REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 65 OF 2008

1. JOHN MUTISO MWANIA

2. JOHN KILONZO WAMBUA …….....APPELLANTS

VERSUS

ANTHONY MUTUKU MWANIKI ……..…….....RESPONDENTS

JUDGMENT

1. By a **Plaint** dated **27/09/2007,** the Respondent herein, **Anthony Mutuku Mwaniki** ("*Respondent*") filed a suit against the two Appellants and Fair Hardware seeking for judgment jointly and severally for special damages; general damages; costs and interest. The suit respects an accident which occurred on **02/07/2007** involving the motor vehicle registration number **KAE 657L** ("*Motor Vehicle").* The main theory of the case is negligence. The ownership of the Motor Vehicle is disputed.

2. The suit was against **Fair Hardware**, **John Mutiso Mwanzia**, and **John Kilonzo Wambua.** The last two are the Appellants herein and jointly referred to as "*Appellants*" or 1st and 2nd Appellant respectively. After a momentary entry of interlocutory judgment in favor of the Respondent against all three defendants (*including the two Appellants*), the two Appellants filed a Statement of Defence through their advocates.

3. The suit was set for trial and it was heard on several sittings at the **Resident Magistrate's Court** in **Tawa** before Learned Magistrate, **Mr. Mararo** in **RMCC No. 105** of **2007**. At the end of the trial, the Learned Magistrate issued a judgment in which he found the Appellants 100% responsible on liability and awarded general damages in the sum of **Kshs. 400,000/=** and special damages in the sum of **Kshs. 23,700/=.**

4. The Appellants are aggrieved by the judgment of the Learned Magistrate and filed a Memorandum of Appeal. They raised six grounds of appeal. However, in their written submissions before the Court (*which is how, by the consent of the parties, the appeal was canvassed*), the Appellants essentially collapsed the grounds into four grounds which I will address below.

5. Naturally, the Respondent opposes the appeal and would have the Court leave undisturbed the findings of the lower court on both liability and damages.

6. It is appropriate for the Court to begin by reminding itself the proper standard of review when sitting on first appeal. The appropriate standard of review can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

These three principles are well settled and are derived from various binding and persuasive authorities including *Mary Wanjiku Gachigi v Ruth Muthoni Kamau* (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA); *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); *Virani T/A Kisumu Beach Resourt v Phoenix of East Africa Assurance Co. Ltd* (Kisumu High Court CC No. 88 of 2002). This last case was cited before me by the Respondent's counsel.

7. With the above principles in mind, I will now proceed to deal with the appeal. I will begin with the known. It is known and undisputed that there was an accident on **02/07/2007** at around 5.00 pm or thereabouts near **Kaani** in **Machakos-Kitui Road.** It is also known and undisputed that the accident involved the Motor Vehicle and the Respondent. Finally, it is known and undisputed that the Respondent had a bicycle at the time of the accident.

8. The convergence of the Appellants' and Respondent's versions of the story ends there. I will briefly set out the areas of sharp dispute:

a. The beneficial ownership of the Motor Vehicle is disputed. The Respondent claims the 2nd Appellant is a beneficial owner. The 2nd Appellant vigorously denies.

b. It is sharply disputed whether the Respondent was riding his bicycle or not at the time of the accident. The Respondent's case is that he was pushing his bicycle on the side of the road. The Appellants' version is that the Respondent was riding his bicycle on the road.

c. It is a point of contention whether Benjamin Kioko ("Mr. Kioko"), who testified as PW2 for the Respondent in the court below was present at the scene of the accident or not. He insists he was present and witnessed the accident. The Appellants' witnesses say he was never at the scene and cannot therefore give any account of the accident.

d. The injuries suffered by the Respondent are also disputed. The Appellants' position is that the Respondent has not established that he suffered the injuries he claims he did or any at all.

e. Finally, it an area of fertile disputes how the accident occurred and who was responsible for the accident.

