REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MACHAKOS

Civil Appeal 97 of 2007

FRANCIS MATI NYUMBU…….….. APPELLANT

versus

FRANCIS KARENGE …….....……...RESPONDENT

(Being an Appeal from the judgment in Kitui Principal Magistrate's Court Civil Case No. 114/2001 by Mr. J.M. Mwangi SRM, Esq on 16.5.2007.)

JUDGEMENT

1. Only two issues arise in the present Appeal; whether there was any basis for attributing negligence to the Appellant and whether there was an error in not awarding costs to the Appellant who succeeded in his suit before the subordinate court.

2. The Appeal itself arises from the judgment of J.M. Mwangi SRM, Esq in Kitui PMCC No. 119/2006. In that case the present Appellant had sued the present Respondent and he was seeking damages for injuries allegedly suffered as a result of an accident when he, a cyclist, was hit by motor-vehicle registration number KAA 940S Toyota Hiace Matatu which was registered in the name of the Respondent. At paragraph 4 of the Plaint, the Appellant attributed the occurrence of the accident to the negligence, carelessness and/or recklessness on the part of the Respondent's servant or driver of the said motor-vehicle. The particulars of negligence were that he was negligent in;

a. "Driving at high speed

b. Driving carelessly along the said road and without exercising due care and attention to the would-be cyclists expected along the road.

c. Being careless and reckless in driving the motor vehicle.

d. Failing to slow down, brake, swerve, control steady the said motor vehicle to a stop to avoid knocking the cyclists.

e. Knocking the cyclist from behind when he could have avoided the accident.

f. Driving a motor vehicle with unserviceable braking systems and/or mechanical condition

g. Driving the aforesaid motor-vehicle while sleepy, drank and/or in dizziness condition.

h. Failing to do anything to steer the motor vehicle away from the cyclist to avoid knocking him."

3. The Defendant was said to be vicariously liable for the said accident and in his Statement of Defence dated 9.6.2006, he denied the particulars of negligence attributed to his servant and instead pleaded that the Appellant was negligent and solely and/or substantially caused the accident in;

a) "Recklessly getting in the path of the vehicle;

b) Failing to swerve, stop slow down or in any other way act to prevent injury or the accident in general.

c) Failing to exercise sufficient regard for his safety while cycling on the road.

d) Failing to heed warning signs and hooting given by the driver of the vehicle.

e) Failing to keep any or proper look out for other road users;

f) Failing to have sufficient regard for the safety or other road users and particularly that of the driver of the vehicle.

g) Ferrying, and unsafely ferrying, pillion passenger (s) and/or luggage.

h) Unnecessarily exposing himself to danger.

i) Breaching, disregarding and/or disobeying the Highway Code, and

j) Causing the accident."

4. The evidence by thy Appellant in support of his averments on negligence was that on the material date he was riding his bicycle at 8.00 a.m towards Kitui Town. At Onyaa, a matatu heading the same direction hit the rear tyre of his bicycle and he was lifted up and the impact flung him on the right side of the road while the bicycle got stuck to the vehicle. It was his evidence that the road had potholes and the speeding vehicle hit a pothole, veered towards the left side and made impact with the bicycle and the Appellant was then injured. No other witness testified as to how the accident occurred because PW2, I.P Bernard Ochola in his evidence stated that the accident was still under investigation as the evidence on record was not sufficient to warrant any criminal or other charges against any of the parties that were involved in it.

5. The Respondent called no evidence to either rebut the Appellant's evidence nor to prove its allegation that the Appellant was the one who solely or substantially caused the accident as was pleaded in the Statement of Defence. In his detailed judgment the learned magistrate analyzed the Appellant's evidence as to how the accident occurred and came to the conclusion that "***the Plaintiff has himself to blame for having failed to call for corroborative evidence to establish absolute liability against the omission which omission did not make matters easier for the court to deliberate on the issue of liability?"*** Further, that the "***Plaintiff is the one who was mainly negligent for the occurrence of the accident by recklessly getting in the part of the vehicle, failing to exercise sufficient regard for his safety while cycling on the road and failing to keep any proper lookout for other road users. I also find that the Defendant was also contributory negligent for occurrence of the accident, albeit on a smaller scale. Had the driver of the vehicle exercised proper control of his vehicle and had he exercised proper duty of care towards plaintiff, reduced the speed of his vehicle, he would have taken measures to avoid hitting the plaintiff's bicycle…..***

6. ***On the issue is liability doing my best on the basis of evidence on record I apportion liability at 70% against the Plaintiff and 30% against the Defendant who is vicariously liable."***

7. As I understand the law "***the assessment of the degree of contributory negligence is within the discretion of the judge"*** as was stated in Gakere vs Ngugu [1981] KLR 306 but like all discretion it must be exercised judiciously and on appeal it must be shown that the presiding officer "***acted on the wrong***

principle or misapprehended the relevant facts while exercising discretion." In the instant case, there was no evidence whatsoever by the Respondent as to how the Appellant came to be injured. The only evidence was that of the Appellant himself and it was that evidence that the learned magistrate used as a basis for finding him substantially negligent and apportioned 70% liability. In the extract of judgment reproduced above, all the particulars of negligence on the part of the Respondent's servant were found to have been proved. Where is the evidence that the Appellant was in fact negligent? I see none on my part and the learned magistrate fell into error when he largely theorized on the conduct of the Appellant in relation to the accident when the Respondent called no such evidence.

8. In my view, once the Appellant's evidence was accepted as true and it is not challenged by adverse counter-evidence, then there was absolutely no basis for apportioning liability to him and I will instead find the Respondent vicariously liable at 100% for the accident. That being the case, judgment earlier entered is substituted with an award of Kshs. 75,000/= as computed by the learned magistrate, and which has not been disputed by either party.

9. As to costs, once the Appellant has fully succeeded, he will have the costs of the lower court and of this Appeal.

10. The Appeal is allowed in those terms.

11. Orders accordingly.

Dated and delivered at Machakos this **28th** day of **April 2009.**

Isaac Lenaola

Judge

In the presence of: Mr.Ngolya for Mr. Kilonzo for Appellant

No appearance for Respondent

Isaac Lenaola

Judge