REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 603 OF 2012

STANELY NJIHIA NJENGA.....……APPELLANT

VERSUS

FRANCIS PETER MASILU KAMUYA….....….RESPONDENT

(Appeal from the original judgment and decree of Hon. Mr. Ole Keiwua (PM) in Milimani Commercial Courts., CMCC No. 4090 of 2010 delivered on 26th October, 2012)

JUDGMENT

1. The appellant **Stanley Njihia Njenga**, was sued by the respondent **Francis Peter Masilu Kamuya**, seeking compensation following a road accident which occurred on 11th January, 2010. Upon hearing the matter, the trial court found the appellant 80% liable for the accident. The trial magistrate further, held that on the issue of quantum, the medical report by Dr. Wokabi laid out the injuries as a fracture of the left femur and the P3 form concluded that the injuries were of grievous harm. The magistrate further considered the authorities presented by the appellant and respondents and entered judgment for Kshs 581,150/= as general damages plus Kshs 21, 150/= being special damages in favour of the plaintiff together with cost of the suit plus interest.

2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal and put forward the following grounds:

a) "That the Learned Magistrate erred in law and fact in finding the appellant 80% liable for the respondent's injury , yet there was overwhelming evidence to show that the respondent who was inebriated at the time of the accident and who neglected the foot bridge to cross the road, was the author of his own misfortune;

b) That the Learned Magistrate erred in law and fact by considering extraneous matters in finding the appellant liable;

c) That the Learned Magistrate erred in law and fact by failing to consider the merits of the defence on record;

d) That the Learned Magistrate erred in law and fact by failing to consider the defence evidence of the appellant's witness while making decision on liability.

e) That the Learned Magistrate erred in law and fact in failing to put into consideration the submissions of the appellant; and

f) That the Learned Magistrate erred in law and fact by failing to consider the authorities relied on by the appellant in his submissions and sections of the statutes therein cited."

3. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at Pg. 429**).

4. The appellant's case was that, on 11th January, 2010, while at Mbagathi road driving motor vehicle no. KAY 055Z, the respondent suddenly crossed the road and he hit him despite applying emergency brakes. On cross examination, he testified that; he was not drunk at the time of the accident. The appellant also stated that he was driving from city mortuary to Ngumo estate when the respondent jumped onto the road and he only saw him when he was about 10 meters way. He hit the respondent at the bridge area and from his evaluation, he did not suffer serious injuries. He was on the highway driving at less than 50 km/hr, he further refuted claims that the respondent was knocked while on the road side.

5. The respondent's case was that, he was hit by the appellants motor vehicle at Mbagathi road near Kenyatta National Hospital at around 2:00 p.m; He claimed that he was hit while off the road. He reported the matter to Kilimani Police Station. He claimed he suffered injuries on the mouth, shoulder, teeth, legs and hands. He was admitted at Kenyatta National Hospital for 1 month and 2 weeks. He produced police abstract and its receipts, which were marked as exhibit 2(a) and (b). He further produced a P3 form that was marked as exhibit 4. A bundle of receipts for payments at the hospital were produced as exhibit 5 while the outpatient card was produced as exhibit 6.

6. The respondent called **Doctor Washington Wokabi** to testify as PW1. He stated that he examined the respondent on 29th April, 2010. He confirmed that the respondent sustained head injury, was unconscious for 3 weeks, had laceration on the face, a fracture of the right collar bone, compound fracture of the left tibia and left tibular and a fracture the left femur, that caused him difficulties in walking for long time. He produced treatment notes, a report, a receipt of Kshs 2,000/= for the report and receipt of kshs 5,000/= for court attendance all produced as exhibits 1(a),(b), (c) and (d) respectively.

7. The appellant submitted that the trial court found him liable because he was shaking while in the witness box hence not truthful and by virtue of that he must have lost control of the motor vehicle. No further evidence was adduced to support the finding of the court other than its observation of the appellant. He further submits that the court failed to consider the fact that the respondent neglected to use the foot bridge to cross the road. The trial court failed to take into account that the appellant and the respondent gave contradictory evidence necessitating reliance on independent evidence such as discharge summary from Kenyatta National Hospital or the police abstract. There were no charges preferred against the appellant nor police officers testimony adduced to shed light on the accident. The determination should therefore have been taken on balance of probabilities.

