



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 100 OF 2007

KIMANI MUHORO.....APPELLANT

VERSUS

JOHN WAIGANJO MBUTHIA.....1ST RESPONDENT

MARK GITUKU GICHUHI.....2ND RESPONDENT

(An appeal from the Judgment and decree of the M.K.K. Serem – SRM

in Nyeri Chief Magistrate’s Court Civil Case No. 47 of 2004.)

J U D G M E N T

1. The appellant being dissatisfied with the judgment and decree in CM Civil Case No. 47 of 2004 at Nyeri filed a memorandum of appeal on 12th October, 2007. He raised the following grounds of appeal:-

- i. The learned Magistrate erred in law and fact in finding that the appellant was 50% liable for the 1st respondent’s injuries;*
- ii. The learned magistrate erred in disregarding the evidence on record which evidence pointed to full negligence on the part of the 2nd respondent;*
- iii. The learned magistrate erred in law and in fact in awarding special damages which were not strictly proved as required by law;*
- iv. The learned magistrate erred in law and in fact in making an excessive award for pain and suffering which award had no basis on the evidence tendered; and*
- v. The learned magistrate erred in law in basing his decision on extraneous matters not relevant to the facts in issue.*

2. The appellant prays for the following orders:-

- i. The appeal to be allowed;*
- ii. The finding on both liability and quantum done by the subordinate court be set aside and for this court to do its own assessment;*

iii. The appellant be awarded costs of the appeal and of the court below; and

iv. Such other relief as this Honourable court deems fit.

3. The appellant filed his written submissions on 15th July, 2015. The other parties did not file any. The learned appellant (representing himself) and Mr. Karwero, the learned counsel for the 1st respondent appeared before this court on 20/7/2015 where they made oral submissions. The 2nd respondent did not attend court.

The appellant's submissions.

4. The appellant submitted that the 1st respondent who was in the 2nd respondent's motor vehicle was very clear and categorical that the 2nd respondent's motor vehicle was being driven without due care and attention. That the 2nd respondent's motor vehicle veered to the right after hitting a pothole. It was being driven at a high speed.

5. The appellant submitted that he was very clear that the accident happened on his side of the road and that this was confirmed by the 1st respondent. The appellant submitted that the learned magistrate erred in finding that there was no eye witness, yet the 1st respondent was an eye witness. The 1st respondent was a passenger in the 2nd respondent's motor vehicle.

6. The appellant further submitted that no evidence was adduced that he was to blame. He submitted that the magistrate erred in assessing contribution and apportioning liability to him and prayed that the 2nd respondent be found fully liable.

7. The appellant also submitted that the case in the lower court was a test case. There are other matters where the 2nd respondent has been sued.

1st respondent's submissions.

8. Mr. Karwero, learned counsel for the 1st respondent submitted that the appellant was joined in as a 3rd party by the 2nd respondent. The 2nd respondent was blaming the appellant. The 1st respondent was blaming the 2nd respondent and that the appellant was blaming the 2nd respondent. The fact that an accident happened and that the 1st respondent was injured was not contested.

9. The 2nd respondent only called the driver of the vehicle. The appellant was the driver of the 3rd party vehicle. There was no independent witness to verify how the accident happened.

10. Mr. Karwero submitted that the learned magistrate was correct in apportioning liability on a 50/50 basis between the appellant and the 2nd respondent. He urged this court to re-evaluate the evidence and reach its own decision on liability. He submitted that the appellant was involved and the 1st respondent should get compensated. He further submitted that the learned magistrate was spot on in the award of damages and that this court can only disturb such an award if overtly excessive. He prayed that the award of damages should not be disturbed as it was not excessive.

11. Mr. Karwero prayed for costs of the appeal to be borne by either the appellant or the 2nd respondent.

12. In response to Mr. Karwero's submissions, the appellant submitted that he had no problem with the quantum but his issue was on the apportionment of liability.

13. This being a 1st appellate court, I am reminded of my primary role of re-evaluating, re-assessing and re-analyzing the evidence adduced at the lower court. See the case of **Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2EA 212** where the Court of Appeal held inter alia:-

“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.”

14. This court will therefore proceed to re-evaluate, re-assess and re-analyse the evidence adduced in the lower court.

The plaintiff's/1st respondent's case.

15. The 1st respondent, John Waiganjo Mbutia adduced evidence that on 25/9/2003 at 6.00 p.m., he was on the Nairobi-Nyeri route aboard motor vehicle KAP 749U. He was seated on the first row from the driver. At Sagana, he heard a loud bang on the driver's side. The motor vehicle swerved off the road and rolled. He gave evidence that the road was clear, it was not raining. The road had potholes and that the motor vehicle was moving at about 100 KPH.

He indicated that the motor vehicle rolled severally and he was injured. He was taken to Murang'a District Hospital after the accident. He suffered a fractured clavicle bone and minor bruises on the body, on the left arm, which pains and the chest. He produced treatment notes and a P3 form, police abstract and a demand letter to the 2nd respondent.

16. He stated that the owner of the accident motor vehicle was the 2nd respondent. He was not aware of another motor vehicle that caused the accident. On cross examination by the 2nd respondent, he said that he did not see the speedometer reading at the time of the accident.

17. On cross examination by the appellant, PW1 said that he had a bang after the motor vehicle hit a pot hole. The motor vehicle swerved to the left side of the road at the scene of the accident. The motor vehicle rolled and landed off the road on the right side as one faces Nyeri town direction. According to him, the accident motor vehicle was not driven with due care to other road users.

