REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 5 OF 2011

(CORAM: F. GIKONYO J)

JOTHAM MURUNGI ….....…….....…… APPELLANT

Versus

DANCAN MWENDA .....1ST RESPONDENT

BERNARD MUGAMBI..... 2ND RESPONDENT

(Appeal from the judgment of Hon. S.N.K Addrriessen, Principal Magistrate in Meru CMCC. NO. 5 of 2009)

JUDGMENT

[1] This Appeal emanates for the Judgment of Hon S.N.K Addriessen, Principal Magistrate in Meru CMCC. NO 5 of 2009. The judgment was delivered on 10th December 2010. In the judgment, the trial magistrate found the Appellant- the Plaintiff in the lower court case- to be wholly liable for the accident in question and dismissed his case entirely. That decision really aggrieved the Appellant and so he filed this appeal. In the Memorandum of Appeal the Appellant set out 5 grounds of appeal, namely:

> ***(1) THAT learned trial magistrate erred both in law and in fact in finding that the appellant was wholly liable in negligence for the occurrence of the accident even though no evidence was tendered by the defence in both the traffic case and civil case to prove in anyway that the appellant actually caused and/or contributed in any way to the occurrence of the accident or that he was negligent.***
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> ***(2) That the learned trial magistrate erred both in law and in fact in failing to consider that the Traffic proceedings against the appellant were discharged and the appellant was never convicted of any traffic offence.***
>
> ***(3) That the learned trial magistrate erred both in law and in fact in disregarding the evidence of PW3 PC Abdullahi Hassan that the driver of motor vehicle registration no. KWD 557 Toyota Corolla Saloon the 2nd respondent was to blame for the occurrence of the said accident.***
>
> ***(4) That the learned trial magistrate erred both in law and in fact by disregarding the appellant's evidence and the pleadings more particularly on negligence attributed to the 2nd respondent.***
>
> ***(5) That the learned trial magistrate erred entirely in law and fact in dismissing the appellant's case.***

[2] The above grounds of appeal could be summarized as follows;

> ***(1) That the leaned trial magistrate erred in finding the Appellant wholly liable for the accident in question in the absence of evidence towards that end. Under this cluster, matters of discharge of the Appellant in the traffic charge and alleged error in the dismissal of the Appellant's case in ground 2 and 5 of the Memorandum of Appeal, respectively, will be discussed and determined. This broad cluster combines grounds 1, 2 and 5 in the Memorandum of Appeal because they share close and direct connexion;***
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> ***(2) That the learned trial magistrate erred in disregarding pleadings and evidence by and for the Appellant especially by PW3 to the effect that the 2nd Respondent being the driver of motor vehicle registration mark KWD 557, make TOYOTA COROLLA Saloon was to blame for the accident herein. This ground combines grounds 3 and 4 in the Memorandum of Appeal for they are inextricable.***

[3] It is not lost to me that this is the first appeal, and therefore, I am under an obligation to analyse the evidence as was recorded by the trial magistrate in order to arrive at my own decision based on the evidence. I am, however, minded that I never saw nor heard the witnesses, and I should give due allowance thereto. See **SELLE vs. ASSOCIATED MOTOR BOAT COMPANY (1968) EA 123.**I will, therefore, consider the evidence, the submissions by parties and the law.

Submissions of parties

[4] On 25th June 2015, it was agreed among the parties and directions were given that this appeal shall be canvassed through written submissions. Pursuant to these directions parties filed their respective submissions on this appeal.

