REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NUMBER 236 OF 2011

ROBERT KOSKEI SAINA.....APPELLANT

VERSUS

SAMSON KIBOIWO KIRUMET.....1ST RESPONDENT

JOSEPH MUREITHI MURAGE.....2ND RESPONDENT

CONSOLIDATED WITH

NAKURU HIGH COURT CIVIL APPEAL NO. 235 OF 2011

JOAN JESARO CHEPKONGA.....APPELLANT

VERSUS

SAMSON KIBOIWO KIRUMET.....1ST RESPONDENT

JOSEPH MUREITHI MURAGE.....2ND RESPONDENT

(Being an Appeal from The Judgment And Decree Of Honourable Mr. H. Njaga Principal Magistrate, Kabarnet In Kabarnet PMCC No. 104 Of 2009 Dated 30th November 2011)

JUDGMENT

1. On the 15th August 2009, an accident occurred between motor vehicle **Registration Number KAP 289M** being driven by **Robert Kosgei Saina** the Appellant herein and **KAU 448Z** being driven by **Samson Kiboiwo Kirumet**, the 1st Respondent and owned by the 2nd Respondent along the Kabarnet-Marigat Road. The Appellant sued the Respondents for negligence and damages from injuries he sustained following the said accident. Upon full hearing, the trial court dismissed the appellants case on the grounds that he did not prove negligence upon the 1st respondent on a balance of probability.

2. The appellant appealed to this court citing various errors of law and fact on the issue of negligence, that the trial magistrate erred in relying wholly on the evidence of the investigating officer and ignored evidence of both the appellant and the Respondent on how the accident occurred, and that the trial court failed to consider the pleadings and submissions filed by the appellant thus arrived at a wrong conclusion.

The appellant has urged the court to set aside the judgment and find in his favour.

The court being the first appellate court shall re-evaluate the evidence tendered before the trial court and come up with its own conclusion and findings. While doing so, the court will also look at the pleadings by the respective parties. See **Selle & Another -vs- Motor Boat Co. Ltd and Others -vs- Civil Appeal No. 31 of 1967 (1968) EA L.R 123**. and followed in many decisions among them **Farah -vs- Lento Agencies C.A No. 34 of 2005(2006) KLR 123.**

3. The Appellants case is based on his further Amended Plaint dated the 3rd September 2011 where the appellant stated that he was driving on his correct lane when the 1st Respondent moved from his lane and collided with his vehicle whereof he sustained injuries. He stated particulars of negligence that the 1st Respondent drove at a speed that was excessive in the circumstances, drove without due care and attention without due regard to other road users and moved into the 1st Respondents lane thus caused the accident.

4. In their amended defence dated the Respondents denied the occurrence of the accident, ownership of the vehicle and the 1st Respondents being the driver and agent of the 2nd respondent. They further blamed the appellant for the accident and/or having contributed to the same.

Before the trial court, the appellants case was that while around Patkawanin and negotiating a sharp corner about 6.30p.m. driving towards Kabarnet, he saw a vehicle headed towards him, then heard a loud bang. On cross examination, the appellant stated that he was driving on the left lane while the Respondents motor vehicle was on the right side, and was driving at 60-70 KPH at a sharp corner when the other vehicle appeared suddenly. He stated that his vehicle was damaged on the right side. He denied that the other vehicle was stationery, that it was on the yellow line and that the point of impact was slightly on his lane.

5. The Appellant called one CPL Daniel Mwangi, a police officer from Marigat Sub Base who was the investigating officer. It was his testimony that he visited the scene of accident on the night of the accident in the absence of both the appellant and the 1st Respondent, and later on the 16th August 2009 again in the absence of the drivers. He told the court that he gave out a police abstract to the 1st Respondent without having taken a statement from the appellant. It was his testimony that on the night of accident, at the scene, he found motor vehicle KAU 448Z on the left side leaning on the road railings while motor vehicle Registration No. KAP 289M part side was on its lane and the other part on the right side. On cross examination, he stated that he drew a sketch plan and that the point of impact as on the right side facing Kabarnet, on the lane headed to Marigat near the yellow lane going to Marigat. From the above statements, the investigating officer concluded that motor vehicle registration No. KAP 289M crossed to the opposite lane and therefore was to blame. He did not produce the sketch plan he alluded to, but also told the court that both drivers blamed each other for the accident.