18. The 2nd respondent/defendant, James Mbugua Kariuki, adduced evidence as DW1. He stated that on 24/9/2003, he was driving motor vehicle KAP 749U along the Nairobi - Nyeri road with 14 passengers. He reduced the speed of the motor vehicle to 60 Kmph from 80 Kph at Sagana near a bus stage.

19. He testified that motor vehicle registration No. KAC 249J was ahead of him and was moving at a high speed. He stated that the said motor vehicle had a tyre burst and it knocked his motor vehicle on the driver's side and the steering wheel of his motor vehicle locked. His motor vehicle then landed on the sides (sic) of the road on the left side. When he came out of his motor vehicle, he saw motor vehicle No. KAC 249J standing (sic) nearby.

20. DW1 further stated that motor vehicle No. KAC 249J is to blame for the accident as it was overtaking another and had a front tyre burst on the driver's side. The point of impact at the scene was on the left side, off the road. DW1 said that his vehicle did not roll severally and that his vehicle did not swerve on to the right side of the road towards Nyeri direction and he is not to blame for the accident.

21. On cross examination by Mr. Karwero, DW1 indicated that the scene of the accident had no pot holes at all. That after his motor vehicle was knocked (sic), it fell on the side and skidded for about 5 metres. He stated that his motor vehicle left the sides of the road at the scene across the road.

22. DW1 further said on cross examination that he gave way for oncoming motor vehicle KAC 249J and that he was not at (sic) high speed and never hit a pot hole at all. That he saw motor vehicle No. KAC 249J at 200 metres away after the tyre burst.

23. On being cross examined by the appellant/third party, DW1 said that his motor vehicle had a speed governor and the scene of the accident had no pot holes at all. He further said that he moved his motor vehicle off the road on the left side on seeing motor vehicle KAC 249J. He stated that he gave way to the said motor vehicle but it still knocked him (sic).

24. On re-examination, DW1 said that he saw motor vehicle No. KAC 249J at about 100 meters away before the impact and that his motor vehicle remained on the tarmac after the accident.

25. DW2, the appellant herein came into the proceedings after the 2nd respondent took out of 3rd party proceedings against him.

He testified that on 25/9/2003 he was driving motor vehicle No. KAC 249J along the Nyeri-Nairobi road. At Sagana town near a curio shop, he saw a motor vehicle ahead of him at a high speed on his side. He heard a loud bang and an accident had happened. His vehicle was on the left side of the road towards Nairobi. He was treated at Sagana hospital and admitted to Nairobi hospital for 4 days. He had fractures on the ribs and he was treated for over one year.

26. He further stated that the road was clear at the scene and he had seen the said motor vehicle 50 metres ahead prior to the accident. He testified that he was driving at 60-70 kmph and blames the motor vehicle that knocked him since it went to his side. He further said that the point of impact was on the left side of the road towards Nairobi.

27. On cross examination by Ms. Mwai for the 2nd respondent, the appellant testified that the tyre never busted (sic) and that the Nissan (the 2nd respondent's motor vehicle) knocked him on the left side of the road towards Nairobi and that the front of his motor vehicle was damaged.

28. After hearing the evidence of the parties, the learned magistrate found that no independent witness was called to testify and give a different account as to how the accident could have happened. The magistrate found that the evidence on record is that of interested parties **"and who wish to pursue the court to second them."** The magistrate then proceeded to apportion liability at the ratio of 50/50 against the appellant and the 2nd respondent.

29. After re-evaluating & re-analyzing the evidence, this court is of a view similar to that of the learned magistrate in that there was no independent witness that was called to give evidence. The 1st respondent who was a passenger in the 2nd respondent's motor vehicle heard a bang when the accident happened, after which the vehicle rolled severally. The 1st respondent as such did not see how the accident happened.

30. The 2nd respondent on the other hand blames the appellant for the accident. It was the 2nd respondent's evidence that the appellant's motor vehicle had a tyre burst and it knocked the 2nd respondent's vehicle on the driver's side and his vehicle landed on the left side of the road. He denied that his motor vehicle rolled severally as had been testified by the 1st respondent.

31. The appellant on his part blamed the 2nd respondent whom he says drove at a high speed on his side and that he heard a bang when the accident happened.

32. It is evident that there was a collision between the appellant's motor vehicle, as a result of which the 1st respondent sustained injuries. In the absence of independent evidence on how the accident occurred and in the presence of the blame game, this court finds that the magistrate arrived at the correct finding of apportioning liability at 50/50 against the appellant and the 2nd respondent.

33. Neither the appellant nor the respondent called the police officers who went to the scene after the accident, to shed light on whether indeed the appellant's motor vehicle had a tyre burst or if the 2nd respondent's motor vehicle drove onto the path of the appellant thereby occasioning the accident the

subject of this appeal. In the absence of that evidence, I uphold the decision of the learned Magistrate in the lower court.

34. The Court of Appeal in **Vyas Industries vs. Diocese of Meru (1982) KLR 114** held that:-

“The appellate court will not interfere with the issue of appointment of liability unless the Judge came to a manifestly wrong decision or based his apportionment on wrong principle”

This court finds that the learned magistrate did not apportion liability on the wrong principle. This court therefore declines to interfere and set aside the decision of the learned magistrate in **Nyeri CMC. Case No. 47 of 2004.**

The upshot of the foregoing is that the appeal is dismissed with costs to the 1st respondent herein.

It is so ordered.

DATED and **SIGNED** at Kakamega on this 28th day of October 2015.

NJOKI MWANGI.

JUDGE.

DELIVERED, DATED and **COUNTERSIGNED** at **NYERI** on this 3rd day of November, 2015.

J. MATIVO.

JUDGE.

In the presence of:-

..... **Appellant.**

.....**1st Respondent.**

..... **2nd Respondent.**