CIVIL APPEAL

- ***Principle to guide the first appellant court***
- ***Respondent had a burden to prove the link between the appellant's negligence and his injuries.***

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 115 OF 2007

(An appeal against the judgment of Mr. G. Oyugi SRM in Tigania Civil Case No. 131 of 2006 delivered on 1125th September 2007)

PETER KAIBUNGA NKIRITI ……………………………………………….. APPELLANT

VERSUS

JOHN MWENDA MURAA …………………………………………………… RESPONDENT

JUDGMENT

The respondent filed a case being SRMCC Tigania Case No. 131 of 2006 against the appellant seeking an award of special and general damages. Those are damages that resulted after the accident which occurred on 22nd January 2005. As pleaded in the plaint, the respondent was walking off the Meru Maua tarmac road when the appellant allegedly negligently drove motor vehicle KAR 630Q thereby causing the said vehicle to veer off the road across the off side land and outside the tarmac. It was alleged in that plaint that as a result of that negligence the respondent who was walking off the tarmac road was hit by that vehicle. As a result of that accident, the respondent stated in his plaint that he suffered the following injuries:-

a) Compound fracture of the left tibia and fibula bones.

b) Fracture of the lower jaw necessitating K-wiring.

c) Loss of 7 teeth.

d) Bruises on the left side of the face.

e) Bruises on the scalp.

f) Lacerations on the inner aspect of the lower lip.

g) Bruises over the left forearm.

The appellant denied the respondent's claim and stated in his defence that the accident was wholly or substantially contributed by the negligence of the plaintiff. Some of the particulars of the respondent's negligence which the appellant attributed as having caused the accident were:-

· *Crossing and attempting to cross the road when it was dangerous to do so.*

· *Suddenly stepping on the path of motor vehicle registration KAR 630Q without giving the driver of that said motor vehicle any reasonable opportunity to avoid the accident.*

The trial court in its judgment dated 25th September 2009 found the appellant liable for that accident and awarded the respondent Kshs. 450,000/= in general damages and Kshs. 8,019/= in special damages. That judgment is subject of this appeal. The appellant by his Memorandum of Appeal has faulted that judgment on the basis that the trial magistrate failed to apportion liability between him and the respondent. That the trial court's award was inordinately excessive and was not supported by evidence. Further that the learned trial magistrate erred in failing to consider the appellant's defence. He also faulted it on the basis that the learned trial magistrate in considering liability believed the respondent. I will try to give some snippets of that judgment to try and show how the trial magistrate arrived at his decision.

"Now PWII and IV (respondent's witness) are categorical that the subject accident took place on the left lane of Meru Maua Road towards Meru direction that evidence though disputed by the defendant (appellant) is believable. I don't think that the plaintiff (respondent) did jump onto the road with a view of blocking the motor vehicle driven by the defendant. That was suicidal and there is no evidence that the plaintiff wanted to commit suicide. Such an action is not reasonably expected of normal person and I have to reject that defence on a balance of probability.

Now the police seems not have gone to the scene as they made no effort to ascertain the point of impact that leaves the PWII and IV evidence that the accident took place on the left lane towards Meru direction plausible (sic). Having said that the defendant obviously was on the wrong and drove along the wrong lane – right lane instead of the left lane towards Maua direction. Given the injuries PWII sustained it can be concluded that he must have been driving that motor vehicle at a very high speed in the circumstances. The plaintiff must have been taken by surprise when he got hit by the defendant motor vehicle. I see no blame to attach on the plaintiff side since he was never on the lane of the defendant motor vehicle. Walking on the road, especially on the left lane towards Meru direction could not have contributed in any way to the accident if the defendant had kept on his left lane towards Maua direction. As much (sic) the defendant is held 100% liable for the subject accident."

In considering this appeal, I will be guided by the case **<u>Selle vs Associated Motor Boat Co.</u>** [1968] E.A. 123 at page 126 where the Court of Appeal stated:-

"………………….(the) principles upon which this court acts in such an appeal are well settled. Briefly put they are but this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demenour of a witness is inconsistent with the evidence in the case generally."

Bearing in mind the principles in that case, I will proceed to examine the evidence adduced in the lower court. The respondent in describing how the accident occurred stated:-

"The motor vehicle was from Meru Town to Maua direction. I then moved off the road but it was late and the motor vehicle got off and hit me and I fell down. The motor vehicle was being driven on the other lane – left lane towards Meru Town. The place of the accident is at a sharp corner. There is a curve and cannot see the oncoming motor vehicle. I was hit while off the road left side towards Meru direction. The motor vehicle was being driven at high speed."

The respondent on being cross examined responded as follows:-

"I was on the left of the road towards Meru Town direction. I was with Mike Mwenda ahead of others. Mwenda did not get hit. He is deceased. The others were also not hit. The motor vehicle came from my side since it was from the opposite direction………………………….. I was walking outside the road. I got injured on the left leg. I can tell the motor vehicle hit me on the left leg. I was on the left side of the road."

On being re-examined, the respondent stated:-

"I tried to move from the scene. That's when I got hit by the motor vehicle."

