REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 680 of 2007

JULIUS OMOLO OCHANDA……..……..……....1ST APPELLANT
JOYCE ATIENO MUGA……..……..……2ND APPELLANT

VERSUS

SAMSON NYAGA KINYUA…….……..…..……...RESPONDENT

(An appeal from the judgment and decree of the Principal Magistrate, A.N. Ongeri (Mrs) delivered on 19th July, 2007 in Milimani CMCC No.7951 of 2004)

J U D G M E N T

1. This is an appeal arising from a judgment which was delivered by the Principal Magistrate in Nairobi CMCC No.7951 of 2004. Samson Nyaga Kinyua, (hereinafter referred to as the respondent), was the one who initiated the proceedings. He sued Julius Omolo Ochanda and Joyce Atieno Muga, (hereinafter referred to as the 1st and 2nd appellant respectively).

2. The respondent claimed general and special damages for personal injuries suffered by him as a result of an accident involving the 2nd appellant's motor vehicle registration No.KXX 838, (hereinafter referred to as the appellant's vehicle). The respondent contended that the accident was caused by the negligence of the 1st appellant who was driving the appellant's vehicle and for whose negligence the 2nd appellant is vicariously liable.

3. The appellants filed a joint defence and counterclaim to the respondent's claim. The appellants admitted ownership of the aforementioned vehicle, but denied that the 1st appellant negligently drove the appellant's vehicle or caused it to hit the respondent. The appellants maintained that the respondent negligently and or recklessly, and without any warning ran into the road just in front of the appellant's vehicle thereby giving the 1st appellant no chance at all to avoid colliding with him. The appellants therefore denied any liability to the respondent. The appellants counterclaimed special damages of Kshs.34,800/= being loss suffered by the appellants in repair charges to the appellant's vehicle and fees for a police abstract report.

4. During the trial in the lower court, the appellants' counterclaim was of course denied by the respondent, who reiterated that the accident was wholly caused by the negligence and careless manner of driving of the 1st appellant. Two witnesses testified in support of the respondent's case, these were Dr. George Kungu Mwaura and the respondent.

5. Briefly their evidence was that on 8th June, 2003, the respondent was walking along Waiyaki way on his way from Uthiru to Kinoo. As he was crossing the road, he saw a bus coming from a distance. Another vehicle then overtook the bus, came off the road, and hit the respondent when he was far from the road. The respondent lost consciousness. He was taken to Kenyatta National Hospital where he was admitted. He gained consciousness about two months later. He produced the card and discharge summary from Kenyatta National Hospital which showed that he suffered the following injuries: -

- Fracture of the left tibia and fibula mid shaft
- Fracture of the left mid shaft humerus
- Fracture of the left distal libiofulsaler
- Linea scalp fracture of the left parietal bone
- Brain oedema

While at Kenyatta National Hospital. The respondent underwent surgery. Upon discharge from the hospital, he obtained a P3 and a police abstract report. He was later examined by Dr. George Kungu Mwaura on 7th April, 2004.

6. Dr. Kungu Mwaura prepared a medical report in which he noted that the respondent's injuries had healed though he still complained of loss of memory. There were also residual scars on the chest, back, both upper limbs, left thigh and left knee. Dr. Kungu Mwaura noted that the respondent was not able to bend the left knee, and that the injuries left the respondent with a deformity and shortening of the left leg by two centimeters. The doctor assessed the respondent's permanent degree of incapacity at 15%.

7. The respondent testified that he was hit by the 2nd appellant's vehicle while he was off the road. He denied having jumped across the road or that he intended to commit a robbery. He maintained that the accident was caused by the negligence of the 1st appellant.

8. Three witnesses testified for the appellants. These were, Paul Amuga, who was a passenger in the aforesaid vehicle, P.C. Robert Langat, an officer from Gigiri Traffic Police, and the 1st appellant. Their evidence was as follows:

9. On the material date, the 1st appellant was driving the aforesaid vehicle travelling from Nakuru to Nairobi. On arrival at Kabete area, just around the Kabete flyover, he was in the inner lane when the respondent appeared suddenly and ran across the road. The respondent lifted up his hands and the 1st appellant slowed down but drove off when he saw many people coming towards him. The 1st appellant drove to Kabete Police Station where he found that a report of the accident had already been made.

