REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 16 OF 2014

EGARA KABAJI …… APPELLANT

VERSUS

GORDON NGUKA ……..…… RESPONDENT

JUDGMENT

Introduction:

1. By a judgment delivered by the trial Court on 11/02/2014 in Kakamega Chief Magistrate's Court Civil Suit No. 167 of 2012 (hereinafter referred to as **'the suit'**) which had been instituted by the Appellant herein, EGALA KABAJI, the said suit was dismissed with each party bearing its own costs.

2. The suit arose from a road traffic accident which occurred on 08/12/2011 at around 8.00 p.m. along Kakamega – Webuye road at the turn-off to Masinde Muliro University of Science and Technology where the Appellant was a pillion passenger in a motor cycle and the Respondent was the driver and the owner of motor vehicle registration number KBN O39P make Toyota NZE. The Appellant sustained injuries as a result of which the suit was instituted.

The Suit:

3. The suit was commenced by way of a Plaint based on negligence on the part of the Respondent herein and prayed for damages, costs and interest. The suit was defended by the Respondent who through his Advocates filed a Statement of Defence. On 27/11/2012 the hearing began before the trial magistrate. PW1 was the Appellant herein who testified on how the accident occurred, the injuries he sustained and on the prayers before Court. He called 3 witnesses being PW2 PC Polycap Odoyo from Kakamega Police Station, Dr. Charles Andai as PW3 and the Appellant's father as PW4.
4. The Respondent herein testified on 14/05/2013 and did not call any witness. The parties produced various exhibits and filed their respective submissions leading to the judgment upon which this appeal was preferred against.

The Appeal:

5. On 03/03/2014 the Appellant herein through his Advocates lodged a Memorandum of Appeal raising 7 grounds namely:-

1. ***The Learned Trial Magistrate erred in Law and fact in dismissing the plaintiff's case on the ground that the plaintiff had failed to prove his case to the required standards.***

2. ***The learned trial magistrate erred in law and fact by misapplying the Provisions of Order 14 Rule 6 in writing judgment appealed from.***

3. ***The learned trial magistrate erred in law and fact in believing in whole the testimony of the respondent and disregarding the testimony of the appellant.***
4. ***The learned trial magistrate erred in law and fact in giving reasons for her judgment which were so contradictory to the plaintiff's evidence.***

5. ***The learned trial magistrate erred in law and fact in applying the principle captured in KIENA MUTUKU VERSUS KENYA HANDLING SERVICES LTD adversely to the Appellants case and failing to appreciate that the appellant had satisfied all the requirements of the aforesaid principles in his case.***

6. ***The learned trial magistrate erred in law and fact by failing to appreciate that the burden on the appellant lay in establishing that there was an accident involving the respondent's motor vehicle in which the appellant was injured and further by failing to appreciate that the appellant had discharged that burden.***

7. ***The learned trial magistrate erred in law and fact in finding that neither the appellant nor the respondent was liable in occasioning the accident hence leaving the issue of liability in her judgment hanging.***

6. On 09/09/2014 the appeal was admitted for hearing and directions were given on 04/10/2014 where parties were to file written submissions towards disposal of this appeal. Whereas the Appellant's Counsel duly complied with the directions and filed the submissions, the Respondent's Counsel did not and even despite being given time did not so comply. The matter was eventually fixed for judgment.
7. The Appellant persuaded this Court that the findings of the trial Magistrate were wrong and argued all the grounds of appeal as one. He relied on the persuasive authorities of **Kisumu HCCA No. 46 of 2007, Nyeri HCCA No. 46 of 2012** and **Meru HCCA No. 118 of 2010.**

The Appellant then prayed that the appeal be allowed and the judgment of the trial Court be set-aside with an assessment of damages for the injuries sustained by the Appellant.

Analysis and Determination:

8. This being a first appeal it is settled law that this Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. However, this Court must appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in ***Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** *and* ***Kiruga –versus- Kiruga & Another (1988) KLR 348.***

It was further held in the case of ***Hahn Vs. Singh (1985)KLR 716*** that the appellate Court will hardly interfere with the conclusions made by a trial court after weighing the credibility of the witnesses in cases where there is a conflict of primary facts between witnesses and where the credibility of the witness is crucial.

