REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO.94 & 95 OF 2010

JOHN GITONGA GERMANO …….....……1STAPPELLANT
BOBMILL INDUSTRIES …….....…….2ND APPELLANT

VERSUS
RISPA PAUL OGAL
(Suing as next friend of
D.O.O.…….....

……1ST RESPONDENT

CONSOLATA APIYO (suing as the
Next of friend of
A.O.O. …….....…….....

……..2ND RESPONDENT

J U D G E M E N T

By consent of the parties appeals No.94 & 95 of 2010 were consolidated. On 16th April, 2008 **D.O.O.** (a minor) (hereinafter referred to as the 1st respondent) while cycling along Katito-Onyuonyo road was hit by the 1st defendant while the 1st defendant was driving motor vehicle registration No.**KAN 910 Z.** The said cyclist had a passenger A.O.O.(hereinafter referred to as the 2nd respondent).

The 1st respondent as a result of the accident sustained injuries as follows:-

- **a deep cut wound on the head and occipital region;**
- **fracture on the right shoulder;**
- **dislocation on the right shoulder;**
- **cuts and bruises on the right foot;**
- **cut wounds on the groin;**

The 2nd respondent sustained the following injuries:

- **injuries to the neck and chest;**
- **crack right elbow;**
- **cut wound on the right small figure;**
- **dislocation of the right elbow joint.**

It is the accident that gave rise to **SRMCC Case No.32 & 35** of 2008 where **Risper Paul Ogal** (sued the

first defendant **John Gitonga Germano** and the 2nd defendant **Bobmill Industries** for damages on behalf of 1st respondentand **Consolata Opiyo** on behalf of 2nd respondent**.** The case was heard and determined by a judgment of the learned trial magistrate, that was delivered on the 29th of April 2010. Being aggrieved by the said judgment the appellants appealed to this court on the grounds contained in a memorandum of appeal dated 28th May, 2010 as follows:

1. The learned trial magistrate erred in law and fact in holding that the defendants were 100% liable for the accident and or at all.

2. The learned magistrate erred in law and fact in failing to appreciate the impeccable evidence of the defence and thereby arriving at a wrong and erroneous conclusion condemning the defendants to 100% liability and or at all;

3. The learned trial magistrate erred in law and fact in awarding damages in favour of the plaintiff without any legal and or evidential justification;

4. The learned trial magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bring law into confusion and thereby deriving an erroneous finding/conclusion;

5. The learned magistrate erred in law and fact in failing to appreciate as follows:

(c) THAT the evidence in support of the plaintiffs case was incongruous with the pleadings composes of hearsays, tendered by incompetent witness, contradictory and discreditable

(d) THAT the plaintiff's pleadings and the evidence tende3red in support thereof was incapable of sustaining any award of damages.

6. The learned trial magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendants inspite of the plaintiff's miserable failure to establish his care on a balance of probability;

7. The learned trial magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The court award is unsustainable and baseless in the circumstances;

8. The learned trial magistrate erred in law and fact in entering judgment for the plaintiff in total disregard of the exculpotary evidence by the defendants' defence.

9. The learned trial magistrate erred in law by awarding, excessive damages beyond the scope evidence and or legal entitlement;

10. The learned magistrate erred infact and law in failing to hold that the plaintiff had failed to prove ownership of the subject motor vehicle as against the defendants.

The appellants further sought:

- **that the judgment of the trial court and consequential orders be set aside with costs;**
- **the court do vary, alter and reduce the award of damages;**
- **and civil suit No.37 of 2007 be dismissed with costs.**

The defendants in a defence dated 13th March 2009 filed on the same day denied allegations and particulars of negligence, in the alternative they pleaded contributing negligence and gave particulars of negligence. The defendants did not adduce evidence at the hearing of the case but filed submissions.

In his submissions Mr. Mose counsel for the appellants submitted that the court misdirected itself by holding the appellants 100% liable for the accident yet the 1st respondent was entrusted on the road by the plaintiff. Further that the accident was never investigated; and that the evidence that the accident was in the middle of the road was never proved. On quantum he submitted that the 1st respondent obtained soft tissue injuries. A crack on the elbow and cut on finger. He similarly submitted of the second appeal in regard to 2nd respondent. He proposed a figure of Kshs.40,000/= as damages.

