REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 256 OF 2013

GICHUKI KAMONDO …….…… …….....APPELLANT

-VERSUS-

STEPHEN MWAURA KARANJA …….RESPONDENT

JUDGMENT

GICHUKI KAMONDO the appellant herein was dissatisfied with the judgment entered against him on 6th December 2011 in Wang'uru Senior Resident Magistrate's court Civil Suit NO. 38 of 2010 where the appellant was found to be 30 **%** liable while the respondent, **STEPHEN MWAURA KARANJA,** the victim was found to be 70% liable. The lower court gave an award of kshs 150,000/ for general damages and kshs 17,120/ being special. After subtracting the contribution in liability, the appellant was ordered to pay kshs 62,120/. The appellant filed his appeal on 30th December 2011 dated 28th December 2011 and listed six grounds in the appeal. The appellant chose to file written submissions in support of his appeal.

The appellant was aggrieved by the finding of the learned magistrate on liability submitting that the respondent was 100 **%** to blame for the accident that occurred on 20th December 2009 along Sagana – Makutano Highway near Embu-Mwea junction popularly known as Makutano. The appellant's advocates written submissions contend that the evidence adduced demonstrated that the respondent was to blame for the accident and that the respondent conveniently avoided to call a traffic police officer who investigated the accident because he knew that the evidence would be unfavorable to him.

The appellant has submitted the respondent did not discharge his burden of proof in, the lower court when he failed to call an eye witness in place where there were many people who would have ordinarily witnessed the accident. The appellant contends that the learned trial magistrate aided the respondent on a case that was failing especially as no negligence was proved against him. The appellant quoted **Section 107** of the **Evidence** and some authorities in **VOW –VS- PRIVATE SAFARI (E.A.) LTD (2010) e KLR , NZOIA SUGAR CO. LTD –VS- DAVID NALYANYA (2008)eKLR, WALTER ONYANGO –VS- FOAM MATRESS LTD (2009)eKLR,KIEMA MUTUKU –VS- KENYA CARGO HANDLING FACILITY LTD** and the case of **FLORENCE REBECCA KALUME –VS- COASTLINE SAFARIS & ANOTHER (1996) e KLR** to stress the position that negligence attributed to a party in a suit must be pleaded and specifically proved and in the absence of proof negligence cannot lie.

Finally on the issue of quantum, the appellant's contention was that the award of kshs 150,000/- was excessive and submitted that an award of kshs 100,000/ could have been fair and sufficient in the circumstances.

The respondent on the other hand has opposed this appeal. He filed submissions followed it up with highlights of the same. The respondent has mainly supported the judgment of the trial court submitting that there was no dispute that the accident occurred and that the respondent got injured as a result. The respondent has further submitted that he lost consciousness upon being knocked down and only regained consciousness after three days by which time it was too much to expect that he could still secure eye witnesses to the accident. The appellant has blamed the police for his woes in his pursuit of justice submitting that the police did not do enough to ensure that the driver who caused the accident was apprehended and taken to court to face justice for careless driving.

According to the respondent, the evidence placed before the trial court was sufficient to prove that the appellant was to blame for the accident.

On the issue of quantum the respondent has submitted that the amount of kshs 150,000/- is reasonable and not excessive in view of the injuries suffered.

I have considered both the appellant's submissions and the rival submissions by the respondent. The appellant has quoted a number of authorities which I have considered. It is true that whoever alleges must prove and that the plaintiff is always under a legal obligation to prove his case on a balance of probabilities. The appeal herein relates to a road traffic accident which involved the respondent who was a cyclist and the defendants motor vehicle registration number KBA 734H. The respondent got injured and was hospitalized for some time owing to the injuries sustained. These are facts which were not disputed. What was contested in the lower court and in this appeal was the issue of liability. The appellant has submitted that the respondent was 100 **%** to blame.

I have evaluated the evidence tendered before the learned trial magistrate. It is apparent that the accident which is the subject of this appeal occurred close to a major junction - Makutano junction. It is also apparent that the point of impact was in the middle of the road which is a highway but more drifting to the right onto the oncoming vehicles lane. According to DW2, the driver of the vehicle involved in the accident motor vehicle registration number KBA 734 H he was driving at a speed of 70 kilometer per hour when the plaintiff, a pedal cyclist emerged from a side foot path suddenly and caused the accident. The respondent in his evidence told the court he was cycling towards Makuyu on the right side when he was suddenly knocked down from behind by appellant's motor vehicle. The two different explanation given on how the accident occurred to me do not appear to reflect the true facts. If it is true that the appellants motor vehicle was being driven at 70 kilo meter per hour , that speed at a busy junction , is high speed and one would expect a diligent driver to slow down quite considerably when approaching such places due to sudden occurrences of traffic emerging from a junction suddenly without giving way according to the traffic rules. The respondent on the other hand did not explain to the court what he was doing on the right side of the road riding towards oncoming traffic. That to me was reckless and dangerous and I am not surprised that the learned trial magistrate held him 70 **%** liable to the occurrence of the accident. Indeed I find that from the evidence adduced, the trial magistrate was correct to apportion blame in the manner he did. The appellant could not have escaped blame entirely for the reasons that his motor vehicle appears to have been moving at too high a speed for safety of passengers and other road users particularly given the nature of the area that the accident occurred. It is my find that the trial learned magistrate cannot be faulted for apportioning 30 **%** blame to the appellant. The evidence adduced sufficiently supported that finding.

On the question of quantum, it important to note that the issue is normally a more discretionary issue for a trial court and unless it is shown that the award is so manifestly high as to show that a wrong principle was applied, an appellate court rarely interferes.

This is a position that is apparent in many judicial decisions and I am in concurrence. The appellant for good measure quoted the decision in **BUTLER –VS- BUTLE (1984) KLR 225** where the court made the following observations which I entirely agree with;

"The assessment of damages is more like an exercise of discretion ***by the trial judge and an appellate court should be slow to reverse***

the trial judge's finding unless it is shown that he either acted on ***wrong principles or awarded so excessive or so little damages that***

no reasonable court would; or he has taken into consideration ***matters he ought not to have considered or not taken into***

consideration matters he ought to have considered and in then ***result, arrived at a wrong decision".***

The learned trial magistrate in this case awarded kshs 150,000/ in general damages. I find that the appellant had submitted that an award of kshs 100,000/- would be sufficient compensation. I have no reason to fault the trial magistrate in awarding kshs 150,000/- as general damages. The figure to me appears reasonable and in that regard the trial magistrate was correct in my view.

For the above reasons I find no merit in this appeal. It is dismissed with costs.

R.K. LIMO

\JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17TH DAY OF MARCH 2015 in the presence of

Mr Kairu MC Court counsel for appellant

Mr Kiama counsel for respondent

Willy Court Clerk