6. The 1st Respondent testified that he was with his mother, father and sister when the accident occurred. His testimony was that from the opposite direction, he saw a vehicle that swerved from its lane on to his lane, that he stopped next to a barrier on the left side when the other vehicle hit his at the front and pushed it to the barrier. He denied having been driving at an excessive speed nor on wrong lane and later obtained a police abstract from the police station where he reported the accident the same night.

7. In its judgment after evaluating the above evidence and submissions filed on behalf of the parties, the trial court made findings that the issue of ownership of the Respondents vehicle was not an issue as the 1st respondent stated that he had borrowed the same from one Muriithi Murage while the occurrence of the accident was a none issue in view of the evidence, that indeed the accident occurred between the two vehicles and both drivers admitted having been the drivers of the respective vehicles.

8. On negligence, it was the trial courts findings that the appellant's vehicle caused the accident as it had crossed from its lane to the opposite lane, and stated “this is what caused the accident.” To justify the above holding, the trial magistrate stated that there was nothing to show that the 1st Respondent

contributed in any way to the accident, and that "is why the point of impact was actually on the lane that he was on."

In arriving at the above conclusion, the trial court relied heavily on the investigating officers evidence (PW2) when he stated that motor vehicle KAU 448Z was partly on its lane and partly leaning on the rail on the left side of the road while KAP 289M had crossed over to the opposite lane.

9. The Appellant's submissions differ sharply with the conclusions of the trial court. It is submitted that the investigating officer in his own testimony stated that the two drivers gave conflicting, different versions of what happened, and further told the court that each driver blamed the other for the accident.

The 1st Respondent stated that he did not swerve, that it was not a head on collision, that his vehicle was hit on the offside front right hand, that the appellant drove on the wrong lane.

On the other hand, it is on record that the Appellant too blamed the 1st Respondent, that he drove on the wrong lane. It is further submitted that the trial court relied heavily on the evidence of PW2 the investigating officer who did not produce a sketch plan to show the court where the point of impact was which he concluded was on the right side of the road as one faces Kabarnet direction.

The Respondents submissions supported the investigating officers testimony that the appellant was to blame for the accident, that the resting positions of the two vehicles was not consistent with a head on collision and that the point of impact was on the Respondents right side facing Kabarnet and drew the conclusion that the Appellants vehicle was to blame for the accident.

10. **Evaluation of evidence and submissions.**

The court has evaluated the evidence of the two drivers and the investigating officer's evidence. Two versions of the manner of the occurrence of the accident present themselves. Each driver blames the other. The 1st Respondent stated that he had with him three passengers. It is not clear why he could not call those witnesses to testify and buttress his version of the story.

The only independent person to whom the court may rely on for more insight and light was the investigating officer(PW2), who essentially should help the court into coming up with an informed decision. The said investigating officer in my view was not competent and was of very little help to the trial court.

It was his testimony that on the date of accident, he visited the scene in the absence of the drivers and drew a sketch plan. That sketch plan was not produced in court. In his own testimony he stated as follows:

> ***"I found motor vehicle KAU 448Z on the left side leaning on the road railing. Motor vehicle KAP 289M front side was on its lane. The other side of the motor vehicle was on the right side."***

On cross examination he stated:

> ***"I went to the scene. Motor vehicle Registration No. KAU 448Z was partly on its lane on the right side. The resting position is not consistent with a head on collision--- Motor vehicle registration No. KAU 448Z was damaged on the front right side, Motor vehicle KAP 289 M was damaged on the front right side. The entire front was damaged----Motor vehicle KAP 289M should have been on the left side facing Kabarnet. The point of impact was on the right side, facing Kabarnet, on the lane headed to Marigat.--- I concluded that the driver of motor vehicle KAP 289M crossed to the opposite lane. He was to blame for the accident."***

The above is the evidence that the trial court relied on heavily to make a conclusion that the appellant was wholly to blame for the accident.

11. At the time the investigating officer made the above conclusion, he had not taken or recorded a statement from the Appellant who apparently had been taken to hospital. The 1st Respondent had recorded his statement same night of the accident and it appears the investigating officer relied wholly on the said statement.

