**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL APPEAL NO.40 OF 2011**

**IBRAHIM IMERIKIT PAPAI ……APPELLANT**

**VERSUS**

**KEFA OMANYALA INGURA ……RESPONDENT**

**(Being an Appeal from the Judgment of the SRM M/s Njagi in Busia PMCC No.305 of 2009 delivered on the 7th July 2011)**

**J U D G M E N T**

1. On 14th September 2008, Kefa Omanyala Ingura (**the Respondent**), was involved in a road accident along Moding Kakamer road. The accident involved motor vehicle Reg. No.KAL 126Y belonging to Ibrahim Imerikit Papai (**the Appellant**). The Respondent commenced proceedings in the Surbordinate Court at Busia in respect to the injuries he had sustained. After hearing five witnesses the trial Magistrate returned a verdict in favour of the Respondent on both Liability and Damages. On Liability, the Court found that the Respondent was 20% to blame for the accident while the Appellant shouldered 80% blame. On Damages, the Court made an award of General Damages of ksh.460,000/= and Specials of 3500/=.
2. The Appellant was aggrieved by that decision and mounted this Appeal. The Appeal challenges the Trial Magistrate's findings on both liability and quantum. The Memorandum of Appeal is short and pointed. It raises the following two grounds:

1. **THAT the learned trial magistrate erred in law and fact in failing to properly evaluate the evidence on record thereby reaching a wrong decision on liability.**
2. **THAT the learned trial magistrate erred in law in awarding the quantum of general damages that were so inordinately high.**

3. The Respondent hails from Kakemer in Teso. On the fateful day, at around 3.00p.m, he was on the Moding Kakemer Road. It was his testimony that he was pushing his bicycle from the direction of Moding. That he was on the left lane of the dirt road. While so doing, a speeding motor vehicle came from the opposite direction. The driver of the motor vehicle appeared to have lost control, came into the Respondents lane and knocked him down. It was from the knock that he sustained serious injuries which required him to be admitted at Webuye District Hospital for one week.
4. Rebecca Chemutai (PW4) was walking 20 metres behind the Respondent. She too, saw a vehicle coming from the other direction. It was speeding. It knocked the Respondent who was on the left lane of the road.
5. The Appellants evidence was diametrically different with the account of the claimant and his witness. He remembers driving motor vehicle KAL 126Y on that day. At around Duka Moja he saw a cyclist from the opposite direction cycling in a zigzag manner. This was round a sharp

bend. He applied brakes and hooted but was still unable to avoid a collision. Following the accident he was charged with a traffic Offence of Careless Driving contrary to Section 4 (g) (i) of the Traffic Act in the Chief Magistrate's Court at **Bungoma in Traffic case no.150 of 2008 – Republic –vs- Ibrahim Emerikit Papai**. After trial he was acquitted. In the civil claim he produced the traffic proceedings in his aid.

6. In the Appeal it was contended by the Appellant's Counsels that the trial Magistrate failed to properly evaluate the evidence on record and thereby reached a wrong decision on liability. Much was made on the trial courts failure to properly consider the evidence in the traffic proceedings and also the Defence case.
7. As this is a first appeal, it falls to this Court to evaluate the evidence on Liability and Damages and to draw its own conclusion. This Court however bears in mind that it did not have the advantage of seeing the witnesses testify and so due allowance must be given for this. (**Selle –vs- Associated Motor Boat Company Ltd** [1968] E.A.123).
8. It is common ground that the accident happened on a dirt road. It is also common ground that the Respondent and the Appellant were coming in opposite directions. It was the evidence of the claimant that he was pushing his bicycle when he was hit. That was supported by PW4. For the Defence it was maintained that the claimant was riding the bicycle on a zig zag manner. The Appellant and Respondent had testified in like manner in the traffic proceedings. In those proceedings, two of the four eye witnesses called by the Prosecution told Court that the Respondent was riding the bicycle. The other two said that he was pushing it. These two were the claimant himself and Tabitha Chemutai who also testified as PW4 in the civil claim.
9. In the traffic proceedings, the Court found that the Prosecution case was inconsistent on this aspect while in the civil claim the trial Magistrate chose to believe the claimants. He gave his reason for this.

