



**REPUBLIC OF KENYA**

**High Court at Kisumu**

**Civil Appeal 124 of 2008**

**ALLPACK INDUSTRIES LTD.....RESPONDENT**

**VERSUS**

**THOMAS OCHIENG ONOKA.....APPELLANT**

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

The appeal herein is composed of 6 grounds. In summary the appellant is challenging the lower court's finding on quantum namely that the same was excessive and on negligence, that the trial court did not take into consideration relevant facts in determining who caused the accident.

The brief facts are that on the 2<sup>nd</sup> day of January, 2004 the respondent was heading home a board a matatu along Kisumu- Ahero road. When he alighted at Nyalenda at a place called Kachok he crossed the road and began walking on the side. Suddenly he was hit from behind by a motor vehicle. When he regained his consciousness he was at Nyanza provincial hospital.

According to the report prepared by a **Dr. Nyamogo PW1** the respondent sustained blunt injuries to the chest, spine, upper limb brain concussion, laceration to forehead and left knee. At the time of testifying he had generally healed save for some occasional complaints which he said that he treats himself using herbs.

**PW3 P.C Samson Chakachi**, produced the police abstract forms which showed that the appellant owned the motor vehicle. The said officer did not however produced the police file as the officer who investigated the accident had left on transfer.

The respondent however argued that the appellants driver was over speeding and that after the accident he lost consciousness and he did not know what had happened.

The defendant on the other hand acknowledged that he was driving the said vehicle on the material day. He told the court that there were three other vehicles ahead of him and one behind. At some distance he saw somebody who was staggering and drunk crossing the road.

He applied emergency brakes and the person jumped off the road into a ditch. The appellant driver denied hitting the person.

The said driver went straight and reported the accident at the police station beside writing his statement.

The issue to determine is whether indeed an accident occurred on the material day. From the evidence of the parties herein there is no doubt that an accident occurred and it involved the parties herein. Although the police failed to produce their file which I suppose had the detail of the accident the

police abstract, which ordinarily is the extract of the register prove as much.

The production of the said abstract convinces me that indeed the accident occurred whether or not the driver of the appellant was charged.

However, who caused the accident? The appellant argues that the respondent was staggering across the road as if he was drunk. No evidence was laid before the trial court to establish the respondent drunkenness.

The appellant further argued that there was no dent on the motor vehicle which would have been consistent with an accident. I respectfully disagree. There is no sufficient evidence that whenever a vehicle would hit a human being there must always be a dent to the vehicle. It is equally possible that such damage could occur including the cracking of a windscreen or such other damages but it does not follow always that it must occur.

The appellant argued that he was driving at a slow speed of between 40-50 KM per hour. This perhaps might have contributed to the lack of damage to the vehicle.

The respondent on the other hand told the court that:-

**“ I was knocked from behind. I heard people screaming and when I realized vehicle was approaching me and I wanted to run off the road I was knocked”.**

I do not find the evidence of the respondent very convincing. How could he run off the road if indeed he was off the road? My observation is that the respondent was either on the road or beside the road.

Equally, I do not find it reasonable enough that the vehicle hit the pavement and proceeded to hit the respondent. If it hit the pavement a dent would have been left on the car.

My over all assessment is that both the appellant and the respondent were responsible for the accident. The idea of reporting the matter to the police and the insurance company shows that there was some element of guilt on the part of the appellant.

The apportionment of liability by the trial court was fair and reasonable in the circumstances.

Had the police produced their record and the file in particular the court would have had a proper perspective. I do note equally that there was no evidence from any other independent witness for this would have altered the landscape.

The upshot of my findings therefore is that both the appellant and the respondent are to blame for the accident.

On quantum this court shall interfere only if **“the judge or magistrate in assessing the damages took into account an irrelevant fact or is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages”**

**See I Langa -VS- Manyoka [1961] EA 765.**

The injuries suffered by the respondent though healed were serious. He suffered brain concussion and was admitted for 2 days. They are blunt injuries and lacerations.

My finding is that the net sum awarded of Kshs. 180,000/= is fair and reasonable in the circumstances taking into consideration that the accident occurred in January 2004 as well as the prevailing inflation.

In summary therefore the appeal is hereby dismissed with costs to the respondent.

**Dated, signed and delivered this 25<sup>th</sup> day of March 2013.**

**H.K. CHEMITEI  
JUDGE**

In the presence of:

.....the appellant

.....the respondent

*HKC/va*