REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

Civil Appeal 196 of 2003

PETER OKELLO OMEDI …… APPELLANT

VERSUS

CLEMENT OCHIENG ……..…….. RESPONDENT

(Being an appeal from the judgment of Honourable Kasera, Resident Magistrate in Kisumu CMCCC No. 177 of 2003 dated 12th November 2003).

BETWEEN

PETER OKELLO OMEDI …… PLAINTIFF

VERSUS

CLEMENT OCHIENG ……..…….. DEFENDANT

JUDGMENT

This is an appeal from the judgment of the subordinate court Madam Kasera, Resident Magistrate Kisumu made on 4th November 2003. The case of the plaintiff before the trial Court was that on 1st December 2002, he was from Muhoroni and was going home. He alighted from a motor vehicle around Kisumu Boys High School, near the roundabout before the turn. As he crossed the road he saw the defendant's motor vehicle which moved to his side of the road and knocked him down. He thereafter sustained injuries to his right leg ankle. He also contended that he looked at his left and right before he attempted to cross the road. And that he was careful and even gave way but the defendant without even warning knocked him down.

The defendant stated that on the material day he was driving his motor vehicle registration number KAE 946Y from Kibuye to town and around Kisumu Boys he noticed a pedestrian jump into the road and he applied emergency brakes. The defendant stated that he was driving between 10 - 20 K.P.H. when he noticed the pedestrian, who was about 20 metres away. And to avoid knocking the pedestrian he applied emergency brakes and he succeeded in doing so, but the person fell down. And when he came out to check he realized the person had fractured his leg claiming to have been knocked down by him. It is the case of the defendant that the driver disembarked and proceeded to where the pedestrian had fallen as a good Samaritan. And the fact that the driver took the pedestrian to a hospital as a good Samaritan does not connote that the driver was to blame for the accident. It is further argued by the appellant that though the driver took the plaintiff to hospital in the company of police officers, he did not hit the plaintiff with his motor vehicle.

It is clear that no investigating police officer was called by either parties to shed some light on the opposing versions which were before Court. And equally no eye witness was called to testify in support of the plaintiff's case. The evidence before Court was that of the plaintiff and defendant apart from the doctor who produced the medical report. The appellant claims that there was no proof of negligence on the put of the plaintiff. The particulars that were pleaded by the plaintiff against the defendant were not proved.

It is the case of the appellant that the plaintiff suddenly jumped into the road but he fell near the motor vehicle driven by the defendant. There was no basis for liability and no basis for the award. First and foremost the issue of ownership was not an issue for determination before Court, as the defendant admitted ownership of the motor which allegedly caused the accident. And it is not within the powers of the Court to make an issue, a subject which was not disputed and not made an issue for determination before the Court. If one were to believe the evidence of the defence no explanation is given as to why the plaintiff should run and just fall infront of the defendant's motor vehicle. The defendant stated that when he came out from his motor vehicle, he realized that the plaintiff had fractured his leg and could not walk. The plaintiff stated that the driver did not hoot and/or give any prior warning so as to alert other road users of his presence. The time when the accident occurred is around 6 p.m. and darkness must have interfered with the judgment of the driver and the plaintiff to avoid and/or eliminate the occurrence of the accident.

I appreciate this is a first appeal and this Court is empowered to reconsider the evidence, evaluate it and draw its own conclusions, giving some due diligence to the fact that this Court has never seen or heard the plaintiff and defendant therefore must give some due allowance for that inability. The impression I get from the evidence available is that the trial Court clearly failed to take into account the particular circumstances and probabilities of the evidence tendered by the plaintiff and defendant. There is no reason why the Court believed greatly the evidence of the plaintiff as to the way the accident occurred. On my part I think the learned trial magistrate's approach on liability is basically and fundamentally faulty. The Court did not take into account the events as narrated by the parties. The Court was confronted by two opposing versions as to how the accident involving the respondent and the motor vehicle driven by the appellant had occurred. The Court conceded that the plaintiff had a duty of care to other road users but there is no evidence to show that the plaintiff had discharged his duty of care to the defendant to uphold the apportionment of liability as was done by the trial Court.