Appellant's submissions

[5] The Appellant submitted that he called three witnesses who gave an account of how the accident on 21st February 2006 occurred. But, the Respondents did not call any witness to controvert his evidence before the trial court. Therefore, in these circumstance, the Appellant finds it to be wholly untenable that in the absence of any evidence by the Respondents to controvert the evidence he laid before the trial court, the learned trial magistrate went ahead to attribute liability wholly upon the Appellant. He found fault with the reasoning by the trial magistrate that, had the Appellant's headlights been on, the 2nd Respondent could have seen him and may not have collided with the Appellant's vehicle. The statement at the bottom of page 45 to the top of 46 of the Record of Appeal is the basis of this appeal. His reasons for that submission were that; (1) the issue whether the headlights were working or not was never proved. The only reason the trial magistrate held that view was because the Appellant had been charged with a traffic offence but for which he was discharged under section 87(a) of the CPC; (2) the 2nd Respondent had an obligation to switch on his headlights so that he can see the cyclist and avoid hitting him. In fact, the Appellant relied on the evidence by PW3, a police officer to the effect that it was the duty of the driver of the motor vehicle to give way to the cyclist; and (3) the trial magistrate ought not to have attributed any weight to the fact that the Respondent was never charged with any criminal offence as the duty to charge or not to charge is made by the police and not the Appellant. The latter reason given by the trial magistrate was speculative and did not recognize the fact that the standard of proof in criminal and civil cases is different. According to the Appellant, the totality of all the above reasons shows that the conclusions reached by the trial magistrate were made on no evidence at all, and therefore, illegal, unlawful and against all principles of law. He beseeched this court to set aside the judgment herein and find the Respondents to be wholly liable for the accident in issue.

Respondents' submissions

[6] The Respondents, on the other hand, argued that, although they did not call any evidence, the circumstances of the case pointed negligence to the Appellant. They relied on the evidence of PW2, a

police officer who told the trial court that the Appellant, who was a cyclist, was riding on the road at night without any reflectors or headlights on. The Appellant was charged for this offence although he was discharged under section 87(a) of the CPC. They stated that the 2nd Respondent was not charged with any offence arising from this accident. They further submitted that the decision by the police to prefer criminal charges against the Appellant and not the 2nd Respondent was material evidence and as per the evidence by PW2 the decision was made by the police officers who arrived at the scene immediately after the accident occurred. Therefore, the trial magistrate considered that evidence to be material and this court should similarly find. They submitted that a cyclist ridding on the road at night without reflectors or lights is a potentially dangerous venture and most negligent act; it caused the accident in question. The 2nd Respondent was not warned of the presence of the Appellant when he turned to the other side. Apart from liability, the Respondents also addressed the quantum of damages and stated that the Appellant sustained soft tissue injuries which should be adequately compensated by an award in the sum of Kshs. 50,000. Their submission was, nonetheless, that the appeal should be dismissed with costs.

DETERMINATION

[7] Upon consideration of the pleadings herein, the rival submissions by the parties, I take the following view of this appeal. The thrust of the matter is: who was to blame for the accident which occurred on 25th June 2006? On answering this question I will determine whether the trial magistrate erred in finding the Appellant to be 100% to blame for the accident, and consequently dismissing his case entirely.

[8] From the testimonies by the Appellant and PW2- I think it ought to be PW3- the accident herein happened at the entrance to the Githongo Stage, Meru. The Appellant was cycling from Nkubu towards Meru town and the 2nd Respondent was driving from the opposite direction. I gather from the evidence, the stage was on the right and so the 2nd Respondent turned right to enter the stage. At the time, the Appellant was riding exactly at the entrance of the stage; his bicycle was then hit by motor vehicle KWD 557 on the right pedal, thereby, injuring him. I note that the accident herein happened at 7 pm and it was dark at the time. Each party blames the other to be the cause of this accident. Accordingly, this case cannot be decided without reference to the pleading of the parties for purposes of establishing the specific burden of proof borne by each party. The Appellant in his plaint claimed that the Respondents were liable for the accident and the resultant injuries that he sustained. The Appellant, therefore, bore the onus of proof that the 2nd Respondent was negligent and that he wholly caused the accident in issue. The Respondents, in their Defence denied any liability for the accident, and attributed negligence to the Appellant. Therefore, the Respondents bore the onus of proving contributory negligence by the Appellant. I will proceed on this basis.

[9] The Appellant blames the 2nd Respondent for not signalling or hooting when entering the stage. I agree, there is nothing to show that the 2nd Respondent signalled or hooted before turning right. Again, the Appellant blamed the 2nd Respondent for not giving the Respondent, a cyclist, way to pass before turning to the right. On this, I should say that, within the traffic law and regulations any motorist or cyclist who is turning from left to right is under an obligation to give way to other road users who are using the road and keeping left at the time. Of course, in Kenya vehicles, bicycles and motorcycles keep to the left. Technically, therefore, at the time of the accident, the Appellant may have had right of way. But, before condemning the 2nd Respondent, one needs to ask whether the Appellant was really negligent and was responsible for his misfortune?

