REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Civil Appeal 42 of 2010

OSMAN AHMED KAHIA……...……...……...APPELLANT

VERSUS

JOSEPH G. NJOROGE…….……RESPONDENT

Coram:
Mwera, J.
Kariuki for Appellant
Wafula for Respondent
Court Clerk Furaha

JUDGMENT

The record of appeal herein was filed on 5th December, 2011. There are four grounds. The appeal arose from the lower court judgment delivered on 25th February, 2010. Before the learned trial magistrate it had been pleaded that the appellant's motor vehicle registration number KAY 628J was so negligently driven on 19th January, 2008 somewhere in Changamwe area that it collided with the respondent's motor cycle injuring him. The usual particulars of negligence were set out. The respondent claimed that he suffered a fracture of the left 1st metacarpal hand bone and another to the right pelvic bone. He prayed for special and general damages, costs and interest.

The appellant denied the claim by way of his defence adding that if the said accident occurred, it was solely caused or substantially contributed to by the respondent. The usual particulars of contributory negligence were pleaded. The plaintiff's case was supported by three witnesses including himself while that of the appellant depended on two, including the appellant himself.

The learned trial magistrate crafted a judgment, found the appellant whole liable. As regards the quantum of general damages the learned trial magistrate considered the cases presented by each side in submissions. He awarded Shs. 400,000/= as general damages plus Shs. 5,700/= special damages.

In the appeal it was contended that the learned trial magistrate was wrong not to find that the respondent had failed to prove his case; the award of damages was excessive; the learned trial magistrate had not properly applied the principles on determining liability in negligence claims and had thus erred to find that the respondent proved his case on the balance of probabilities. Both sides submitted.

Arguing grounds 1, 3 and 4 together, the appellant maintained that the respondent did not prove his case on a balance of probabilities and so the finding that the appellant was 100% liable was wrong. The

learned trial magistrate should have apportioned liability, if anything. The appellant based his position on the aspect that while in examination-in-chief the respondent had stated that the accident was sudden, in cross-examination he had stated that he only saw the appellant's motor vehicle at the time of the accident. Thus he was not attentive. It was added that the respondent did not clearly state how the accident took place and so negligence could not be attributed to the appellant. There was no eye witness and the police officer, PC Ismael (PW 3) was not one. He did not investigate the accident or draw the sketch plan which was, anyway, not produced in court. In the police statement the appellant had stated that the respondent's motor cycle hit his car. That Sahil Ahmed (DW 2) said the same in evidence. The appellant was not charged with a traffic offence. So all in all, he was not negligent. That the learned trial magistrate did not give reasons why he disbelieved the evidence of DW 1, 2 by terming it untruthful and unreliable. The appellant referred to the case of **Peter Kabibi vs. Francis Mburu NRI HCCC 2643/86** where liability was apportioned on 20:80 ratio. His plea was that here 50:50 ratio should apply.

As regards the quantum it was considered excessive. Referring to the evidence of Dr. Ajoni Adede it was submitted that he had observed that due to the age of the respondent bone repair could not be carried out on him. Then the doctor's view was that the respondent did not suffer permanent incapacity. Any disability or delayed healing of a wound on his leg was due to his old age. Citing NRI HCCC 860/2001 **Joseph Mbiria vs. Jamlic Kirimi** and NRI HCCC…….**Christine Muthoka vs. Simon Obok & Another** – cases with more or less similar injuries, the court was urged to find that Shs. 150,000/= would suffice for general damages together with the special damages as awarded by the lower court.

On his part, it was contended for the respondent that the appellant's motor vehicle swerved into his lawful left lane without warning. He was liable and even the evidence of PW 3, was that the appellant did not give way to respondent's motor cycle. And that the award in general damages was deserved/warranted. The lower court's findings both on liability and quantum should be left undisturbed.

This is a matter where findings both on liability and quantum are contested. This court thus will review the proceedings before the learned trial magistrate to arrive at its own conclusions.

The evidence of Dr. Ajoni Adede (PW 1, Exhibit P1) was that he examined the respondent about a month following the accident. He was still using crutches and the left hand was in plaster. The prognosis was that the respondent's advanced age did not favour bone repair; the wound on the left leg had taken long to heal; there was permanent partial disability due to old age and post-fractures arthritis and pain was probable. There would be no residual disability following soft tissue injuries.

