



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 543 OF 2008

**KENNEDY OKONGO ODHIAMBO..... APPELLANT/
ORIGINAL DEFENDANT**

VERSUS

**JAMES KARIUKI
RESPONDENT/ ORIGINAL PLAINTIFF**

(Being an appeal from the Judgment of Hon. A. Muchelule Esq, Chief Magistrate on 15th September 2008 in Civil Case No. 1417 of 2007 at Milimani Commercial Courts at Nairobi)

J U D G M E N T

I. INTRODUCTION

1. This appeal arises out of TORT. It is a running down matter whereby James Kariuki, the original plaintiff/respondent (herein referred to as the respondent) was cycling along the Komarock road when a lorry went onto a pavement that he was cycling on and ran him down.
2. That lorry was identified as motor vehicle lorry registration No.KAU 797S that was in the control of Kennedy Okongo Odhiambo (herein referred as the appellant.)
3. The respondent sustained injuries as a result of the accident. This was pleaded as:
 - a) **Fracture of the right hip.**
 - b) **Dislocation of the right hip joint.**
 - c) **Fracture of the right mandible**
 - d) **Loss of teeth**
4. The evidence of both the plaintiff respondent and the defendant appellant was heard together with their witness.
5. The trial magistrate came to the conclusion that the said appellant was vicariously liable for the accident at 100%.

6. The quantum was awarded as follows:

<u>General damages</u>	
Pain and suffering	Ksh. 1,200,000/-
<u>Special damages</u>	
a) Copy of record	Ksh. 500/-

b)	Medical report	Ksh. 2000/-
c)	Fracture medical expenses	<u>Ksh. 20,000/-</u>
	Total	<u>Ksh 1,222,500/-</u>

7. Being dissatisfied with this award, the original defendant appellant filed this appeal to the High Court.

II APPEAL

8. The memorandum of appeal outlined that the Hon. Magistrate erred in fact and law:

8.1 ... by arriving at a decision that was wholly against the weight of evidence.

8.2 ... by finding the appellant liable for the accident when he was not the driver.

8.3 ... the plaintiff/respondent failed to prove negligence.

8.4 ... award of Ksh. 1.2 million was excessive.

9. The appellant submitted that the appeal be allowed. The subordinate court case be dismissed.

10. He further stated that the award was excessive and should not be permitted.

11. In reply the respondent stated that the appellant was wholly liable for the accident. That the evidence before court was sufficiently proved to show that the accident occurred.

12. The assessment of damages was a matter of discretion of court.

III OPINION

13. On looking at the evidence before court, the Hon. Magistrate was correct in reaching his verdict that the appellant defendant is liable for the said accident.

14. This liability is described as vicarious liable for the acts of your servant and or agents.

15. I would not interfere with the aspect of liability.

16. As to quantum, I would agree entirely with the appellant. There has been shown no basis to the court that this award of 1.2 million be given. It is too large and inordinate.

17. I would allow the appeal on damages of pain and suffering at

1.2 million and set aside the Hon. Trial magistrate's claim. I would substitute this with the sum of Ksh. 200,000/= taking into account the loss of teeth and fractures.

18. I would not interfere with the special damages award as none of the parties addressed me on this.

IV IN CONCLUSION

19. This appeal is allowed partially on the following terms:

19.1	Liability	100%
19.2	Quantum	
	<u>General damages</u>	
i)	Pain and suffering	Ksh. 200,000/-
	<u>Special damages</u>	
i)	Copy of record	Ksh. 500/-
ii)	Medical report	Ksh. 2500/-
iii)	Medical expenses	Ksh. 20,000/-
	Total	<u>Ksh. 23,000/-</u>
19.3	Total	<u>Ksh. 223,000/-</u>

20. I would enter judgment in favour of the plaintiff on the said sum above.

21. I would award interest from the date of the subordinate court's judgment 15th September 2008.

22. I would award interest on special damages from the date of filing suit.

23. I award the costs of this appeal to the appellant/original defendant. The costs of the subordinate court case to the respondent/original plaintiff.

DATED THIS 20TH DAY OF DECEMBER 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates :

ii) *G. K Matunda instructed by M/s Omwenga & Associates for appellant/original defendant*

ii) *F G Mungai instructed by M/s Munene Mwenga & Co Advocates for respondent/ original defendant*

Editorial Summary

1. *Civil Appeal*

2. *Subject of Subordinate Court Case*

TORT

2.1 *Running down cause*

2.2 *Male adult cyclist.*

2.3 *Motor vehicle/cyclist
Collision with motor vehicle registration
KAU 797S*

2.4 *Cause of action
11th August 2006
Komarock road*

2.5 *Cyclist sustains injuries*

Pleaded:

- a) *Fracture of right hip
(right acetabulum)*
- b) *Dislocation of right hip joint*
- c) *Fracture of right mandible*
- d) *Loss of teeth*

2.6 *Judgment of court
15th September 2008:*

- a) *Liability 100%*
- b) *Quantum*

	<u>General damages</u>	
	Pain and suffering	Ksh. 1,200,000/-
	<u>Special damages</u>	
500/-	Copy of record	Ksh.
	Medical report	Ksh. 2500/-
	Future medical expenses	<u>Ksh. 20,000/-</u>
<u>1,222,500/-</u>	Total	<u>Ksh.</u>

3. Appeal filed 13th October 2008

- 3.1 Memorandum of appeal
Hon. Magistrate erred in fact and law:
- a) ... arriving at a decision that was wholly against the weight of evidence.
 - b) ... by finding appellant liable for accident when not driving.
 - c) ... the plaintiff/respondent failed to prove negligence.
 - d) ... award of Ksh. 1.2 million was excessive.
- 3.2 Appeal be allowed and substantive orders dismissing appeal.
- 3.3 In reply, respondent
- i) Accident occurred
 - ii) Liability correct
 - iii) Appellant vicariously liable
 - iv) Amount of damages a matter of discretion.

4. Held:

- a) Appeal allowed partially
- b) General damages of 1 million excessive reduced to Ksh. 200,000/-
- c) Costs to appellant in appeal court costs to respondent in subordinate court.

5. Case Law:

- a) Kenya Bus Services Ltd
Vs
Dina Kawira Humprey (estate of Josephat KenegeniM'daka)

CA 295/00
2003 Eklr
Omolo, Tunoi, Githinji JJA

- b) *Automobile Association of Kenya*
Vs
James Jaganga
CA 92/99 Eldoret
Dulu ag J
- c) *Kimatu Mbuvi T/a Kimatu Mbuvi & Bro*
Vs
Augustine Munyao Kioko
CA 203/2001 Nairobi
Omolo, Waki, Deverell JJA
- d) *Michael Hubert Kloss & Another*
Vs
David Seroney & 5 Others
Bosire, Waki, Nyamu JJA

6. *Advocates* :

i) *defendant* *G. K Matunda instructed by M/s Omwenga & Associates for appellant/original*

Advocates for ii) *F G Mungai instructed by M/s Munene Omwenga & Co*
respondent/ original defendant