9. The main contention in the appeal rested on how the trial Court assessed the evidence before it especially on how the accident occured. **Hon. Ojwang, J** (as he then was) in the case of **CHIVATSI SIMBA MWANGIRI VS. BONIFACE MUSYOKA (2011) eKLR** in respect to the issue of assessment of evidence by a trial Court had this to say:-

"But the main basis for determining this appeal, as foreshadowed in the grounds of appeal, and as clearly emerges from a reading of the trial court proceedings, is the mode of assessment of the

evidence. As the very essence of then judicial task is invariably application of the law and assessment of evidence, a focused attention to the matters is vital; and this is expressly so for evidence, because it nearly always unfolds differently for every case. What is sought in the evidence is the true story; and an effective scrutiny of the evidence given, however long or short it is, will always illuminate the true position; the court's orders must be founded on the truth."

10. Let us therefore revisit all the evidence on how the accident occurred. The Appellant herein in examination-in-chief described how the accident occurred as follows:-

" ..... On 8/12/2011 I was from visiting a friend at Kefinco. It was around 8.00 p.m. I boarded a motor cycle to go to school. At the turn to the school, the motor cyclist indicated and we turned to enter. The vehicle from behind wanted to overtake. He hit us and he made to overtake. After that, I tried to stand but I could not. My right leg was painful ..... My friend called Benson was from eating, he saw me by the road. He called other colleagues. They got hold of the person who had knocked me and forced him to take me to hospital. He had stopped a distance away ..... I blame the one who was driving who is Gordon Nguka. We had indicated and started the turn to school and he still started overtaking, he caused the accident ....."

On cross-examination, the Appellant stated as follows:-

" ..... it was 8.00 p.m. We were on the left side, the vehicle was behind. The vehicle wanted to overtake as we were turning. We were at the gate. I saw him put his hand as indication ..... The vehicle was at a high speed. It stopped a far distance away. The impact threw me in the middle of the road. It threw me on the top of the vehicle. The left side of the mirror was slashed ..... It stopped near Alpha hotel. The motor cyclist stopped in the middle of the road after we fell ....."

11. PW2 was a Police Officer from Kakamega Police Station. He was **No. 81494 PC Polycap Odoyo**. He confirmed that an accident occurred and was reported vide OB No. 5/9/12/2011 involving the Appellant and the motor vehicle registration number KBN 039P make Toyota NZE. He informed the Court that the Investigating Officer was PC (W) Nyachae had been transferred to Nairobi and is the one who visited the scene. Charges were preferred against the driver of the vehicle, the Respondent herein and that the matter was still pending before Webuye Court in Traffic Case No. 2517/2011 under Police Ref. No. 40003/11. He produced a Police Abstract No. 0153385 as an exhibit. He confirmed that there was no sketch map produced. He did not have the Police file given that a traffic case was pending determination.

12. The Respondent herein testified on 14/05/2013. He stated as follows:-

" ..... I recall 8/12/2011. I was on duty until very late. I left the office at 7.30 p.m. I passed through Nakumatt Supermarket. I live on the outskirts of Kakamega past Bishop Stamp. I left the supermarket and drove slowly about 30 Kmph. I was on the Kakamega-Webuye road. While approaching the gate at the main campus, there were other road users, motor cyclists and vehicles. There were motor cycles behind and ahead. I was able to see clearly. I was not catching up with the ones ahead. One of the motorcycles from behind passed me on the left side. The motor cycle passed off the road. It is wrong to overtake on the left ..... I did not see if it had the lights on.

Most likely, it did not have its lights on. At that time, there were no lights at the gate. It was on the wrong side of the road. There was a bang on the left side of the vehicle. After I heard this bang, I stopped and walked out of the vehicle. The motor cyclist hit me.

..... I made a report to the police ..... I was charged with careless driving. The passenger did not have a helmet nor a reflection jacket. The motor cycle's lights were not on. If the indicator was on, I would have seen the same. If I would have knocked them it would be the front. But in the present case, the left side was damaged ..... I have a copy of the examination report certificate of examination.

..... The reflector of the front left headlamp was damaged. The impact was from the side. The glass did not break. I blame the rider for the accident. He drove on the wrong side. He did not have any reflector or jacket or helmet. I did not see that."