9. At trial below, the Respondent called three witnesses while the Appellants called two witnesses. The Respondent testified as PW1 and narrated that he was pushing his bicycle on the side of the road near **Kaani market** on the **Machakos-Kitui** road when the Motor Vehicle emerged. He testified that the Motor Vehicle was speeding and when it got near where he was, it swerved and veered off the road knocking him unconscious. When he came to, he was in the hospital and it was three days later. He also had serious injuries on his head, knees, chest, legs and foot. **Mr. Kioko** testified as PW2 and testified that he saw the accident happening from about 150 metres away. In every material detail, he corroborated the Respondent's story.

10. The 1st Appellant testified as DW1. He impugned the Respondent's story and proffered, instead, that he was driving the Motor Vehicle at an eminently reasonable speed of no more than 40 Km/h on a road that has plenty of pot holes. He testified that he saw Respondent riding his Motor Vehicle on the road ahead of the Motor Vehicle. When he got closer, the Respondent suddenly cut on to the path of the Motor Vehicle. Although he did his best to brake and swerve, he hit the Respondent from behind. In his estimation, the accident was entirely caused by the negligence of the Respondent. DW2, **Samuel Katiku**

Ikuta, who was a passenger in the Motor Vehicle, corroborated the 1st Appellant's version of events.

11. Faced with this dueling accounts of what happened on that fateful evening, the Learned Magistrate analyzed the evidence and reached the following conclusion on liability:

[*The 1st Appellant] approached the [Respondent] from behind and hit him while trying to avoid a pot hole. [The 1st Appellant] must have been at a high speed as he failed and/or was unable to control the Nissan Saloon motor vehicle so as to avoid hitting the [Respondent]. Further the Nissan Saloon stopped 4 metres away from the spot of the accident. [The 1st Appellant] being behind the [Respondent] and driving a motor vehicle had a high duty of care towards the [Respondent] who was a cyclist/pedestrian riding/walking on the side of the road. I henceforth find that [the 1ST Appellant] was not as diligent as required in regards to the [Respondent] and that he failed to control the Nissan Saloon as required. I, as a consequence, find the driver of the Nissan Saloon Motor vehicle 100% liable and the [1st Appellant vicariously liable*.

12.I find a number of weaknesses in the conclusions of the Learned Magistrate. First, whereas the Learned Magistrate was entitled to believe the evidence given by the Respondent and his witness as opposed to that given by the 1st Appellant and his witness, respectfully, he should have stated why he chose to believe the former over the latter. The Learned Magistrate does not give us a glimpse as to why he chose to believe the Respondent's story over that the Appellant.

13.The law required the Respondent to prove his case on a preponderance of evidence. Did the Respondent prove on a balance of probabilities that the Appellant was 100% negligent? I am not so convinced. The Respondent would have had to prove that he was on the side of the road and not on the road itself for the court to make a finding of a prima facie case of negligence. If the Respondent was on the road, more would be needed to prove 100% liability on the part of the Appellants. The Respondent would have had to adduce more evidence to show that it is the 2nd Appellant who was negligent when the accident occurred. The presumption of negligence which would apply if the Respondent was struck while outside the road would not apply here.

14.Yet, the Learned Magistrate does not find it necessary to make a finding whether the Respondent was on the road or not. I think this is an error. It led him to conclude that the Appellants were 100% liable. Looking at the evidence in its totality, I would conclude that it is more likely than not that the Respondent was on the road when he was struck. I say so for at least two reasons. First, the Police records do not indicate PW2 was at the scene of the accident. It also seems strange that PW2 who said he is a childhood friend of the Respondent neither accompanied him to hospital nor waited at the scene for the police to arrive. I would therefore discount the evidence of PW2.

15.I would therefore find that the Respondent was, in fact, riding his bicycle on the road when he was struck. In that case, I do not think the Respondent has proven that the Appellants were 100% to blame for the accident. For him to prove that, he needed to show more than that there was an accident. He needed, for example, to put in evidence sketches or police notes showing how the accident occurred. He did not do this. In the circumstances, I would not assign more than 75% blame on the driver of the Motor Vehicle. I would have put it at 50% but the 2nd Appellant testified that he hit the Respondent from "*behind*." This clearly shows that he should bear a bigger portion of the blame because he had more opportunity to prevent the accident.

