REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 101 of 2005

DR. ADOLF MUYOTI …….. 1st APPELLANT

COLINS OUMA OUNDA……....……2nd APPELLANT

VERSUS

THOMAS MICHA SAWE……RESPONDENT

Being an appeal from judgment and decree of the Chief Magistrate's Court , Kisumu (Kiarie, PM) in Kisumu CMCC No. 583 of 2003)

JUDGMENT

The appellants Dr. Adolf Muyoti and Nzoia Sugar Company Limited were the first and second defendants respectively in a personal injury claim filed in the lower court on 10th July 2002 by the respondent Thomas Michia Sawe.

An amended plaint filed on the 21st November 2002 introduced a third defendant Collins Ouma Ounda. The memorandum of appeal filed herein on 24th August 2005 shows that this is an appeal by the said Dr. Adolf Muyoti (1st appellant) and the said Collins Ouma Ounda (2nd appellant).

The appeal is against the judgment of the learned Principal Magistrate K. W. Kiarie, delivered on the 25th July 2005, in Kisumu CMCC No. 583 of 2003. The suit arose out of a road traffic accident which occurred along the Kisumu /Ahero Road near a mobile Petrol Station on the 20th June 2002. It was the respondent's contention that he was a pillion passenger on a bicycle which was hit by a motor vehicle registration number KAG 012 P belonging to the first appellant and driven at the time by the second appellant. The respondent suffered bodily injury as a result of the accident which he blamed on negligence allegedly occasioned by the appellants. The appellants denied all the allegations of negligence made against themselves and attributed the accident to the respondent's negligence.

After the trial before the learned Principal Magistrate, the appellants (1st and 3rd defendants) were found liable and an award of Kshs. 180,000/= was made in favour of the respondent being general damages for pain, suffering and loss of amenities.

The appellants being aggrieved and dissatisfied with the decision, lodged this appeal on the basis of the

following grounds:-

(i) The learned trial magistrate erred in law and fact in finding that the second appellant herein was culpable in negligence when no credible evidence of negligence was offered either by the respondent or his witnesses.

(ii) The learned trial magistrate erred in law and fact in holding and finding that the second appellant must have been negligent and therefore caused the accident despite noting that the evidence of the plaintiff and that of his witness were totally at variance as to the circumstances of the accident.

(iii) The learned trial magistrate misdirected himself by holding that the first appellant was vicariously liable for the acts /omission of the second appellant when vicarious liability was never pleaded specifically as a cause of action against the first appellant and neither was evidence led to support the finding of vicarious liability

(iv) The learned magistrate erred in law and fact by making an award of damages which was excessively high and totally out of tandem with the recent trends of judicial awards in personal accident cases regard being had to the injuries pleaded as having been suffered by the respondent.

(v) The learned trial magistrate misdirected himself by failing to take cognizance of the submissions and authorities supplied by counsel for the appellant and therefore arrived at a manifestly unjust decision.

(vi) The learned trial magistrate arrived at a decision that is totally out of tune with the evidence on record.

Consequently, the appellants are asking this court to set aside judgment of the learned trial magistrate and substitute it with an order dismissing the respondent's suit with costs. Alternatively, the appellants are asking the court to set aside the award of damages made by the learned trial magistrate and substitute it with an order substantially reducing the award.

At the hearing of the appeal, the appellants were represented by learned Counsel Mr. Wasuna while the respondent was represented by learned Counsel Mr. Mochama.

In his arguments, with regard to negligence, Mr. Wasuna said that the respondent stated in his evidence that he did not see how the accident occurred and that no eye witness was called to testify as to how the accident occurred and more so the cyclist who was riding the bicycle carrying the respondent.

Mr. Wasuna argued that the police investigating officer did not testify and that the police officer who testified in court (PW3) was not the investigating officer. He argued that PW3 said that the police file was misplaced and so the sketch plan and photographs of the scene as well as photographs of the vehicle were not produced to enable the trial magistrate make an independent judgment of know the accident occurred. Further, the trial magistrate did not have the advantage of being shown the point of impact.

Mr. Wasuna asked the court to note that neither the cyclist nor the driver of the motor vehicle were charged with a traffic offence. He said that the police occurrence book (O/B) showed that investigations of the accident were pending. He contended that there was insufficient material upon which the appellants were found negligent. He said that the trial court relied on the fact that the respondent and the cyclist were on the main road while the appellant's vehicle came from a petrol station.

