REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 206 OF 2008

JOSEPHAT WAITHAKA WANGUNGA...APPELLANT

-VERSUS-

SILAS ADIEKA..RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Migori,

Hon. Ezra Awino in CMCC No. 839 of 2005 dated 28th October, 2005)

The respondent herein **Silas Adieka**, as the plaintiff filed a suit against the appellant, **Josephat Waithaka Wangunga** as the 1st defendant, **Manish Gift House**, **William Omollo Owuor** and A-**H Hameed Traders** as the 2nd, 3rd and 4th defendants respectively in the Principal Magistrate's court at Migori. The respondent impleaded interalia that at all material times, the appellant was the owner of motor vehicle registration number KAK 876A Isuzu Lorry which at the time of the accident was still registered in the name of the 2nd defendant while the 3rd defendant was the owner of motor vehicle registration number KAT 815V Toyota Hiace which again at the time of the accident was still registered in the name of the 4th defendant. The respondent pleaded further that on or about the 21st June, 2005 at around 3.00p.m along Rongo-Awendo road, he was travelling as a fare-paying passenger in motor vehicle registration number KAT 815 Toyota Hiace, hereinafter ***"the matatu"*** when at Oyugi Ogango area or thereabouts the appellant, his driver, agent and or servant negligently and or carelessly drove and controlled the motor vehicle registration number KAK 876A Isuzu Lorry, hereinafter ***"the lorry"*** such that it lost control and violently collided with the Matatu thereby, occasioning him multiple injuries, which injuries the 2nd, 3rd and 4th defendants are vicariously liable and the appellant is directly liable.

The particulars of negligence the respondent attributed to the appellant and 2nd defendant were as follows:-

"a. Driving without undue care or attention in (sic) a busy road

b. Driving in a zig-zag manner.

c. Failing to give enough space to other road users

d. Failing to apply brakes, slow down, stop or in any manner try to avoid the collusion (sic).

e. Driving at high speed.

f. Permitting motor vehicle registration number KAK 876 Isuzu to ram into motor vehicle registration number KAK 815V Toyota Hiace…".

As for the 3rd and 4th defendants, the respondent blamed them for the accident on account of their driver, servant and or agent:

"a. Driving motor vehicle registration number KAT 815V Toyota Hiace at a high speed in the circumstances.

b. Failing to give adequate space to motor vehicle registration number KAK 876A Isuzu lorry.

c. Failing to stop swerve and or apply brake or by any other means to avoid the collision…".

By reasons aforesaid, the respondent suffered personal injuries, pain and was put to loss and damages. Particulars of injuries sustained were said to be traumatic extraction of one tooth in the upper jaw, blunt injury to the left eye, chest contusion and compound fracture of the left tibia and fibula. He had spent kshs. 6,500/= on medical report, doctors attendance and search fees which he claimed as special damages.

The appellant filed a statement of defence denying ownership of the lorry. However the occurrence of the accident was admitted but he denied that the respondent was involved in the same as a passenger or at all. The appellant equally denied the particulars of negligence attributed to him but pleaded negligence on a without prejudice basis against the 3rd defendant, the owner of the matatu. Those particulars were:-

"a. Driving at a high speed.

b. Failing to keep the correct side of the lane.

c. Driving zigzagly on a busy road and at a bend…".

On the other hand, the 3rd defendant filed a statement of defence denying ownership of the matatu and the particulars of negligence attributed to him and or his agent, servant and or driver in the plaint. Most notably the 3rd defendant pleaded negligence against the 1st and 2nd defendants in terms that their agent and or driver was guilty of:

"a. Driving too fast in the circumstances.

b. Failing to exercise care, skill and or prudence and thereby causing the said accident

c. Changing lines on the said road haphazardly.

d. Failing to maintain any or sufficient – control of motor vehicle registration number KAK 876A to avoid the accident.

e. Failing to stop down, brake swerve and or stop to avoid the accident.

f. Driving motor vehicle registration number KAK 876A on the said road without paying attention to and or safety to the other road users.

g. Failing to adhere to the highway code and traffics rules thereof.

h. Changing lines on the said road haphazardly therefore causing the accident…".

