



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO. 200 OF 1992**

MARTHA C. MWAMBIA APPELLANT

VERSUS

JULIUS ARITHO MUTEA RESPONDENT

JUDGMENT

The appeal before me emanates from the decision of the Senior Resident Magistrate sitting at Nairobi. The decision was delivered on the 7th of January, 1991.

The original plaintiff and appellant in this case had been involved in a road accident. The motor vehicle she was travelling in as a fare paying passenger overturned. Apparently the vehicle overturned over the right way up. The passengers, including the appellant, boarded and continued their journey that was between Nairobi and Meru.

At Embu the appellant alighted. She was refunded 40/-. She was able to recall the registration number of the vehicle and sued the Defendant No.1- the owner of the vehicle and Defendant No.2 - the driver.

It seems that Defendant No.2 never attended court to give evidence. Defendant No.1. stated he had no idea that his vehicle had been involved in an accident. There was no indication of this when looking at the said vehicle.

In her judgement the trial Magistrate held that the Defendants were to blame for the accident. She held the defendant No.1 vicariously liable for the negligence of Defendant No.2.

Thereafter she noted that Special Damages had been proved and awarded the plaintiff this head of damages.

The only issue that was left, which is a basis of this appeal, is on Quantum.

The trial Magistrate found that the P3 form and Medical report produced to court were extremely at variance. It is therefore unclear whether the appellant had sustained injuries or not.

As a result the trial Magistrate made no award as to the General damages.

The appeal courts advocate argued from this finding that if the trial magistrate could award special damages it follows that the Plaintiff/appellant must have been injured. General Damages must therefore be awarded possibly based on the P3 form that was in fact on record and more accurate.

The respondents advocate stated that the injuries, if any, were minor. He supported the Magistrates findings.

From the judgement the Magistrate found that the appellant had pain on her shoulder and neck.

That she was treated at Embu General Hospital and at Aga Kha General Hospital where she stated she had been admitted for 3 days. No medical evidence from the two institution was produced to prove the said injury.

Nonetheless the appellant produced a P3 form by Dr. Mulupi on 3.5.88 (The accident occurred on 28.6.86).

The P3 form revealed the appellant had a injuries being:

- a) a fracture of clavicle
- b) Fracture of 7th & 6th rib
- c) Fracture of pelvis

The above injuries are said to have been one day old when examined namely 3.5.88.

Dr. Wokabi on the other hand examined the appellant on 10.5.88 - a week later.

The doctor stated that there was a healed fracture of the outer trip of the right collar bone. There was no mention of the 7th and 6th ribs being fractured nor of the pelvis being fractured.

The reports revealed that the examination occurred two years after the accident and not after one day.

The best medical evidence a litigant ought to bring to court is that which is produced nearest to when the accident occurred.

I find that the respondents submission on this appeal is correct when he states that the treatment carried from Embu General Hospital and Aga Khan General Hospital be made available during trial. Nonetheless the opinion of a Consultant Surgeon is imperative. Unfortunately I am amazed and perplexed that an accident that occurred two years prior to the examination by Dr. Mulupi and Dr. Wokabi should be one day old. This would only mean that the injures sustained may not have anything to do with the case.

The matters are made worse when the advocate for the plaintiff appellant failed to particularize the injuries sustained.

Under paragraph 4 of the Plaint "particulars of injuries" has been stated as "To be filed in court" (Emphasis mine). This of course is not desirable in any case. Particulars must be pleaded and proved. This point was brought up by the advocate for the respondent.

I would therefore find that this appeal has no merits. The same be and is hereby dismissed with costs to the respondent.

There was no cross appeal by the respondent on the Special Damages and I make no findings here.

Dated this 16th day of June, 1999 at Nairobi.

M.A. ANG'AWA

JUDGE