13. On cross-examination the Respondent stated as follows:-

" ..... the mudguard damaged, front bumps, driving minor holder left was broken, front bump sum damaged, front windscreen shattered on the lower corner, electrical system – headlamp lens damaged, driving mud guard damaged driving mirror holder broken. The damages were on the left front side. I was hit from the left side. He turned on his right and hit me on the left ..... I went to the police. They did investigations. I was charged in a traffic case. It is still in court. I am waiting for judgment. It is on 30/5/2013 ..... I stopped almost on the same spot. I blame the rider ....."

In re-examination, the Respondent had this to say:-

" .....the rider and passenger did not have reflector jacket or helmet. I am clear on that. I blame the rider.

The passenger ought to have had the jacket and helmet."

14. The foregone are the twin versions on how the accident occurred. Whereas the Appellant holds that the Respondent's motor vehicle hit them as they were turning towards the University gate at the junction, the Respondent holds that it was the rider of the motor cycle who wrongly overtook him on the left side and hit the vehicle.
15. It is a fact that the Appellant was a pillion passenger in a motor cycle which was involved in the accident at around 8.00 p.m. on 8/12/2011. The Appellant stated that when the motor cycle reached the junction to his school the motor cycle indicated and it started turning to enter. But the Respondent's vehicle which was behind them attempted to overtake them hence hitting them on the front left side. The rider also used his hand to show that he was turning. In particular, the Appellant emphasized in cross-examination that:-

" ..... I blame the one who was driving who is Gordon Nguka. We had indicated and stated the turn to school and he still started overtaking, he caused the accident."

16. The Appellant sustained injuries on his right leg including fractures, bruises and cuts. The vehicle sustained damage on the front left side and not on the front left. That means the point of impact must have been on the front left side and not the very front left. The damage on the vehicle included on the mudguards, driving mirror, lower corner of the front windscreen among others. The Respondent equates the said damage to when the rider turned and hit the car. He specifically states as follows:-

" ..... The damages were on the left front side. I was hit from the left side. He turned on his right and hit me on the left ....."

17. Let us carefully look at the scenario here. First, if the rider overtook the vehicle on the left side and then turned and hit the very vehicle then it is expected that the motor cycle's front part was the one to come into contact with the car. It would have occurred that between the rider and the passenger then the rider was near the point of impact with the vehicle and not the passenger since in turning to the right the front part of the motor cycle would naturally come near the vehicle whereas the rear part where the Appellant was drifted away from the vehicle. However, it is the passenger who instead was seriously injured on his right leg.

Secondly, if the collision arose out of the rider turning to the right and onto the vehicle, then the point of impact on the vehicle would most likely be a defined spot and not an array of damage from the front to the driving mirror to the mudguard. This connotes that the impact was instead not on a single spot but across the left side from the front to the left tyre. It is important to note that even the vehicle's headlamp

was damaged. It only holds that the vehicle must have crushed against an object which was almost out of its way on the left side as opposed to one which directly came towards it from the left side. This scenario therefore adds credence to the Appellant's version on how the accident occurred that they were hit from the rear as the vehicle was attempting to overtake when they had began turning to the left. Placing the vehicle and the motor cycle as such brings the rear of the motor cycle closer to the front left side of the vehicle and the Appellant's leg into direct contact with the vehicle. The rider would only be reached after the Appellant had been hit. This therefore explains why the damage on the vehicle extended from the head lamp to the mudguard on the tyre and instead the Appellant's right leg which was near the vehicle's front left side was injured.

18. Another important issue relates to the motor cycle's lights and indicators. To this end, the Respondent stated as follows:-

" ..... I did not see if it had the lights on. Most likely, it did not have its lights on. At that time, there were no lights at the gate ..... The motor cycle's lights were not on. <u>If the indicator was on, I would have seen the same</u> ...." **(**emphasis added).

The Appellant had this to say:-

" .... At the turn to the school, the motor cyclist indicated and we turned to enter ....We had indicated and stated the turn to school and he still started overtaking, he caused this accident..... We were on the left side, the vehicle was behind.

The vehicle wanted to overtake as we were turning. We were at the gate. I saw him put his hand as indication....."