8. The respondent submitted that he was walking along mbagathi way when he was hit. That according to the appeal filed, the quarrel is with finding of liability and not the award of Kshs 700,000/=. Order 18 rule 7 allows the court to record remarks as it deems crucial in respect of the demeanor of any witness while under examination.

9. After a careful consideration of the submissions and the material placed before this court, the following issues have emerged for determination;

i. Whether the appellant was 80% liable for the accident,

ii. Whether the trial magistrate fully considered the evidence before him

10. It is imperative to note that the parties are in agreement that there was indeed an accident where the respondent was hit by the appellant. The contention however arises where the appellant claims that the respondent contributed to the accident when he decided to cross the road at an area that was not designated for pedestrians given that there was a foot bridge that was safe for the respondent to use. The

respondent on the other hand claims that he was not crossing the road when he was hit. He asserts that the appellant diverted from the road and hit him while on the sidewalk. The two parties are the only witnesses in this case that were at the scene. It is on these evidence that the trial court apportioned liability as aforestated.

11. The question arising therefore is whether it was correct to apportion liability in the ratio of 80:20 in favour of the respondent. The trial magistrate chose to take into consideration the demeanor of the appellant, correctly so, under Order 18 rule 7 of the Civil Procedure Rules to conclude that the appellant was dishonest. He concluded that the fact that the appellant was shaking in the dock meant that he was being dishonest.

12. It is the contention of the appellant that he was wrongly held liable by virtue of his demeanor in the trial court. In his response, the respondent is of the view that the magistrate correctly took into account his demeanor as provided for under Order 18 Rule 7 of the Civil Procedure Rules question arising here therefore, is whether a person's mannerism can solely be used to condemn him. Demeanor is a very essential factor that should be considered when examining a witness. It is the one aspect of a case that the appellate court is careful not to delve into considering it did not have the opportunity to observe the witnesses as they adduced their evidence. Subsequently, the trial magistrates observance of the fact that the appellant was shaking cannot be discounted with, however, there must be evidence to substantiate the demeanor as was held by the court of appeal in case of **Andrew Peter Ngirichi & another v Wanje Masha Wanje [2015] eKLR,** where the court stated in part as follows:

> ***"This is a finding on the demeanor and credibility of a witness by the trial court which this Court cannot interfere with unless it is demonstrated that the finding was not supported by evidence or was otherwise plainly wrong. Taking into account all the foregoing, we are satisfied that the learned judge did not base her decision merely on the demeanor of the witnesses as claimed by the appellants, but on the evidence that was adduced by the two parties."***

13. The evidence of the two witnesses is contradictory with each party blaming the other. There is no evidence by the police given to establish whether the accident occurred on the side walk or on the main highway. There were no other witnesses called to shed more light on the accident. Basing liability at 80:20 in favour of the respondent is in my view erroneous given the circumstances of the case. What then would be an appropriate apportionment? After a careful re-evaluation of the evidence, I am convinced that a fair apportionment on liability should be the ratio of 50:50.

14. On the question as to whether the trial court took into account the evidence, looking at the Magistrates judgment, It is clear that she fully relied on the medical doctors report and the P3 form. As far as injuries are concerned, a report by PW1 clearly illustrated the injuries suffered by the respondent, they included: head injury, laceration on the face, fracture of the right collar bone, compound fractures of the left tibia and left tibular and a fracture of the left femur. These were serious injuries and must have been the reason the trial court saw it fit to award the respondent Kshs 602,300/= plus interest and costs.

15. Moreover, looking at the grounds of appeal, as submitted by the respondent's advocate, the appellant has appealed solely on the issue of liability and not quantum.

16. The appeal is therefore allowed. Consequently, the order apportioning liability in the ratio 20%:80% is set aside and is substituted with an order apportioning liability in the ratio of 50%: 50%. The aforesaid ratio be applied to the awards of damages given by the trial court. Plus costs and interest at court rates.

Dated, Signed and Delivered in open court this 25th day of September, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent