REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 147 OF 2011

GEOFREY GACHECHE KARIUKI..........................APPELLANT

VERSUS

HOWARD WANYONYI NDIEMA…......................RESPONDENT

(Being an appeal from the original judgment and decree of Hon. A. B. Mongare,

Resident Magistrate in Eldoret CMCC No. 1239 of 2004 deliveredon 8th October 2007)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Resident Magistrates Court dated 8th October 2007. The appellant was the defendant in the lower court. The respondent had filed a suit claiming special and general damages. He claimed that on 21st September 2004, he was riding a bicycle along Uganda Road. At a place called Duka Moja, he was knocked down by the appellant's vehicle, KAQ 583D Toyota Corolla Saloon. He blamed the driver for speeding; or, overtaking a lorry at a road block. He said he suffered injuries on the back of the head, right hand, hip, and chest.
2. The appellant denied the claim *in toto*. The lower court found that the appellant was 80% liable while the respondent was liable at 20%. The learned trial Magistrate then assessed general damages for pain and suffering at Kshs 130,000. The claim for special damages was dismissed for want of a revenue stamp on the receipt produced. The net award was thus Kshs 106,000 together with costs and interest.
3. The appellant has lodged a memorandum of appeal dated 6th November 2007. There are six grounds of appeal. They can be condensed into five. First, that the trial court erred by finding the appellant guilty negligence yet the respondent failed to file a reply to defence; secondly, that the award of general damages was inordinately high; thirdly, that there was no evidential or factual basis for blaming the appellant at 80%; fourthly, that the learned trial magistrate misapprehended the burden of proof; and, fifthly, that the learned trial magistrate failed to consider the appellant's final submissions.
4. The appeal is contested by the respondent. The respondent submitted that negligence or fault by the appellant was proved. The respondent denied that he was to blame wholly for the accident. The respondent contended that the appellant's motor vehicle hit his bicycle from behind. It was submitted that the decision of the lower court on liability and quantum of damages was sound. I was implored to dismiss the appeal.
5. The appellant has filed detailed submissions dated 26th October 2015 with authorities annexed. The respondent's submissions were filed on 19th October 2015. On 27th October 2015, learned counsel for both parties informed the court that they would rely entirely on their written submissions. I have considered the memorandum of appeal, the record of appeal, the pleadings in

the lower court, the evidence and the rival submissions.

6. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See <u>*Peters v Sunday Post Limited*</u> [1958] E.A 424, <u>*Selle v Associated Motor Boat Company Ltd*</u> [1968] EA 123, <u>*Williamson Diamonds Ltd v Brown*</u> [1970] EA 1, <u>*Mwanasokoni v Kenya Bus Services Ltd*</u> [1985] KLR 931.
7. By an amended plaint dated 29th March 2005, the respondent pleaded that the appellant's vehicle was driven too fast and without care and attention. In particular he blamed the driver for failing to brake or control the vehicle thus causing the accident. In a formal defence dated 16th March 2005, the appellant denied ownership of the vehicle. He also blamed the respondent for causing the accident.
8. The particulars of negligence pleaded by the appellant against the respondent were as follows: entering the highway from a side road without yielding; crossing in front of the vehicle; dangerously disembarking from his bicycle and crashing into the vehicle; and, riding his bicycle in a reckless manner along a busy road.
9. The respondent did not file a reply to the statement of defence. The appellant thus contends that the respondent should have been found 100% liable for the accident. I hold that failure to file a reply to defence was *not* fatal to the respondent's case. The respondent had *pleaded* the particulars of negligence of the appellant at paragraph 3 of the amended plaint. The appellant had countered with the statement of defence. There was no counterclaim. Failure to file a reply only meant there was a *joinder of issues* on that defence.
10. True, Order 7 Rule 17 (1) states that a plaintiff *shall* be entitled to file a reply to defence within fourteen days of service. But failure to do so does not render his claims in the plaint otiose. See <u>*Joash Nyabicha & another v Kipkembe Limited & another*</u>, Kisumu, Court of Appeal, Civil Appeal 302 of 2010 (unreported), <u>*Peter Kanithi v Aden Guyo Haro*</u>, Nairobi, High Court Civil Appeal 307 of 2008 [2014] eKLR.
11. The respondent called Dr. Sirma (PW2). He confirmed the injuries as a cut wound on the occipital area of the head; blunt chest injury, blunt injury and bruises to the right hip joint; and, bruises to the left arm on third ulna region. His narrative was largely confirmed by PW3, a clinical officer at Uasin Gishu Hospital, who attended to the respondent on 21st September 2004. He filled the P3 form (exhibit 2). The appellant submitted that the award of damages was not commensurate with the injuries sustained by the respondent.
12. The appellant did not lead evidence to controvert the medical reports by the respondent. The learned trial magistrate was thus entitled to find that the respondent suffered those injuries. The injuries were of a soft tissue nature. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See <u>*Butt v Khan*</u> [1982-88] KAR 1, <u>*Arkay Industries Ltd v Amani*</u> [1990] KLR 309, <u>*Karanja v Malele*</u> [1983] KLR 42, <u>*Kemfro Africa Limited & another v Lubia & another*</u> [1987] KLR 30, <u>*Akamba Public Road Services Ltd v Omambia*</u> Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.
13. It is common ground that the respondent suffered multiple soft tissue injuries. From the evidence of PW3 he was given analgesics and antibiotics. He was discharged the same day. In <u>*Peter Kahugu & another v Ongaro*</u>, High Court, Nairobi, Civil Appeal 676 of 2000 [2004] eKLR, the plaintiff suffered soft tissue injuries. An award of Kshs 80,000 was made. In <u>*Mumias Sugar Company Limited v Julius Shibia*</u>, High Court, Kakamega, Civil Appeal 112 of 2011 [2004] eKLR, the court reduced the general damages for multiple soft tissue injuries to Kshs 100,000.
14. Granted the evidence and precedents, I disagree with the appellant that the damages were *inordinately* high. The learned trial magistrate made an award of Kshs 130,000. I can only interfere if the lower court applied the *wrong principles* and arrived at an *unjust* decision; or the award is manifestly high or inordinately low. <u>*Butt v Khan*</u> [1982-88] KAR 1. The award of Kshs 130,000 may seem a bit high. But I cannot say the award is *exorbitant* or founded on *wrong principles*. I thus decline to disturb the award. I also concur with the trial magistrate that the documentary evidence in support of special damages was inadmissible. The respondent was thus not entitled to special damages.
15. From the evidence, I entertain *no* doubt that the appellant was the owner of the suit vehicle. Although the statement of defence pleaded that he was *not* the owner, it turned out to be *false*.

