REPUBLIC OF KENYA

High Court at Nakuru

Civil Appeal 149 of 2008

NDUNGO KAHIGA…….....……..APPELLANT

VERSUS

SIMON NASONGA WERUNGA…….....……..RESPONDENT

(An Appeal from the Judgment/Decree of Hon. Nduku Njuki, Senior Resident Magistrate, in Naivasha C.M.C.C.No.985 of 2007 dated 5th September, 2007)

JUDGMENT

The learned trial magistrate (Hon. Nduku Njuki, SRM) after apportioning the liability at 80:20% in favour of the respondent proceeded to award Kshs.500,000 and Kshs.79,236/= as general and special damages, respectively.

The finding on liability and the award has aggrieved the appellant who has challenged that judgment on the following summarized grounds:

i) that the evidence of the respondent was not credible;

ii) that no reasons were given for the apportionment of liability;

iii) that the respondent did not prove the particulars of negligence;

iv) that the trail magistrate misapplied the principal of *paribus sententiis reus absolvitor* by failing to give the appellant the benefit of doubt;

v) that the court erred by holding that since the respondent was not charged with a traffic offence, the appellant was to blame for the accident

vi) that the award of general damages was excessive;

vii) that the trial court ignored the appellant's submissions.

It is common ground that there was a collision between the appellant's motor vehicle, KAP 698J and the respondent who was bicycle cyclist in Naivasha on 25th December, 2006 at about 2.30p.m. along Naivasha-Kongoni Road. Following the accident, the respondent suffered fairly serious injuries involving:

a) compound fracture of the left tibia/fibular.

b) laceration of the right hand

c) dislocation of the left ankle joint

d) cut wound on the left thigh, lateral aspect

e) lacerated wound on the left thigh

As a result thereof the respondent was left with:

a) ugly scar on the left thigh with keloids formation measuring 11 X 3 centimeters.

b) swollen left ankle joint.

c) completely stiff left knee joint which is tender on palpitation.

d) ugly scar on the left ankle joint.

The respondent brought the action in the court below claiming general and special damages. The evidence as to the occurrence of the accident turned on the testimony of the 2nd appellant, the owner and driver of the matatu on the other hand and that of the respondent on the other hand.

According to the former, the accident was caused by the latter, who was cycling on the opposite direction and suddenly changed his lane to the lane of the on-coming traffic, where the appellant was driving; that due to the sudden change of lanes, the 2nd appellant had no opportunity to avoid the accident. He maintained that since he was going uphill, he was not speeding. The 2nd appellant also relied on the entry in the Occurrence Book indicating not only the fact of the occurrence of the accident but also that it occurred on the path of the matatu, driven by the 2nd appellant.

For this part, the respondent insisted that it was the 2nd appellant who, in an attempt to avoid stones which had been washed onto the road by the rain, swerved on to his (the respondent's) side thereby colliding with him.

Upon consideration of the foregoing evidence, the learned trial magistrate in his judgment delivered himself thus:

"Each of the parties insist that the accident occurred on his side of the road. Evidence by the police does not assist in any way. Such evidence would have been essential in establishing the point of impact and also whether there were any other overriding elements on the road (e.g. stones swept on to the road by rain)…… There is nothing to assist this court as to who was equally to blame for this accident and to what extent. From what is on record, this court would apportion liability at 80:20% in favour of the plaintiff."

It is the duty of this court to evaluate afresh the evidence on record in order to arrive at its own independent conclusion.

Whereas there is no dispute of the occurrence of the accident, the sole question before the trial court and indeed before this court is who, between the 2nd appellant and the respondent was responsible for the collision. Each is claiming that one crossed to the other's path. It is this piece of evidence that the trial court ought to have interrogated in the absence of an independent witness. As correctly pointed out by the learned trial magistrate, an O.B. entry without the evidence of the officer who recorded it, or the officer who visited the accident scene, such evidence was of no use.

The 2nd appellant testified as follows:

"I was going uphill. A cyclist was coming downhill. I saw him from a distance. Suddenly the cyclist changed lanes and came onto my lane from about five (5) meters……..... I could not be able to avoid a collision. On my left was a ditch. On the right was an oncoming lorry. I hit onto my brakes but the collision was inevitable"

In re-examination he went on to say that:

"The cyclist was in the wrong (sic). There were skid marks of about 2 meters. They were on the left lane facing OSERIAN where I was going. He was hit by the left side of my vehicle."

The respondent on the other hand said the following:

"…….. It was raining and stones had been swept onto the road. The driver attempted to avoid and swerved into my side (sic) of the road. I tried to avoid the accident and fell down."

In cross-examination, he said:

"I was hit by the <u>left front</u> part of the vehicle…… I saw the vehicle from about 20 meters."

(Emphasis added)

From the foregoing, there is consensus that it is the left front side of the *matatu* that came into contact with the respondent. If that be so, then it goes to confirm that the respondent was not cycling on the right side of the road towards Naivasha town as he claims. It is inconceivable that a person on the right side of the road would be hit by the left side of a vehicle travelling to the opposite direction. Clearly the finding of the learned trial magistrate was not supported by the evidence presented before him.

In failing to analyse the evidence, the learned trial magistrate fell into error and arrived at a wrong conclusion, namely, that neither of the parties was to blame for the accident. If that was the case, then there was no logic in the wide ratio of apportionment of liability. The learned magistrate ought to have found as I hereby do that the respondent was to blame for the accident.

For the reasons stated, I find merit in this appeal which I allow with costs. The judgment of the court below is set aside also with costs.

Dated, Signed and Delivered at Nakuru this 17th day of October, 2012.

W. OUKO
JUDGE