However, the evidence was fundamentally inconsistent. Mr. Wasuna further contended that it was not made clear on which side of the road the cyclist was riding and that the fact was appreciated by the trial magistrate when he noted that the evidence of the police officer and the respondent in relation thereto was not in agreement. However, the trial magistrate did not resolve the conflict. Therefore, Mr. Wasuna contended, the trial magistrate should have held both the cyclist and the respondent liable or found them

guilty of contributory negligence and if not, the respondent be held liable at 90%.

On vicarious liability, Mr. Wasuna, argued that no evidence was led to establish that the second appellant was driving the vehicle in the course of and within the scope of his duty or with the consent of the first appellant.

On damages Mr. Wasuna, argued that the award made by the trial magistrate was excessive and incompatible with the injuries suffered by the respondent.

In conclusion, Mr. Wasuna, argued that the respondent failed to establish that he was on the correct side of the road. He (respondent) did not therefore discharge the burden of proof even through the appellants did not testify. In that regard, Mr. Wasuna referred the court to the High Court decision in the case of **JANE MWIKALI =vs= AKAMBA PUBLIC ROAD SERVICES HCC 79 OF 1991 at Machakos (unreported).**

On his part, Mr. Mochama, started by saying that the aforementioned case referred to a passenger who failed to prove that she was inside a bus by failing to produce a bus ticket. He said that the respondent herein was a pillion passenger and did not admit that he did not see how the accident occurred.

Mr. Mochama went on to say that the respondent was on the main road and had the right of way as corroborated by the evidence of Solomon Andaje (PW3). He said that the issue regarding the side of the road that the respondent was on was established and if any contradiction existed, it was minor. He said Andaje (PW3) was not the investigating officer and could not tell which direction the cyclist was riding. His (PW3's) purpose in court was only to produce the police abstract.

Mr. Mochama contended that the evidence on liability was not challenged as the appellants did not adduce any evidence although they had a duty to do so. The evidence was adequate even in the absence of the sketch plan.

On vicarious liability, Mr. Mochama, contended that the second appellant admitted that he was the driver of the material motor vehicle whose owner was the first appellant.

On damages, Mr. Mochama, contended that the respondent suffered serious injuries and in awarding damages, the trial court relied more on the cases cited by the respondent and not those cited by the appellants which were for minor injuries. Therefore, the trial court correctly arrived at the award of Kshs. 180,000/= In conclusion, Mr. Mochama, contended that the appellants were wholly liable for the said accident.

This being a first appeal, the duty of the court is to re-evaluate the evidence, asses it and make its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (**See SELLA =vs= ASSOCIATED MOTOR BOAT CO LTD [1968] EA 123 and EPHANTUS MWANGI & ANOTHER =vs= DUNCAN MWANGI WAMBUGU [1982-88) I KLR 278).**

The case for the respondent was that he was a pillion passenger aboard a bicycle taxi commonly known as "**boda – boda**" heading to Kachok from Kisumu town. On reaching a nearby mobile petrol station the bicycle was hit and knocked down by a motor vehicle registration number KAG 012 P belonging to the first appellant and driven at the time by the second appellant.

As a result of the accident, the respondent suffered injuries and was taken to hospital. He blamed the appellants for the accident and filed the present suit for damages.

The appellants filed a statement of defence denying all allegations of negligence made against themselves and contending that the accident was caused by or substantially contributed to by the negligence of the respondent.

However, at the trial, the appellants failed to lead any evidence in support of their denial and contention.

As may be deciphered from the foregoing, the occurrence of the accident is a factor which is not at all or substantially disputed. So is the fact that the respondent was occasioned bodily injuries as a result of the accident. The basic issue that arose and arises for determination is whether the accident was as a result of the negligence of the appellants or that of the respondent or both.

The respondent was a pillion passenger of a bicycle under the control of a third party. He was not expected and could not have made any contribution to an accident involving a collision of a bicycle taxi and a motor vehicle. He was a victim of other people's negligence. The allegation in the defence that he jumped off a moving bicycle was not established at all. If anything, the actual cyclist should have been joined by the defendants as a third party now that the defence attributed the accident to his negligence.

