REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 74 OF 200

VALLEY BAKERY LTD……...……..…1ST APPELLANT

ALFRED AMBULULI OGALO…….……2ND APPELLANT

VERSUS

MATHEW MUSYOKI…….. …….RESPONDENT

JUDGMENT

The Respondent, Mathew Musyoki, was riding his bicycle on the 13th of October 2000 along Langalanga-Racecourse road when he alleges he was hit by motor vehicle registration number KAM 476Q owned by the 1st Appellant, Valley Bakery Ltd and driven by the 2nd Appellant Alfred Ambululi Ogalo. The Respondent averred in his plaint that the said accident was caused by the negligence of the driver of the Appellants motor vehicle. As a result of the said accident the Respondent sustained injuries which he sought to be compensated by the court. The Appellants denied that they were responsible for the said accident. It was the Appellants case that the said accident was caused by the negligence of the Respondent. After hearing the case, the trial court apportioned liability at the ratio of 75:25 in favour of the Respondent and as against the Appellants. General damages for pain and suffering was assessed at Kshs 300,000/-. Special damages was assessed at Kshs 2,000/-. The final award in favour of the Respondent, less contribution was Kshs 226,500/-. The Appellants were aggrieved by the said decision of the trial magistrate and have appealed to this court.

The grounds of appeal put forward by the Appellants are basically twofold; that the trial magistrate erred in finding liability at the ratio that he did. It was the Appellants opinion that the Respondent ought to have borne a higher ratio of liability than was decided by the court. The Appellants were further aggrieved that the general damages awarded were excessively high in the circumstances and were not supported by the evidence adduced in court. At the hearing of the appeal, Mr Kisila, Learned Counsel for the Appellant urged this court to allow the appeal, whilst Mr Gekong'a submitted that the decision of the trial magistrate ought to be upheld. I will consider the arguments made after briefly setting out the facts of this case.

In the trial before the lower court, the Respondent testified that he was riding his bicycle on the material day along Langalanga-Racecourse road. He testified that he was riding his bicycle on the right hand side of the road on the pedestrian path which was about four metres away from the tarmac road. It was his testimony that he saw the Appellants motor vehicle being driven towards him from the opposite

direction. A Nissan motor vehicle was in the middle of the road. To avoid colliding with the Nissan, the 2nd Appellant veered off the road towards the path that the Respondent was riding his bicycle and collided with Respondent. The Respondent became unconscious and later found himself at the Nakuru Provincial General Hospital. The Respondent blamed the 2nd Appellant for the accident as he alleges the driver drove into the path that the Respondent was riding his bicycle in a bid to avoid colliding with the Nissan which was stationary in the middle of the road. The Respondent testified that the 2nd Appellant was driving the said motor vehicle at a very high speed hence he could not control it when he saw the Nissan parked on the road. The Respondent testified that he sustained a fracture of his leg below the knee, fracture of the knee, injury on the back, both shoulders and injury on the back of the neck.

The 2nd Appellant testified on behalf of Appellants. He testified that on the material day he was driving motor vehicle registration number KAM 476Q along Langalanga road. He saw a Nissan which was parked on its side of the road. It was his testimony that as he attempted to pass the Nissan, the Respondent, who was riding a bicycle emerged from a lane behind the Nissan onto the road. The 2nd Appellant testified that when he saw the Respondent, he applied emergency brakes in a bid to avoid colliding with the Respondent but it was in vain. The motor vehicle landed on a ditch and that is the time when the Respondent collided with the motor vehicle. According to the 2nd Appellant, it is the Respondent who was to blame for the accident as he was overtaking the Nissan without first confirming if it was safe to do so. He testified that the accident occurred because at the time he saw the Respondent, the Respondent was too close. It was his testimony that he hooted and applied emergency brakes in an unsuccessful bid to avoid the accident.

The Respondent produced in evidence the medical treatment chits and the medical reports prepared by Dr Wellington Kiamba and Dr Jayant G. Karania. The injuries that the Respondent had sustained was on medical examination found to be;

(i) Fracture of the left tibia (leg bone) in the middle one third.

(ii) Fracture of the fibula bone in the left side upper one third area.

(iii) Soft tissue injuries on the shoulders, arms chest, forehead and back.

According to the medical report prepared by Dr Jayant G. Karania, who examined the Respondent on the 11th of June 2001 the fractures that the Respondent has sustained had healed although the movement of the left leg caused pain when the Respondent walked for a long distance, it was assessed that the said injury would give the Respondent a problem in future. Permanent disability was assessed at 2%.

