**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT ELDORET**

**Civil Appeal 41 of 2001**

**EDWARD KIPSONGOK ……..……..…APPELLANT**

**VERSUS**

**DAVID KIRWA SATO ……..……...……RESPONDENT**

**JUDGMENT**

Edward Kipsongok initially filed his case against David Kirwa Sato, and sought judgment against him for general and special damages as well as costs of the suit and interest therein. He based his claim on the fact that on 29/4/1995, Sato who was then driving his motor vehicle registration number KUZ 939 from Eldoret towards Kapsabet handled the said vehicle car at an excessive speed, in a negligent and careless manner thereby causing an accident in which he knocked Kipsongok's bicycle as a result of which Kipsongok sustained injuries, for which he prayed to be compensated accordingly.

After a full trial in which both parties called evidence, the learned trial Magistrate found that Kipsongok who was wholly to blame for the accident, and he dismissed the case with costs.

Being dissatisfied with the said judgment, Kipsongok (hereinafter called 'the appellant') has now preferred this appeal, which he bases on the following grounds:

"*1. The learned Resident Magistrate erred in law and fact in failing to find the defendant/respondent liable in negligence for the damage suffered by the plaintiff/appellant.*

*2. The learned Resident Magistrate erred in law and in fact in failing to find that the defendant/respondent failed to brake, swerve, slow and/or otherwise so to control his motor vehicle Reg. No. KUZ 939 as to avoid hitting the plaintiff/appellant.*

*3. The learned Resident Magistrate erred in laws and in fact in holding the plaintiff/appellant wholly to blame for the accident giving rise to Eld. SPMCC. No. 1495/96."*

Mr. Obiero who appeared for the appellant chose to combine the three grounds and to urge them as one, and it was his submission that the evidence on record should not have been disregarded as it placed the court under a duty to find that it was the respondent who had caused the accident which gave rise to the suit; that the suit should not have been dismissed but that liability ought to have been apportioned between the two. He appreciated the fact that the appellant had not filed any reply to the respondent's allegation in his defence that he had contributed to the accident, but he urged the court to find that lack of reply to defence could not have been fatal to his claim, more so because the evidence supported the

pleadings.

Mr. Kigamwa for the respondent opposed the appeal and urged the court to uphold the learned trial Magistrates findings. It was his submission that liability could not have been apportioned especially in view of the fact that the respondent had pleaded contributory negligence in his defence.

I have as required to do at this stage, it being the first appellate stage, re-evaluated the evidence on record, with a view to establishing whether the learned trial Magistrate's finding was proper and also whether the appeal is meritorious.

It was the appellant's evidence that Sato's vehicle veered towards the left side of the road and collided with him on the aforementioned date, and according to him the collision was as a result of Sato loosing control of his vehicle after which it collided with the plaintiff. He however conceded during cross examination that the subject vehicle was moving at a normal speed and not in the zig zag manner as alleged in the plaint. The respondent's evidence which was corroborated by his witness was that the appellant had ridden from a feeder road into the main road without stopping at the junction; that he tried to avoid him without success; that he stopped and talked with him and that all that the appellant talked about was the damage to his bicycle; that he never complained of having sustained any injuries. He attributed the full blame to the appellant, perhaps this would explain the fact that his plaint portrayed a different scenario in that he claimed that the vehicle hit his bicycle. His evidence which was in any event not corroborated did not support the averments in his plaint. It is important that I reiterate that it is trite that parties are bound by their pleadings, and a party can not give evidence which contradicts his pleadings, that is why a party can apply for leave to amend his pleadings at any stage of the proceedings. I would therefore find that he did not prove his case on a balance op probability as required and the trial Magistrate can not be faulted.

But even if I am wrong in the above finding it is on record that the respondent had raised the issue of contributory negligence in his defence. He also pleaded the particulars of such negligence, which issue was not controverted by the appellant. It is now trite that a party who fails to traverse by further pleadings the particulars of negligence alleged in the defence is assumed to have admitted the negligence alleged in the defence **(Mount Elgon Hardware v. United Millers CA (Ksm) No. 19/1996),** and that being the case, no liability could have been apportioned to the respondent at all, for which reasons I find that this appeal lacks in merit and I dismiss it with costs.

Dated and delivered at Eldoret this 5th day of October 2006.

JEANNE GACHECHE

Judge

Delivered in the presence of: Mr. Obiero for the appellant and Mr. Kigamwa for the respondent