The factors that made the trial Court determine liability at 80 - 20 is not clear. A party who called no unless to justify his evidence or reception of his evidence cannot be said to have proved his case to warrant 20% liability against him. There is material conflict as to the occurrence of the accident as related to Court by the plaintiff and defendant and when there is a difference or discrepancies between two opposing versions of evidence, the Court must give reasons why it believed a certain version before apportionment of liability is done. It is not just right to determine liability without sufficient reason and the basis for so holding. I am satisfied that the conclusions reached by the trial Court on liability is not based on an accurate analysis of the facts as presented by the parties to the case. There is a material deficit in the evidence of the plaintiff to warrant or sustain judgment on liability as held by the trial Court. The defendant stated that he had applied an emergency brakes to avoid the accident, however inview of the injuries sustained by the plaintiff, it cannot be stated that he was not hit or involved in accident. The probable conclusion taking into account the presence of the defendant at the place where the plaintiff was allegedly injured, is that the defendant must have played a great role in the commission of the accident. The degree of blame is what was at stake before the trial Court. The plaintiff tried to cross the road and the defendant admitted the presence of this particular pedestrian on the road at the material time though the versions of the occurrence of the accident is disputed by each party. I have no evidence to show that the defendant made any maneuvers to avoid the accident inorder to extricate himself of any blame. The version by the defendant that he had applied emergency brakes and did not hit the plaintiff may have been ingeniously orchestrated but certainly difficult to believe like that of the plaintiff. It therefore means there is a material conflict without any further support from either party which mandates the Court to apportion liability at 50/50. Due to darkness, the sight of the parties may have been limited, as the defendant did not have his lights on, though it was around 6.00 p.m. or thereabout. The plaintiff being a pedestrian owes a duty of care to other road users to move with due care

and in a manner that would not endanger the safety of other road users. The failure by both parties to observe their respective obligations to each other might have caused the accident and in the absence of clear and uncontroverted evidence, I set aside the apportionment of liability by the trial Court and substitute with 50/50 against each party.

The other point is whether the award by the trial Court is inordinately too high and manifestly excessive for the injuries sustained by the plaintiff. The plaintiff sustained a fracture of distal fibular with dislocation of cervical joint and he complains of inability to walk on the right leg due to the aftermath of the injuries suffered. The doctor observed that fracture dislocation of the ankle joint is normally very difficult to manage and may need regular surgical follow-up. I restate that the assessment of damages by a trial Court is discretionary powers taking into consideration the nature of injuries and other residual effects of the injury sustained by the plaintiff.

In Bashir Ahmed Butt Vs. Uwais Ahmed Khan (1982 - 88) 1 KAR page 5 it was held:

"An appellate Court will not disturb an award of damages unless it is so 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."

These principles must form the basis of my approach to the matter before me. It has been truly said that a very strong care must be made out before the exercise of discretion can be overruled. There must be a clear case to justify in one interfering with the discretion of the trial Court. The discretion will be reviewed if it is exercised in consequence of erroneous view of the law and facts and results in an obvious mistake or as a complete departure from the material presented before Court. And equally the Court would interfere where it is impossible to say that there has been reasonable exercise of the discretion. And that the trial court took into consideration extraneous matters to arrive at the award. In view of the injuries suffered by the plaintiff, the ward of KSh.300,000/= cannot be said to represent an entirely erroneous estimate of the loss suffered by the plaintiff and it cannot also be said that the trial Court took into account irrelevant factors and if such factors do exist, it was not brought to my attention. I am reluctantly to disturb the award by the trial for lack of sufficient reasons offered by the appellant. And so to that extent the appeal on damages fails.

Order:

I enter judgment on 50/50 liability on the sum of KSh.300,000/=. Each party to bear its costs in this appeal. The plaintiff shall be entitled to 50% costs before the lower Court.

Dated and delivered at Kisumu this 30th day of January, 2006.

M. WARSAME

JUDGE

30.1.2006

Warsame - J.

Mr. Magare for the appellant.

Mr. Omwanza for the respondent.

Collins Court Clerk.

Court:

Judgment read in open Court in the presence of both Advocates.

M. WARSAME

JUDGE