This is a first appeal. As was held in the case of **Selle & Anor –versus- Associated Motor Boat Company Ltd & others [1968] E.A. 123** an appeal to the High Court is by way of retrial and the Appellate Court is not bound to follow the trial courts finding of fact if it appears either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with evidence generally. The High Court is mandated to reconsider the evidence adduced and re-evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In the instant appeal, I have re-evaluated the evidence that was adduced on behalf of the Appellants and the Respondent before the trial court. I have also considered the submissions made by Counsel for the Appellants and Counsel for the Respondent. The issue for determination by this court is whether, on the evidence on record, the Respondent has established to the required standard of proof that he was injured by the negligence of the 2nd Appellant. The other issue for determination is what quantum of damages ought to be assessed for the injuries that the Respondent sustained.

On liability, the Respondent and the 2nd Appellant gave differing versions of the events that took place on the material day. While the Respondent testified that he was hit by the motor vehicle driven by the 2nd Appellant as he was riding his bicycle on a pedestrian path off the tarmac road, the 2nd Appellant testified that the Respondent hit the said motor vehicle when it had veered off the road whilst the 2nd Appellant was attempting to avoid colliding with the Respondent. It was the Respondent’s testimony that

the 2nd Appellant was driving the said motor vehicle at a very high speed that when he saw a Nissan parked in the middle of the road, he drove the said motor vehicle off the road onto the pedestrian path and hit the Respondent. On the other hand the 2nd Appellant testified that as he was passing the Nissan which was stationary on its side of the road, the Respondent emerged suddenly and without warning from behind the Nissan forcing the 2nd Appellant to apply emergency brakes and veer off the road in an unsuccessful bid to avoid colliding with the Respondent. The two parties involved in the accident blame the other for causing the said accident. Matters were not helped by the fact that neither the 2nd Appellant nor the Respondent deemed it necessary to call an independent witness to testify on the events that took place on the material day. The trial magistrate was not of any assistance to this court as he did not make any comment as the demeanour of the witnesses. The evidence on record in respect of what actually took place on the material day is thus contradictory and completely at variance with each other. This court will resolve the contradiction apparent in the evidence adduced by the 2nd Appellant and the Respondent by apportioning liability on a 50:50 basis. The Appellants and the Respondent will therefore share the blame equally for the said accident. I therefore reverse the finding of the trial magistrate on liability and substitute the said decision with the finding of this court apportioning liability at the ratio of 50:50.

As regards quantum, I am guided by the Court of Appeal when it held in **Butler –versus- Butler [1984] KLR 225** that the assessment of damages is more like an exercise of discretion by the trial court and an appellate court should be slow to reverse the trial court unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result arrived at a wrong decision. In **Idi Ayub Shabani & Anor – versus- City Council of Nairobi & Anor (1985)1 KAR 681 Hancox, J. A. (as he wa s then) held that:**

> ***"The text as to when an appellate court may interfere with the***
>
> ***award of damages was stated by law JA in BUTT V. KHAN (1977)1 KAR 1***
>
> ***(a case referred to in another context by the Learned Judge) as follows: -***
>
> ***"An appellate court will not dis turb 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 arrive d at***
>
> ***a figure which was either inordinately high or low."***

In the instant appeal, after reviewing the decided cases as relates to the injuries that the Respondent had sustained, the trial court assessed general damages for pain suffering and loss of amenities at Kshs 300,000/-. After reviewing and re-evaluating the decided cases that was placed before the trial magistrate, I hold that the comparable case which the court ought to have considered, in view of the injuries sustained by the Respondent is **Nairobi HCCC No. 5141 of 1991 Isaya Magumba Kirambi – versus- John Kipngetich Koech & 2 others** (*unreported)* where an award of Kshs 250,000/- general damages for pain suffering and loss of amenities. I have however reevaluated the assessment of damages reached by the trial magistrate and it is my finding that the said award was not excessively high or excessively low as to warrant interference by this court on appeal. I have put into consideration the fact that the **Magumba Kirambi case** (*supra)* was decided nearly at the same time that the trial magistrate gave his award. In the premises therefore I find no merit on the appeal filed by the Appellants on quantum.

In the circumstances therefore I will allow the appeal filed by the Appellants to the extent that liability is apportioned equally at the ratio of 50:50. Judgment is therefore entered for the Respondent as against the Appellants jointly and severally as follows:

(i) Liability is apportioned at the ratio of 50:50.

(ii) The Respondent is awarded general damag es for pain suffering and loss of amenities at Kshs 300,000/ - less 50% liability.

(iii) Special damages is awarded at Kshs 2,000/ - less 50% liability.

(iv) Since the Appellant was partially successful in his appeal the Appellant shall get half of the costs on appeal.

(v) The Respondent shall however get the costs of the suit in the lower court.

(vi) Interest shall be applied on the general damages awarded from the date of the delivery of the judgment by the lower court.

DATED at NAKURU this 21st day of January 2005.

L. KIMARU

JUDGE