knock the Appellant and finally failed to stop or slow down or manage the subject vehicle as to prevent it from causing the accident. In my view, the Appellant had proved all the particulars of negligence pleaded against the 1st Respondent. In view of the foregoing, by any means the 1st and 2nd Respondent should have shouldered a greater responsibility in the occurrence of the accident.

14. In this regard, considering the role each party played in the occurrence of the accident and taking into consideration the circumstances surrounding the accident, the Appellant should have shouldered 10% while the 1st Respondent should have shouldered 90% of the liability. To that extent, the trial court was in error in holding liability at 50 : 50 between the Appellant and the Respondents. Accordingly, the first ground succeeds.

15. The next ground is that the court erred in failing to award the sum of Kshs.50,000/- for the removal of the implant. The evidence of PW2, Dr. John Macharia was that the Appellant suffered, inter alia, a compound comminuted fracture of the tibia and fibula bone. That part of the treatment was the fixation of the surgical plate. That the implant is required to be removed in future at a cost of Kshs.50,000/-. When cross-examined, PW2 was not challenged on this piece of evidence neither did the defence offer any contrary evidence. In this regard, the trial court erred in holding that there was no evidence that the implant required to be removed in future. The trial court questioned the doctor's opinion without offering any reasons. The figure of Kshs.50,000/- was not only pleaded but was proved. In this regard, the trial court was wrong in rejecting the claim. That ground also succeeds.

16. The final ground is that the award of Kshs.400,000/- was excessively low in view of the injuries suffered. The jurisdiction of this court on damages is well settled. This court, in order to interfere with the trial court's findings on damages, it must be satisfied that the trial court made an error on principle or misapprehended the law. In *Loise Wanjiku Kagunda .v. Julius Gachau Mwangi CA No. 142 of 2003 (UR)* the court held:-

***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the Judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the Appellate court would award but whether the lower court acted on wrong principle. (see *Mariga .v. Musila [1984] KLR 257*). (Empasis added.)"***

17. I have looked at the trial court's judgment on quantum. The trial court considered the injuries that the Appellant sustained. It also considered the authorities relied on by the parties. While the one relied on by the Appellant consisted of more serious injuries, the one relied on by the Respondents was too old to be comparable. The court considered the principles that govern the measure of damages, including that the same is not meant to enrich a claimant; that the same is only meant to compensate a claimant in monetary terms of the loss actually suffered. In addition, the court considered the element of inflation before assessing the damages. I have considered the cases relied on by the parties both before the trial court and before me. The injuries are not comparable. Accordingly, I do not find that the trial courts assessment of damages was erroneous as contended. That ground is hereby rejected.

18. Accordingly, the appeal succeeds. Judgment on apportionment of liability is set aside and entered as follows:-

- a. the Plaintiff - 10 %
- b. the 1st and 2nd Respondent - 90%
- c. Kshs.50,000/- for future removal of implant.

The appeal on quantum is dismissed.

Judgment is therefore entered as follows:-

a. General damages - Kshs.400,000/-

b. Specials - Kshs. 53,500/-

**Total - Kshs. 453,500/-**

The award is therefore settled at Kshs.453,500/- less10% (Kshs.45,350), Kshs 408, 150/- which is awarded to the Appellant together with interest thereon from 21<sup>st</sup> February, 2012 until payment in full.

19. The costs of the Appeal is awarded to the Appellant in any event.

It is decreed accordingly.

**DATED and Delivered at Chuka this 1st day of September, 2016.**

**A. MABEYA**

**JUDGE**

Judgment read and delivered in open court in the presence of all the parties.

**A.MABEYA**

**JUDGE**

**1/9/2016**