



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 178 OF 2008

PETER KAMAU KANINI.....1ST APPELLANT

PETER MWENJA KARIITHI.....2ND APPELLANT

VERSUS

ISAIAH OWILI KIBURO.....RESPONDENT

J U D G M E N T

The appellants were sued by the respondent seeking damages for a road traffic accident that occurred on 17-10-2004 along Angawa Avenue in Kisumu. The respondent in the suit had accused the appellants of negligence in causing the said accident. After a full trial where the appellant did not adduce any evidence the respondent was awarded the sum of Kshs. 300,000/= as general damages and Kshs. 32,574/= as special damages together with costs and interest.

The appellant being dissatisfied with the said appeal cited 8 grounds. The same essentially revolves around the question of negligence and quantum.

The appellant has submitted in writing that though they did not adduce any evidence the evidence on record was not satisfactory enough to have established 100% negligence on the part of the appellant as opined by the trial court.

The respondent has of course opposed the appeal by equally filing his submissions.

To answer this question of negligence it is imperative to evaluate again the evidence on record taking into consideration the fact that the trial court had a better advantage of listening to the parties directly. There is no dispute that an accident occurred on the material day and it involved the parties herein. The vehicle was owned by the 1st appellant and driven by the 2nd appellant.

The respondent told the court that the motor vehicle hit him after he had crossed the yellow line. It actually hit him on the right side of the road. He said during his evidence in chief:

“The road was clear. A bicycle had passed and I crossed. A motor vehicle hit me from right side. The motor vehicle was coming up from the roundabout. I had passed yellow line. The bicycle was from the left”.

On cross examination he said:

“There was a visible yellow line. I had crossed the yellow line. I was on tarmac between right edge and yellow line. I gave way to bicycle going down towards town. It was on the tarmac. I

concentrated on the bicycle going down. I did not check on the right hand side. I am aware that before crossing road you check right, left and right and if clear you cross. It was clear initially I crossed over. On the way, mid a bicycle passed. I stopped for it. I was alone”.

From the above statement it appears that the respondent though he initially checked the road, he was distracted midway by a bicycle. Is it possible that he failed to check on the bicycle? If he allowed the bicycle to pass is it possible that, that was the time he was knocked? Before he crossed the road where was the bicycle? He clearly on cross examination answered that he did **“not check the right hand side”**.

PW2 George Philip Opande's evidence did not help things much. By the time the accident occurred he was facing the seller of a bag he was purchasing. He only heard the impact and the sound and not witness the accident directly. He only came after the incident.

By not calling any witness the appellant left it to the court to determine matters as presented by the respondent. However it is not entirely disputed that the respondent was hit after he had crossed the yellow line. Both the respondent and his witness PW2 confirms this.

My finding is that the respondent ought to carry some level of blame. As clearly stated in **Charlesworth on Negligence Third Edition page 186,**

“A pedestrian owes a duty to other highway users to move with due care”.

The respondent on the other hand had a duty to other road users as well. It is not indicated the nature of speed the appellant's driver was driving at the respondent. PW2 stated that the vehicle was being driven at a high speed. Ordinarily, vehicles moving at a slow speed or relatively low speed can be controlled and or managed. It is also not known whether the appellant's driver issued any warning or applied any sort of brake so as not to cause the accident.

In the premises and based on the above finding the trial court ought to have apportioned blame to the respondent.

Part 1 of our Highway code provides:

“6 Before you cross the road stop at the kerb, look right, look left and right again. Do not cross until the road is clear; then cross at right angles, keeping a stop on it and look again. On one way traffic road stop and look towards on coming traffic before you cross”.

The respondent admitted that he did not check on the right hand side. This misaction essentially and perhaps would have avoided the accident.

Consequently, I shall alter the court's finding and apportion liability at 70% as against the appellant and 30% against the respondent.

The next issue raised by the appellants is on quantum. They argued that the court did not consider the injuries as provided in the plaint but instead considered other injuries which were contained in the medical report as well as the P3 form.

The injuries pleaded in the plaint are:

- a. **Head injury (cerebral concussion).**
- b. **Blunt chest injury.**
- c. **Bruise on the right hand.**
- d. **Cut wound on the dorsum of the right hand.**
- e. **Bruise on both thighs.**

From the record the injury to teeth came during trial and not in the plaint. As is the rule now parties

are bound by their pleadings. The injury on the teeth is not pleaded and thus it was wrong for the trial court to have relied or considered the same. Equally, as it was not pleaded the appellants were therefore not in a position to respond to in their defence.

Pursuant to this the appellants have argued that the finding on quantum was therefore high and excessive considering the fact that the injuries were soft in nature.

I am not really persuaded that the injuries alone were soft in nature. It must be taken into consideration that the respondent lost consciousness for six hours. He must have therefore suffered serious bodily pain. In any event the contributory negligence of 30% ameliorates the appellants contention herein.

In the premise, I shall allow this appeal as follows:

1. **Negligence shall be apportioned to the appellants in the ratio of 70% against the appellant and 30% against the respondent.**
2. **The general damages of Kshs. 300,000/= awarded by the trial court shall be assessed based on the above apportionment.**
3. **The special damages shall remain as they were.**
4. **The appellants shall have ½ costs of this appeal and in the court below.**
5. **Interest shall be charged from the date of the trial court's judgment.**

Dated, signed and delivered at Kisumu this 19th day of February, 2014.

**H.K.
JUDGE**

CHEMITEI