REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

HCCA NO.23 OF 2009

JOSEPHAT OMUKAGA EKISA
(suing as father and next friend to JOHN EKISA) ……APPELLANT

VERSUS

MOI UNIVERSITY …….....……RESPONDENT

J U D G E M E N T

The appellant Josephat Omukaga Ekisa appeals against the judgement of Busia Principal Magistrate in Busia SPM CC no.8 of 2008. One Josephat Omukaga Ekisa brought the suit for damages as father and next friend of the appellant minor based on negligence. The facts of the case are that the appellant was riding a bicycle along Busia – Malaba murram road when he was knocked by defendant's vehicle registration number KAJ 133s Nissan Pick Up. The Appellant sustained injuries as a result of the impact. The court dismissed the appellant's case on grounds that the same had not been proved. The appellant felt aggrieved by the decision and appealed against it.

Both parties filed written submissions in support of their arguments. The appellant relied on the ground that the trial magistrate erred in finding that the appellant had not proved his case. It was submitted that DW1 and DW2 admitted that the bicycle was being cycled on the correct side of the road. DW2 said he had seen the appellant before the accident. The appellant said his bicycle was hit from behind falling into a trench on its correct lane. DW2 ought to have braked to avoid the accident.

The appellant's case had three witnesses. PWI was the father of the Appellant (PW3) who did not witness the accident. PW2 was the police officer who testified that on the material day an accident involving defendant's vehicle and the Appellant was reported to Adungosi Police Station. A police abstract was issued on 29/11/07. The officer did not investigate the case and did not have the police file in court when he testified. The appellant was the 3rd witness. He testified that he was riding a bicycle on the left side of the road along Malaba – Busia road. The Respondent's motor vehicle KAJ 133s came and passed very fast knocking him from behind. He did not see it because the road was very dusty. PW4 examined the appellant at Alupe hospital. He produced the P3 form showing soft tissue injuries.

The Respondent called two witnesses. DW1 was the driver of the defendant's vehicle. He testified he saw the Appellant swerved to the right and then to the left of the road. DW1 tried to avoid the cyclist but hit his bicycle from behind.

DW2 told the court that he was with DW1 the driver in the Respondents Pick-up when they saw the Appellant cycling ahead of them in a zig zag manner in the middle of the left lane. The Appellant's bicycle was hit from behind.

In his judgment, the magistrate found that the Appellant had failed to prove his case on the standards

required in civil cases. The court noted that the particulars of negligence set out in the plaint were not proved and that the appellant was into a truthful witness.

The parties agree that the road was dusty having been recently engravelled. The Respondent testified that there was a vehicle ahead of them. The plaintiff ahead of them. The Plaintiff said he saw only one vehicle being that of the defendant. He said that when his bicycle was knocked from behind, the vehicle blew a lot of dust preventing him from seeing it. Being the only eye witness in this case, the appellant did not even see the vehicle which hit him approaching. He told the court that he was cycling along the left lane of the road. The defence said the Appellant was moving in a zig zag manner. He swerved to the right and to the left and was hit in the middle of the road. The plaintiffs evidence was contradictory in that he could not have been hit from the left lane and at the same time off the road as he said. Both parties agree that both sides of the road were raised and it was not possible for the appellant to go off the road. He had to cycle on the road or on its side but not off the road. The magistrate did not find the appellant a truthful witness due to the contradictions in his evidence on the point of impact and the nature of injuries. The appellant said he lost consciousness while the medical report showed soft tissue injuries.

The police did not investigate the accident to find out who was to blame. PW3 produced the police abstract form but not the police file.

The appellant had a duty to prove his case. Paragraph 5 of the plaint sets out five (5) particulars of negligence. One was that the defendant (DW 1) was at a high speed. From the evidence the condition of the road which was recently engravelled would not allow a vehicle to be driven at a high speed. The appellant did not prove this particular aspect of negligence. It was not proved that the driver lost control of the vehicle. DW1 and DW2 said it was the appellant who was obstructing them by moving in a zig zag manner. The appellant did not prove the other three particulars of negligence. In his submissions, the Appellant relied on the evidence of DW1 and DW2 that they both admitted that the appellant was hit while on the left lane which was his correct lane for him. The defendant's vehicle was heading towards the same direction with the bicycle. This vehicle was on its correct lane too but found the Appellant ahead of it swerving from right to left.

The magistrate analyzed the evidence before him and found that the plaintiff did not discharge his burden of proof. The law demands that whoever makes any allegations proves them. The Appellant was duty-bound to prove the particulars of negligence against the Respondent which he failed to do. This court was urged by the Appellant to find contributory negligence and apportion liability. It is my considered opinion that the evidence on record insufficient to prove contributory negligence.

I find that the magistrate reached a correct finding. I dismiss the appeal for lack of merit with costs to the defendant.

F.N. MUCHEMI J.

Judgment dated and delivered this 7th day of December 2010 in the presence of the Mr. Omondi for Mwinamo for the Defendant.

F.N. MUCHEMI
J U D G E