> **"Both in the instant and traffic case is consistent on the other hand the defendants evidence herein that prior to the accident the plaintiff was cycling in a zigzag manner differ with what he told court that heard the traffic case against him that the complainant therein (the complainant herein) suddenly changed lanes. The defendant also told Court that him and the Plaintiff were involved in a collision while in the traffic case he said he hit the plaintiff, accordingly I find there is change of facts as above said because the defendant evidence in the traffic case and herein while the plaintiff and PW4's remarks can count."**

10. Those remarks by the trial Court may have indeed influenced by what Appellant had told the Traffic Court in cross examination. This is what he said:

> **"I was driving slowly because of the pot holes. I collided with the cyclist. I took the complainant to the hospital. He was complaining of injuries on the right leg. I tried to swerve but I hit the pedestrian."** (emphasize mine).

The Appellant was not clear as to whether the person he hit was cycling or walking.

11. That said, for purposes of civil liability, the crux of the matter would be on the point of collusion. What would have resolved that matter would be the sketch plan that was drawn by the police and produced in the traffic case. This is because, the claimant and Defence had given conflicting evidence on how and where the accident occurred. Although the Appellant produced certified copies of the proceedings and judgment, the sketch plan does not appear to have been placed before the trial Court in the running down matter.
12. Looking at both the traffic proceedings and the judgment of the traffic Court, the question of the point of impact does not emerge clearly. The police officer who drew the plan added yet another angle. He told Court,

> **"The motor vehicle veered off the road and hit the bicycle rider"**

This would differ from the evidence of PW4 in the civil case where who stated that the claimant

was knocked when she was on the left lane of the road. As for the claimant he had in his examination in chief stated that he was knocked while he was off the road. This changed when in cross examination he stated,

> **"All of a sudden it veered to my lane. It was so sudden I just found it where I was. I could not do anything then to avoid the accident."**

Clearly an issue in contention was the point of impact.

13. On that issue, the trial Magistrate in the Civil claim held,

> **"For the above reasons, I believe the Plaintiff and his PW4 that at the time of the accident the Plaintiff was pushing his bicycle as he testified to and consequently that the Defendants motor vehicle veered off to where the Plaintiff was and knocked him."**

But as I have demonstrated there was no unanimity between the claimant and PW4 as to the point of impact. Even if the Court had believed that the claimant was pushing his bicycle and not riding it the critical question remained the point of impact. That all important question would have been answered by the sketch plan. The onus was on the claimant to prove liability and he failed himself when he failed to prove the point of impact. It is for this reason that this Court departs from the finding of the trial Court that it was the Appellant to blame substantially or at all for the accident.

14. The result is the Appeal succeeds on the question of liability. If however I had reached a different outcome, I would not disturb the Learned Magistrate's finding on quantum. The injuries sustained by the claimant were a fracture of his right Tibia and Fibula, wound on the right leg and blunt injuries to the lower abdomen. His right leg had shortened by one centimeter. These injuries no doubt are serious. I would agree with the trial Court that the award of kshs.460,000/= made in the decision of Nrb H.C.C. No.1054 of 1996 **Edith Mary Owuor –vs- Across Africa Safaris** compared well. In that case, the Plaintiff had suffered a fracture of the upper thigh of the left tibia with a depressed lateral tibia plateau and a contusion of the left iliac crest. But because of my decision on liability I would allow, as I now do, the Appeal in its entirety. Costs to the Appellant.

**F. TUIYOTT**

**J U D G E**

**DELIVERED, DATED AND SIGNED AT BUSIA THIS 27TH DAY OF MAY 2014**

**IN THE PRESENCE OF:**

**KADENYI ……COURT CLERK**

**……FOR APPELLANT**

**……FOR RESPONDENT**