At the hearing of the case, the respondent testified that on 21st June, 2005, he was travelling from Awendo to Kanyada in matatu. The said matatu was involved in an accident near Kanga area when it collided with the lorry. According to the respondent it was the lorry which collided into the matatu. There was a trailer coming from Rongo direction. The lorry was behind the trailer. As the lorry was overtaking the trailer it collided into the matatu. As a result of the collision, he was injured. He was taken to Awendo hospital thence to Homabay district hospital where he was admitted between 21st June and 2nd July, 2005 respectively. Later he reported the accident to Rongo police station and was issued with P3 form. The same was filled by **Dr. Ajuoga**. Again the same police station issued him with a police abstract. Subsequently, the same **Dr. Ajuoga** examined him and prepared a medical report. He was also constrained to conduct an official search in respect of the two motor vehicles involved in the accident as aforesaid and incurred expenses in the process.

As a result of the accident his leg was fractured, he also lost one incisor tooth, left eye was injured by glasses and the chest too was injured. As at the time he was testifying he had not fully recovered from the after effects of the accident. He blamed the accident on the driver of the lorry. He therefore prayed for compensation.

To support his claim, the respondent called **Dr. Ajuoga** as a witness. His testimony was that he examined the respondent on 8th July, 2005. He noted traumatic external injury of one upper tooth, blunt injury to the left eye, chest contusion and compound fracture of tibia and fibula bone. He thereafter prepared a medical report. He tendered in evidence the medical report as well as the P3 form. He charged the respondent kshs. 6,000/= for attending court and testifying on his behalf.

On 1st July, 2008, parties consented that the police abstract be admitted as an exhibit without calling the maker. Further that the respondent goes for a 2nd medical opinion by **Dr. Orwenyo**. With that the respondent closed his case.

At the defence hearing, **David Onyango Agrico**, the driver of the ill fated matatu testified that on the material day he was driving the matatu from Migori to Homa-Bay. After Kanga, a lorry which was overtaking a tractor hit him in the process. He was climbing and the lorry was coming downhill and there was a corner. He was not to blame for the accident as the lorry came speeding and collided with his matatu on his side of the road. He tried to avoid the accident to no avail. The driver of the lorry was solely to blame for the accident. The said driver was subsequently arrested and charged with the traffic offence of careless driving at Rongo Law Courts. With that the 3rd and 4th defendants closed their case.

The case was then rescheduled for the appellant's defence hearing on 7th October, 2008. Come that day and **Mr. Odhiambo**, learned counsel for the appellant informed the court that ***"…I have no witnesses in court and I am constrained to close defence for the 1st and 2nd defendants…".*** Parties thereafter filed and exchanged written submissions. In a reserved judgment delivered on 28th October, 2008, the learned Ag. Senior principal magistrate found for the respondent holding thus:-

"…Evidence on record shows that this accident was primarily caused by dangerous driving of motor vehicle KAK 876A it was overtaking at a dangerous place of Kanga which is hilly with corners and collided with motor vehicle from the opposite direction and the driver was charged with the offence of driving carelessly in traffic case No. 788 of 2005 and the driver seemed to have jumped bail before conclusion of the case. I would now find the 1st and 2nd defendant liable to the extent of 90%. The 3rd and 4th defendants would contribute 10%. On the issue of quantum the plaintiff suffered traumatic extraction of one tooth on the upper jaw.

- ***Blunt injury to the left eye.***

- ***Chest contusion.***

- ***Compound fracture of the left tibia and fibula***

It is the opinion of Dr. Ajuoga that he suffered serious compound fracture of the leg and that the eye injury will leave him with reduced vision. I have considered the case relied on being High Court Civil Appeal No. 19 of 2005 Eldoret and I would award general damages at kshs. 500,000/= and 6,500/= as special damages with cost and interest from the date of this judgment. The 1st and 2nd defendant to shoulder 90% and the 3rd and 4th defendants to shoulder 10% of the award jointly and severally…".