19. With the words ***"most likely, it did not have is lights on"***, it is apparent that the Respondent was not sure on whether the motor cycle had its lights on or otherwise. And with the words '***If the indicator was on, I would have seen the same***' it means that the Respondent must have been behind the motor cycle so as to see the indicator. But there is also evidence of the pillion passenger that the indicator was on and further that the rider even used his hand to indicate that he was turning to the right.

Further if the motor cycle did not have its lights on one wonders how it would have been driven off the road and overtook the vehicle and yet according to the Respondent the place was dark as the lights at the University gate were not working on that day. On a balance of probability, this Court therefore finds it difficult to accept the allegation that the motor cycle's lights were not on.

20. There is also the issue of the speed of the vehicle. The Appellant testified that the vehicle was being driven at a high speed in the circumstances and that after the accident it stopped a far distance away and had to turn to come back to where the accident had occurred. The Respondent maintains that he was driving at a minimal speed of 30 kmph. But the damage on the vehicle was extensive coupled with the fact that the Appellant was thrown on to the top of the vehicle when he was hit. On the other hand, the motor cycle stopped in the middle of the road after the collision. We recall the Respondent testifying that he lived in the outskirts of Kakamega past Bishop Stamp and that he had been on duty that day until very late. He clearly stated as follows:-

" ..... I recall 8/12/2011, I was on duty until very late. I left the office at 7.30 p.m. I passed through Nakumatt Supermarket. I live on the outskirts of Kakamega past Bishop Stamp ....."

It would therefore not be stretching too far for this Court to find that since the Respondent lived in the outskirts of Kakamega and had left the office **'very late'** at 7:30 p.m. and passed through a supermarket and by 8.00 p.m. he was on the road home, then he definitely was rushing home thereby it is not likely that he was driving at the speed of 30 kmph. This Court highly doubts that had the Respondent been driving at the said speed such damage to the vehicle and injury to the Appellant would have been occasioned. The averment by the Appellant that the vehicle was being driven at a high speed is therefore

believable.

21. Turning to the judgment of the trial Court, in determining liability the Court stated as under:

"The plaintiff did not state which part of the road he fell on and this was necessary to displace the defence pleaded that the motor cyclist overtook from the wrong side of the road and as stated by the defendant ....."

But the Appellant in his cross-examination had stated that:-

" ...The impact threw me in the middle of the road. It threw me on the top of the vehicle..."

It is possible that the trial Court did not find this part of the Appellant's testimony when it made the above finding and I have no doubt in my mind that had the said evidence come to the attention of the trial Court, the Court would have definitely held otherwise. Further if it is true that the motor cycle hit the vehicle from off the road then it would not have been possible for the pillion passenger to be thrown onto the windscreen and fall right at the middle of the road and likewise the motor cycle would not have stopped in the middle of the road. The evidence of the Appellant so confirms that:-

"The motor cyclist stopped in the middle of the road after we fell. Another vehicle even knocked the motorcyclist that was at the road. I cannot tell if he was injured. I helped myself out of the road....."

22. On the issue of rider not reporting the accident to the police and instead disappearing, the trial Court posed the question:

"Could he have been on the wrong?

However, it is not clear in the judgment whether the question formed the final opinion of the Court in dismissing the suit, but mostly it did. The Court was to analyse the evidence before it critically and make clear findings but not to let some loose ends and unanswered questions. It ought to have answered the question it posed on what it made out of the rider's disappeance based on the evidence on record.

23. On the issue of the failure of the rider and the Appellant wearing helmets ad reflection jackets, the trial Court only noted that under Section 103 of the Traffic Act the Appellant was supposed to have been provided with the same by the rider. Be that as it may, going by the version of the Respondent on how the accident occurred then the Respondent, even if the Appellant and the rider had helmets ad reflection jackets, still he would not have seen them because they were riding in the dark. The Respondent would have had the advantage of the jacket only when the motor cycle was ahead of him and going by his insistence during the trial and in his submissions that fortifies the Appellant's testimony that the motor cycle was instead on the road and ahead of the Respondent's vehicle.

But, that was not the end of the matter. The Court further went on to find that:-

"I find that whereas there is no evidence that the plaintiff himself contributed to the accident, the case has not been proved on a balance of probability that the accident was as a result of negligence on the part of the defendant."

