REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 8 OF 2017

BETWEEN

DOMINIC WAINAINA MUTURI .....APPELLANT

AND

PETER KIRAGU KIERE.....RESPONDENT

(*Being an appeal from the Judgment and Decree of Hon.R. Kihara, RM dated 25th October 2016 at Keroka Magistrates Court in Civil Case No. 131 of 2015*

JUDGMENT

1. The appellant contests the judgment of the subordinate court in which he was found fully liable for an accident that took place on 3rd April 2015 along the Keroka – Sotik road.

2. According to the plaint, the respondent was a passenger in the appellant's motor vehicle registration number KBP 580V when it was driven so negligently that it lost control and overturned thereby causing the respondent to sustain injuries. The plaintiff was awarded Kshs. 380,000/- and Kshs. 6,500/- as general and special damages respectively.

3. In its statement of defence, the appellant denied that the accident took place. It however pleaded in the alternative that if it did take place, it was occasioned solely by the negligence of the plaintiff.

4. At the hearing the respondent (PW 1) testified. The appellant called his driver, Peter Kanywira (DW 1) as his witness. As I stated the trial magistrate found the respondent fully liable. He expressed the following conclusion:

> *Whereas the driver can be said to have done his best in the circumstances of the case and may even be said to be a prudent driver. The manourver he made to avoid an accident turned out to be dangerous one and did still cause an accident whereas the driver of the alleged oncoming vehicle may have contributed to the accident, having been brought on board. The issue of contribution cannot arise. I don't see what the plaintiff did as would make the court say he did contribute to the accident.*

5. I have set out the part of the judgment because a substantial part of the memorandum of appeal dated 29th April 2017 contests the finding on liability. The thrust of the appellant's case is that the respondent failed to prove, in the balance of probabilities, that the appellant was liable. The respondent supported the judgment and took a contrary view. His position was that the respondent proved the case on the balance of probabilities.

6. Both parties have filed extensive written submission and cited various authorities. Ultimately the issue of who is to blame is a question of fact and it is one I must turn to. Since this is a first appeal, I am alive to the principle that the first appellate court is required to reconsider the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd* [1968] E.A. 123, 126**). At the hearing only the plaintiff called witnesses.

7. In his evidence in chief, PW 1, stated that he was passenger in the vehicle. He recalled that the motor vehicle was speeding, lost control and rolled. He blamed the driver. In cross-examination, he stated that the he did not know what speed he was travelling at though he was awake and never saw any oncoming vehicle. He stated that the driver lost control as there was an oncoming vehicle that encroached on their lane causing the driver to swerve and lose control.

8. DW 1 stated that as he was driving, he saw a speeding trailer from the opposite direction which encroached on his lane. He swerved off the road and hit an electric pole. He denied that he was careless. In cross- examination, he reiterated that he hit an electric post and lost control

causing the vehicle to land in a ditch.

9. From the evidence of PW 1 and DW 1, there is no dispute that an accident took place. DW 1 admitted that he was the driver for the appellant who was the owner of the vehicle. This means the appellant was vicariously liable. The main issue is whether the respondent established negligence on the appellant's part. In dealing with this matter let me adopt the statement of principle in the case cited by the appellant, ***Eastern Produce (K) Limited v Christopher Atiado Osiro*** **ELD HCCA No. 43 of 2001 [2006] eKLR** where Gacheche J., quoting other authorities, summarised the position as follows:

> *It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of* ***Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258****, 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".*
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> *I have in mind the description of negligence as is to be found in* ***Salmond and Heuston on The Law of Torts 19th Edn.*** *where it is described as "conduct, not a state of mind – conduct which involves an unreasonably great risk of causing damage……. negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do." (underlining is mine) The position is laid more clearly as "In strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing." (Lord Wrigur in* ***Lochgelly Iron and Coal Co. v. M'Mullan [1934] A. C. I,25****)*

10. In the particulars of negligence pleaded in the plaint, the respondent alleged that the appellant or his agent or employee was negligent as follows:

> a. Failing to keep any or any proper look-out or to have any or any sufficient regard for the plaintiff.
>
> b. Failing to steer the said motor vehicle in time sufficient enough to keep the same from overturning.
>
> c. Failing to exercise or maintain any or any proper or effective control of the defendant's said motor vehicle.
>
> d. Driving at a speed which was excessive in the circumstances.
>
> e. Causing or permitting the said motor vehicle registration mark KBP 580V to overturn.
>
> f. Failing to prevent the said motor vehicle from overturning.
>
> g. Failing to prevent the said vehicle from overturning.
>
> h. Failing to brake, stop, slow down, swerve or in any other way manage or control the said motor vehicle as to prevent the same from overturning.
>
> i. Driving a defective motor vehicle.
>
> j. Driving without due care and attention.
>
> k. Failing to heed to the condition of the road.

