REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.188 OF 2012

GEOFFREY MUNGAI KAMAU.....APPELLANT

VERSES

SUNRISE (1976) LIMITED.....1ST RESPONDENT

JOHN KARIUKI.....2ND RESPONDENT

JUDGEMENT

1. The appellant was involved in a road traffic accident on **18th May 2007** along Naivasha /Gilgil road which involved him and motor vehicle registration number KAX 506S lorry driven by the 2nd respondent and owned by the 1st respondent. He was riding his bicycle when the said accident occurred.

2. The appellant in his plaint at the lower court laid blame and negligence on the respondent wholly. As a result of the said accident the appellant suffered serious injuries which led to the amputation of his left lower limb above the knee. He thus sued the respondents jointly and severally for general and damages as well as loss of earnings and the cost of artificial limb.

3. In their defence the respondents attributed negligence on the appellant who according to them did not observe basic traffic rules and regulations and that he rode his bicycle while drunk. They blamed him for the accident.

4. The matter when to full trial where the appellant testified and called one witness who was a traffic police officer who produced the police Occurrence Book records. The appellant narrated how the accident occurred as well as the fact that he lost consciousness after the accident. He was rushed to the hospital and later his leg was amputated from the knee.

5. He said that he was careful and followed all the traffic rules and that it was the 2nd respondent who caused the accident by hitting him.

6. The 2nd respondent acknowledge the occurrence of the accident. He said that it was the appellant who hit his lorry on the side. He said that he went and had the matter reported at the police station. He was not however charged as the police laid blame on the appellant.

7. After the matter went to full trial the court dismissed the appellant's case on the grounds that he failed to establish any claim against the respondents.

8. Dissatisfied with the said verdict the appellant has filed this appeal citing several grounds. The substantive grounds are that the trial court erred in finding that the case was not proved beyond the balance of probabilities and that the court failed to appreciate the issues of quantum.

9. The parties were then directed to file their written submissions which they complied and the court has gladly perused the same. The appellant has submitted that the trial court despite finding that an accident had occurred erroneously attributed negligence upon the appellant yet it was clear that it was the first respondent that caused the accident. He said that the court was wrong when it relied on the contents of a police abstract which laid blame on the appellant.

10. The appellant submitted that there was no scientific or clinical evidence that the appellant at the time of the accident was drunk despite the reference in the discharge summary. He therefore prayed that the court should set aside the trials courts finding and consider the issue of quantum as he submitted. The proposed trial courts finding on quantum was low in the circumstances.

11. The respondent's submissions essentially supported the findings by the trial court and stated that all the indications by the police pointed out to the fact that it was the appellant who caused the accident. He prayed that the appeal should be dismissed with costs to the respondents.

ANALYSIS AND DETERMINATION

12. The occurrence of the accident is not in dispute. The issue is whether it was caused by the appellant as found by the trial court. The other limb is on the issue of quantum. The extent of the injuries sustained by the appellant are not disputed by either side.

13. In his evidence in chief the appellant on how the accident occurred said that;

> ***"That motor vehicle hit me, it came at a speed and found me on my side of the road on the left. I had not joined highway. It hit me and I fell in the same left side. That motor vehicle also stopped in the same left side of the road. The motor vehicle came to my left side of road...."***

14. The 2nd respondent on his part testified that;

> ***"We were diverting at Gilgil as road was under construction. We were entering Gilgil town as road was blocked. While I put on indicators to enter right there were other vehicles. When I turned I heard the motor vehicle tilt and when I check the side mirror I saw a cyclist. I stopped and when I alighted I saw the cyclist had knocked my lorry."***

15. Pw2 the police officer on his part stated that;

> ***"The O B indicates pedal cyclist was entering the main road as the lorry was turning right at the junction entering Gilgil***."