Mr. Maube for the respondents on his part opposed the appeals. On the issue of liability he submitted that the learned trial magistrate did not err. That although the respondents were minors they were intelligent and clear on how the accident occurred. The 1st respondent though aged 15 had cycled for 2 years; and was on the left side of the road when he was knocked from behind; that this was not controverted in cross-examination and despite opportunities availed to the defendants they failed to adduce evidence and that the respondents proved their case on a balance of probabilities. On quantum he submitted that the injuries were serious. He urged this court to uphold the quantum as assessed by the trial court.

This is the first appellate court and has the duty to re-consider, evaluate and analyse the evidence on record in order to arrive at an independant conclusion, bearing in mind all the time that the trial court had the benefit of seeing and hearing the witnesses and giving an allowance to this fact. See **Sella & Another versus Association of Motor Boat Company Limited (1968) E.A. at 123.**

Having considered the evidence on record the issues for determination is whether the respondents, there being no dispute that an accident occurred, were liable for the accident and if so to what extent, and what damages are they entitled to if any.

The appellants did not adduce any evidence at the hearing of the two suits. The evidence therefore for consideration is that of the respondents and their witnesses. It is to be noted that a defence filed in court ***per se,*** in the absence of evidence in support is a mere denial and of no evidential value. And therefore in this case the evidence of the respondents remained uncontroverted.

The 1st respondent stated as follows in his evidence, that: On 16/4/08 at 1 p.m. coming form Katito market going home he was involved in an accident. He was riding a bicycle and carrying 2nd respondent. They were hit by motor vehicle registration No**. KAN 910 Z.** He was riding on the left side of the road and was hit from behind. He blamed the driver of the motor vehicle. In cross-examination he said he had cycled for 2 years. He was not playing on the road. He sustained injuries as follows:

- **deep cut wound on the head;**
- **fracture and dislocation of right elbow;**
- **cut on the right hand;**
- **cut wound on the groin.**

The 2nd respondent also aged 15 years stated in his evidence as follows: That he was a passenger on the 1st respondent's bicycle. They were hit from behind by a vehicle registration **No.KAN 910 Z** where he sustained injuries. He gave injuries as:

- **dislocation right elbow;**
- **injury to the neck, right small finger and chest;**
- **cut on right leg.**
- **He blamed the driver of the motor vehicle for the accident.**

The above evidence was not challenged and the court therefore has no evidence from the appellant; to weigh against what the respondent put before it.

Although the respondents are minors, who were on the road that perse in the absence of evidence that they were negligent cannot be a basis to find that they contributed to the accident. The evidence

before court is that they were on their right side of the road and were hit from behind. Coupled with the facts of the case, the court is of the view that the 2nd appellant driving a motor vehicle on the road had a higher duty of care compared to that of a cyclist as he drove a machine which if not properly controlled had serious consequences. As such I do agree with the finding of the lower court that the 1st appellant was wholly to blame for the accident.

On the issue of quantum, the law on when the appellate court can intervene is very clear. It can do so where the award is manifestly too low or excessively high so as to cause an injustice. The 1st respondent according to the medical report by Dr. Oruro dated 12th May, 2009 sustained his injuries as follows:

- **Deep cut wound in the occipital region of the head;**
- **Dislocation on the right should;**
- **Cut wounds on the groin;**
- **Cuts and bruises on the right foot.**

He classified the injuries as harm.

The 2nd respondent's report also by **Dr. Oruro** is dated similarly the 12th of May 2009. the doctor gave injuries sustained as follows:

- **crack on the right elbow joint;**
- **cut wound on the right hand small finger;**
- **blunt injury on the neck; blunt injuries on the chest.**

He classified injuries as maim.

For the 1st respondent the trial magistrate awarded Kshs.300,000/= and for the 2nd respondent Kshs.250,000/=. I have considered the authorities cited by the parties some of which were fairly current at the time of hearing. I find that the awards were excessively on the high side. I therefore do agree with the appellants' counsel in this regard. I also take cognisance that the 1st respondent's injuries were categorized as harm yet he was highly awarded as compared to the 2nd whose injuries were categorized as main. I am of the view that a global figure of Kshs.180,000/= would be fair and reasonable to both respondents. They recovered fairly well and had no inabilities reported. The appeal therefore succeeds to that extend.

In summary the judgment is that:-

1. **I affirm the finding of the trial court on liability;**
2. **I set aside both awards on quantum and award both respondents Kshs.180,000/= for injuries sustained;**
3. **I affirm the specials at Kshs.1,500/= awarded to the 1st respondent;**
4. **Each party to meet their costs of this appeal.**

Dated and delivered this 30th day of June 2011

ALI-ARONI
J U D G E

In the presence of:
…….Counsel or the appellants
…….Counsel for the respondents