The appellant's vehicle as stated above was partly on its lane (the front side) while the rest of the vehicle was on the right side. The court fails to understand the logic as stated in the investigating officer's evidence. On page 11 of the Record of Appeal, the Investigating officer on cross examinations stated that motor vehicle KAU 448Z was partly on its lane and partly on the right lane, a complete departure from what he stated in evidence in chief that the said motor vehicle KAU 448Z was on the left side leaning on the road railings. As stated earlier, no sketch plan was produced to indicate the point of impact.

12. From the above contradictory statements by the two drivers and the investigating officer, the court is unable to make a firm concussion as to which of the two drivers was to blame for the accident. The investigating officers evidence only adds more uncertainty to the same as without the sketch plan, his opinion on the causation of the accident and the point of impact remains as an opinion without any support, and which opinion does not bind the court. I have not seen a copy of the investigation report. Indeed none was produced before the trial court.

13. The court finds that the trial court's reliance on the oral evidence and opinion of the investigating officer's evidence when he was not an eye witness to the accident wanting. As much as it may have been useful to the court, it only remains as an opinion as stated above and does not bind the court as stated in the case **David Kajogi M'Mugaa -vs- Francis Muthomi (2012) KLR.** As such, the court can either accept or reject the said evidence.

In my own assessment and evaluation of the evidence, I find that the two drivers were both to blame as no clear evidence on which of the two drivers caused the same as no clear evidence on which of the two drivers caused the same.

In **Farah vs Lento Agencies (Supra)** the Court of Appeal held that where there is no concrete evidence to determine who is to blame between two drivers, both should beheld equally to blame. In the case **Multiple Hauliers Ltd -vs- Ralids Muthoni Kimani (KLR) 2015, KLR**, this court faced with a similar situation pronounced itself on the issue of contributory negligence and proceeded to apportion liability between the two drivers – where blame was more evident on one of the drivers, unlike in the present case where the evidence is full of contradictions, each party blaming the other for the accident, and the investigating officer adding more uncertainty by failure to produce a sketch plan and the investigation report.

Contrary to submissions by the Appellants advocates, it is not always that where two vehicles collide and no clear evidence is adduced, both parties ought to be held equally to blame. See **Lakha – Mishi -vs- AG (1971) EA 118.**

Circumstances pertaining to each case must be taken into account.

In **Baker vs Market Haiborough Industrial Co-operative Society Ltd** (**1953**) **I WLR 1472, Lord Denning** (as he was then) observed:

> ***"Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One of the other is held to blame and sometimes both---."***

This court wholly associates itself with the wise observations of the celebrated Judge, Lord Denin, (as he then was), in the above case.

14. Section 107, 108 and 109 of the Evidence Act places the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. As much as the appellant had a duty to prove his case against the Respondents, the Respondents too were under a similar obligation. Indeed both parties

(drivers) had a duty of care towards each other and all other road users. The court finds that neither of the two drivers discharged the duty of care towards each other adequately. It can not be doubted that both drivers were to blame. The court finds that the trial magistrate erred both in law and fact in relying mainly on the evidence of the investigating officer and in the finding that the 1st Respondent driver did not contribute in any way to the accident.

15. On the issue of quantum of damages, the trial court assessed general damages awardable to the Respondent in the sum of Kshs.180,000/= for pain and suffering and Kshs. 2,000/= in special damages.

The appellant has not demonstrated to this court how the trial court erred in arriving at the said sum. None of the parties addressed this court on the said issues of quantum of damages.

In line with the case **Bashir Ahmed Butt -vs- Uwais Ahmed Khan (1982-88) 1 KAR,** I shall not interfere with the trial court's exercise of discretion in making the above award.

16. In conclusion, the appeal succeeds to the extent that the trial court's judgment dismissing the appellant's case is set aside and is substituted with a judgment that both the appellant and the Respondents are equally to blame for the accident. The award on special and general damages shall remain undisturbed.

17. As agreed by the parties at the commencement of the hearing of this appeal, the judgment herein shall apply to **Nakuru High Court Civil Appeal Number 235 of 2011** between **Joan Jesaro Chepkonga -vs- Samson Kiboiwo Kirumet and Joseph Mureithi Murage.**

As the appeal succeeds partly, each party shall bear its own costs.

Dated, signed and delivered in open court this 28th day of January 2016

JANET MULWA

JUDGE