The traffic police officer who produced the police file on this accident stated that the police investigation revealed that the respondent was walking on the road. The investigation also revealed that the respondent was trying to block the appellant's motor vehicle. The police officer did however concede that those investigations did not indicate the point at which the impact occurred. PW4 was the respondent's sister. In her evidence in chief, she stated thus:-

"Both Mwenda (respondent) and Michael Mwenda were ahead of me. Then we saw a motor vehicle ahead of us. We were walking towards Meru Town direction along Meru/Maua road. We then saw a motor vehicle just in front of us and we suffered (sic) jumped off the road. The motor vehicle was heading towards Maua direction. I was with Samuel behind John and Michael Mwenda. We were walking off the road on the left side of the road facing Meru direction. We managed to jump off the road but John Mwenda was hit. The accident took place at a corner. The motor vehicle drove into the left lane towards Maua direction. The motor vehicle is (sic) on the right lane towards Maua direction not left lane. A vehicle moving towards Maua direction is supposed to use left lane but his motor vehicle was on the right lane facing Maua direction. The accident took place on the right side of the road towards Maua direction."

She was cross examined and she responded as follows:-

"It was too late for the John Mwenda to jump of (sic) the road and he was knocked down by the motor vehicle. The motor vehicle had its headlights on………… The motor vehicle never came off the road after hitting Mwenda."

The appellant's evidence was that on the material date he was travelling from his office at Kenya Power & Lighting Company. He was on his way home. It was 9.30pm. He had had 10 years of driving experience. At that time, there was no other motor vehicle on the road. He was driving on the Meru/Maua road. That was the road that he frequently used. He was travelling on the left side of the road. When he reached a bend, he saw three people from a distance of about 20m. He applied breaks. He was then driving between 50 and 60kmph. One of those people that he saw jumped on the road. He did not expect him to jump on the bonnet of his car. He tried to swerve to the right and the person fell on the road. Fearing that these people had intention to do him harm, he drove ahead and stopped at some distance from them. He telephoned the police and he was advised to report to the police station. The victim, that is, the respondent found him at the police station. It is important to note that the appellant's evidence of how the accident occurred was not subjected to cross examination by the respondent's counsel. That evidence therefore remained unchallenged. The evidence that remained unchallenged was that the appellant was driving on the correct side of the road when at a distance of 20m he saw people and although he applied his breaks, one of those people jumped on the bonnet of his car. A case in point is **Statpack Industries vs. James Mbithi Munyao** Nairobi HC Civil Appeal No. 152 of 2003 (unreported) where Visram J. as he then was stated:-

"Coming now to the more important issue of 'causation', it is the trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a casual link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's

negligence. An injury per se is not sufficient to hold someone liable."

The burden of proof was on the respondent to prove that the accident occurred as a result of the negligence of the appellant. From the summarized evidence in this judgment, it becomes clear that the respondent did not satisfy that burden of proof. In my view, the respondent did not prove on a balance of probability that the accident was caused by the appellant's negligence. The respondent was categorical that the vehicle came off the road and hit him. PW4 however repeatedly stated that the appellant's vehicle did not leave the tarmac. There are certain statements made by the respondent and PW4 which suggest that the respondent and his companions who included PW4 were walking on the tarmac road. When the appellant came towards them with his motor vehicle the others except the respondent managed to get off the road. By implication the respondent supported that evidence when he said:-

"I then moved off the road but it was too late."

PW4 in that regard stated:-

"We saw a motor vehicle just in front of us and we suffered (sic) jumped off the road."

That suggests that they were on the road but on seeing the vehicle they jumped off the road except for the respondent. PW4 stated:-

"We managed to jump off the road but John Mwenda (respondent) was hit ……………. It was too late for John Mwenda to jump of (sic) the road he was knocked down."

Those quotations from the lower court's evidence show that the respondent was on the road when the accident occurred. It is also important to bear in mind that the appellant's injuries were concentrated on the left side of his body. See the itemized injuries above in this judgment. Motor vehicles on the Kenyan roads travel on the left side of the road. If indeed the appellant drove on wrong side of the road as suggested by the evidence of the respondent and PW4, the impact on the respondent would have been on the right hand side of his body. This is because it is accepted by all parties that the respondent and his companions were walking from Maua to Meru direction whilst the appellant was driving from Meru to Maua direction. The injuries that the respondent suffered are in my view consistent with the respondent being on the right side of the road as one travels from Meru to Maua, whilst the appellant was on the left hand side of the road as one travels from Meru to Maua. The respondent said as much when he was cross examined when he said:-

"I was on the left side of the road."

It is also accepted by all parties that the accident occurred at about 10pm. Even if there was a bend on the road it would be expected that the respondent and his companions saw the headlights of the vehicle even before it approached them. The fact that the respondent remained on the road despite those lights shining does support the appellant's case that the respondent deliberately remained on the path of the motor vehicle. The evidence adduced by the respondent and his witness in my view did not prove negligence on the part of the appellant. I certainly find that there was no evidence to show that the appellant was 100% liable for the accident. I would allow this appeal by setting aside the lower court's judgment and by ordering that suit in the lower court to be dismissed with costs to the appellant. If however I would have upheld the lower court's judgment, I would have found the respondent 75% liable. In summary the judgment of the court is as follows:-

1. The appellant's appeal is allowed and the judgment in RMCC 131 of 2006 Tigania of 25th September 2007 is hereby set aside and is substituted with an order dismissing that suit with costs to the appellant.

2. The appellant is also awarded the costs of this suit.

Dated, signed and delivered at Meru this 10th day of August 2011.

MARY KASANGO
<u>JUDGE</u>