[10] The Appellant urged that he was not to blame but the 2nd Respondent was for he did not ensure that there are no other road users before turning. The Appellant also accused the 2nd Respondent of not seeing him when he turned. I note that the Appellant sought to introduce evidence in his submissions that the 2nd Respondent would have seen him had he put on his headlights. That notwithstanding, the Respondents had a defence to all these allegations; that the Appellant did not have reflectors and headlights on and so he could not have been seen by the 2nd Respondent before turning. For this point to be understood better, I wish to state an appropriate analogy; that the Appellant's bicycle does not enjoy the aeronautical technology which enables the radar to take notice and recognition of an aeroplane, whether night or day;

and without the necessity of visual sight. For a cyclist on the road at night, his presence is registered to other road users through reflectors and switching on the headlights. This way other road users are warned of your presence. The evidence before this court is that the Appellant did not have reflectors and headlights on as required by traffic rules and regulations. Remember it was at 7pm and was dark. In such circumstances, it would be expecting too much from the 2nd Respondent to have noticed the Appellant in good time. I wish to state that the Appellant as a road user also bore the duty of ensuring he can be seen at night by having reflectors and headlights, and such accidents may be avoided. The Appellant failed in this duty and the fact that he was discharged under section 87(a) of the CPC does not absolve him from blame in a civil court where evidence is adduced towards that end as is the case here. Therefore, although the 2nd Respondent did not signal his entry to the stage, his liability may be minimal, if at all. In this case, the Appellant was substantially to blame for the accident herein. This is not a case where you can apportion liability at 50-50%. There could be no precise measurement of liability but the circumstances of this case impel me to place blame of 80% upon the Appellant and 20% upon the 2nd Respondent. Accordingly, I find and hold that the Appellant was 80% to blame for the accident and the 2nd Respondent 20%. As the 2nd Respondent was an employee of the 1st Respondent, and he committed the wrong in the course of his employment, I find the 1st Respondent to be vicariously liable for the accident up to 20%.

[11] I now turn to quantum of damages. From the Medical Report submitted by Dr. I. M. Macharia, the Appellant sustained; (1) bruise on the right elbow 5x5; and (2) multiple bruises on the right leg. According to the doctor, these were soft tissue injuries and have healed completely without permanent incapacitation. The Appellant proposed a sum of Kshs. 120,000 as compensation for these injuries and the Respondents proposed a sum of Kshs. 50,000. The trial magistrate awarded a sum of Kshs. 60,000. I have considered all the authorities cited by parties. I have also considered the record and the award by the trial magistrate, and come to the conclusion that the trial magistrate did not commit any error in principle (as in taking into account irrelevant factors or leaving out of account any relevant factor). This award is fair compensation given the minor nature of the injuries sustained and the fact that they have completely healed. The award by the trial magistrate was not inordinately low or high. Accordingly I award a sum of Kshs. 60,000 as general damages for pain and suffering. On special damages, I see only two receipts for Kshs. 200 and Kshs. 4,000 for hospital expenses and medical report, respectively. I award Kshs. 4,200 on special damages. In the final analysis I set aside the judgment by the trial court and I enter judgment for the Appellant and against the Respondents severally and jointly as follows:

(a) General damages for pain and suffering....Kshs. 60,000

(b) Special damages.....Kshs. 4,200

TOTAL.....Kshs. 64,200

LESS 80% Contribution.....Kshs. 51,360

NET TOTAL.....Kshs. 12,840

[13] I also award interest on the principal sum at court rates from the date of this judgment. Costs of the suit and this appeal go to the Appellant.

Dated, signed and delivered in open court at Meru this 25th day of July 2016

F. GIKONYO

JUDGE

In the presence of:

Mr.Mutegi advocate for respondents

M/s. Mutinda advocate for applicant

F. GIKONYO

JUDGE