REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 72 OF 2015

KEITH MUKOLWE KEYA.....APPELLANT

VERSUS

FREDRICK O. WERE..... RESPONDENT

(from the judgment and the decree of Hon. C. Kendagor, SRM, in Kakamega CMC Civil Case No. 23 of 2012 dated 21/8/2015)

JUDGMENT

1. The appellant had sued the respondent at the lower court claiming general and special damages after the appellant was knocked down by the respondent's motor vehicle registration No. KBA 230H while he was riding a motor cycle registration number KMCK 173M along Kakamega - Mumias road. The trial court held that the appellant was the one who was entirely to blame for the causation of the accident and dismissed the case. The appellant was aggrieved by decision of the trial court and filed this appeal. The grounds of appeal are:-

(1) That the learned trial magistrate grossly erred in her evaluation of the evidence before her.

(2) That the trial magistrate did not place enough weight to the fact that the defence proffered no evidence.

(3) That the learned trial magistrate grossly erred in failing to find that the respondent wholly or substantially contributed to the occurrence of the accident herein.

(4) That the learned trial magistrate grossly erred in placing more emphasis on the appellant's lack of a riding license and by so doing reached on erroneous decision.

(5) That the learned trial magistrate's final orders have occasioned a miscarriage of justice.

2. The appeal was opposed by the respondent vide the written submissions of his advocates, **Andia & Co. Advocates**. Though Mr. Kombwayo, advocate for the appellant informed the court that they had filed submissions in the case there are none in the court file.

Case for Appellant –

3. The case for the appellant was that on the 26/6/2010 the appellant was riding his motor cycle from Shimanyiro market towards Mumias-Kakamega highway. He was to pick his mother at Maondo junction on the highway. That on reaching the junction he was to turn right to pick his mother who was a distance away from the junction on the way from the junction towards Mumias. At the junction he turned left towards Mumias. A Nissan matatu came from kakamega side going towards Mumias. The matatu slowed down. The appellant started to cross the road to the right. He was then knocked down by the respondent's car that was at the time overtaking the matatu. The point of impact was on the middle of the road. The accident was witnessed by the appellant's mother PW3 and a motor cycle boda boda operator, Alfred Makomere PW4 who was at Maondo junction. The appellant received serious injuries. He was unconscious. His mother picked him up and took him to Kakamega Provincial General Hospital. He was admitted there for some days and referred to Moi Teaching & Referral Hospital, Eldoret where he was admitted for several months. The accident was reported to the police. Investigations were conducted but the police blamed the appellant for causing the accident. The police file was closed without anybody being charged over the accident. The appellant later sued the respondent.

4. The respondent did not call any evidence in the case.

Submissions in this appeal –

5. Miss Andia, advocate for the respondent submitted that the burden of proof was on the appellant to establish negligence on the part of the respondent. That the appellant did not ascribe any negligence on the respondent. That the appellant admitted that he did not possess a driving

licence which means that he was not qualified to ride a motor cycle on a road. That he admitted that he did not have a helmet and a reflective jacket as required by the law. That the appellant contributed to the accident when he attempted to cross the road from one side to the other without stopping to check the flow of traffic on the main road. That in the circumstances the appellant was the one to blame for the accident and was the author of his own misfortune. That the respondent did not contribute to the occurrence of the accident. Counsel urged the court to dismiss the appeal.

Analysis and determination -

6. This being a first appeal, the duty of the court is to analyse and re-evaluate afresh the evidence adduced at the lower court while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify – See **Selle & Another –Vs- Associated Motor Boat Company Limited & Others (1968) EA 123**.