10. Both the 1st appellant and Paul Amuga maintained that the respondent, who had no shirt on, ran suddenly across the road. They further stated that there was a flyover at the point where the accident occurred but the respondent did not use the flyover. Both witnesses further maintained that the aforesaid vehicle was travelling at a moderate speed, of about 60-70 Km/ph. The aforesaid vehicle was damaged on the windscreen, side indicator and roof. The indicator and the windscreen had to be replaced. The total cost of repairs came to Kshs.34,800/= which the appellants counterclaimed from the respondent.

11. Counsel for each party filed written submissions, each urging the court to find in favour of his client. In her judgment, the trial magistrate found that the occurrence of the accident and the injuries sustained by the respondent were not in dispute. She further found that it was not denied that the 2nd appellant's motor vehicle knocked the respondent. She apportioned liability at 50-50%.

12. The trial magistrate further noted that in respect of the counterclaim no assessor's report was produced, and therefore the special damages were not proved to the required standard. She accordingly dismissed the

counterclaim. The trial magistrate awarded the respondent general damages of Kshs.600,000/= for the injuries he suffered and special damages of Kshs.2,000/= in respect of the medical report.

13. Being aggrieved by that judgment, the appellants have lodged this appeal citing the following grounds:

(i) The learned trial Magistrate erred in law and fact in deciding the case against the weight of the evidence on record.

(ii) The learned trial Magistrate erred in law and fact in failing to find, as she ought to have found, that the accident in question was wholly caused by the plaintiff's (respondent's) negligence since there was overwhelming evidence on record showing that the respondent's negligence was the sole cause of the accident.

(iii) The learned trial Magistrate erred in law and fact in apportioning liability between the appellants and the respondent at 50:50% even after correctly finding, as she did, that there was no evidence that it was the 1st defendant (1st appellant) who was responsible for the accident. In so doing, the trial Magistrate erroneously held the appellants liable without any proof or evidence of negligence on their part.

(iv) The learned trial Magistrate erred in law and fact in failing to appreciate, sufficiently or at all, the judicial nature of the case that was before her and thus gravely erred when she held the appellants liable merely because *the occurrence of the accident and the injuries sustained are not disputed* and not because of any proved fault or negligence on the part of the appellants.

(v) The learned trial Magistrate erred in law and fact in finding and holding that the 2nd appellant's counterclaim had not been proved when the same had in fact been proved to the required standard.

(vi) The learned trial Magistrate erred in law and fact in dismissing the 2nd appellant's counterclaim upon a ground that no assessors report had been produced when there was sufficient evidence that the 2nd appellant's vehicle had been damaged in the accident which was wholly caused by the respondent and there was also sufficient evidence that the sum claimed in the counterclaim had been incurred in repairing the vehicle.

(vii) The trial Magistrate erred in law and fact in awarding to the respondent damages that were manifestly excessive.

14. It was agreed by the parties that the appeal be disposed of by way of written submissions, which were duly exchanged and filed. For the appellant, it was submitted that under Section 107 of the Evidence Act Cap 80 Laws of Kenya;

> ***"Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."***

15. Counsel for the appellant submitted that the respondent having alleged that the accident occurred as a result of the 1st appellant's negligence, he had to prove the particulars of negligence alleged against the 1st appellant before liability could attach. It was noted that the trial magistrate having found no evidence that it was the 1st appellant who was responsible for the accident the burden of proving the 1st appellant's negligence was not discharged and no liability whether direct or vicarious could attach against the 1st appellant. It was thus maintained that the apportionment of liability at 50-50% was grossly wrong as it had no basis.