11. Considering the testimony of PW 1 and DW 1, I am satisfied that from the evidence that DW 1 was driving too fast and failed to control or manouver the vehicle when he saw the oncoming vehicle coming towards his lane. The inference that he was driving too fast to manouver the vehicle is from the fact that vehicle lost control and rolled.

12. The appellant also complained that the trial court erred in failing to apportion liability. In the particulars of contributory negligence against the respondent as follows:

> *(i) Boarding Motor Vehicle Registration No. KBP 580V Isuzu FFR without the authority, consent and/or knowledge of the Defendant and/or authorised agents.*
>
> *(ii) Failing to keep any/or proper look out for his own safety.*
>
> *(iii) Exposing himself to risk of injury by failing to exercise, prudent casre for his own safety.*
>
> *(iv) Dangling dangerously in the said Motor Vehicle Registration No. KBP 580V Isuzu FFR.*
>
> *(v) Jumping out of the said Motor Vehicle Registration No. KBP 580V Isuzu FFR while still motion.*

13. It was the duty of the appellant to prove the particulars of negligence pleaded his defence. From the evidence of DW 1, none of the particulars were proved and there was no basis upon which the court could apportion liability. As the trial magistrate pointed out, the

respondent, against who contributory negligence was alleged, could not have contributed to the accident in the circumstances as he was a passenger. The other vehicle which DW 1 alleged to have encroached on his lane was not joined as a third party and thus there was no basis to apportion liability.

14. I now turn to the issue of damages. The appellant submitted that the trial magistrate ignored his submission based on the case cited that the sum of Kshs. 150,000/- as general damages would be a reasonable award. He argued that the award was therefore excessive. The respondent supported the award and submitted that the appellant had no established a basis for interference by this court.

15. The nature and extent of the respondent's injuries is not in dispute as evidence from the P3 medical form and the report by Dr Ogando Zoga, the respondent sustained a displaced fracture of the right clavicle, contusion to the chest, back and neck. The doctor concluded from examining him that apart from the fracture, the respondent suffered severe soft tissue injuries.

16. Before the trial court, the respondent suggested that Kshs. 600,000/- would be reasonable. It relied on two cases; ***Zacharia Mwangi Njeru v Joseph Wachira Konoga*** **[2014] eKLR** where the plaintiff suffered a fracture of the tibia/fibula and was awarded Kshs. 400,000/- . and ***Benjamin Shelemia v Scooby Enterprises Limited*** **[2011]eKLR**, the plaintiff sustained a fracture of the tibia/fibula bone, dislocation of the right ankle and bruises on the right knee and was awarded Kshs. 450,000/- in 2011.

17. The appellant cited the case of ***Simon Mutisya Kavii v Simon Kigutu Mwangi*** **[2013] eKLR** where the plaintiff suffered incapacity of both left and shortening of the left leg with extensive burns which led to disfigurement. The court awarded Kshs. 200,000/- in 2013. On this basis the appellant suggested a sum of Kshs. 150,000/-.

18. I dealing with the issue of quantum of damages, I accept the principle that this court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see ***Butt v Khan*** **[1981] KLR 349***)*.

19. I have considered the decisions cited by the parties, the nature of injuries sustained by the respondent, the level of inflation and I am not convinced that Kshs. 380,000/- is excessive to attract interference by this court in line with the principle settled in ***Butt v Khan*** **(Supra)**.

20. I affirm the decision of the trial magistrate and dismiss the appeal with costs to the respondent which I assess at Kshs. 40,000/-.

DATED and **DELIVERED** at **KISII** this 11th day of **APRIL** 2019.

D.S. MAJANJA

JUDGE

Mr Onchwangi instructed by Oguttu-Mboya and Company Advocates for the appellant.

Mr Otieno instructed by Khan and Associates Advocates for the respondent.