



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL 16 OF 2010**

**AMOS OLOO ODOYO.....APPELLANT**

**VERSUS**

**AUGUSTINE MWALO KIRANDE.....RESPONDENT**

**J U D G M E N T**

The respondent on 3-7-2007 was riding his bicycle along Kisumu - Bondo road at around 8.30 a.m. He was, according to his testimony at the lower court hit by the motor vehicle registration number **KAV 006 A** owned and driven by the appellant. He sustained serious injuries which included:-

- (a) Blunt chest injuries.**
- (b) Fracture of the right 1<sup>st</sup> and 2<sup>nd</sup> metacarpal.**
- (c) Injury to the 2<sup>nd</sup> and 4<sup>th</sup> distal phalanx.**
- (d) Haematoma of the nail bed.**
- (e) Compound fracture oblique upper 1/3<sup>rd</sup> and middle 1/3<sup>rd</sup>.**

He filed his claim for damages and he was awarded general and special damages of Kshs.609,880/=.

The appellant being dissatisfied with the said judgment has filed this appeal citing six grounds of appeal which can be summarized into two major limbs, that is quantum and negligence.

According to the appellant the trial magistrate erred in law and fact by finding that the appellant was 100% liable for the said accident. Further, that the award of Kshs. 600,000/= as general damages was manifestly excessive considering the nature of the injuries sustained by the respondent.

I have perused the entire evidence on record and what I find not in dispute is that the said accident indeed occurred and that the motor vehicle in question was owned and driven by the appellant.

The said accident occurred at an area near or within a trading center and the presumption is that there was a high human traffic mobility.

The plaintiff and his witness **PW3 Kennedy Ouma Oduogo** said that the motor vehicle had come from Bondo direction heading to Kisumu. The plaintiff on the other hand was heading towards Bondo from the Kisumu direction.

The appellant on the other hand contradicts the respondent. He said:

**“Near Holo market I saw a pedal cyclist on the left of the road. Suddenly the cyclist swerved onto the road. I was also driving on the left. The cycle knocked the left side of my car. While hooting I swerved towards the right to avoid the cyclist. I managed to stop about 20 -30 meters away on the left of the road”.**

What is interesting however is the testimony of PW2 on cross examination where he said:

**“I witnessed as Augustine was hit by the motor vehicle I had not seen him before he was knocked down. He was not crossing the road”.**

My observation is that the said eye witness only saw the respondent when he had been knocked. He clearly told the court that he had not seen him prior to the accident. It further means that there was a high possibility that had the accident not occurred he would not have seen the respondent.

I further doubt whether the said witness saw the vehicle before the accident. If the same was moving on a different direction it would have created an attention to the witness.

From the evidence tendered by the appellant he said that the left side bumper was damaged showing further that the accident must have occurred on the left side of the road.

The police evidence which I could call an **“expert testimony”** is worth considering. PW2 told the court that:

**“The file however shows the cyclist was solely to blame for the accident. The file was closed without anyone being charge. A rough plan of the scene is in the file”.**

The rough sketch was however not produced. This perhaps would have helped the court really determine the spot where the accident occurred.

My finding therefore is that both parties should carry responsibility for the accident. My finding is buttressed by the testimony of the traffic officer. I believe that the sketch plan was drawn immediately after the accident and the scene was therefore very fresh. I do not find any reason why the police would blame the respondent and not the appellant. The fact that they did not charge the respondent does not bar this court from relying on the said evidence.

What about the appellant? He is equally culpable. This was a market area. He has in fact admitted on cross examination that he did not know the speed limit in such an area. In my opinion therefore the trial court erred in failing to apportion liability between the two parties.

Taking all the factors into consideration I shall set aside the judgment of the trial court in finding the appellant wholly liable and substitute it with the finding that the appellant shall be 80% liable against the respondents 20%.

On quantum I have seen the nature of the injuries sustained by the respondent. Indeed, they are serious. The sum of Kshs. 600,000/= awarded to him was not excessive in the circumstances. The respondent will be unable as a result of the said accident to use part of his limbs.

In the final analysis the lower court's judgment is set aside and order that:-

**(a) Judgment is hereby entered against the appellant on liability of 80% and 20% against the respondent.**

**(b) General damages of Kshs. 600,000/= together with the special damages of Kshs. 9,880/= totaling Kshs. 609,880/=. The same to be calculated on the basis of the aforesaid liability.**

**(c)Half (½) costs of this appeal to the appellant.**

Orders accordingly.

**Dated, signed and delivered at Kisumu this 15<sup>th</sup> day of October 2012**

**H.K. CHEMITEI**

**JUDGE**

In the presence of:

Otieno for the appellant

Odhiambo Miss for the respondent

*HKC/va*