



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL APPEAL 79 OF 2010**

**WILSON LONAPA.....APPELLANT**

**AND**

**PATRICK KAMANDA NGUGI.....RESPONDENT**

*{Being an appeal from the judgment of the Senior Resident Magistrate, Hon. D.K. Kemei,  
dated 29<sup>th</sup> April, 2010 at Eldoret Chief Magistrate's Court in Civil Case Number 662 of 2008}*

**JUDGMENT**

This appeal is from the judgment and decree of the learned Senior Resident Magistrate, **D.K. Kemei**, dated 29<sup>th</sup> April, 2010, in Eldoret Chief Magistrate's Court Civil Case Number 662 of 2008. The appellant, **Wilson Lonapa**, was the defendant and the respondent, **Patrick Kamanada Ngugi**, was the plaintiff. The learned Senior Resident Magistrate held the appellant 70% liable and awarded the respondent Kshs 500,000/= general damages plus costs and interest for injuries suffered by the respondent in a road traffic accident involving the appellant's motor vehicle registration number **KAZ 349**. That decision triggered this appeal.

The respondent pleaded, *inter alia*, that on or about 20<sup>th</sup> may, 2008, he was lawfully walking along Uganda Road when, near Caltex in Eldoret, the defendant, by himself, his servant and/or agent caused to be driven in a negligent manner the said motor vehicle as a consequence of which it hit the respondent and thereby caused him injuries. He particularized the injuries as a bruised tender and swollen right leg and fractures of the right tibia and fibula at the ankle joint.

In the particulars of negligence, the respondent averred, *inter alia*, that the appellant/his servant and /or authorized driver, drove the said vehicle without due care and attention; failed to have due regard to other road users; failed to hoot; drove at a high speed and failed to steer and/ or control the said vehicle.

In the written statement of defence, the appellant denied the respondent's claim and averred, *inter alia*, and without prejudice that if indeed an accident occurred as alleged, then the same was inevitable and /or that it was wholly caused and /or substantially contributed to by the respondent because of the negligent manner in which he was walking along the road.

In the particulars of the negligence alleged against the respondent, the appellant averred that the respondent walked on the Highway rather than on the pedestrian's pathway; unreasonably exposed himself to danger; failed to heed the presence of the said vehicle and failed to have due care and attention to other road users and thereby caused the accident.

In his appeal, the appellant has given (5) grounds of appeal. The grounds however challenge the learned Senior Resident Magistrate's findings on liability and the award of damages. With regard to the former, the appellant contends that the learned Senior Resident Magistrate based his judgment on matters which were not pleaded and proved and with regard to the latter, the appellant contends that the learned Senior Resident Magistrate erred in not holding that the respondent was the sole cause of his injuries if not to a large extent and that the trial magistrate applied wrong principles.

The respondent's case at the trial was briefly as follows:-

On 21<sup>st</sup> May, 2008, he was standing on the island in the middle of Uganda road, near Eldoret Police Station, when a lorry came from behind and hit him on the shoulder. He fell down unconscious and he came to, while he was on his way to Moi Teaching and Referral Hospital. He was then in great pain on his right leg. The same was bandaged and he was discharged. Later, he was admitted at the same hospital. A discharge summary, a P.3 form, and a medical report in respect of the injuries were produced by consent.

The respondent blamed the driver of the said vehicle for the accident because, in his view, he was not careful and did not hoot. He also produced a police abstract through **Kosgei, P.W.2**.

The appellant's case on the other hand, was that his driver, **Paul Lonapa (D.W.1)**, was driving the said motor vehicle on the said road when, near Eldoret Police Station, through the side mirror of the vehicle, he saw that he had hit somebody and had fallen down on the pavement in the middle of the road. Police officers visited the scene but did not find the driver to blame nor did they find any fault with the said vehicle. The appellant's driver denied that he had been negligent or that he drove at high speed.

The learned Senior Resident Magistrate found that both the respondent and the driver of the appellant were to blame for the accident and apportioned liability as already stated. He also found that the respondent had suffered a fracture of the right ankle joint and would later require removal of screws and plate used and healing. On the basis of that injury, and the testimony of the respondent, the learned Senior Resident Magistrate awarded the respondent the said sum of Kshs 500,000/= plus costs and interest.

When the appeal came up for hearing before me on 27<sup>th</sup> March, 2012, counsel agreed to file written submissions which were duly in place by 15<sup>th</sup> May, 2012. I have read those submission and the authorities relied upon by counsel. I have also considered the record of the learned Senior Resident Magistrate. Having done so, I take the following view of the matter.