When cross-examined (at page 61 of the record), the appellant said he sold the vehicle in 2005. The accident was on 21st September 2004. The respondent said as follows: *"I have never said I am not the owner…..I denied ownership it was not in my name but the motor vehicle was mine"*.

16. I will finally deal with the element of negligence. I have already held that failure to file a reply to defence did not render the respondents claims hopeless. The appellant and respondent presented contradicting versions of the accident to the trial court. The appellant (DW1) testified that he was driving *from* Kitale *towards* Eldoret. He was at the road block near Pipeline Estate. He said the road was busy. He said he was doing 30 to 40 KPH. Suddenly, the respondent entered the road from a side road. The feeder road is on the *left* as one *faces* Eldoret. He said there was an oncoming lorry. Sensing danger, the cyclist jumped from his bicycle. The appellant said the respondent was not hit by the vehicle. He said the bicycle was hit by his vehicle damaging the windscreen and right side mirror. If one believes that version, the respondent was in the middle of the road at the point of the accident.
17. The respondent on the other hand said he was on the *left* side of the road *facing* Kitale. I do not entirely believe the respondent. If he had not done anything wrong, why was he running away from the scene of the accident? The appellant on the other hand moved the vehicle from the scene. No police officer visited the scene. The evidence of DW2 Police Constable Sambu was not helpful regarding the circumstances of the accident. He could obviously not tell the point of impact. The police abstract (exhibit 3) did not blame the respondent.
18. I have reached the conclusion that the respondent was hit by the appellant's vehicle as he tried to cross the road to Maili Nne. The motor vehicle was behind him, failed to brake and hit his bicycle. The cyclist entered the road without keeping a proper look-out. Considering that the right hand side mirror of the vehicle was damaged, the accident was in the middle of the road. The appellant on the other hand was *speeding* and could *not* control his vehicle. If the appellant was doing a speed of 30 to 40 KPH as he alleged, he would have been in a better position to brake suddenly or control the vehicle. I got the distinct impression he was doing a *higher* speed.
19. From the evidence and my analysis so far, there was *no* basis for blaming the appellant *more* than the respondent. I would apportion liability equally in the circumstances. See *Woods v Durable Suites Ltd* [1953] 2 All ER 391, *Devki Steel Mills Limited v Joseph Mulwa* Nairobi, High Court Civil Appeal 658 of 2002 [2004] eKLR. I will thus set aside the judgment on liability and order that both parties share liability at 50% each.
20. The upshot is that this appeal succeeds only on liability for negligence. I set aside the judgment on liability and order that both parties share liability at 50% each. The appeal against quantum of damages is dismissed. In the result, the appellant shall pay the respondent Kshs 130,000 *less* 50% liability which is to say Kshs 65,000. The appellant shall also pay interest and costs of the suit in the lower court. As both parties have partly succeeded in the appeal, each party shall bear its own costs of this appeal.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET this 19th day of January 2016.**

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

No appearance for the appellant.

No appearance for the respondent.

Mr. Lesinge, Court clerk.