7. The burden of proof in the case was on the appellant to prove that it is the respondent who was negligent in knocking the appellant down when he was crossing the road. Section 107 (1) of the Evidence Act places the burden on any person who desires a court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts to prove that those facts exist. Section 108 of the Act provides that the burden in a suit or proceeding lies on that person who would fall if no evidence at all were given on either side. Ibrahim J. (as he then was) in **Treadsetters Tyres Limited –Vs- John Wekesa Wepukhulu (2010) eKLR** quoted Charlesworth & Percy On Negligence 9th edition at Pg. 387 on the question of burden of proof and stated that:-

> ***"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonable inferred, negligence is in fact inferred."***

8. In dismissing the case against the respondent the trial magistrate stated that the evidence pointed at the appellant as the one to blame for occasioning the accident. That he ought to have foreseen the danger he put himself in choosing to cross the road when the main road was not clear. That he did not have a driving licence. That a rider who has no driving licence cannot *ipso facto* be assumed to be knowledgeable as a driver. That there was no evidence that the respondent was driving at an excessive speed. That there was no contributory negligence on the part of the respondent.

9. The questions before the court are –

(1) Whether the trial court erred in holding that it is the appellant who was to blame for the accident.

(2) Whether the trial court erred in holding that the respondent did not contribute to the occurrence of the accident.

10. The motor cyclist PW1 testified that on reaching the junction he truned left towards Mumias. That on his side mirror he saw a matatu that was coming from Kakamega direction. The matatu slowed down. He started to cross the road to the right. He could not recall anything after that except that he later came to find himself in hospital. He all the same said that he was not to blame for the accident. He admitted that he did not have a driving licence and that he had not been to a driving school. He said that he had borrowed the motor cycle from a neighbour.

11. The cyclist's mother stated that she was across the road from PW1. That there was a matatu and a saloon car heading towards Mumias direction from kakamega. That the matatu slowed down. The saloon car was speeding. That as the cyclist crossed the road he was hit by the saloon car that was overtaking the matatu. That the point of impact was on the middle of the road. That she did not know who had the right of way.

12. The boda boda motor cycle operator PW4 testified that at the time of the accident he was at Maondo junction motor cycle stage. That he saw PW1 riding a motor cycle towards Mumias direction from Shimanyiro. That he was being followed by a Nissan matatu behind which there was a saloon car. That the matatu slowed down. That as PW1 crossed the road he was knocked down by the saloon car that was at the time overtaking the matatu. That the point of impact was on the middle of the road.

13. A police officer who testified in the case PW5 produced the police file covering report of the investigating officer and a sketch map of the scene as exhibits, D.Ex 1 and 2 respectively. According to the covering report it is the motor cyclist who emerged into the main road from a feeder road carelessly without observing traffic rules as a result of which he was knocked down by the motor vehicle. That the investigating officer recommended for the police file to be closed without any charges being preferred on anybody.

14. Upon re-evaluating the evidence adduced at the lower court I am in agreement with the trial magistrate that the appellant is the one who was to blame for the accident. The appellant in his evidence never stated that when he reached the highway he stopped to check on the traffic before joining the highway. He instead turned left towards Mumias and shortly after turned right to cross the road to the right. It would appear that it is his sudden act of joining the road and abruptly turning right that forced the matatu to slow down. If the appellant had stopped at the junction he should have given way to the matatu and the saloon car. Police investigations put the blame on him. The fact that the appellant had not been to a driving school is depicted by his lack of knowledge for traffic rules. It seems that he was unaware that he was required to give way at the junction. He was therefore to blame for occasioning the accident.

15. The point of impact was on the middle of the road. The respondent was overtaking the matatu when the accident occurred. The question is whether the respondent contributed to the accident.

16. A person driving a motor vehicle on the road is under a duty of care to other road users. In the case of **Teresia Sebastian Massawe (suing as the legal Administratix of the estate of the late Silvia Sebastian Massawe –Vs- Solidarity Islamic (Kenya Office) & Another (2018) eKLR**, Nyakundi J. cited the English case of **M. Jones –Vs- Livior Quarries Ltd (1992) 2QB 608** where Lord Denning had the following to say on what constitutes contributory negligence:-

> ***"A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man or woman he or she might be hurt himself or herself and in his or her reckoning he or she must take into account the possibility of others being careless."***

17. The respondent did not adduce evidence in the case. In my view the failure to adduce evidence in the case was not evidence of blameworthiness. The appellant was first required to ascribe some aspect of negligence on the respondent which would require the respondent to rebut. The witnesses for the appellant blamed the accident motor vehicle to have been going at high speed. However there was nothing from the sketch map to indicate that the vehicle could possibly have been at high speed. There were no skid marks shown in the sketch map.

