



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 79 OF 2005

(Being an appeal from the Judgment and Decree of the Senior Resident Magistrate Court at Kangundo, Hon. Mochache (Mrs) in Kangundo SRMCC No. 95 of 2004)

PETER KITHUKA MATOLO.....1ST APPELLANT

QUENTIN WAMBUA MUTISYA.....2ND APPELLANT

VERSUS

SOMBA WAMBUA.....RESPONDENT

JUDGMENT

1. The Appellants, Peter Kithuka Matolo (*1st Appellant*) and Quentin Wambua Mutisya (*2nd Appellant*) and one Michael Kinuthya Mutisya (*3rd Defendant in the lower court*) were sued in the lower court by the Respondent, Somba Wambua for damages sustained when the Respondent was injured in a road traffic accident involving motor vehicle registration No. KZK 866 Nissan Lorry on 5th April 2000 along the Machakos-Kangundo road.
2. The 1st Appellant was sued as the driver of the motor vehicle while the 2nd Appellant was sued as being in actual possession and control of the motor vehicle. Michael Kinuthya was sued as the registered owner of the motor vehicle.
3. The Respondent blamed the accident on the alleged negligent manner that the motor vehicle was driven at the material time.
4. The 1st and 2nd Defendant/Appellants entered appearance and filed a statement of defence. They denied the claim. The 3rd Defendant did not enter appearance and interlocutory judgment was entered against him.
5. During the trial, the Respondent testified and called three other witnesses. It was the Respondent's case that he was hired by the driver (*the 1st Appellant*), to load stones on the motor vehicle. That the driver requested him to board the motor vehicle to go for payment. The Respondent's evidence was that he boarded the motor vehicle and sat on top of the stones. That the motor vehicle was driven at a high speed while descending a slope and lost control and rolled. The Respondent sustained injuries and was treated at Kangundo hospital.
6. PW4 Virginia Musembi a Clinical Officer at Kangundo hospital who examined and treated the Respondent produced a P3 form and a receipt for Ksh 1,000/= for attending court.

7. PW2 Dr. Wairagu produced a medical report and a receipt for Ksh 2,000/= for preparing the same and a further Ksh 2,000/= for attending court.
8. From the Respondent's evidence and that of the Clinical Officer and the doctor, the Respondent sustained the following injuries:
 - (1) Bruises on the right anterior shin.
 - (2) Bruises on the back.
 - (3) Bruises on the right upper quadrant of the abdomen extending to the anterior chest wall on the same side – on x-ray no fracture seen.
 - (4) Left wrist swelling – x ray revealed a fracture on the distal ulna bone.
9. PW3 PC Zablon Mathenge issued the Respondent with a police abstract on the accident.
10. The 1st and 2nd Respondent closed their case without calling any evidence.
11. The trial court entered judgment on liability on a 100% basis against the Appellants/Defendants. The award of General Damages was Ksh 200,000/=, special damages Ksh 10,200/= plus costs and interest.
12. The 1st and 2nd Appellant were aggrieved by the said judgment and appealed to this court on grounds that can be summarized as follows:
 - (1) That the Respondent's case was not proved.
 - (2) That the trial magistrate erred in finding that the Appellants were 100% liable for the accident.
 - (3) That the award of special damages was neither specifically pleaded nor proved.
13. The appeal was canvassed by way of written submissions which I have duly considered.
14. The Respondent's evidence was not controverted by any other evidence. The Respondent in his evidence identified the 1st Appellant as the driver of the motor vehicle. The Respondent also identified the 2nd Appellant as the one in charge and control of the motor vehicle and the one who was to pay him. The Respondent's further evidence is that he was a passenger in the motor vehicle in question. His evidence blames the driver for driving at a high speed while on a descent and losing control of the motor vehicle. It is noted that although the Respondent's evidence was that there was nothing the driver could do to avoid the accident, the Respondent also stated that he had never driven a motor vehicle. The Respondent therefore may not have known what the driver should have done to avoid the accident. However, the Respondent's evidence clearly reflects negligence on the driver's part by failing to slow down or control the motor vehicle. The Respondent's evidence therefore established negligence on the 1st Appellant's part for which the 2nd Appellant and 3rd Appellant were also vicariously liable. However, the Respondent also bears some responsibility for sitting on top of the stones which is a dangerous position. I would therefore apportion liability at 20% against the Respondent.
15. The Respondent's claim was for special damages of Ksh 2,000/= for the medical report and Ksh 200/= for the police abstract. The receipt for Ksh 2,000/= for the medical report was produced. No receipt was produced for Ksh 200/= for the police abstract. The Ksh 2,000/= was specifically pleaded and specifically proved. No other claim for special damages was specifically pleaded and proved.
16. With the foregoing, I find and hold that the Respondent ought to have borne 20% contributory negligence. The total award comes to Ksh 200,000/= general damages plus Ksh 2,000/= special damages

less 20% contribution. This comes to Ksh 161,600/=. Consequently, I enter judgment for the Respondent in the sum of Ksh 161,600/= plus costs and interests. The Appellants are entitled to 20% of the costs of the appeal.

B. THURANIRA JADEN

Dated and delivered at Machakos this 7th day of October, **2015**