24. The trial Court seems not to have attached much weight to the Appellant's testimony regarding the cause of the accident upon which the claim was based. Had the Court addressed itself fully to the twin versions on how the accident occurred it would have found out that the Appellant was to be believed and had proved the aspect of negligence on the part of the Respondent in the circumstances of the case. The upshot is therefore that the trial Court, with respect, came to a finding that was not in keeping with the evidence on record. The Court was in error to hold that the Plaintiff had not established any claim as against the Defendant. Instead the Court ought to

have found that the Plaintiff (now Appellant) had proved his case on a balance of probabilities. The trial Court should have attributed the entire liability to the Defendant (now Respondent).

The upshot is therefore that the appeal is hereby allowed with a finding that the Defendant (now Respondent) was 100% liable for the accident and for the injuries occasioned thereby.

25. On quantum, the trial Court correctly captured the injuries sustained by the Appellant herein as follows:-

"(i) ***Bruises on the ocupital region of the head;***

(ii) Compound fractures on the right leg tibia and fibula;

(iii) Cut wound on the right knee.

(iv) The plaintiff had undergone surgery known as internal fixation to support the fractured bones with some nails, which are also to be removed surgically."

The Court was of the opinion that had liability been proved it would have awarded general damages at Kshs. 900,000/=. The Court was also satisfied that special damages of Kshs. 210,429/- had been proved but for the issue of liability. Each party was ordered to bear its own costs of the suit.

26. **The Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013** came into force on 28/01/2014 and introduced a schedule guiding the award of damages arising out of road traffic accidents. I have carefully gone through the same and have not found any category of injuries similar to the ones sustained by the Appellant herein. That being the case, this Court has no alternative but to assess the damages in the manner before the coming into force of the said Act.

27. I have also looked at the authorities relied upon by the Appellant before the trial Court in his submission for an award of Kshs. 3,000,000/= on general damages. They are all persuasive to this Court. Whereas the Courts therein made awards in the region of Kshs. 650,000/= to Kshs. 750,000/=, I do note that the injuries therein were far too serious. In **HCCC 718 of 1990 (Mombasa)** and **HCCC No. 298 of 1989 (Mombasa)** the Plaintiffs therein sustained fractures of the tibia/fibula bones on both legs. The Courts awarded Kshs. 750,000/= in 1993 and 2000 respectively. In **HCCC No. 403 of 1996 (Mombasa)** the Court awarded Kshs. 650,000/= in 2000 for fracture of the left tibia/fibula where the Plaintiff had been hospitalized for 3 months with a permanent disability assessed at 25% with restricted movement of the leg and shortening by 4 cm.

In the case of the Appellant herein, the Doctor (PW2) confirmed that the Appellant will fully recover without any permanent disability. There is no restricted movement of the right leg neither is there any shortening thereof. Indeed the Appellant was only hospitalized for only 5 days. I therefore find the proposed award by the trial Court of Kshs. 900,000/= to be too far on the higher side. I would therefore not adopt the same but instead make an award of Kshs. 500,000/= on general damages. I further do agree with the trial Court that the special damages were proved but since the Appellant pleaded the sum of Kshs. 207,929/= only and not Kshs. 210,429/= as confirmed in the receipts, this Court awards the sum of Kshs. 207,929/= on special damages.

Conclusion:

28. This Court therefore makes the following final orders in this appeal:

a. ***The appeal be and is hereby allowed.***

b. ***The judgment of the trial court delivered on 11/02/2014 in Kakamega Chief Magistrates Civil Case No. 157 of 2012 be and is hereby set aside.***

c. ***The Respondent herein (the Defendant in the suit) GORDON NGUKA be and is hereby held 100% liable for the accident which occurred on 08/12/2011 involving his motor vehicle registration number KBN 039P and the Appellant herein.***

d. ***General damages for pain, suffering and loss of amenities assessed at Kshs. 500,000/= with interest from the date of judgment before the trial Court.***

e. ***Special damages of Kshs. 207,929/= is allowed with interest from the date of filing of the suit.***

f. ***Costs of this appeal as well as those of the Kakamega Chief Magistrates Civil Suit No. 157 of 2012 be borne by the Respondent in this appeal.***

Orders accordingly.

DELIVERED, DATED and SIGNED this 29th day of May, 2015

A.C. MRIMA

JUDGE