The respondent (PW 2) went over the injuries he sustained in the accident, the treatment he received and payments he made. For the accident and how it occurred, the respondent was brief:

"I blame the driver of the said motor vehicle….. because he swerved to (sic) my lawful lane without warning …….It is not true that I was careless in my riding."

And in cross-examination:

"I was on my way to Mombasa town. I was riding the motor cycle on (sic) my lawful lane. I only saw the said motor vehicle at the time that the accident occurred."

From the respondent's evidence it is not said from/to which directions the two motorists were going – the same direction or from opposite sides. Or did one get into the main road from a minor one; if the collision had an impact point and where on the road.

P.C. Ismael Adam (PW 3) came to court with a file in connection with the subject accident which was investigated by P.C. Koech, since transferred to Gilgil. P.C. Koech also drew a sketch plan. He told the learned trial magistrate that investigations revealed that the appellant caused the accident; he did not give way to the respondent. PW 3 produced an abstract (Exhibit P7) and a P3 (Exhibit P5) then added in cross-examination:

"I do not know whether the accident occurred off the road or on the road,"

but the appellant had recorded a statement that the respondent/motor cyclist hit his motor vehicle. Apparently the sketch plan was not produced.

The appellant (DW 1) told the learned trial magistrate that he was driving from Mombasa town direction towards Magongo. At a certain corner he drove off the road but then a cyclist hit his motor vehicle on the left rear side and fell down off the road. He was injured. DW 1, with Sahil Ahmed (DW 2) took the cyclist to hospital. He denied blame. He was not charged with a traffic offence even as Changamwe police investigated the accident. He had not been driving at a high speed. He blamed the motor cyclist for the accident.

Sahil Ahmed's (DW 2) story was more or less similar to that of DW 1 in all respects. He too blamed the respondent. The accident took place off the road where their pick-up was.

In determining liability, the learned trial magistrate delivered himself *inter alia* that:

"The plaintiff's evidence that the accident was wholly caused by the negligence of the defendant is corroborated by that of PW 3. Indeed PW 3's evidence also shows that investigations carried out in this matter revealed that the defendant was wholly to blame for the occurrence of the accident. The fact that the investigating officer(s) of this matter never blamed the plaintiff for the occurrence of the accident clearly shows that the plaintiff never contributed in any way to its occurrence. I therefore find it difficult to believe DW 1's and DW 2's evidence that the accident was wholly caused by the plaintiff's negligence. I find the evidence of DW 1 and DW 2 to be untruthful and unreliable."

And with that, the liability was wholly laid at the doorstep of the appellant.

It has been noted above that the respondent did not tell the court whether he and the appellant were going in the same direction or in opposite directions. Although the appellant with his witness does not say as much, but they stated that the appellant moved of the road and the respondent rode up and hit the rear left side of their pick up. Unless the respondent was riding into the road from the left side of the appellant then he must have been riding following them.

Then the evidence of PW 3 (PC Ismael). He did not investigate the accident. He brought to court the investigation file as P.C. Koech had compiled it. It even had the appellant's statement that the motor cyclist hit his car. A sketch map in that file was not produced to aid the court in determining whether the point of impact was on the road or on the side and on whose correct side of the road. Essentially, PW 3's evidence was hearsay. The file was not produced as an exhibit, desirably by consent for the lower court to peruse/consider. And PW 3 held the view that investigations from statements recorded therein plus sketch maps drawn, showed that the appellant was to blame. PW 3's evidence could not corroborate anything in the case before the learned trial magistrate. He was not the investigating officer or an eye witness. Thus his evidence and that of the respondent could not support (the learned trial magistrate termed it corroboration) that of the respondent who did not even seem to know where the appellant's motor vehicle came from to hit him. Yes, the accident could not have been wholly caused by the respondent but the learned trial magistrate did not assign reasons why he found the evidence of the appellant and his witness untruthful and reliable. Had for instance an eye witness or a sketch map or other evidence controverted the evidence of these witnesses, then the learned trial magistrate could have been justified to find as he did. But there was none – not even from the respondent himself who *"saw the appellant suddenly swerve into his lane"* and only saw the motor vehicle *"at the time the accident occurred."* If one may ask: Was the respondent attentive and concerned about his safety or that of other road users? It hardly appears so.

All in all this appeal is allowed. The respondent did not prove his claim especially on liability as against the appellant to warrant the orders made in his favour. Costs to the appellant.

Delivered on 21st September, 2012.

J. W. MWERA
JUDGE