16. He went on to state that the traffic police referred the matter to the insurers and blamed the appellant.

17. There were no police sketch maps of the scene produced. In the absence of the same the court finds it difficult to determine the exact spot of the accident. One can however note that it did not occur on the main Nakuru /Nairobi highway. The respondent had made a turn to Gilgil town. This conclusion is buttressed by the evidence of both parties that the vehicle driver had indicated that he was turning.

18. Having stated so who then was to blame for the accident? There was no eye witness and the only independent witness, namely pw2 did not give a conclusive evidence. He said his business was to come and produce the O B only. Blaming the pedal cyclist as indicated in the police abstract without taking any further action of charging him with the offence was too casual in the circumstances. Referring the matter to the insurers was in a sense an escapist by the traffic police. What was difficult in charging the appellant?

19. In my view, in the absence of an independent witness, both parties must shoulder liability. The appellant ought to have been more careful noting that the vehicles from the main highway were being diverted as the road was undergoing construction. At the same time with the kind of intersection and turning that he was expected to make, the 2nd respondent ought to have been more careful. It was not enough to state that***," I heard my vehicle tilt".***

20. There is therefore a possibility that the respondent was rushing or at a speed that he was not able to control his vehicle. At the same time the appellant was careless in not considering that he was almost entering a major intersection and thus ought to be more careful as well. All in all, in the absence of a police sketch plan it becomes difficult to lay blame wholly to one of the parties. Nonetheless it is the finding of this court that they both ought to share liability equally.

21. Having stated so, the issue of whether the appellant was drunk during the accident featured in the proceedings. This was the findings by the medical officer who attended the appellant as per the discharge summary produced. He indicated that;

> ***"...middle aged man who is confused, sick looking, drunk***"

22. As submitted by the applicant, the conclusion by the clinical officer was not proven. There was nothing scientific to show that he was drunk, confused or sickly. There was therefore need to have called the maker of the document to be cross examined on this line. A mere conclusion that he was drunk is as parallel conclusion as that indicated in the police abstract by the traffic police that the appellant was to blame for the accident without taking any further precipitate action.

23. For now, this court in its respectful analysis has no difficulty in concluding that without any substantive proof of his intoxication the court cannot conclude that he was drunk during the accident.

24. The final issue to analyse is the question of quantum. The court shall only disturb this limb if the same was too high or too low in the circumstances or the trial court considered erroneous matters. See **KEMFRO AFRICA LTD T/A MERU EXPRESS SERVICE & ANOTHER VERSES A. M. LUBIA AND OLIVE LUBIA (1982-1988) KAR.**

25. It is not in doubt that the appellant lost apportion of his leg. Looking at the authorities cited by the parties and the proposed award by the lower court of Kshs 650,000, this court finds that an award of Kshs 700,000 would be adequate in the circumstances taking into consideration inflation.

26. The cost of Kshs. 50,000 for the artificial limb as per Dr. Shah report is appropriate in the circumstances.

27. The trial courts finding on special damages of Kshs 4600 is allowed as pleaded.

28. There was no evidence as rightly found by the trial court of the loss of earning. It was not enough to simply claim that he used to run a

shop or herd animals without any prove. That limb is disallowed.

CONCLUSION

29. In conclusion this court finds that the appeal is meritorious as reasoned above. The trial court err in dismissing the same with costs.

30. In the premises the trial courts judgement and the decree is hereby set aside. Judgement is entered as hereunder.

(a) Liability is hereby apportioned at 50% each between the appellant and the respondents.

(b) General damages for the appellant and against the respondents of Kshs. 700,000.

(c) Cost of artificial limb kshs.50000.

(d) Special damages of kshs.4600

(e) Sub Total .....Kshs. 754,600.

(f) Less 50% contribution on (e) above..... Kshs. 377,300

(g) Interest on (f) above from the date of the lower court's judgement till payment in full.

(h) The appellant shall have half costs of this appeal as well as half costs at the lower court.

Dated at Nakuru this 17th day of December 2020.

H. K CHEMITEI

JUDGE.