



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Appeal 66 of 2008**

WESTON NKOROI ..... 1<sup>ST</sup> APPELLANT

AQUARINA G. WESTON ..... 2<sup>ND</sup> APPELLANT

VERSUS

DAVID KAJOGI M'MUGAA ..... RESPONDENT

*(Being an appeal from the judgment of learned principal magistrate Hon. A.K. Kaniaru Nkubu PMCC No. 55 of 2006 dated 18<sup>th</sup> day of June 2007)*

**JUDGMENT**

The respondent sued the appellant in the lower court claiming special and general damages which resulted from the accident that occurred on 16<sup>th</sup> October 2005. The respondent in his plaint stated that on that material day he was cycling his bicycle along Ndamene/Nkubu road. That the appellant so carelessly and negligently drove his motor vehicle registration No. KAL 066A. The appellant denied the respondent's claim. The appellant pleaded in his defence that the accident was caused by the respondent. The lower court awarded the respondent Kshs. 300,000/= as general damages and Kshs. 25,047/=. The appellant, being dissatisfied with that judgment has presented this appeal. The appellant has presented 9 grounds of appeal. The grounds of appeal raised issues relating to the contradictory evidence of the respondent and his witnesses and it is stated in those grounds that the learned magistrate failed to consider the contradictory evidence and proceeded to hold that the appellant contributed 50% to the accident. The appellant argued that the magistrate's finding was against the weight of the evidence. As I begin to consider this judgment, I am guided by the case **Selle and Another Vs. Associated Motor Boat Company Ltd and Others** [1968] E.A. 123 at p. 126 Sir Clement de Lestang V-P said:-

*"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally **Abdul Hameed Saif Vs. Ali Mohamed Sholan** [1955], 22 E.A.C.A. 270"*

The evidence of the lower court was that the respondent was a cyclist on the material day the accident occurred. PW2 a police officer gave evidence that on the material day when the accident occurred the same was investigated by P.C Mercy Muthoni who had since been transferred. PW2 said that the respondent according to the investigation of that officer was blamed for the accident. He however stated that the respondent said that was he was knocked

by the appellant's motor vehicle which was crossing the road. This witness stated that the appellant's motor vehicle was subjected to inspection and was found to have been in good condition prior to the accident. He stated that the investigation showed that the respondent claimed that the appellant's motor vehicle was crossing from the left to the right side of the road. He however said that there was no damage which was noted on the front part of the motor vehicle. The only damage that was noted was at the rear part of the vehicle. The damage was at tail guard which was found to have been hit and damaged. The appellant, according to the officer who investigated the matter stated that the vehicle was hit by the peddle cyclist. This witness concluded in cross examination by stating that the peddle cyclist was to blame. In re examination, he referred to the sketch map which showed that there was a feeder road. He further stated that the passengers who were on the appellant's motor vehicle which was a pick up shouted, 'it has no brakes, it has no brakes.'

The respondent in evidence said that on the 16<sup>th</sup> October 2005 at about 3.30 pm he was on his way from work riding his bicycle along Nkubu/Ndamene earth road. Whilst he was riding his bicycle, he was hit by the appellant's vehicle. That the appellant's vehicle was reversing as he was driving forward. The vehicle was coming from a feeder road. He said that there were no people at the scene of the accident. That the appellant did not hoot as he reversed. That there was a corner which prevented him from seeing the appellant's vehicle. That he was hit by the rear of the motor vehicle and as a result he injured his right leg and his head. He was taken to Consolata Hospital for treatment. On being cross examined, he confirmed that on the material day, he was carrying his wife on the bicycle. He also confirmed that he was going down a depression. That the accident occurred near where the road enters Nkumari Factory. He however said that there was no roads going across the scene of the accident. PW4 was a witness for the respondent. On the material day, at 3pm, he was on his way from Nkubu to Ndamene walking. When he joined the road to Mitunguu, he saw ahead of him a motor vehicle. It was coming from Ndamene factory to join the road. It was in reverse. He saw the respondent trying to swerve to avoid that motor vehicle but the motor vehicle hit him. On being cross examined, he confirmed that the respondent as he was cycling was going a bit fast. The appellant stated that on the material day at 4pm he was driving towards Nkumari coffee factory. This was on Nkubu Ndamene road. He was in the company of DW2 and 3 and his wife. He and his wife were sitting in the front cabin in the pick up while DW2 and 3 were seated at the back in an open pickup. When he reached the junction where he was to enter into Nkumari factory he heard a bang. He stated that he found that the vehicle had been hit from the rear side by a cyclist. He noted that the cyclist was lying on the ground together with his wife. DW2 and 3 were assisting the cyclist. He then stated:-

***“The wife (of the respondent) was there trying to quarrel the husband (respondent). She was saying that he was riding while drunk and that that is the third time the cyclist had missed the way to where they were going that very day.”***

He further stated that the police came on the scene and the cyclist was taken to Nkubu Consolata hospital for treatment. The appellant, in the company of the police, went to Nkubu Consolata Hospital where the wife of the respondent pleaded with him not to take the matter to court. He confirmed that at the scene of the accident there was a depression on the road. When the accident occurred, he said that he had slowed down because he was entering into another road. He said his vehicle was found to have had no prior accident damage. He also stated that the respondent was at the time of the accident smelling alcohol. DW2 was in the appellant's motor vehicle seated at the back of the pick up. When the vehicle reached the junction to Nkumari he saw a bicycle coming at high speed behind. That bicycle hit the pick up at the rear. On cross examination, this witness said that there were no other people at the scene of accident. DW3 was also in the appellant's pickup. He too confirmed that as they were about to enter into the road leading to Nkumari factory, the respondent's bicycle hit the vehicle whilst the vehicle was moving forward. This witness also confirmed that there were no other people at the scene of the accident. The doctor who examined the respondent noted that the respondent suffered a cut on the right side of the face and a fracture of the right fibia. The fracture was managed surgically with the insertion of screws for the fracture. The learned magistrate after considering and analyzing that evidence had this to say in respect of liability:-