16.On appeal, the Appellants raised another critical objection on liability. They say that the Respondent never proved his injuries to the required standard of proof. This is because, the Appellants argue, the Respondent did not produce the treatment notes from **Shalom Hospital** where he was treated and the **Medical Report** by **Dr. Kuria**. Relying on the case of *Eastern Produce (K) Ltd v James Kipketor Ngetich* (Eldoret HCCA No. 85 of 2002), the Appellants argue that the omission to put on the record these documents if fatal to the Respondent's case.

17.I have read the *Eastern Produce Case* cited by the Appellants. I do not think it stands for the

proposition that a Plaintiff's case in personal injury cases will fail every time she does not enter into the record treatment notes. Like all the other elements of negligence, injury to the Plaintiff must be proved on a preponderance of evidence. It is true that a medical report by a doctor coupled with treatment notes from the same doctor would be unassailable evidence to prove injuries. But it is not the only proof of injuries in negligence cases. I find that, here, the uncontradicted evidence of the Plaintiff about his injuries as buttressed by the evidence in the P3 form is enough to establish, on a balance of probabilities, that the Respondent suffered those injuries. In my mind, this would have been different if the Appellants had seriously impugned the existence or extent of those injuries through cross examination or placing on record contradictory evidence. Without more, the Court is entitled to believe the Respondent as to the extent of his injuries – especially when corroborated by the P3 form.

18.That brings us to the crucial issue of quantum. The Appellants complained that the Learned Magistrate failed to consider case law involving similar injuries and considered a case law which was provided for reasons other than assessment of quantum. This, the Appellants argue, demonstrates that the Learned Magistrate's findings on quantum deserve to be upset by this Court on Appeal.

19.The principles upon which an appellate court will interfere with quantum are well settled in Kenya. The leading authority is *Butt v Khan* (1977) KAR 1 where Law JA held:

An Appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which as either inordinately high or low.

20.I cannot say that the Learned Magistrate violated any of the principles outlined here. There is no evidence that the Learned Magistrate took into consideration a relevant factor. Considering a case submitted for another purpose in considering quantum is not, with due respect to the Appellants, considering a "*wrong factor.*" Similarly, I cannot say that the Learned Magistrate left out a relevant factor. Finally, I do not think the sum of Kshs. 400,000/= is so inordinately low as to be an erroneous estimate of damages. I do not think the sum awarded here violates the famous principle set out in West (H) & Sons v Shepherd (1964) AC 326, 345 that *"it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards."*

21.There is one last issue we must deal with before concluding. The Respondent brought this case against **Fair Hardware** as the legal owner of the Motor Vehicle and the 1st Appellant as the beneficial owner thereof both under the theory of vicarious liability as the main tortfeasor. To substantiate his claim against Fair Hardware, the Respondent produced a Copy of Records which shows that Fair Hardware was the owner of the Motor Vehicle. The Respondent offered no proof at all – not even an allegation in evidence – that the 1st Appellant is the "*beneficial*" owner of the Motor Vehicle. It was, therefore, an error for the Learned Magistrate to have found liability against the 1ST Appellant. There was no evidence to come to that finding. Liability could only have been entered against the 2nd Appellant and, of course, against **Fair Hardware** as the legal owner of the motor vehicle.

22.In the end, therefore, I will allow the appeal to the following extent:

a. First, I set aside the judgment against the 1st Appellant, ***John Mutiso Mwania.***

b.Second, I apportion liability as against the 2nd Appellant at ***75%.***

23.I will not interfere with the quantum.

24.The appeal is allowed to the extent stated above. In that connection, I will make no order as to costs.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this day **15TH** day of **FEBRUARY 2012**.

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J.M. NGUGI
JUDGE