Be that as it may, it was incumbent upon the respondent to establish on a balance of probabilities that the accident was solely caused by the negligence of the appellants notwithstanding their failure to lead any evidence in the trial.

The failure by the appellants to lead evidence gave the respondent's case an advantage but did not lessen or discharge the respondent's obligation to establish and prove his case to the required standard.

In his evidence, the respondent (PW1) indicated that the bicycle carrying him was on the left side of the road towards a place called Kachok when it was hit and knocked down by the appellants' motor vehicle which had emerged from a petrol station on the road side.

Having been on the main road, the cyclist carrying the respondent had the right of way vis-à-vis the appellants' motor vehicle which entered the main road from a minor road exiting a petrol station. This fact was not challenged or discredited during the respondent's cross – examination. He remained steadfast when he stated:-

" **I do not know the mistake of the cyclist. Cyclist was on the main road".**

The statement implied that the cyclist was not to blame as he was on the main road. It did not imply , as the appellant's learned counsel wanted the court to be believe, that the respondent could not tell how the accident occurred.

There was also no challenge of the respondent's contention that they were moving towards Kachok from town on the left side of the road when they were hit by the appellant's vehicle coming from a petrol station. P. C. Solomon Andaje (PW3) was mistaken and clearly contradicted the respondent when he said that the cyclist and the respondent were heading to Kisumu town from Nyamasaria. He however, corrected himself in cross-examination when he stated that the cyclist was coming from Kisumu town.

The evidence by the respondent did on a balance of probability establish that the accident was occasioned by the appellants' negligence in failing to stop and give way to the bicycle moving along a main road.

This court does not see any reason to fault the learned trial magistrate on his finding on liability. He correctly directed himself when he stated:-

" **Our highway code requires a motorist from a feeder road to give way to the road users on the main road. The 3rd defendant (herein 2nd appellant) failed to do so and he is therefore held liable for negligence. The 1st defendant (herein 1st appellant) being the owner of the motor – vehicle KAG 012 P is therefore vicariously liable to the plaintiff".**

The documents produce in the trial court (PEX 2, 3 & 4) showed that the material vehicle belonged to the first appellant as at the time of the accident. They further showed that the vehicle had been purchased by the first appellant from Nzoia Sugar Company Limited which was the second defendant in the case.

The vehicle was at the material time being driven by the second appellant meaning that he was so driving as an agent and with the authority of the first appellant.

Vicarious liability was established against the first appellant and was in any event, not substantially disputed.

With regard to damages, the medical report by Dr. Nyamogo (PEX 1) showed that the respondent suffered injuries to the head, thorax, back, lower and upper limb. He was treated and discharged at the Nyanza Provincial Hospital. He complained of frequent headaches especially during hot weather. He also complained of occasional pain in the injured areas. He was in good general condition at the time of the medical examination.

The medical opinion was that the respondent suffered soft tissue injuries to the chest and wrist which improved. He sustained lacerations to the forehead, arms. Back and leg which fully healed. The post traumatic headache was expected to improve with time.

The respondent proposed an award of Kshs. 250,000/= on the basis of the decision in **NBI HCCC NO. 2886/1995 Jane Njoki Moraya & Another =vs= Alice W. Kimani & Another** where an award of Kshs. 150,000/= was made for soft tissues injuries.

The appellants proposed an award of Kshs. 40,000/= on the basis of the decisions in **NBI HCCC NO. 1313/87 Francis Muiruri Kariuki =vs= Samwel Njoroge Kiningi & Another** where on award of Kshs. 50,000/= was made and **NBI HCC 5365 of 1990 Pauline M. Waigai & Another =vs= Valley Transporters** Ltd where an award of Kshs. 60,000/= was made.

The learned trial magistrate considered all the aforementioned decision and found that the case of Jane Njoki Muraya & Another =vs= Alice W. Kimani & Another (supra) to be most appropriate to the present case and awarded a sum of Kshs. 180,000/=, general damages.

In the opinion of this court, the learned trial magistrate directed his mind correctly and awarded the respondent Kshs. 180,000/= which was reasonable and may not be regarded as excessive.

In the end result, this appeal is unsustainable. It must and is hereby dismissed with costs.

Dated, signed and delivered at Kisumu this 9th day of October 2008.

J. R. KARANJA

JUDGE

In the presence of:

Mr. Onyango for appellant

Mr. Mochama fro respondent.

JRK/aao