**“Extreme positions these (sic). But to us, liability is a convoluted issue requiring tact and pragmatism in approach. Both sides have clung to their extreme positions. It is an irksome task. It is clear though that a middle half that involves sharing of liability would cut both sides in equal measure. We therefore apportion liability on a 50 – 50% basis. Liability over, the next step is quantum.”**

The learned magistrate on quantum had this to say:-

**“More authorities are cited by both counsel but the court is reluctant to place reliance on them. They are not very appropriate and are generally unhelpful. The plaintiff counsel had opposed 600,000/= as adequate compensation to the plaintiff on 100% liability basis against the defendant. Yes, the court will have awarded that on 100% liability basis but that is not the position now. The liability of the defendants has abated (sic) by 50% because of plaintiff’s contributory negligence. Bearing that in mind, the plaintiff is awarded half of the amount, i.e. Kshs. 300,000/= to be specific. Awarded too are costs and interest of the suit on the same basis.”**

The Court of Appeal in the case Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu [1982 – 85] 1 KAR 275 at p. 292 Hancox, J.A. (as he then was) in considering when a court hearing an appeal can interfere with the finding of fact of a trial court had this to say:-

**“In Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu [1982 – 85] 1 KAR 275 at P. 292 Hancox, J.A. (as he then was) said:-**

**“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 of the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”**

The first holding in that case is also relevant namely that:-

**“The Court of Appeal would hesitate before reversing the decision of a trial Judge on his findings of fact and would only do 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.”**

The police officer, that is, PW2 in my view gave very contradictory evidence. At one time, he said that the respondent was to blame for the accident and later said that the people who were being carried in the appellant’s motor vehicle shouted that the vehicle had no brakes. If that is so, then what was the basis of blaming the respondent for the accident? It should be noted that this witness said that the appellant’s motor vehicle had no prior defects. If that is so, then the appellant’s motor vehicle had brakes that were functioning well. The respondent in his own evidence said that there were no people at the scene of the accident. Having said so, in examination in chief, it was not clear where PW4 was when the accident occurred. PW4, it will be recalled he said that he witnessed the accident. But perhaps the most damning evidence is that the respondent was carrying his wife on the bicycle. This was confirmed by all the witnesses. The respondent’s wife was not called as a witness in the lower court. The question is, why was she not called? Was it because of her utterances at the accident scene? It will be recalled that she said the respondent had caused 3 other accidents on the same day. It will also be recalled that the appellant and his witnesses said that the respondent’s wife was annoyed at the scene of the accident. I surmise that the reason the respondent did not call his wife is because she would probably had given adverse evidence against him. Bearing the contradictions that are there in the respondent’s case, and bearing the fact that even PW4 confirmed that the respondent was riding his bicycle a bit fast, and bearing in mind that all the witnesses confirmed that the respondent was riding his bicycle down a depression, then I find that the evidence tendered in the lower court do not support the finding of the learned magistrate. I find that the appellant and all his witnesses were consistent in their evidence that the appellant was heading to Nkumari factory and when he reached the junction entering into the factory, he slowed down. When he slowed down, it seems that was when the respondent collided with the vehicle hitting the vehicle from behind. The learned magistrate in my view, did not properly analyze the evidence tendered before him. Had he done so, he would not have found that the appellant contributed to the accident. In my view, he misapprehended the evidence that was tendered before him. I find the

respondent was wholly to blame for the accident and that the appellant did not at all contribute to it. There certainly was no evidence that was adduced to show such contribution. Bearing in mind the injuries that were suffered by the respondent, I also find that the award given by the learned magistrate far exceeded the award that would compensate for such injuries. I have considered the following cases HCC No. 26 of 2001 NRB **Peter Munyingi Vs. Wynack Enterprises Ltd** and HCC No. 621 of 1998 **Joseph Mutua Kinuthia Vs. David Kamande Kunuthai**. In respect of both cases, the injuries suffered by the claimants was similar to the ones suffered by the respondent. In the first case, the claimant was awarded Kshs. 150,000/= as general damages. In the second case, the claimant was awarded Kshs. 120,000/=. The assessment by the learned magistrate of Kshs. 600,000/= was too high, in my view. Indeed it was inordinately high to represent an erroneous estimate. For this reason, it attracts disturbance by this court. See the case of **Bashir Ahmed Butt Vs. Uwais Ahmed Khan by M. Akmal Khan**[1982 – 88] 1 KAR. Had I found that the appellant was responsible for this accident, I would have awarded the respondent Kshs. 100,000/=. However, since I do not find the appellant to be liable, I hereby allow this appeal and set aside the judgment in PMCC Nkubu 55 of 2006 dated 18<sup>th</sup> June 2008 and I hereby substitute it with an order dismissing that suit with costs to the appellant. I also award costs of this appeal to the appellant.

Dated and delivered at Meru this 4<sup>th</sup> day of June 2010.

**MARY KASANGO**  
**JUDGE**