



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 78 OF 2005

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate's Court at Kangundo, Hon. D. Mochache (Mrs) in SRMCC No. 94 of 2004)

PETER KITHUKA MATOLO.....1ST APPELLANT

QUENTIN WAMBUA MUTISYA.....2ND APPELLANT

VERSUS

BENSON MUTUKU.....RESPONDENT

JUDGMENT

1. The Appellants, Peter Kithuka Matolo (*1st Appellant*) and Quentin Wambua Mutisya (*2nd Appellant*) were sued by the Respondent Benson Mutuku vide a plaint dated 18th June, 2004. The Respondent claimed damages which allegedly arose when he was involved in a road traffic accident on or about 5th April, 2002 along the Machakos-Kangundo road while the Respondent was travelling in motor vehicle registration number KZK 866P Nissan Lorry as a passenger. The Respondent blamed the accident on the alleged negligent manner that the motor vehicle was being driven at the material time by the 1st Appellant. The 2nd Appellant was sued as the person who had the possession and control of the motor vehicle while the 3rd Appellant was sued as the registered owner of the motor vehicle.

2. The 1st and 2nd Appellant filed a joint statement of defence and denied the claim.

3. During the trial, the Respondent testified and called three other witnesses. The Appellants case was closed without the calling of any witnesses.

4. The trial magistrate entered judgment in favour of the Respondent against the Appellants on 100% liability, Ksh 105,000/= as General Damages and Ksh 11,200/= as special damages, costs and interest.

5. The Appellants were dissatisfied with the said judgment and appealed to this court on grounds that can be summarized as follows:

(a) *That the judgment was against the weight of the evidence.*

(b) *That the finding on liability was against the weight of the evidence.*

(c) That the special damages were not specifically pleaded and strictly proved.

(d) That the award of general damages was excessive.

6. The appeal was canvassed by way of written submissions which I have duly considered.

7. This being the first appellate court, the court is duty bound to re-evaluate the evidence on record and come to its own findings – See **Selle –vs- Associated Boat Co. Ltd (1968) EA 123**.

8. The Respondent, Benson Mutuku Munguti testified that he was working at the quarry when the driver (*1st Appellant*) asked him and one Somba (*the plaintiff in CMCC 95/2004*) to load the motor vehicle with stones. The driver then asked them to board the motor vehicle and accompany him to Mukunike trading centre for payment. They boarded the vehicle and sat on top of the stones. That when they reached a sloppy area, the motor vehicle was driven at a high speed and the vehicle lost control and started moving in a zig-zag manner then rolled. The Respondent sustained injuries on the face, chest, right leg and the big toe left leg.

9. The Respondent was treated at Kangundo Hospital by PW4, Virginia Musembi, a Clinical Officer. A P3 form was filled. The P3 form reflects the injuries sustained as bruises on the chest wall, cut wound on the right knee and big right toe and bruises on the right thigh. Ksh 1,000/= was paid for the P3 form. Both the P3 form and the receipt for the payment for the same were produced as exhibits.

10. PW1 Dr. Sammy Kioko subsequently examined the Respondent and prepared a medical report which he produced as an exhibit together with the receipt of Ksh 2,000/= for preparing the same.

11. The medical report reflects that the Respondent sustained soft tissue injuries which healed well with no deformities.

12. The Respondent's evidence was that the *1st Appellant* was the driver of the motor vehicle while the police abstract named the *2nd Appellant* as the owner of the motor vehicle. A third defendant, Michael Kinuthia Mutisya against whom interlocutory and final judgment was entered against who is not enjoined in the appeal was the registered owner of the motor vehicle.

13. PW3 PC Zablon Mathenge confirmed in his evidence that the accident was reported at Kangundo Police Station and he investigated the same. He blamed the accident on brake failure and not over speeding. He also named the Respondent, Benson Mutuku, one John Muema and Sumba Wambua as amongst the injured. He produced the police abstract in respect of the accident as an exhibit and stated that he was paid Ksh 2,000/= to come to court and give evidence.

14. The Appellants did not give any evidence during the trial. The Respondent's evidence was therefore not controverted by any other evidence. The Respondent's evidence proved on a balance of probability that the *1st Applicant* was the driver of the motor vehicle and the *2nd Respondent* the beneficial owner of the motor vehicle. The *2nd Respondent* is named in the police abstract as the owner of the motor vehicle. According to the Respondent, the *2nd Applicant* was in-charge of the motor vehicle and the one managing the motor vehicle and the one who was to pay them. Both the *1st and 2nd Appellant* cannot therefore escape liability. (See for example **Lake Flowers –vs- Cila Francklyn Onyango Ngonga & Anor**.

[2008] eKLR.

15. The Respondent described himself in paragraph No. 6 of the plaint as a passenger who was lawfully travelling in the motor vehicle. The Respondent did not describe himself as a fare paying passenger as suggested in the Appellants' submissions. The Respondent pleaded the particulars of negligence to include speed which was excessive and dangerous in the circumstances and failure to brake or stop. The Respondent's evidence supports these particulars of negligence. This evidence was not rebutted by any other evidence.

16. Although the evidence of the investigating officer contradicted that of the Respondent on the question whether the accident was caused by the high speed or the brake failure, it is noted that the investigating officer is not a motor vehicle inspector or an expert in that regard. His evidence on whether the brakes were functioning is hearsay as the person who inspected the motor vehicle did not testify.

17. On whether the Respondent was a lawful passenger, the Respondent's uncontroverted evidence was for the 1st Appellant hired them to load the stones in the motor vehicle and then invited them on board to go for the payment. Whether the Respondent contributed to the accident is a matter that was not pleaded or supported by any evidence. The trial magistrate cannot be faulted for finding the Appellants 100% liable.

18. On the award of General Damages, the Respondent was awarded Kshs 105,000/=. Taking into account the authorities cited before the lower court (**Joshua Anam Mikele –vs- Shum Gebrezghir Yendego, Nrb HCCC No. 3443 of 1991** and **Margaret Njeri Njiri –vs- Mohamoud A. Mohamed & Anor, Nrb HCCC No. 5497 of 1990**) the award is within the range of awards for similar injuries.

19. As stated by the Court of Appeal in the **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A. M. Lubia and Olive Lubia [1982-1988] 1 KAR 727** at p. 730:-

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

20. The Respondent pleaded special damages of Ksh 2,000/= for obtaining the medical report and Ksh 200/= for the police abstract. A receipt of Ksh 2,000/= was produced by the doctor. No receipt was produced in support of the claim for Ksh 200/=. The award of Ksh 11,200/= as special damages was erroneous. The total pleaded and proved is Ksh 2,000/=.

21. The judgment of the lower court though headed SRMCC No. 94 of 2004 Benson Mutuku Munguti vs. Peter Kithuka Matolo, Quentin Wambua Mutisya & Michael Kinuthya Mutisya also covers Case No. 95 wherein the Appellant was found to be 100% liable for the accident and an award of General Damages for Ksh 200,000/= and Ksh 10,200/= special damages made. However, although the Memorandum of Appeal and the amended Memorandum of Appeal includes the awards made in both SRMCC Kangundo No. 94 of 2004 and 95 of 2004 this judgment is in respect of SRMCC No. 94 of 2004 with the Plaintiff as Benson Mutuku (*Respondent herein*). The record of appeal has only included the proceedings of SRMCC No. 94 of 2004.

22. Subject to the adjustment of the special damages, the appeal has no merits and is dismissed with costs.

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B. THURANIRA JADEN

Dated and delivered at Machakos this 5th day of June, 2015

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B. THURANIRA JADEN

JUDGE