16. Counsel for the appellant maintained that negligence of a party in a traffic accident cannot be proved by the fact of the accident, but by cogent evidence tending to prove the negligence of that party. It was further submitted that the evidence of the respondent that he was hit by the appellant's vehicle while he was far from the road was controverted by the evidence of the defence witnesses together with the sketch plan of the accident taken by the police officer. It was maintained that the evidence showed that the accident occurred on the inner lane on the tarmac, and that that is why the 1st appellant was not charged. Further, it was contended

that the respondent was careless and negligent in failing to use the designated footbridge at the point of the accident. The court was referred to ***Civil Appeal No.254 of 1996 Patrick Mutie Kamau & Another vs Judy Wambui Ndurumo*** for the proposition that a pedestrian owes a duty to other highway users to move with due care.

17. With regard to the counterclaim, it was submitted that the burden of proof in civil cases was on a balance of probability and not beyond reasonable doubt. It was maintained that the appellants demonstrated by admissible evidence that the accident was caused by the respondent's negligent and careless action, of jumping on to the road on the path of an oncoming vehicle. Moreover, the accident occurred at a place where a prudent reasonable man would have used the footbridge. It was contended that the appellant's motor vehicle was damaged and that the repair charges of Kshs.34,800/= and receipts produced in evidence, were not denied. It was contended that although the assessor's report would have provided better evidence of the extent of damage and approximate costs of repairs, it was not only the admissible evidence.

18. With regard to the award of Kshs.600,000/= in respect of general damages, it was submitted that there was no basis for this award as the authorities which were cited by the respondent in support of his quantification were distinguished by the trial magistrate. It was maintained that the trial magistrate did not exercise her discretion on any known sound legal principles nor on any principles at all. The court was therefore urged to allow the appeal.

19. For the respondent, it was submitted that there was sufficient evidence on record in support of the trial magistrate's decision. It was noted that the evidence of the 1st appellant was contradictory as he claimed to have hit the respondent in the middle lane whilst at the same time alleging that he was near the edge of the road. It was noted that the evidence of the 1st appellant and his witness was contradictory as to the lane where the accident occurred. The court was urged to accept the respondent's explanation that he was hit when he had crossed the road. The court was urged to reject the appellants' submissions that there was a flyover which the respondent ought to have used. Relying on ***Clerk and Lindsell on Tort, 17th Edition, at Page 354***, it was submitted that a pedestrian does not have to cross a road only at a pedestrian crossing, and that provided he takes reasonable care he may cross where he likes.

20. It was further pointed out, that the extensive damage caused to the appellant's vehicle, was not consistent with the moderate speed at which the appellant's vehicle was alleged to be travelling. It was submitted that the 1st appellant was over-speeding at the time of the accident, and that is why he was unable to take evasive action to avoid hitting the respondent. The court was therefore urged to uphold the finding of the trial magistrate and apportionment of liability.

21. Relying on ***Yusuf Haji vs Elisha Ambani, Civil Appeal No.118 of 1998*** (UR), it was submitted that the finding of a trial court as to the degrees of blame to be attributed to two or more tort-feasors involve an individual choice or discretion and should not be interfered with on appeal except in very exceptional circumstances. The case of ***Karanja vs Malele [1983] KLR 142,*** and ***Berkley Steward Ltd, David Cottel and Jean Susan Cottel vs Lewis Kimani Waiyaki [1982-88] 1KAR 101-108***, were relied upon for the proposition that since there was no crucial evidence on who was to blame between the two parties, both should be held equally to blame.

22. As regards the counterclaim, it was submitted that the 2nd appellant's counterclaim being one for special damages, it had to be strictly proved. It was maintained that there was necessity to call the motor vehicle assessor to prove the extent of the damage to the appellant's vehicle and the necessity for the repairs. No such evidence having been adduced, it was contended that the trial magistrate was right in dismissing the counterclaim. On the issue of quantum, it was pointed out that the respondent suffered injuries which were

confirmed by the doctor who examined him. It was noted that the trial magistrate assessed the quantum of damages having given due consideration to the authorities cited to her, and the nature of injuries sustained by the respondent. The court was urged to uphold the award as the same was not excessive.

23. In response to the submissions made by the respondent, it was submitted for the appellant, that there was no contradiction in the evidence of the 1st appellant. It was pointed out that the 1st appellant merely stated that he was in the inner lane near the edge. It was noted that the 1st appellant's evidence was that he hit the respondent in the "middle of the inner lane", and not the "middle lane" as alleged by the respondent. It was held that the evidence of the appellants was consistent with the sketch which was produced by the police officer.