The appellant was aggrieved by the judgment and decree aforesaid. Hence he preferred the instant appeal on 6 grounds to wit:-

"1. The learned trial magistrate erred in both law and infact when he failed in his judgment to address all the issues raised by the pleadings and the evidence led at the trial in arriving at the decision which was manifestly faulty and erroneous.

2. The learned magistrate erred in both law and infact in holding that the respondent had proved negligence against the appellant to the extent of 90%.

3. The learned trial magistrate erred in both law and infact when in awarding to the respondent the sum of kshs. 500,000/= as general damages which amount was manifestly excessive and exorbitantly high in the circumstances and thereby constituted an erroneous estimate of the alleged damages

suffered.

4. The learned trial magistrate erred in both law and infact in disregarding in his judgment all the evidence given by the witnesses at the trial law (sic). When he failed to apportion liability on 50:50 basis is (sic) against the offending motor vehicles in the circumstances.

5. The learned trial magistrate erred in both law and in fact in failing to hold that the evidence on record was insufficient to hold the appellant 90% liable for the occurrence of the accident as he did.

6. The learned trial magistrate erred in both law and in fact in failing to hold that the evidence on record was insufficient to hold the appellant 90% liable for the occurrence of the accidents as he did

7. The learned magistrate erred in both law and in fact in failing to hold that the accident was substantially contributed to by the negligence of the driver of motor vehicle registration mark KAT 815V in which the respondent had been travelling and in failing to apportion substantial liability in that regard against the 3rd and 4th defendants…".

When the appeal came before me for directions, it was agreed amongst other directions that the appeal be canvassed by way of written submissions. Parties subsequently filed and exchanged the written submissions which I have carefully read and considered.

I appreciate that this is a first appeal. As such this court is expected to subject the evidence tendered in the trial court to exhaustive evaluation so as to draw its own conclusion, though it did not see or hear the witnesses as they testified.

In this case, it is common ground that there was an accident involving the matatu and lorry. It is also common ground that the two vehicles belonged to the appellant, the 2nd defendant and the 3rd and 4th defendants respectively. It is also common ground that the respondent was injured in the said accident. The injuries sustained by the respondent being loss of upper incisor tooth, injury to the eye and chest and the more serious injury being the compound fracture of the left tibia and fibula. It is also common ground that following the accident, the appellant's driver was arrested and arraigned before the Resident Magistrate's court, Rongo on the traffic offence of careless driving contrary to section 49(1) of the **Traffic Act**, if the police abstract tendered in evidence is anything to go by.

What is in dispute is who among the appellant and the owners of the matatu was to blame for the accident. According to the respondent and the owners of the matatu, the blame lies squarely with the appellant and his co-owner. But according to the appellant, the accident was solely caused by the owners of the matatu. From the extract of the judgment of the learned magistrate already produced elsewhere in this judgment, the learned magistrate was persuaded that the appellant and his co-owner of the lorry were largely to blame for the accident. He apportioned liability 90%:10% in favour of the owners of the matatu. Who can blame him?

It is instructive that the respondent's evidence before the trial court was never challenged and or contraverted by the appellant as he opted to close his defence case without offering any evidence of the appellant to contravert the respondent's evidence on record. The learned magistrate's finding that the appellant was liable for the accident to the extent of 90% cannot therefore be impugned. The averments of the appellant in his defence in the absence of any evidence to buttress them remained, mere averments. In arriving at the apportionment of liability, the trial magistrate did not at all error since he based the finding on the evidence on record. He relied wholly on the evidence of the respondent and DW1. In the absence of any other evidence to the contrary, he really had very little choice in the matter. The respondent's evidence was that he was travelling as a fare paying passenger in the matatu heading towards Rongo direction from Migori. It was his further evidence that the matatu which was on its left lane collided with the lorry belonging to the appellant and his co-owner which was coming from Rongo direction but heading for Migori. The lorry left its correct lane as it was overtaking a trailer. The overtaking was at a

dangerous place as it was at a corner and it was being driven at an excessive speed. Further following the accident, the appellant's driver was charged with the traffic offence of careless driving. On this unchallenged evidence of the respondent, I do not see how the learned magistrate would have reached any other verdict other than that the driver of the lorry was grossly negligent in overtaking the trailer when it was not safe to do so, at a speed and whilst at a corner.

