



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MERU**

**Civil Appeal 67 of 2005**

**FERDIDNARD JOHN KITHINJI ..... APPELLANT**

**VERSUS**

**DAVID MWITI ..... 1<sup>ST</sup> RESPONDENT**

**JULIUS NKARICHIA ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from a judgment of G. Oyugi, R.M. in Tigania*

*delivered on 2<sup>nd</sup> August 2005)*

**JUDGMENT**

This appeal is only challenging the finding of the trial court that the appellant was 100% liable for causing the accident in which the respondent was injured.

The background to this appeal may be stated briefly as follows:- On 29<sup>th</sup> February 2004 at about 6pm the respondent was involved in a collision while cycling along Meru-Maua road with a motor vehicle registration number KAA 407F owned and driven at the material time by the appellant. It was the respondent's case that he was cycling a bicycle on the Maua-Meru road towards Meru on the right hand side as one is traveling towards Maua. That the appellant's motor vehicle which was traveling to the opposite direction swerved to the right, presumably to avoid a pothole, and in the process collided with the respondent.

The police visited the scene and drew a sketch plan, which unfortunately was not produced as an exhibit. The respondent was examined by Dr. John Macharia (PWII) about six months after the accident. The doctor noted the following injuries in his report dated 4<sup>th</sup> August 2004:-

- (i)** head injury with skull fractures (bilateral temporal fractures)
- (ii)** cut wound over the right side of the face/head
- (iii)** fracture of his left clavicle

The doctor further observed that the injuries had healed leaving scars on the right side of the face.

The appellant in his defence stated that as he was driving the motor vehicle in question towards Maua from Meru direction he came by a stationary lorry on the side of the road he was traveling. The lorry was

parked off the road – on the left side as one faces Maua from Meru. He suddenly saw the respondent emerge from the side the lorry was parked at a short distance riding a bicycle. He applied the brakes, hooted and swerved to the right to avoid collision but failed due to the short distance between the motor vehicle and the respondent.

The learned trial magistrate found for the respondent, holding the appellant fully responsible for the accident and awarded to the former Kshs. 250,000/= in general damages and Kshs. 3,000/= in special damages.

As I have already stated, the appeal only challenges the finding of liability. I am bound, being the first appellate court to re-evaluate the foregoing evidence in order to arrive at my own independent conclusion.

This suit was brought on behalf of the plaintiff by his father, Buruno Julius Nkarichia, as his next friend. The plaintiff was 13 years old at the time of the accident. There were only two eye witnesses to the accident, PW 1V, Simon Ntoitome (Simon) and PWV, Erastus Mwenda Ndegwa (Erastus). They gave a consistent account that they were walking together towards Maua for Meru direction when a motor vehicle being driven at a high speed passed them going on the same direction as themselves. The motor vehicle veered off its lane and knocked down the plaintiff who was cycling on the right hand side of the road towards the opposite direction, Meru direction. They suspected that the driver of the motor vehicle was trying to avoid hitting potholes, hence the collision. That the motor vehicle was traveling at great speed.

This account was denied by the appellant who argued that the respondent made a sudden dash on to his path giving him no opportunity to avoid hitting him. He also maintained that he was only driving at approximately 40km per hour.

It is common ground that the respondent was involved in a road traffic accident with a motor vehicle driven at the time by the appellant. The broad issue for determination is whether the accident was caused solely by the negligence of the appellant or whether the respondent contributed to it.

There is evidence that the motor vehicle and the respondent were traveling on opposite directions on the main Meru-Maua road. There is also evidence that the accident occurred on a straight stretch of the road.

I am persuaded by the evidence of the two eye witnesses, Simon and Erastus that the accident occurred on the right hand side of the road as one faces Maua. That is where the respondent was riding his bicycle and landed on impact. The two witnesses witnessed the accident as it happened in front of them. It was about 6pm. The witnesses attributed the accident to the appellant's attempt to avoid potholes and high speed driving. They estimated that the appellant stopped some 30m from the point of impact.

From the foregoing evidence, I come to the conclusion that the accident was solely caused by the appellant. I also find that the respondent's counsel submissions on 5% liability did not constitute an admission.

I find no merit on this appeal and dismiss it with costs to the respondent.

Dated and delivered at Meru this 15th day of February, 2008.

**W. OUKO**

**JUDGE**