**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL 122 OF 2011**

**ISMAIL MOHAMED AHMED ……. APPELLANT**

**V E R S U S**

**EDWIN ODHIAMBO …… RESPONDENT**

**JUDGEMENT**

1. This Appeal is against the lower Court judgment of 10th June 2011. By that judgment the lower Court found the Appellant 80% liable for the road traffic accident whereby the Respondent was injured. The Court proceeded to award the Respondent Kshs. 600,000/- in general damages and Kshs., 100,000/- for future medical treatment.

2. The Appellant has filed this appeal based on the following grounds-

***"(a) The Honourable Magistrate erred in law and fact by***

***holding the Appellant liable against the weight of the***

***evidence in SRMCC No. 2410 of 2009.***

b. ***The Honourable Magistrate erred in law and fact by arriving at a wrong conclusion against the weight of the evidence on record.***
c. ***The Honourable Magistrate erred in law and in fact by awarding damages that are excessive and oppressive to the Appellant given the nature of the injuries allegedly suffered by the Respondent."***

3. This is the 1st Appellant Court as such, this Court is guided by the principles set out in the case **SELLE & ANOTHER -VS- ASSOCIATION MOTOR BOAT COMPANY LTD & OTHERS [1968]E.A 123**. The Court in that case stated-

> ***"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally……."***

I will however consider the caution stated in the case **PETER -VS- SUNDAY POST LTD [1958] E.A. 424** where the Court had this to say-

***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide…"***

4. The Respondent gave evidence to the effect that he was on the material date walking towards Makupa and on reaching at Saba Saba was knocked down by a vehicle which had veered off the road. He was hit whilst he was off the road. He stated that it was the Appellant who was driving the vehicle at the time when the accident occurred. He was injured and he did state at his trial that he still suffered pain whenever it was cold. He also stated that he required Kshs. 100,000/- for future medical treatment. That as a consequence of the accident he was unable to continue doing his painting work.

5. On being cross examined he stated that he had become disabled following that accident. That immediately after the accident he lost consciousness but he suffered a fracture to his right leg.

6. On re-examination he stated that he suffered internal injuries to his head.

7. PW2 was the Doctor. He confirmed that the Respondent had a fracture of the skull, head injury with brain contusion, fracture of the left fumer and multiple cuts on the lower limb. The Respondent was admitted in hospital for fifty six (56) days. He had metal implant inserted on his left fumer which would require Kshs. 100,000/- for its removal.

8. PW3 the Police Officer confirmed that the accident occurred. He also confirmed that the car was driven by the appellant whilst the Respondent was a pedestrian. According to the Policeman the cause of the accident was still under investigation when he testified.

9. The Defendant did not offer any evidence in support of his defence.

10. The grounds of appeal filed by the Appellant relate to the lower Court's finding on liability and quantum.

11. On liability the Respondent gave uncontroverted evidence that he was

a pedestrian and he was hit by the Appellant's vehicle which veered off the road and hit him when he was off the road. The trial Magistrate's finding that the Appellant was 80% liable for the accident cannot be in the light of that evidence be faulted. I could not find any mention by the Respondent that the Appellant stopped 2 metres ahead of the scene of the accident. That statement is not supported by the evidence before the trial Court. Even if the Respondent had made that statement it would not make any difference because as I understand the evidence of the Respondent is that the Appellant was not necessarily driving at a high speed but rather that he veered off the road and therefore caused the accident. The appellant's ground in respect of liability is therefore rejected.

12. The ground of appeal on quantum will also fail. I cannot find any justification to interfere with the trial Court's finding on damages. The Respondent in his submissions relied on two cases the first one is **JACKSON KIHORO -VS- PETER MUTUKU NBI HCCC NO. 4077 OF**

**1992**. The Court in that case awarded the Plaintiff Kshs. 650,000/- for a fracture of the skull. This case was determined in 1999. The second case is **MAHINDER SEMBI -VS- A.G. NBI HCCC NO. 817 OF 1993**. This was determined in the year 2000. The Court in that case awarded Kshs. 500,000/- for a fracture of the fauma.

13. Bearing in mind the injuries that the Respondent suffered I cannot find that the trial Court's award

of Kshs. 600,000/- was inordinately high. It therefore does not attract the interference of this Court. It is for that reason that I find that the second ground of appeal fails.

14. In the end I find that there is no merit in the Appellant's appeal and the same is hereby dismissed with Costs to the Respondent.

**Dated and delivered at Mombasa this 17th day of October, 2013.**

**MARY KASANGO**

**JUDGE**