IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.84 OF 2010

SIMON NGAMAU……..…..1ST APPELLANT

GEOFFREY KURIA KAMAU……..……..…..2ND APPELLANT

VERSUS

MARTIN NZIOKA KITHEKA…….....…RESPONDENT

[An Appeal from the Judgment/Decree of Hon. S. Muketi, Senior Resident Magistrate, in Nakuru C.M.C.C.No.914 of 1999 dated 19th June, 2001]

JUDGMENT

This appeal arises from the Judgment of the court below (S. Muketi, Senior Resident Magistrate, as she then was) in which the learned magistrate awarded to the respondent Kshs.75,000/=for soft tissue injuries sustained in an accident involving motor vehicle KAH 305H, in which the respondent was travelling and KZL 416 belonging to the 1st appellant and driven by the 2nd appellant.

That decision aggrieved the appellants who have brought the instant appeal on four (4) grounds which can be summarized as follows:

1) that the trial magistrate erred in finding the appellants 100% liable;

2) that the respondent's evidence was unreliable and uncorroborated;

3) that the award was excessive;
4) that the finding on liability was unreasonable.

Before considering these grounds, it is necessary to outline the facts on how the accident occurred. It is common ground that the two motor vehicles in this appeal were travelling towards the same direction when the accident occurred. KZL 416 hit KAH 305H from the rear and the respondent who was a passenger in the latter vehicle sustained soft tissue injuries. According to the respondent, he was not able to explain how the accident occurred as the motor vehicle in which he travelled was hit from the rear.

The respondent, for his part recalled that a combine harvester travelling towards the opposite direction of his vehicle occupied nearly the whole road forcing him to swerve to the left and briefly losing control of his motor vehicle. When he gained control and returned to the road, he suddenly saw ahead of him a stationary *matatu*, KAH 503H in the middle of the road.

The 2nd appellant went on to explain that in view of the state of the road, having no space to the right and

the *matatu* in the middle of the road, the accident was inevitable. The 3rd party after filing defence did not participate by adducing evidence.

I have duly considered the written submissions and cited authorities by counsel for the parties. It is clear from the evidence presented at the trial and summarized in the preceding paragraph that the only issue for determination is whether the accident was occasioned by the 2nd appellant's negligent driving, there being no controversy as to the ownership of the motor vehicle or the capacity of its driver, the 2nd appellant as these matters were confirmed by the latter at the trial. I also find the failure of the 3rd party to call evidence does not affect the respondent's case, as a witness.

The respondent having explained that KAH 305H was hit from the rear, and the 2nd appellant having explained how that happened, it remained for the trial court and indeed this court to analyse the circumstances presented by the two sides in order to determine who was to blame for the accident. The 2nd appellant gave a candid account of the accident. That account can be summarized thus:

There was an oncoming combine harvester occupying *"the whole road"* or *"most of the road."* The 2nd appellant was driving his motor vehicle at a speed limit of 70 Kilometers per hour, the road was flat and straight with no pot holes at the accident spot, it had not rained and therefore visibility was clear, there were no other vehicles ahead of the 2nd appellant's vehicle; he had seen the combine harvester some 50 meters away approaching; he briefly lost control as he passed the combine harvester; when he gained control, KAH 305H was 20meters ahead and stationary.

The other related question to the early question is whether the accident was inevitable from the circumstances explained above. The particulars of negligence pleaded by the respondent included the fact that the 2nd appellant drove without due care and attention; that he failed to slow down, swerve or to maintain his vehicle to avert the accident; that he drove at excessive speed. The respondent also relied on the doctrine of *res ipsa loquitor*.

Without shifting the burden to the 2nd appellant, if indeed the combine harvester occupied "*the whole*" or "*most of*" the road, that would have called for extra caution. In fact, a prudent driver approaching such a machine, travelling on the opposite direction would have stopped until the danger had passed. It is clear that the 2nd appellant did not stop. 70 kilometers per hour in the circumstances was high hence his losing control of the motor vehicle. It appears to me that in the process of gaining control of his vehicle, he rammed on to KAH 305H.

Given the state of the road, the weather and the events before the accident, like the learned trial magistrate, I find that the 2nd appellant was wholly to blame for causing the accident. The 1st appellant as the employer is also vicariously liable.

On the issue of the award of quantum of damages, the respondent suffered:

i) cut wound on the left ring finger palmer region;

ii) severe soft tissue injuries on the left ring finger;

iii) severe soft tissue injuries of the left elbow joint.

For these injuries, his counsel submitted before the trial court, pleaded general damages in the sum of Kshs.150,000/= relying on the case of **James Njuguna Ngugi** V. **Ephantus K. Maina,** Nbi. HCCC No.5032/1989 where the court awarded Kshs.80,000/= for lacerations and cut wounds on the face, laceration and bruises on both arms, left leg and blunt injury to the lumber spine.

The appellants' counsel on the other hand submitted for Kshs.40,000/= but did not rely on any authority, only stating that the case of **James Njuguna** (supra) involved serious injuries compared to those suffered

by the respondent.

I reiterate what the court stated in **Kemfro Africa Limited t/a Meru Express Service Gathungo Kanini** V. **A.M. Lubia and Olive Lubia** (1982-1988) 1 KAR 727 at 730 that:

"The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."

Taking into account the year when the case of **James Njuguna** was decided (1991) and when the judgment in this matter was delivered by the trial court (2001), it cannot be said that the award of Kshs.75,000/= was excessively high considering that the appellants had offered Kshs.40,000/=. There are no errors in that judgment.

This appeal fails and is dismissed with costs to the respondent.

Dated, Signed and Delivered at Nakuru this 25th day of November, 2011.

W. OUKO
JUDGE