REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 68 OF 2012

IMPERIAL BANK LIMITED ……APPELLANT

VERSUS

BAKARI JUMA BECHPENDE alias

BAKARI JUMA alias BAKARI RMA JUMA…….....RESPONDENT

J U D G M E N T

1. There are in this file; an appeal by the Appellant and a cross appeal by the Respondent. The appeal challenges the finding by the trial court which adjudged the appellant 100% to blame while the cross appeal challenges the decision by the trial court which assessed general damages at Kshs.400,000 as being too low as to amount to an error in the exercise of discretion in assessment of damages.

2. The facts as pleaded before the lower court can be summarized as follows:-

> That on or about the 28/7/2010, the plaintiff was lawfully and carefully riding his bicycle along Ukunda-Likoni Road when there occurred a collision between him and the defendants motor vehicle KAVE 097B. As a result of the collusion which the plaintiff (now respondent) blamed on the defendants' (Appellant's) driver, the Respondent suffered bodily injuries which were particularized. The particulars of special damages in the sum of Kshs. 9,300 as well as particulars of negligence and an invocation of the doctrine *res ipsq loguitar* were all pleaded.

3. Upon service with the plaint, the Appellant filed a statement of defence which not only denied ownership of the motor vehicle but also the occurrence of the accident, the injuries alleged by the Respondent as much as the particulars of such injury, negligence and damages. There was also an alternative pleading which sought to blame the accident on the negligence of the Respondent. For that alternative pleading particulars of negligence attributed to the Respondent were given. Infact, other than the alternative pleading, made on without prejudice, the Appellant denied every allegation by the Respondent and invited strict proof. The Respondent then filed a reply to defence whose purpose is evident to have been to controvert the charge of negligence against him. Consequently when the pleadings closed, there were no concessions on any fact including the occurrence of the accident itself.

4. All the facts pleaded by both sides were therefore open for proof and towards discharge of that *onus* the Respondent called three witnesses while the appellant called two. Of the witness called only the evidence of PW 2 the plaintiff DW 1 and DW 2 the defendants' driver, and his passenger were the eye witnesses at

the time the accident occurred. PW 1 and PW 3 were the doctor who prepared the medical report and the police officer who was merely called to produce the police abstract.

Re-assessment of evidence and determination on the appeal

5. Being a first appellate court, the question of the inability or causation of the accident can only be determined by re-assessment and re-evaluation of the evidence adduced at trial. See **Selle vs Associated Motor Boat Co. Ltd [1968] EA 123.**

6. PW 2, the Respondent had the following to say in examination in chief:

> **"I was on Ukunda – Likoni road on the left handside. I was riding a motorcycle. I was off the tarmac. I heard noise behind me. A vehicle was braking. I turned to check and was hit. I was thrown to the front. I fell on the cabin then on the ground. I never heard it hooting. The driver was on the wrong. I was offside. I was off the tarmac. I could not think anymore. I came to at hospital the following morning at Coast General Hospital. My left leg was in plaster. I had fractured".**

7. When cross examined by Mr. Wachira, the Respondent said:-

> **"I was all alone. Some people were walking off the road. I was off the tarmac. They were near the market. I do not know if the driver left his path but he hit me when I was off tarmac. I fell on the soil off tarmac. My bicycle is at the garage…..It is not true that I entered the road unexpectedly".**

8. As against that evidence on how the accident occurred the Appellant called the driver of the motor vehicle at the time of the accident. He said:-

> **"At Denyenye an accident occurred. It involved a cyclist/pedal and our motorvehicle. The pedal cyclist was crossing road from left to right facing Mombasa. At middle of the road he quickly turned and went back. It was sudden turn. I tried to swerve toward the left side to avoid knocking him but still knocked him outside the road on the left roadside facing Mombasa. When I saw him he was 50 metres away. All along I was applying brakes. I stopped one two metres after hitting him …. He fell one metre ahead of car. It was not on tarmac but on pavement. My car was not on pavement. It was outside the road when I saw cyclist. I swerved outside to avoid hitting him but since he was going back I hit him. I hit bicycle at the side on middle. By then he had finished crossing road and impact was outside road"**.

