



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 223 OF 2013**

**RAPHAEL ODUOR WANYAMA.....APPELLANT**

**VERSUS**

**LAWRENCE BARAZA SASYENDET.....RESPONDENT**

**JUDGEMENT**

1. By Plaintiff dated 5/8/2010, the Plaintiff (now Respondent) sued the Defendant (now Appellant) for damages arising out of a motor vehicle accident in which the Plaintiff sustained injuries. It was the Plaintiff's case that he was standing off the road along Nakuru-Eldoret near Menengai Refineries on 9/6/2010 when motor vehicle **KAK 688 T** driven by and owned by the Defendant lost control and hit motor while 630 P and KAY 651 A which in turn hit the Plaintiff. At the conclusion of the trial the court (Hon. Mwaniki SRM) held the Appellant fully liable and awarded Kshs.250,000/- general damages for pain and suffering and loss of amenities, Kshs.3,700/- special damages and interest thereon and costs of the suit.

2. The Appellant being aggrieved by the said agreement appealed against both liability and quantum. In the Memorandum of Appeal dated 4/12/2013 the appellant set out five (5) grounds:- that the Plaintiff did not prove his case; that the court misapprehended the evidence and erred in applying the doctrine of negligence; that the court erred in not apportioning liability; and that the court failed to consider the Appellant's authorities.

3. Both parties consented to urge the appeal through written submissions. I have considered the submissions. The key issues in the appeal are whether the Respondent (then Plaintiff) proved his case on a balance of probability; whether the court erred in holding the Appellant 100% liable and; whether the damages awarded were reasonable.

4. This is a first appeal. I am therefore enjoined to consider and re-evaluate the evidence and draw my own conclusion. In so doing I must remember that I have neither seen nor heard the witnesses and therefore make an allowance for the same. See **Williamson Diamonds ltd. Vs. Brown [1970] EA I**

5. It is alleged by the Appellant that the Plaintiff did not prove his case and that the court had no evidential basis to reach the conclusion it did in holding the Appellant liable. The Appellant submits that the testimony of PW2 was not conclusive as he did not witness the accident and was not based on proper investigations. The Appellant also submits that the trial court did not apply the doctrine of negligence correctly as there was no causation proved neither was it proved that the Appellant owed the Respondent a duty of care.

6. The Plaintiff's case in the trial court as presented by the Plaintiff (PW1) was that he was standing on the roadside when the Defendant's motor vehicle registration no. KAK 688 Y Toyota Corolla tried to overtake a matatu but on seeing a pick up motor vehicle registration No. KAY 651 A which was ahead of it, moved back to the left lane and in so doing hit the Nissan matatu registration No. KAS 630 P. The motor vehicle KAS 630 P in turn hit the Plaintiff and one other person named Richard Tanui Chelangat who was said to have died on the spot. The Plaintiff stated that he sustained injuries on the head, right thigh, right ankle and toes and was taken to the Provincial General Hospital where he was treated and discharged.

7. The Plaintiff called **No. 86323 PC Stephen Lengobito** a traffic police officer who produced the police abstract MFI P3 and OB Abstract in respect of the accident and P3 issued to the complainant. He testified that three motor vehicles Toyota Saloon KAK 688 T, Matatu KAS 630 P and Mitsubishi pick up KAY 651 A were involved. He testified that according to the police abstract, the accident was caused by KAK 688 T when it lost control and hit KAS 630P on the rear side and proceeded on to hit KAY 651 A. Gabriel Mburu (PW3) a health records officer at the Nakuru Provisional General hospital produced a print out of the hospital's records for 9/6/2010 (Exh. P.6) which shows that the Plaintiff was treated at the facility on that date. He also produced the Plaintiff's treatment card (Exh. 1).

8. Dr. Obed Omonyoma (PW4) examined the Plaintiff on 28/7/2011. By that time he had recovered from the soft tissue injuries. He produced a medical report P5A which largely relied on the treatment card from the Nakuru Provincial General Hospital. He also produced the P3 Form (Exh. No. 2).

9. The Defendant Raphael Oduor Wanyama (DW1) testified that he was driving motor vehicle KAK 688 T from Nakuru towards Njoro at about 6.30 p.m. That he tried to overtake motor vehicle number KAS 630 P matatu near Menengai Oil Refineries. Suddenly motor vehicle registration no. KAY 651 A and pick up encroached onto his lane. He applied brakes to no avail and hit the pickup. He denied having hit any pedestrian or seeing any one at the scene of the accident. That he was later told by a police officer that he had knocked two (2) pedestrians and injured them seriously. He denied that he was speeding nor that he was under the influence of alcohol.

10. It was the Plaintiff's duty to prove his case on a balance of probability. The evidence of the Plaintiff that he was a pedestrian when he was hit by the accident vehicle was contested by the Defendant. The Plaintiff however provided evidence that he was injured and was treated at the Nakuru Provincial Hospital. The police abstract (Exhibit 3) contained a report of the accident. The Defendant also admitted that he was involved in an accident while driving from Nakuru to Njoro at around 6.00 p.m.

11. The appellant disputes that he hit the two pedestrians on the road and that he did not hit any other vehicle other than KAY 651 A which suddenly re-entered the lane ahead of him. He stated that he did not hit motor vehicle KAS 630 P. He however stated that he lost control of the vehicle and landed in a ditch off the road.

12. I have carefully considered the plaintiff's evidence. I find the occurrence of the accident proved. I also find that the plaintiff as indeed injured in the accident. From the Appellant's admission that he hit the motor vehicle KAY 651 A and that he landed his vehicle in a ditch off the road where the Respondent was standing, I am satisfied that the trial court did not err in holding him liable for the accident. I fail to see how a pedestrian could contribute to the accident.

13. The appellant has argued that the driver of motor vehicle KAY 651 was to blame for the accident. However, nothing in the record shows whether the appellant took out any 3<sup>rd</sup> party proceedings against the driver or owner of the said motor vehicle. The court could not have apportioned liability to a person not party to the proceedings.

14. The trial court awarded Kshs.250,000/- general damages. I have considered the injuries suffered by the Respondent and comparable awards in the authorities supplied by the parties. I find that the award was neither too low nor too high and find no reason to interfere with the discretion of the trial court and disturb the award.

15. The upshot of the foregoing is that the appeal is not merited. It is dismissed with costs to the Respondent.

Orders accordingly.

Judgement signed .....

**R. LAGAT-KORIR**

**JUDGE**

**Judgement dated, delivered and signed at Nakuru this 26<sup>th</sup> day of September, 2018.**

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**JANET MULWA**

**JUDGE**

**In the presence of:**

..... Court clerk

..... For the Applicant

..... For the Respondent