REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 53 of 2006

AGRICULTURE FINANCE CORPORATION .. 1ST APPELLANT
STANLEY GICHURU MUTUERA ..... 2ND APPELLANT
VERSUS
DAVID KARIUKI KITHINJI ..... RESPONDENT

(Being an appeal against the judgment/decree of the Honorouble Senior Resident Magistrate Mr. Ombura delivered on 22nd June 2006)

JUDGMENT

The respondent filed a claim in the lower court claiming for special and general damages for personal injury. The respondent's claim is that the appellant whilst driving a motor vehicle hit him when he was off the road, the Chuka-Meru road. The appellant denied being negligent and also pleaded that the respondent contributed to the accident. After receiving the evidence, the learned trial magistrate found that the appellant was 100% liable for the accident. The learned magistrate awarded the respondent Kshs. 100,000/= in general damages. The appellant has filed this appeal against that judgment. The appellant's grounds of appeal faulted the lower court's judgment on liability and the award of Kshs. 100,000/= in general damages. I will begin by considering whether indeed the trial magistrate erred in making that finding. This is the first appellant court and in that regard, I will be guided in the case of **Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu** [1982 – 88] 1 KAR 278. In that case, Hancox J.A. had this to say:-

"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the findings he did..... The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only to so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally."

PW1, the respondent herein, stated that on 24th November 2004 he was standing next to the road near Kariene Bus Stop along Chuka-Meru road. He was in the company of another person at that stage. They were on the left side of the road facing Meru Town. There was a Nissan motor vehicle that had stopped at that stage. At one time, a motor vehicle KAR 271L Datsun veered off the road and hit the two of them. He said that he was not aware what made the vehicle to veer off the road. He and his companion were about 10 steps away from the main road. As it hit them, the vehicle also hit a fence. He was cross examined and he responded by saying:-

"I had seen the motor vehicle before it knocked us and it was at a high speed. I did not see it veer off the road before it hit me."

PW3 was a police officer. He produced the file relating to that accident to the court. He confirmed that he had perused that file and had found that the officer who carried out the investigation stated that the respondent was a pedestrian and at the time of the accident was standing off the road. The point of impact as seen from the sketch plan showed as much. He stated that according to that investigation, it

found that the respondent was not to blame for the accident but rather that it was the driver, that is the appellant, who was to blame. On being cross examined, he stated that the skid marks on the road went beyond the road, that is, on the left side of the road, facing the Meru direction. DW1 was the driver of the subject motor vehicle. As he drove that vehicle on the 24th November 2004 on the Meru road at Kariene, he saw a boy and a girl emerge from the left side and were crossing the road. At that time, he was traveling at 40kph. He braked but the girl was hit by the vehicle and he swerved to the right side. He then stated that on the girl being hit, she was thrown to the wind screen. The boy, the respondent therein, was thrown to the left side. DW2 is a manager of the first appellant. He was a passenger in the subject motor vehicle on the day of the accident. As they approached Kariene, according to him, a lady and a man jumped into the road and they were hit by the motor vehicle. He saw them about 5 metres away and he noted that the driver DW1 immediately applied the brakes and tried to move away to avoid hitting them but it was a busy day with matatus coming from Meru. He therefore swerved to the right after applying the brakes. The lady was hit from the left side and the man was also hit. On being cross examined, this witness stated that there was a matatu parked on the left side of the road where the respondent and his companion were standing. He however stated that the vehicle did not obstruct DW1. In further cross examination he stated:-

"The lady was on the right and she was hit first and because of the impact the motor vehicle went and hit the man (respondent)."

Although the appellant submitted in support of this appeal that the respondent's evidence and his witnesses was contradictory, I find it to be the contrary. It was, in my view, consistent and reliable. The respondent stated that he was off the road when the appellant vehicle veered off the road and hit him. He saw the vehicle before it knocked him but he did not see it when it veered off the road. The police officer's evidence was clear that the appellant's driver hit the respondent when he was off the road. The skid marks showed that the car went beyond the road. This clearly proved that the appellant went off the road. I hasten to add that the skid marks were a clear indication that the appellant was traveling at high speed. The appellant's driver and manager, in my view, seriously contradicted each other. The manager was a passenger in the subject vehicle. He saw the respondent when he was 5 meters away. He said that he saw the respondent and another lady hopping to the road as they were holding hands. The driver, that is the 2nd respondent, stated:-

"The girl was running and the boy (respondent) was also running across the road."

The question is, were the two running or were they hopping? The appellant driver and manager stated that when they saw the respondent they tried to break but failed. Again, that is a clear indication that the appellant's driver was driving in excess speed. That too may well explain why he veered off the road. It is also pertinent to note that the manager stated that the girl was hit first and later the respondent was hit. That may well be corroboration of the respondent's evidence that he was hit when he was off the road. In my re-examination of the lower court's evidence, I find that I cannot fault the finding by the learned magistrate on liability. On the issue of quantum, I cannot find any reason for interfering with the award by the lower court on general damages. This court can only interfere with such a finding as was well set out in the case of **Butt Vs. Khan [1977] 1 KAR 1** where it was held:-

"An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

The only evidence on injuries suffered by the respondent was submitted by PW2. That evidence was uncontroverted. The respondent suffered bruises on the right scapula, bruises on the lower back and bruises on the left ankle. The award by the lower court of Kshs. 100,000/= for general damages cannot be faulted when one considers the cases that were cited by the respondent which are as follows:-

James Guturu Kimani Vs. Kamanga Wairegi HCC No. 4133 of 1991 Nairobi. **Salim S. Zein Vs. Rose M. Mutua** Court Application Civil Appeal No. 147 of 1994 Nairobi. In the first case, the court awarded Kshs. 150,000/= whilst in the 2nd case, the court awarded Kshs. 50,000/=. Both those cases were decided in 1997. Taking all the above into consideration, I find that the appellant's appeal has no merit and same is hereby dismissed with costs being awarded to the respondent.

Dated and delivered at Meru this 21st day of May 2010.
MARY KASANGO
JUDGE