REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Appeal 134 of 2003

FAMILY HEALTH INTERNATIONAL .....APPELLANT

-VERSUS-

JACKSON MUSITA ASIRA .....RESPONDENT

JUDGMENT

Coram J. W. Mwera, Judge,

Kutwa for Appellant,

Kirenga for Respondent,

Raymond CC.

On 7.8.2003, the learned Senior Resident Magistrate delivered a judgment that has given rise to this appeal. The claim in the lower court arose from a road accident along Jomo Kenyetta Highway Kisumu, which involved the respondent/plaintiff (a cyclist) and a motor vehicle registration no. KAL 392 G, which the appellant/defendant's agent was driving. The learned trial magistrate awarded Kshs 100,000/= general damages.

Mr Kutwa argued the 5 - point appeal thus: grounds 1, 2, 5, together, ground 3 on its own while ground 4 was abandoned. Put together the grounds, attacked the finding on **liability** against the appellant; **ownership** of the offending motor vehicle and the size of the **award**. Mr. Kirenga opposed the appeal.

The court heard that the respondent, cycling along the said road ahead of motor vehicle (s), intended to turn right. That he indicated his intention by hand but then the said motor vehicle hit his front part of the bicycle and he was injured.

While Mr. Kutwa's position was that the respondent, who had indicated that he was turning to his right side of the road, suddenly moved to the left when the crate of sodas he was carrying tilted that way, and thus he was knocked down because of this unpredictable way in which he was riding, Mr. Kirenga argued that the respondent had let one motor vehicle following him pass first before he began turning

right and the appellant's motor vehicle, which he had not noticed, came along and hit his bicycle, as he was executing the turning to the right. That the driver of that vehicle had been talking on a cell phone and so he did not notice the respondent turning right.

Mr. Kutwa further argued that the respondent fell on the left side of the road meaning that that is where he was on the road and not turning right. That he ought thus to have been 100% **liable** for his own careless riding or that he contributed to it.

On **ownership**, the court was told that it was denied in the defence and the respondent did not prove this conclusively by laying before the court a certificate of search from the registrar of motor vehicles as to who was the registered owner. That indeed the police officer who investigated the accident was not called to testify on this point.

Coming to the **award** of Kshs 100,000/=, the court was told that it was excessive in the light of the injuries stated in the medical documents. The case of *THURANIRA KARAURI -VS- AGNES NGECHE, CIVIL APPEAL NO. 192/96* (C.A NYERI) was cited on the need to produce registrar's certificate on ownership of a motor vehicle, and *CHARLES MUKUA -VS- JUDDY MIRANGO* C. A. 182/95 (C. A. KSU) was availed on how the appellate court should approach an award of damages by a lower court. Two other cases were referred to by Mr. Kutwa on the same twin points of ownership of a motor vehicle and award of damages.

Mr. Kirenga's position remained that the appellant's driver was found properly to have been liable in the case in the court below. That the offending motor vehicle's driver, who did not testify in the lower court, was inattentive. He was talking on a cell phone when the accident occurred. That Nelson Onyango Oluoch (DW1) who was a passenger in the offending motor vehicle did not even know exactly the events leading to the accident.

On ownership, the court was told that the appellant was in full use and control of the said motor vehicle, as per DW1 and so was properly found liable. That indeed P.C Charles Akaranga (PW3) testified that the driver of the motor vehicle told him at the scene that the motor vehicle belonged to the appellant.

As for the award of damages, the respondent's side saw no reason to interfere. No irrelevant factor had been taken into account or a relevant one left out in coming to the said award. And that the learned trial magistrate well evaluated the evidence before making a decision.

In claims based in tort as it is the case here in negligence, the claimant needs prove that there existed a duty of care to him which was breached and loss/damage resulted - hence the suit for a remedy.

The appellant's case here is that the respondent ought to have been held wholly or that he contributed to the accident here. It is not in dispute here that an accident took place and the respondent was injured.

After the learned trial magistrate went over the evidence placed before her, she accepted that the respondent was hit on the left of the road by the appellant's motor vehicle that had been following another motor vehicle which had been immediately behind the respondent. That the respondent had indicated his intention to turn right - a thing the passenger (DW1) in the offending motor vehicle did not see. Thus, the learned trial magistrate accepted that the cyclist did indicate accordingly but the motor vehicle driver, who did not testify, did not look out to notice this and so the accident occurred. She also appears to have accepted the respondent's evidence that the driver came a long at a high speed - a thing DW1 (passenger) could not testify on. So she found the driver liable and the appellant vicariously so.

From this court's evaluation of the evidence on liability, it agrees with the lower court. The appellant's driver was negligent. The left front side of his motor vehicle hit the bicycle. It fell to its left side of the road on the grass. It was incumbent on the appellant to bring the motor vehicle's driver to testify and if anything controvert what the respondent said about the accident. If the appellant chose not do so, then the learned trial magistrate cannot be faulted for so noting and accepting the respondent's

version of the story. Despite the evidence of DW1, who apparently was not observant, the lower court on a balance of probabilities concluded as it did. The finding on liability stands.

Coming to the ownership, even as this court appreciates the fact that a certificate of registration from the registrar of motor vehicles is conclusive evidence of ownership, (see **Thuranira's** case above), in the circumstances of this case, the appellant was, if anything, the special owner of the motor vehicle. It did not show evidence as to who the registered owner was, though. But this court is satisfied from the evidence that the motor vehicle "belonged" to it and it is vicariously liable.

The above is premised on the following evidence. Its own employee DW1 (Nelson Oluoch) who was in the motor vehicle said:

"The defendant is my employer. The motor vehicle reg. 392 G was assigned to the defendant company and is registered in the name of DFID ..... ."

In cross-examination DW1 said:

"The driver was employed by the defendant; he is called Peter Onyango Ogwa. Family Health Litem (?) had full control and usage (sic) of the motor vehicle at all material time. I have no document showing that the motor vehicle was owner by DFID".

And P. C Akaranga (PW3) who visited the scene of the accident with P.C Korir, but did not investigate the case, heard and told the lower court;

"The motor vehicle belonged to Family Health International. The driver told me so."

From the foregoing, this court holds the view that the lower court was right in attributing "ownership" of the motor vehicle to the appellant. It was in full use and control of it when its servant drove it so negligently as to knock down the respondent causing him injuries.

The award of Kshs 100,000/= was attacked as being excessive. After going over the injuries suffered and the two cases cited by the respondent regarding damages, the learned trial magistrate noted that the respondent asked for Kshs 150,000/=. She noted that in one of the cases, the injuries were more serious. Mr. Kutwa submitted that the appellant had offered Kshs 70,000/= in the court below. **Even** as the judgment there does not allude, to it gave an award of Kshs 100,000/=. This was arrived at after the learned trial magistrate reviewed medical evidence on injuries as **well** as cases cited in that regard. The appellant has not shown this court why the award of Kshs 100,000/= should be considered excessive. The learned trial magistrate did not fault any principle relevant in assessment of damages. Or the appellant has not argued about any. Accordingly, the award given stands.

In sum, this appeal is dismissed and with costs.

Judgment delivered on 25/5/2006.

J. W. MWERA

JUDGE

JM/hao