In his written submissions, the appellant has faulted the trial court for having held him liable though the respondent testified that he was travelling in motor vehicle registration number KAT 515 as opposed to KAT 815 as pleaded in the plaint. My response is that the issue is not captured in any of the grounds of appeal nor did he raise it during the trial with the respondent during his cross-examination. In any event, the fact that an accident occurred involving the two vehicles was admitted by the appellant. The details of the motor vehicles involved were in the police abstract that was admitted in evidence by consent. To raise this issue which I consider to be of no consequence now, is to my mind a mere afterthought. Infact the appellant is merely clutching on straws so that he may not sink or drown. The same reasoning applies to the contention by the appellant that the respondent in his testimony stated that the appellant's driver was overtaking a trailer from Rongo heading to Migori and that they were from the opposite direction, i.e Migori-Rongo when the accident occurred. That the respondent had not pleaded this fact in the plaint which disentitles him from testifying on this unpleaded point of the lorry overtaking the matatu at a corner. Again I would adopt the same argument to counter the appellant's submissions that it is not clear whether the lorry was overtaking a trailer or a lorry. In any event we all know that tractors too at times pull trailers. The issue whether the 1st respondent saw the lorry overtaking a trailer as opposed to DW1's evidence that it was a lorry is really a non-issue.

For all the foregoing reasons, I am satisfied that the learned magistrate was right in apportioning liability as he did. There was no basis laid by the appellant to enable the court to apportion liability at 50%:50% as suggested by the appellant in his memorandum of appeal and in his written submissions. Of course in apportioning 10% liability to the 3rd and 4th defendants, the learned magistrate was alive to the minimal role played by these defendants in the accident. Having seen the appellants vehicle recklessly approach, he should have undertaken manouvres and evasive action to avoid the accident. But again according to DW1, there was a ditch on his side of the road at the scene of the accident and perhaps if he had swerved in that direction as expected, the result may have been even more catastrophic. All said and done, I would dismiss the appellant's appeal on liability.

On quantum, the appellant submits that the award of general damages of kshs. 500,000/= was excessive and made in ignorance of the appellant's submissions on the same. To them kshs. 200,000/= to 250,000/= would have sufficed. On the other hand, the respondent takes the view that the learned magistrate never erred in both law and fact when he awarded him the sum of kshs. 500,000/= as general damages since the said award was not manifestly excessive and or exorbitantly high in the circumstances to constitute a wholly erroneous estimate of the damage suffered.

I do not think that there is any dispute on the principles, I must have regard to before interfering with the award of general damages in this appeal if it should become necessary. As stated in the case of **Kigaragara –vs- Aya (1985) KLR 273,** the assessment of damages is a matter of judicial discretion and there will always inevitably be differences of view and opinion in such matters. The appellant must therefore demonstrate that the trial court's award was wrong or that it was based on wrong principle or was so manifestly excessive or inadequate that the application of a wrong principle may be inferred. Of course the guiding principles in the assessment of damages in personal injuries are that as far as possible, comparable injuries should attract comparable compensation – a reasonable compensation, and that there should be uniformity in such awards in the interests of consistency and to guard against injuring the body – politic of our country. Again the victim of the injury should not be led to belief that courtesy of the injuries, he should expect a windfall.

I think that the learned magistrate was well aware of the above considerations. The trial magistrate considered the evidence on record, the injuries and pain suffered by the respondent and the relevant authorities cited to him. Considering the injuries sustained by the respondent and the after effects and the toll and or beating that the Kenyan shilling has received, since the awards in the authorities cited before

the trial court were made, I do not think that the learned magistrate made an erroneous estimate by awarding the respondent kshs. 500,000/= as general damages for pain, suffering and loss of amenities. He was perfectly within the law and I do not think that he took into account factors he ought not to have or failed to take into account something he ought to, misapprehended the evidence in some material respect and arrived at a figure which was inordinately high as to amount to a wholly erroneous estimate of damages.

I would in the premises dismiss the appeal with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 30th day of September, 2011.

ASIKE-MAKHANDIA

JUDGE