



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 1016 of 2004

PETER MUTURI KAMATA.....APPELLANT

VERSUS

MUIRURI MUNGAI.....

RESPONDENT

J U D G M E N T

1. Peter Muturi Kamata (hereinafter referred to as the appellant), is dissatisfied with the judgment of a Senior Resident Magistrate delivered in Milimani CMCC No.6696 of 2001. The suit was brought by Muiruri Mungai (hereinafter referred to as the respondent), who had sued the appellant for general and special damages arising from an accident in which the respondent was knocked down by the appellant's motor vehicle Reg. No.KRB 148. The respondent contended that the accident was caused by the negligence of the appellant.
2. The appellant filed an amended defence and counterclaim in which he denied the respondent's claim denying that he was the registered owner of the motor vehicle or that the vehicle was under his direction and control. The appellant further contended that if the accident occurred, the same was caused by the negligence of the respondent. The appellant counterclaimed a sum of Kshs.19,100/= being special loss suffered by him.
3. The suit in the lower court was heard by a Senior Resident magistrate, G.L Ngari. Mrs. Ngari seems to have left the station before the judgment was prepared and therefore the judgment was prepared and delivered by another Senior Resident Magistrate P. Wekesa.
4. Ms Wekesa found that the respondent was involved in the accident and that he was negligent to some extent as he was not using a pedestrian crossing. The magistrate also found the appellant negligent as he appears to have been inattentive. She therefore apportioned liability at 70-30% in favour of the respondent as against the appellant. The further magistrate further awarded general damages of Kshs.100,000/= and special damages of Kshs.1,000 all subject to 30% contribution.
5. Being aggrieved by that judgment the appellant filed this appeal raising 8 grounds.
 - (i) The learned magistrate erred in law and in fact in not dismissing the appellant's claim.
 - (ii) The learned magistrate erred in disregarding the appellant's acquittal by the criminal court whilst determining the issue of liability.
 - (iii) The learned magistrate erred in apportioning liability in the face of evidence proving that the

plaintiff was wholly negligent and culpable for the accident.

(iv) The learned magistrate erred in dismissing the appellant's counterclaim which was proved on a balance of probabilities.

(v) The learned magistrate erred in awarding damages which are manifestly excessive in the circumstances of the case.

(vi) The learned magistrate erred by taking into account irreverent material in her award for damages.

(vii) The learned magistrate erred in holding that the appellant failed to specifically prove his counterclaim.

(viii) The learned magistrate erred by sitting on appeal against the appellant and in favour of the respondent from the judgment and acquittal of the criminal court.

6. During the hearing of the appeal, there was no appearance for the respondent. In support of the appeal Ms. Ondari submitted that the trial magistrate failed to consider the appellant's counterclaim which was not challenged. On liability Ms. Ondari submitted that the appellant explained the circumstances in which the accident occurred and contended that the finding of the trial magistrate was inconsistency with the evidence. Ms Ondari submitted that the magistrate failed to take into account that visibility was poor. The magistrate also disregarded the evidence of criminal trial in which the appellant was acquitted. Further it was submitted that the damages awarded to the respondent were excessive as the respondent only suffered soft tissue injuries. The court was therefore urged to set aside the judgment of the lower court and either dismiss the respondent's suit or substitute the judgment with his own award.

7. I have considered the evidence which was adduced before the lower court. It is evident that the accident occurred at about 9.30 p.m. and therefore, visibility was not perfect. It is also apparent from the evidence adduced that there were some bumps on the road and that there were also drums because of construction which was going on. These affected the visibility on the road.

8. From the respondent's own evidence, after a vehicle from Langata passed, he drew near and stopped on the road waiting for the vehicle from Nairobi direction to pass. He claimed the vehicle left its path and hit him. Although the respondent testified before the trial magistrate that the appellant's vehicle left its path, came and hit him, that was contrary to the evidence which the respondent had given in the traffic case, when he stated that he did not know how the accident occurred, nor did he see the headlights of the accident motor vehicle. It is evident to me, that the respondent not having seen the appellant's vehicle, stepped onto the road suddenly, and was hit by the appellant's vehicle.

9. The appellant appears to have been traveling fairly fast. The appellant also does not seem to have paid particular attention to other road users, given that he did not see the respondent. In the circumstances, both the appellant and the respondent were to blame. I would apportion liability at 60% as against the appellant and 40% as against the respondent.

10. As regards general damages, the report of Dr. Moses Kinuthia showed that the respondent suffered multiple cut wounds on the occipital Scalp and the left shoulder, laceration wound on left scalp region and soft tissue injury on the left ankle joint. All these were soft tissue injuries and the award of general damages of Kshs.100,000/= was not justified. It is evident that the trial magistrate did not take into account the nature of the injuries. Accordingly, I would set aside the award of kshs.100,000/= and substitute it thereof with an award of Kshs.50,000/=. Special damages of Kshs.1,000/= is confirmed.

11. As regards the appellant's counterclaim, it is evident that the trial magistrate was wrong in failing to consider the appellant's counterclaim. Appropriate receipts were produced in support of the special damages of Kshs.19,100/=. Further no evidence was adduced to challenge the appellant's counterclaim. Subject to liability, the trial magistrate ought to have allowed the appellant's claim.

12. For the above reasons, I allow this appeal to the extent of setting aside the judgment of the lower court and substituting it thereof with a judgment on liability in favour of the respondent at 60% , the respondent bearing 40% contribution. I award the respondent general damages of Kshs.50,000/=, special damages of Kshs.1,000/=, all subject to contribution. With regard to counterclaim, the appellant is entitled to 40% contribution from the respondent. To this extent only does the appeal succeed.

Dated and delivered this 3rd day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs. Ochieng H/B for Chalega for the appellant

Advocate for the respondent absent

Erick – Court clerk