REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 36 OF 2008

VASANT BHAI AMBALAL PATEL.....APPELLANT

VERSUS

JOSEPH MBOMERE.....RESPONDENT

(Being an Appeal from the Judgment of the Senior Resident Magistrate Honourable G. A. M'MASI in Eldoret CMCC No. 403 of 2006, dated 13th March, 2008)

JUDGMENT

The appeal herein is against the judgment and decree of *Hon. G.A M'Masi* in Eldoret Civil Suit No. 403 of 2006. In it, the plaintiff/Respondent alleged that on or about 16th December 2005 he was lawfully cycling along Eldoret-Kitale road on the verge of it when at around Pipeline junction the motor vehicle registration Number KAA 252Q, owned by the Defendant/Appellant and being driven by the Defendant himself, his servant, agent or driver was so negligently, carelessly and recklessly driven, managed and or controlled that it lost control, veered off the road and knocked him as a result of which he suffered severe personal injuries.

The plaintiff/Respondent called three witnesses during the hearing of the case. His evidence is that on 16th December, 2005 in the evening he was cycling from Eldoret town towards Mairo Inya. At the pipeline junction a vehicle registration No. KAA 252Q, an Isuzu Pick Up was from the opposite direction. The said vehicle was owned by the Appellant/defendant. It undertook to overtake another vehicle and swerved to the right lane, off the tarmacked road, and hit him. He lost consciousness and regained it at Moi Teaching and Referral Hospital the following day. He was admitted for 2 days.

According to PW-2, the doctor who examined him on 21st December, 2005, he had suffered head injury, loss of consciousness, scalp and forehead were swollen and tender, with deep cut wound of 8cm long. The left shoulder and arm were swollen and tender with bruises and lacerations. The left forearm had fractures at the wrist joint. The left knee and left leg were swollen with bruises and lacerations. Left tibia of knee joint had a fracture. There were soft and hard tissue injuries. He made a report and charged 1,500/= for the services.

The last witness was a police officer who received the report about the accident on 16th December, 2005 at about 6.30 p.m. He said the Respondent was hit by motor vehicle registration No. KAA 252 L, Isuzu Pick Up. He never got to know its owner. It was however driven by one *Benjamin Rugut.* Nobody was charged with a traffic offence out of the said accident.

On cross examination he said the pedal cyclist was to blame for causing the accident. He alleged there was a collision between 2 cyclists. The accident was caused by the first cyclist who hit the plaintiff and the vehicle was very close and it hit him.

On re-examination he said the plaintiff is not to blame for the accident. The plaintiff was hit by the motor vehicle as it was near.

The driver of the said motor vehicle gave evidence for the defendant. His case is that on 16th December, 2005 he left work in the evening and headed towards Eldoret Town. He got to Pipeline junction at about 6.30 p.m. There was jam and were cyclists from Eldoret side. He was on the left lane. Two cyclist were following each other. The one behind hit the one infront. The one behind lost control and hit the motor vehicle right tyre. The cyclist as a result was thrown off the bicycle and fell down. DW-1 was not overtaking as alleged. There was jam and he was driving at 30 to 40 kph. After the accident he reported it at the police station. He was not charged. He blames the Respondent for the accident as he hit a fellow cyclist and lost control and ended up hitting the vehicle. There was jam on both sides of the road.

The trial magistrate evaluated the evidence and found the driver of the vehicle 100% liable for the accident and the Appellant to the same extent vicariously liable. The Respondent was awarded 1,500 as special damages and 300,000/= general damages.

The Appellant dissatisfied with the judgement and the decree appealed to this court on the grounds that:-

(1) The evidence of the appellant was not taken into the account.

(2) The trial magistrate erred in finding the appellant 100% liable despite of the evidence of the appellant.

(3) The defence submissions was not considered.

(4) The damages awarded were excessive.

I have re-evaluated the evidence adduced by both sides in the lower court, submissions tendered, judgment entered grounds of appeal and submissions by both sides on appeal. I have noted, and this is with due respect to the trial magistrate, that some findings in the judgment are not well supported by the evidence adduced. The judgment express that:-

"DW-1 said the plaintiff who was amongst these cyclists left the road and went towards the vehicle he was driving and hit the front tyre of the motor vehicle and fell down. The court finds that the defence of DW-1 does not hold water because if plaintiff would have crossed the road as DW-1 states he would have been hit by other vehicles."

The trial court from the evidence did not have enough facts to enable it safely draw such a conclusion. One can safely cross a busy road if the drivers slows down and or brakes to a stop to give way. One can also manage to do so safely depending on his own speed, that of the vehicle along his path and the distance in between. Without these facts made clear, the conclusion by the trial court on this cannot be correct.

The other issue is:-

"The plaintiff after being knocked fell on the left side of the road. This is confirmed by PW-3 and this is what the plaintiffs told the court in his evidence."

PW-3 from his evidence just received the report about the accident. He never visited the scene. There is no evidence that he even recorded the report in the O.B and the witness statements. Sketch plans were not drawn and he could not ascertain anything on how the accident occurred. We do not know the source of his information on what he attempted to tell the court. On cross examination he blamed the plaintiff for the cause of the accident and talked of him having hit another cyclist making him lose control. The defence case is to the said effect, and the trial court did not evaluate that. It is a point where the plaintiff's witness agrees with the defendant's defence on how the accident occurred. Such an allegation carries some weight.

The allegation that the Appellant's driver was overtaking another vehicle was not well established. The vehicle allegedly being overtaken was not described. It is not clear whether he overtook it or not. This is a case where there is only the word of the Respondent to weigh against that of the Appellant's driver, given that the police did not properly investigate the accident, if at all they did. In law he who alleges proofs. The standard of proof here is on balance of probabilities. It is clear that the Respondent was able to prove that he was involved in an accident with the Appellant's vehicle and sustained the alleged injuries. He however in my view, did not establish on balance of probabilities that the said accident was caused by the appellant's driver manner of driving. There were no basis of holding him liable, leave alone 100% liable. I accordingly find the appeal merited; the judgment and decree in Eldoret CMCC No. 403 of 2006 is set aside with cost to the appellant.

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **27th** day of **November, 2018**

In the absence of:

All parties

And in the presence of Mr. Mwelem – Court assistant