18. It was clear that the appellant joined the highway without a proper look out after which he started to cross the road before ensuring that it was safe for him to do so. The respondent's vehicle must have been very close when the appellant suddenly turned right infront of the matatu. In such circumstances I do not think that the respondent had any option to avoid the accident. He could not be expected to have fathomed a motor cycle crossing the road infront of the matatu when he was overtaking. The evidence of the appellant and that of his witnesses was consistent with absence of negligence on the part of the respondent. It has not been shown that there was contributory negligence on the part of the respondent. It is the appellant who was entirely to blame for the accident. The trial court did not err in holding that the respondent was not liable for contributory negligence.

Quantum –

19. According to a medical report prepared by Dr. Andai (PW1) the appellant had sustained –

- Cut wound to the scalp
- Cut wound to the upper lip of the mouth
- Cut wound to the upper region of the left eye
- Brain concussion
- Bruises on the back
- Abrasions on the right elbow

The doctor assessed the injuries as serious soft tissue injuries. He opined that the appellant had 25% possibility of developing a post traumatic epilepsy as a result of the accident.

20. In his evidence the appellant stated that he had joined university for studies but he had to withdraw as he developed epilepsy. He however did not produce any documents to prove that.

21. The advocates for the respondent had requested for a sum of Ksh. 1 million in general damages. The trial magistrate stated that had the appellant proved his case he would have awarded Ksh. 1 million in general damages. He relied on the authority cited by the advocates for the respondent in the case of **John Kinyanjui Maina –Vs- AG & Another, Nairobi HCC. No. 3502 of 1990** where an award of Ksh. 600,000/= was made to a plaintiff who had suffered brain injury with resultant epileptic fits with 22% permanent incapacity. The advocates had also cited the case of **Lewis Kimani Waiyaki –Vs- David Cothle CA Civil Appeal No. 65 of 1984** where Ksh. 400,000/= was awarded in 1988 for head injury with resultant brain damage leading to loss of concentration and memory loss for recent events.

23. The advocate for the respondent had not made any submissions on quantum.

24. I have looked at other comparative cases involving brain concussions. In **Prem Gupta & Another –Vs- Grimley Otieno & 3 Others (2018) eKLR**, Njoki Mwangi J. cited the case of **Lucy Ntituka –Vs- Bernard Mutwiri & Others, HCC No. 17 of 1983** where the plaintiff had sustained head injuries with resultant cerebral concussion and unconsciousness, laceration on the lateral side of the right eye, lacerations and cut wound on the left arm (elbow), headaches on and off due to brain concussion and weakness in her left hand. Ksh. 800,000/= was awarded in the year 2007. The learned judge also cited the case of **Everest Adhiambo –Vs- Gilgil Telecommunications Industries Ltd, Civil App. No. 162 of 2005** where the appellant suffered injuries to the head with resultant cerebral concussion, complete deafness in the left ear and traumatic epilepsy. Permanent disability was assessed at 40%. An award of Ksh. 800,000/= made in the year 2007.

25. The appellant was admitted in hospital for close to three weeks. This in itself means that the injuries were serious. The doctor opined that there were 25% chances of developing post traumatic epilepsy. I am of the considered view that a sum of Kshs. 800,000/= would have been sufficient in general damages had the appellant proved his claim.

26. Notwithstanding the above, there is no merit in the appeal. The same is dismissed with costs to the respondent.

Delivered, dated and signed at Kakamega this 29th day of May, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for Appellant

No appearance for Respondent

Court Assistant - Polycap

30 days right of appeal.