The record does not show that the appellant made any submissions before the learned Senior Resident Magistrate. Before me however, the appellant has, on liability, submitted that the respondent failed to prove negligence against D.W.1 and that it was infact the respondent who hit himself on the said motor vehicle. Reliance was placed on the cases of **Haji –vrs- Morair Freight Agencies Ltd [1984] KLR 139** and **Nandwa –vrs- Kenya Kazi Ltd [1988] KLR 488**.

In the former, the court found that the cause of the accident "so speculative that no reasonable or probable inference could be drawn that either driver was at fault. There was no direct evidence that either driver was negligent nor could it be inferred from the circumstances". In the latter case, it was held inter alia, that:-

**"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial, there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence**

**provides some answer adequately to displace that inference”.**

In that case, a prima facie inference was made that the accident was due to the negligence of the defendant in failing to keep the motor vehicle in a state of good mechanical repair.

It is plain that the two cases cited by the appellant are clearly distinguishable from the present case. Unlike in the first case, in this case, there is direct evidence of the accident from the respondent and the driver of the appellant (D.W.1). And unlike in the second case, this case does not turn on whether or not the said motor vehicle was properly maintained.

The respondent herein proved that he was indeed standing on the island in the middle of the road when he was hit. D.W.1’s testimony supported the respondent’s testimony in that respect. In his own words:-

**“However, on reaching near Eldoret Police Station ....., I saw somebody from my side mirror had hit the lorry and had fallen down. He had (lied) on a pavement in the middle of the road ...”.**

That testimony suggests that D.W.1 did not see the respondent when he drove past him as he stood on the island in the road. He only realized he had hit the respondent when he checked in his side mirror. Although he had stated that the respondent had hit himself on his lorry, he admitted in cross-examination that **“it was not possible to hit a vehicle.”** That in effect meant that D.W.1 had hit the respondent. In my view, there was basis for finding the appellant liable in negligence to some extent. The learned Senior Resident Magistrate determined that D.w.1 was 70% to blame. I find no basis to fault that finding. In the premises, I cannot disturb the learned Senior Resident Magistrate’s findings on liability and his apportionment.

With regard to assessment of damages, the learned Senior Resident Magistrate relied upon the case of **Stephen Wanderi & Another -vrs- Gladys Wanjiru Kungu (Nakuru HCCA No. 81 of 2005) [UR]**. In that case, the plaintiff suffered “serious and extensive compound fractures of the left leg ..... fractures of the left fibula and tibia. She also suffered extensive skin loss from the knee downwards. The skin loss led to the skin being removed from her left thigh to graft the part of the leg which had no skin. The injury sustained by the respondent had resulted into the respondent’s left leg being disfigured and being ugly. The fractures had united but led to the said leg being 2 cm shorter than the right leg. **Dr. Kudwarwala** stated that **“Mrs Kungu will be left with a grossly disfigured left leg, some pain, some shortening, weak, quadriceps, some limitation of the left knee movements, and possibility of early degenerative changes in the left knee. Dr. Landra, the plastic surgeon opined that he could have restored the area above the knee by skin grafting. He at the time estimated the cost of the operation would be Kshs 106,760/=”.**

I have extensively quoted from the decision relied upon by the learned Senior Resident Magistrate to show that although that case involved the fractures of the fibula and tibia, those injuries were far more serious than the injuries sustained by the respondent herein. The respondent herein suffered no permanent disability. The fractures did unite without shortening of the leg. There was no skin loss.

In the premises, I find and hold that the leaned Senior Resident Magistrate in assessing general damages used as a guide, a case involving injuries which were not comparable to the injuries suffered by the respondent herein. He therefore applied wrong principles in assessing damages due to the respondent.

In those premises, I have come to the conclusion that the sum of Kshs 500,000/= awarded to the respondent as general damages was excessive given the injuries he sustained. I therefore set aside the said award of Kshs 500,000/= and substitute therefore an award of Kshs 350,000/= to be apportioned in the ratio determined by the learned Senior Resident Magistrate i.e 70%: 30% against the appellant. The net sum due as general damages is therefore Kshs 245,000/=. The award of special damages remains undisturbed and is also subject to the said ratio of apportionment.

The appellant has succeeded only in part. In my view, the order on costs of this appeal should be that each party bears his own costs.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF JUNE, 2012.**

**F. AZANGALALA  
JUDGE.**

***Read in the presence of:-***

**Mr. Barasa** for the appellant.

**F. AZANGALALA  
JUDGE  
26/6/2012.**