9. He went on upon cross examination and said:-

> **"The road is straight. It was 5.30pm. I could see clearly. I drove at a speed of about 70KPH. I saw cyclist 50 metres ahead crossing road. There was thing in front of him. If I stopped accident would not have occurred. I could not stop because he had reached middle of road and turned. I had already reached him at 70KPH. It was not a high speed even if someone was crossing infront of me …"**

10. PW 2 was a passenger in the motor vehicle KAU 097B. He confirmed the occurrence of the accident but said the Respondent was hit on the tarmac. He however said that he sat at the back seat but could see well. On cross examination the witness said he first saw the Respondent some 50-100 metres infront and approximated the car speed at 70-80KPH. To him the Respondent was hit at the edge of the road but said different things on where the vehicle rested after accident. I take note that this was a passenger seated at the back seat whose view and account on control of the car cannot by pass that of the driver.

11. I have extensively quoted the portion of evidence of PW 2 and DW 1 who I consider to have been the two people in control of the bicycle and the motor vehicle respectively and were the best custodians of the

accounts on how the accident occurred. Their evidence and even the evidence of PW 3 and DW 2 all confirm the ownership of the motor vehicle and the occurrence of the accident. With their evidence, at the close of the respective cases, the ownership and occurrence of the accident was not in dispute. It was that evidence the trial court considered and came to the conclusion that the Appellants driver was to blame and so to blame at 100%. The trial court said:-

> **"DW 1 confirm that the plaintiff was hit off the tarmac where he also landed. I find this confirms the plaintiffs' version that he was hit of the tarmac. The plaintiff says that he had been riding off the tarmac whereas the defendant says he suddently turned to his path. Strangely the defendants' drive says he had seen the plaintiff in good time and yet no explanation was given for sudden change of course to the defendants' lane."**

12. On the first review of the evidence, I find that the Respondent was hit off the road after the Respondents driver had seen him, whether riding along the road or crossing. It was therefore incumbent upon the driver to take an avoiding action not to hit him. He had the duty to slow down, brake or even stop but he did not. His evidence says that he reached the cyclist while still doing 70KPH. As known in law, negligence is doing or failing to do what a reasonable man would not or do in the circumstances. In the circumstances of this case reasonableness would have demand that the driver slows down or stops within the time and distance at his disposal. He did not and it is not difficult to see that there was outrightly negligent. 'See the decision in **NANDWA -VS- KENYA KAZI LTD [1988] KLR 488** where the court said:-

> **"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in favour of the plaintiff unless the defendants' evidence provides some answer adequate to displace that inference.."**

13. On a first appeal, and upon review of the evidence tendered before the trial court, I am unable to find a fault with the trial court. I am convinced that the court correctly analysed the evidence and came to the determination any reasonable court applying his mind to the facts and the law ought to have reached. To that extent, all the grounds in the memorandum of Appeal lack merit cannot succeed and are dismissed with the consequence that the entire appeal fails and is dismissed.

Cross Appeal

14. The cross appeal faults the trial court for having come to an assessment of damages that was inordinately, overly and manifestly too low as to show an error in exercise of discretion in assessment of damages. I have said in the past and may repeat in this matter that assessment of damages is indeed a difficult task in which exactitude or precision is never intended and can never be achieved.

15. For that reason, unless it is shown that the trial court was wholly, clearly and openly wrong, based on the evidence and the decided cases on comparable past awards, an appellate court ought not to substitute its own view or discretion for that of the trial court.

16. At trial, parties filed written submissions and cited to the court decisions that the court was expected to rely on to assess damages. To be precise the Respondent/Cross-appellant proposed a sum of Kshs.400,000 and cited three decisions being:-

> i) NBI HCC 1762 OF 1998HARUN MACHARIS TITUO VS WINFRED MWAI Where Githinji J awarded to the plaintiff, who had suffered fracture of the left humerus which healed with severe limitation at 90%, the sum of Kshs.270,000 on 22/2/1994.
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> ii) NBI HCC 4750 OF 1993JOHN KINGARA NDERI VS GACHINI GAKWE In which Juma J, on 7/5/1997 awarded to the plaintiff the sum of Kshs.450,000 for the injuries pleaded as fracture of the left fibula/fibia which necessitated multiple surgical operations and hospitalization for a period

of 6 months.

iii) MBAS HCC NO. 403 OF 1996 MASHA KOMBO VS NICHOLAS NYANGE Where Khaminwa J, Commissioner of assize awarded the sum of Kshs.650,000 for crash injury to left tibia/fibula resulting in hospitalization for a period of 3 months with a resultant shortening of the leg by 4cm and a permanent disability assessed at 25%. This was in the year 2000.

