**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL APPEAL NO. 50 OF 2019**

**ENOCK SINDE OBEGI.....APPELLANT**

**=VRS=**

**BENARD SUMO.....RESPONDENT**

**{Being an appeal against the Ruling of Hon. C. W. Waswa – RM – Nyamira**

**dated and delivered on the 26th day of August 2019 in the original Nyamira**

**Chief Magistrate's Court Civil Case No. 178 of 2018}**

**JUDGEMENT**

By the Memorandum of Appeal dated 20th September 2019 and amended on 25th October 2019 the appellant seeks to set aside the judgement delivered by the trial court on 26th August 2019 and a review of the trial Magistrate's findings on liability and damages. The appeal is premised on grounds that: -

> **"1. The Learned Trial Magistrate erred in fact and in law in holding and finding that the Appellant herein had not proved his case in a preponderance of probability, in the absence of any tangible and/or credited evidence at all to that effect.**
>
> **2. The Learned Trial Magistrate misdirected himself in fat (sic) and law, when she failed to properly or at all evaluate and/or analyse the evidence on record cumulatively and/or exhaustively, thus the Learned Trial Magistrate reached an erroneous conclusion insupportable by the evidence on record.**
>
> **3. That the Learned Trial Magistrate misdirected himself in law by dismissing the appellant's case thus occasioning a miscarriage of justice.**
>
> **4. That the judgements and/or decision of the Learned Trial Magistrate is contrary to the weight of the evidence on record."**

The appeal which is vehemently opposed was canvassed by way of written submissions.

As an appeal is in the nature of a retrial I am obligated to reconsider and evaluate the evidence in the court below so as to arrive at my own independent conclusion while keeping in mind that I did not see or hear the witnesses myself (**see Selle v Associated Motor Boat Company Limited [1968] EA 123).**

That an accident occurred between the motorcycle the appellant was riding and the respondent's motor vehicle on the date, time and place averred was not disputed. Neither was the fact that as a result of the accident the appellant sustained injuries and the extent of those injuries. **The only issue between the parties was who was to blame for the accident.** The appellant alleged to have been riding his motor cycle KMCG 926T on his rightful side of the road in relation to the direction he was headed when the respondent's motor vehicle veered from its lane and knocked his motor cycle. The driver of the respondent's motor vehicle however disputed he was negligent and blamed the appellant for driving the motor cycle in a dangerous manner hence ramming into the rea of the respondent's vehicle. A police officer called by the appellant and who was expected to give an objective and independent opinion and therefore aid the court in arriving at a just determination as to which of the two drivers was to blame told the court that he could not tell the circumstances of the accident. It is for that reason that the trial Magistrate found that the appellant had not proved his case and dismissed it. Counsel for the respondent supports the trial Magistrate's finding and has relied on **Section 109** and **112 of the Evidence Act** as well as on the case of **East Produce (K) Limited v Christopher Astiado Osiro [2006] eKLR** Civil Appeal No. 43 of 2001where he submitted it was held that: -

**"It is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 where it was held that "there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."**

Also the case of **Regina Wangechi v Eldoret Express Company Ltd [2008] eKLR** where Koome J, as she then was held: -

**"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant.**

**However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the Defendant, the issue will be decided in the Plaintiff's favour unless the defendant provides some answer adequate to displace that inference."**

Counsel urged this court to apply the standard of proof as defined by Lord Denning J in **Miller v Minister of Pensions [1947] 2 ALL ER 372: -**

**"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.**

**Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing), the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

However, I agree with Counsel for the appellant that this being a case where the accident is not disputed but all we have is one driver's word against the other, it would be a good case to apportion liability in the ratio 50:50%. This is as was held by the Court of Appeal in the case of **Farah v Lento Agencies [2006] 1 KLR 124, 125** where the Court of Appeal held: -

**" ……**

**4. The trial court had two conflicting versions of how the accident occurred. It was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident.**

**5. Where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was equally to blame."**

I find that the trial Magistrate misdirected himself and applied the wrong principle in arriving at the finding on the issue of liability. I accordingly set aside his finding and substitute it with a finding that both drivers were equally to blame for the accident. They shall shoulder liability on a 50:50% ratio.

As to assessment of damages, the Learned trial Magistrate did not make a decision on the amount of damages he would have awarded the appellant although as a matter of principle he ought to have done so **(see John Wainaina Kagwe v Hussein Dairy Limited [2013] eKLR**). I must therefore do an assessment without the benefit of knowing the amount he would have awarded.

The injuries sustained by the appellant were: -

**i. Bruises on the frontal part of the head.**

**ii. Fracture of the right 5th, 6th and 8th ribs laterally.**

**iii. Fracture of the radius/ulna.**

**iv. Fracture of the left proximal phalanx.**

**v. Multiple cut wounds and bruises on the upper limbs.**

**vi. Fracture of midshaft tibia.**

In his prognosis done on 2nd November 2018, Dr. Ombati opined that once healed the appellant required another operation to remove the metal implants at a cost of Kshs. 20,000/=. He assessed permanent disability at 15%. Counsel for the appellant has proposed damages in the sum of Kshs. 1,000,000/=. He has also urged this court to award future medical expenses of Kshs. 200,000/= and special damages of Kshs. 30,450/=.

For the respondent, it is submitted that general damages of Kshs. 300,000/= would fairly compensate the appellant and that while special damages of Kshs. 23,950/= were proved, future medical expenses were not proved and must not be awarded.

I have perused the authorities cited by learned Counsel for the parties. The assessment of damages is discretionary but it must take into account the nature of injuries sustained, past awards and passage of time. The appellant sustained multiple fractures and wounds and bruises that left him with a permanent disability of 15% and taking everything into consideration and doing the best I can I am satisfied that a sum of Kshs. 700,000/= (seven hundred thousand only) would be adequate compensation for pain, suffering and loss of amenities. Future medical expenses which are in the nature of special damages were not specifically pleaded and so will not be awarded. Special damages of Kshs. 30,450/= were proved and the same are awarded.

In the upshot this appeal succeeds and judgement is entered for the appellant against the respondent as follows: -

1. Liability 50:50%

2. General damages for pain and suffering – Kshs. 700,000/=

3. Special damages – Kshs. 30,450/=

**Total** – **Kshs. 730,450/=**

4. Less 50% – Kshs. 365,225/=

**5. Nett Award** – **Kshs. 365,225/=**

6. Interest at court rates (that on specials from the date of filing suit in the lower court and that on general damages from the date of judgement in the lower court).

7. Costs of the suit in the court below and the costs of the appeal.

It is so ordered.

**Signed, dated and delivered in Nyamira this 30th day of April 2020.**

**E. N. MAINA**

**JUDGE**

**This judgement was delivered electronically in view of the Ministry of Health and the World Health Organization's guidelines on combating the Covid-19 pandemic, the Advocates for the parties also having consented.**