24. Counsel for the appellant reiterated that a pedestrian must take reasonable care. He referred to ***page 354 of Clerk & Lindsell*** (supra), wherein a pedestrian who stopped onto the path of an oncoming scooter, was held liable. Counsel for the appellant distinguished the case of ***Berkley Steward Ltd & others*** (supra), contending that in the present case, there was no basis for apportionment of liability equally, unlike the Berkley case, where there was no concrete evidence to distinguish the blame worthiness or otherwise of the drivers.

25. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate as well as the submissions and the judgment of the trial magistrate. I have also given due consideration to the grounds of appeal, the submissions made before me, and the authorities cited.

26. On the issue of liability, I do note that it was not disputed that there was an accident involving the respondent and the 2nd appellant's vehicle. What was in issue, was who was to blame for this accident. As was pointed out by the appellants under Section 107 of the Evidence Act, the burden is upon any party seeking a judgment in his favour as to any legal right or liability to establish the existence of facts upon which such liability arises. In this case, the respondent who was the originator of the suit, alleged in paragraph 6 of his amended plaint that the accident was caused by the negligence of the 1st appellant. It was therefore incumbent upon the respondent to establish the particulars of negligence alleged against the 1st appellant which were set out as follows:

(a) Driving the motor vehicle at an excessive speed in the circumstances;
(b) Driving onto the pavement without regard to pedestrians;
(c) Failing to slow down, swerve and or brake so as to avoid the accident;
(d) Failing to sufficiently control the motor vehicle so as to avoid the accident;
(e) Failing to observed the traffic Act on the Highway Code;
(f) Negligently exposing the plaintiff (respondent) to risk by driving on the wrong side of the road;
(g) Causing the said accident.

27. On the other hand, the appellant in its defence and counterclaim also alleged negligence on the part of the respondent. Similarly, the appellant was under a responsibility to establish the particulars of negligence which were set out as follows:

(a) Failing to heed the presence of the said vehicle which was being very carefully driven on the said road.
(b) Dashing onto the road and on the path of travel of the said vehicle when it was not safe to do so.
(c) Attempting to cause the 1st defendant, who was driving the said vehicle, to lose control of the same by suddenly jumping onto the road, in front of the said vehicle while in motion, bare chested.
(d) Attempting to cross the said road when it was not safe for him to do so.
(e) Carelessly and recklessly managing his body on the said road.
(f) Failing to ensure his safety while on the said road or while attempting to cross the said road.
(g) Attempting to stage a highway robbery.

28. The respondent's evidence before the trial magistrate was that the appellant's vehicle overtook a bus, came off the road and hit the respondent who was off the road. This evidence was strenuously opposed by the appellants

who maintained that the respondent suddenly ran across the road in front of the appellant's vehicle which was travelling on the inner lane. It is obvious that the trial magistrate was faced with two versions as to how the accident occurred. The trial magistrate was under a responsibility to make a specific finding on the evidence which was before her. The trial magistrate appears not to have believed the respondent as she seems to have found no evidence that it was the 1st appellant who was responsible for the accident. However, the trial magistrate shied away from making a specific finding as to which version she believed.

29. Moreover, the trial magistrate did not address her mind to the evidence regarding the particulars of negligence alleged against the respondent. In particular the trial magistrate did not address the evidence of P.C Robert Langat who produced a copy of a sketch plan which was in the police file which showed that the point of impact was on the inner lane. The respondent alleged that the 1st appellant in his evidence contradicted himself as to whether the accident occurred in the middle lane or at the edge of the road. From the record of the lower court, the evidence of the 1st appellant was quite clear that he was driving in the inner lane near the edge of the road, and that he hit the respondent in the middle of the lane. In this context reference to "middle of the lane" can only refer to the inner lane where the 1st appellant was driving and not the middle lane, where the 1st appellant was not driving.

