



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 197 OF 2010**

**SAMUEL MWENGA.....APPELLANT**

**VERSUS**

**JOSEPH CHEGE MUNGAI.....RESPONDENT**

**JUDGMENT**

This is an appeal by Samuel Mwenga who was the plaintiff (now appellant) in Nakuru CMCC 124/20008. Joseph Chege Mungai (now respondent) who was the defendant in the said case. The case was heard by Ms C.A. Otieno who dismissed the suit with costs on 12/7/2010. The appellant was dissatisfied with the decision and filed this appeal raising seven grounds of appeal. Mr. Akango, counsel for the appellant, compressed the grounds into two:-

- 1. That the trial magistrate failed to consider the evidence on record in its totality;**
- 2. That the trial court failed to exercise its discretion properly in arriving at the would have been award.**

The appellant therefore prays that the judgment of the trial court be reversed and the defendant be found liable, in the alternative, judgment be revised and liability be apportioned; that judgment be reversed and the court do award damages and costs of the appeal be awarded to the appellant.

Mr. Akango filed submissions on 18/12/2012.

The appeal was opposed and Mr. Wamaasa, counsel for the respondent also filed written submissions. Both counsel highlighted the submissions.

In the amended plaint filed in court on 12/2/2010, the appellant averred that on 25/10/07 while the appellant was cycling along Nakuru-Nyahururu Road at Bahati Upper Hill Academy, the defendant's vehicle Registration No. KAY 977N was so negligently driven that it knocked down the appellant and he blamed the accident on the negligence of the respondent for driving the vehicle without due care and attention, without a proper look out, driving at an excessive speed, failing to brake or failing to ascertain that the road was clear.

In the defence filed on 15/4/2008, the respondent denied the allegations of negligence and pleaded that the accident was solely caused by the appellant's negligence or substantially contributed to by the negligence of the appellant when he inter alia, rode at an excessive speed, without due care and attention, rode on the wrong side of the road or failed to keep a proper look out.

In his testimony, the appellant (PW1) testified that he was riding from Nyahururu towards Bahati, on the left side of the road when he was hit from behind. He did not see the vehicle that hit him.

PW2, Cpl Joseph Mugenyi was only sent to court to produce the abstract form. He is not the one who filled the abstract form nor was he the investigation officer. The abstract form indicates that the accident was between motor vehicle KAY 977N and a pedestrian. The respondent in his testimony confirmed that his vehicle was in a collision with a cyclist on 25/10/2007 as he drove along Nakuru-Bahati Road. DW1 said that the appellant entered the main road at a junction without stopping and since there was a bush on his right, he could not swerve; that there was also a lorry behind him and so he could not have braked.

In her judgment the trial magistrate observed that PW2's evidence was at variance with paragraph 4 of the amended plaint where it was pleaded that the appellant was a cyclist. Having told the court that he was not the maker of the abstract nor was he present at the scene, the trial court should not have placed much reliance on PW2's testimony. The standard of proof in a civil case is on a balance of probabilities. The defence did acknowledge that the accident was between motor vehicle KAY 977N and a cyclist. DW1 did confirm that indeed his vehicle collided with a cyclist. The abstract relates to the accident that occurred between the appellant and the respondent's motor vehicle on 25/10/07. It is therefore the maker of the abstract who indicated that the accident involved a pedestrian and a motor vehicle who should have explained that anomaly. The court finds that the collision that occurred on the material day and at the said scene was between the appellant who was a cyclist and the respondent's motor vehicle. The entry in the abstract referring to a pedestrian must be an error.

The next question is who is to blame for the accident. PW1 maintained that he was on the left side of the road while the respondent maintained that the appellant entered the road suddenly. The officer who visited the scene may have shed light on the exact point of impact. The court did not have the benefit of that evidence. That leaves the case with no independent eye witness. Since we have the word of one against the other and the standard of proof in civil cases is on a balance of probability, I declare that plague be upon both the appellant and respondent's houses. It is likely either of them was negligent to some extent. I will apportion liability at 50%.

The appellant pleaded that he sustained injuries to the scalp, soft tissue injuries to the neck, chest, bruises on the back of left side, soft tissue injuries to the hip joint, cut wound on the left foot. By the time he testified he was fully healed. The medical records from Bahati Health Centre and the Provincial General Hospital confirm that the appellant sustained soft tissue injuries. He was also examined by Dr. Omuyoma and Dr. Kiamba on 18/8/2009 and 23/11/07 respectively. They both formed the opinion that the degree of injury was harm and assessed the temporary disability at one month. The appellant had made a submission for an award of Kshs.200,000/- as general damages and relied on the decisions of NRB HCC 4084/83, **Daniel Lengete Nkurne v Constantino Thomas**, where injuries suffered were blunt injury to the head, chest, right knee and bruises and an award of Kshs.100,000/- was made in 1997. In the case of NRB HCC 968/1988, **George Karungaru v Tibi Githiora** which decision was made in 1994 for Kshs.100,000/-. the respondent on the other hand made a submission of Kshs.30,000/- as general damages and relied on HCC 2982/1986, **Nancy Kairuki v Francis Mwangi** and NRB HCC 417/86, **Jeverso Nderitu Mureithi v HemDan Mbogo**, where awards of Kshs.50,000/- and Kshs.10,000/- were made in 1987 for nearly similar injuries.

It is trite law that an appellate court will not interfere with the exercise of discretion in awarding damages but it will only do so if the trial court applied the wrong principles and arrived at an erroneous estimate or if the award was so inordinately high or low as to be a wrong estimation or that the court took into account irrelevant considerations and ignored the relevant ones. (See **Butler v Butler (1984) KLR 225**). The authorities relied upon by the respondent were made over 20 years ago and not very relevant. In my considered view, the case of **Daniel Langate Nkurne** is more comparable with the present and in doing my best, I would make an award of Kshs.100,000/- as general damages. The trial court found that the pleaded special damages of Kshs.8,172/- had been proved.

In the end, I will set aside the judgment of the trial court on liability and substitute it with an order that each party bears 50%. As to quantum, I set aside the lower court's judgment and substitute it with an award of Kshs.100,000/- as general damages and special damages of Kshs.8,172/- subject to 50% liability. The plaintiff will have costs of the lower court and appeal at the same ratio. It is so ordered.

**DATED and DELIVERED this 28<sup>th</sup> day of February, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Ms Mugweru holding brief for Akango for the appellant

Mr. Kisila holding bireif for Wamaasa for the respondent

Kennedy – Court Assistant