17. On its side the Appellant proposed a sum of Kshs.100,000 for several damages and cited to court some decisions:-

i) MSA HCC NO. 629 OF 1986 ALEXANDER MUHATI VS HON. AG & ANOTHER In which Githinji J in his judgement dated 14/7/1989 awarded to the plaintiff the sum of Kshs.120,000 for committed compound fracture of the right tibia/fibula with a resultant shortening of the leg by ½ cm.

ii) MERU HCC NO. 68 OF 1989 GEOFFREY MITABARI VS ABDI MOHAMMED Decided by Oguk J on 5/3/1990 and in which an award of Kshs.200,000 was made with regard to injuries compound fracture of the left tibia and fibula among other soft tissue injuries.

iii) MBS HCC NO. 209 OF 1990 ZAKAYO BARIO VS JUMS ABDALLA In which Wambilyanga J made an award of Kshs.80,000 to the plaintiff who had suffered fracture of the right libia and fibula was hospitalized for 4 days and remained out of work for 6 months. That judgment was delivered on 12/7/1991.

iv) NBI HCC NO. 2441 OF 1988 JOHN KINUTHIA KAMAU VS AG A judgment dated 19/9/91 wherein Mbogoli-Msagha J awarded to the plaintiff the sum of Kshs.200,000 for fracture of the tibia/fibula leading to hospitalization for 24 days with the leg healing with a shortening of some 3 cm.

18. Those decisions, as much as one may say, were binding upon the trial court, to me, they were only directory and of guidance and cannot be seen to override the judicial discretion vested upon the trial court. Additionally, those decisions were indeed fairly old with the most recent being made in the year 2000 some 12 years before the judgment appealed against.

19. I take note that not two cases may reveal same injuries and residual effects of resultant injuries so as to be seen as exactly the same. Therefore it will definitely fall upon the shoulder of a judicial officer to assess damages as would meet the ends of justice in each case. In exercising that discretion a judicial officer expects the best support of the legal minds, if any, is engaged in the litigation. While it is true that a court is not bound by the submissions by the parties, as submission are not pleadings, every court must appreciate the fact that the parties are the best custodians and protectors of their own rights. On the same note it is also true that even if the submissions are not pleadings, it would not be permissible for a court of law to just ignore or disregard the submissions offered by the parties. Indeed having given the parties time to submit and having employed judicial time as a resource in taking such submissions, the same are not just nothing meriting no consideration. I find that the court is not bound by submissions but it has no otherwise but to take the submissions offered into account. Taking into account to this court means the court gives every submission the regard it deserves including the legal and jurisprudential relevance to the matter at hand.

20. For the matter before the court for determination, I have read the submissions offered before the trial court and I hold the view that both took diametrically extreme sides on the issue of quantum due for award to the Respondent. Even then however, the same were supported by the law in the decided case. The trial court having considered both, as it was bound to do, came to its own assessment of the damages payable to the Respondent. In doing that it exercised judicial discretion. Even though I consider the injuries pleaded to have been suffered by the Respondent to have been a little more extensive and severer than those in the decided cases, and even if I would have awarded a higher sum, had I sat at trial, that alone is not sufficient for me to interfere by substituting my discretion for that of the trial court. See **Civil**

Appeal 203 of 2001 KIMATU MBUVI -VS- AUGUSTINE MUNYAO KIOKO [2006] eKLR quoting heard Morris in H. West & Sons Ltd vs Shepherd [1964] AC 326 at page 353 to the effect that:-

> **"The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of Judge and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present, it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."**

21. It is now settled that a decision by a court based on discretion ought not to be interfered with lightly on appeal unless certain thresholds are met. The thresholds are that the trial court must be shown to have considered an irrelevant factor or failed to consider a relevant factor and therefore reached a decision that was IPSO FACTO outrightly, wholly, openly and without more erroneous. In **PATRICK MWITI M'IMANENE & ANOR VS KEVIN MGAMBI NKUNJA [2013] eKLR** the Court said and I stand guided by the position as the crystalised Principle applicable.

> **"An appellant court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on wrong principles of law (as by taking into account some irrelevant factor or leaving out of account some relevant one or adopting the wrong approach) or it has misapprehended the facts, or for those or any other reason the award was so inordinately high or low as to represent a wholly erroneous estimate of damages. See also Bashir Ahmed Butt -vs- Uwair Ahmed Khan".**

22. In the matter before me such an error has not been demonstrated as far as the cross-appeal is concerned. That being the position, I find that the cross-appeal equally lacks merit and the same is equally dismissed.

23. I note that both sides have succeeded and lost in equal measures for which reason, the order that commends itself to me on cost is that each shall bear own costs.

Dated, signed and delivered at Mombasa this 30th day of November 2016.

HON P. J. O. OTIENO

JUDGE