30. I find that there was no inconsistency in the evidence which was adduced by the appellant regarding the point of impact. Moreover, the fact that the 1st appellant was not charged, also negates the respondent's contention that the appellant's vehicle went off the road and hit him when he was off the road. I find that the evidence which was before the trial magistrate was sufficient to support the defence of the appellants that the respondent was hit by the appellant's motor vehicle in the middle of the inner lane, as he crossed the road.

31. Further, it is not disputed that the accident occurred just next to a flyover bridge. It would have been prudent for the respondent to use the flyover bridge to cross the road. Therefore, the respondent was negligent in crossing the road at a point where it was not safe for him to do so. I find that the respondent failed to ensure his safety while attempting to cross the road by failing to use the flyover bridge.

32. On the other hand, the evidence before the trial magistrate was not sufficient to establish any of the particulars of negligence which were alleged by the respondent against the 1st appellant. It is true that the 1st appellant had a lethal machine (vehicle), under his control and that the appellant's vehicle was involved in a collision with the respondent. However, given the circumstances of the accident, in particular the fact that the respondent suddenly ran across the road, onto the path of the appellant's vehicle which was travelling on the main highway, it is difficult to lay any blame on the 1st appellant. As was held by the Court of Appeal in ***Civil Appeal No.254 of 1996, Patrick Mutie Kamau & another vs Judy Wambui Ndurumo*** (supra), a pedestrian owes a duty to other highway users to move with due care and follow the provisions of the highway code. Clearly, the accident was caused by the respondent running suddenly across the road without due regard to his own safety and that of others.

33. The circumstances of this case are distinguishable from ***Berkely Steward Ltd & others vs Lewis Kimani Waiyaki [1982-88] 1KAR 101-108*** (supra), in which the court held both parties to blame for an accident in respect of which there was no crucial evidence which could show who was to blame between the parties. In this case, there was appropriate evidence before the trial magistrate upon which a proper finding could be made as to who was to blame. There was therefore no need for an assumption that both parties were to blame.

34. I have cautioned myself that as an appellate court I should hesitate to interfere with the findings of fact or the exercise of the trial magistrate's discretion in apportioning or assessing blameworthiness. Nonetheless, I find that the trial magistrate failed to properly assess the evidence which was before her, and that the apportionment

of liability was based on a wrong premise that since there was an accident involving the 2nd appellant's vehicle and the respondent, both should share the blame equally.

35. In the light of the evidence which was before the trial magistrate, it was clear that the 1st appellant was not to blame for the accident and therefore the 1st appellant was not liable and the issue of vicarious liability in respect of the 2nd appellant or apportionment of liability did not arise. I come to the conclusion that it is necessary to interfere with the judgment of the trial magistrate. Accordingly, I find the appellants not liable and set aside the apportionment of liability.

36. With regard to the issue of quantum, the respondent suffered 3 fractures, laceration, cuts and bruises. He was admitted in hospital for a period of two months during which period he underwent a surgical operation. Given the injuries that were suffered by the respondent, the sum of Kshs.600,000/= which was awarded by the trial magistrate was not so excessive or low as to justify the intervention of this court. Accordingly, I find that the appeal in respect of quantum has no merit.

37. As regard the counterclaim, the appellants failed to call a motor vehicle assessor to testify. Although evidence was adduced and receipts produced, to show that a sum of Kshs.34,400/= was paid by the 2nd appellant for repairs to the appellant's vehicle, there was nothing before the court to confirm the extent of the damage to the appellant's vehicle arising from the accident or confirming that all the repairs paid were a result of damage arising from the accident subject of the suit. In the circumstances, the appellants failed to prove that the loss of Kshs.34,400/= was a direct consequence of the accident subject of this suit. The trial magistrate cannot be faulted for having dismissed the counterclaim.

38. The upshot of the above is that I allow the appeal and set aside the judgment of the trial magistrate and award in respect of the main suit and substitute thereof an order dismissing the respondent's suit. I uphold the judgment of the trial magistrate dismissing the appellant's counterclaim. Each party shall bear his own costs.

Dated and delivered this 24th day of February, 2010

H. M. OKWENGU

JUDGE

In the presence of: -
Mungla for the appellant
Muhia for the respondent
Eric - Court clerk