**REPUBL 0F KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL APPEAL NO 48 OF 2017**

**STEPHEN OMAMBIA ANUNDA.....APPELLANT**

**VERSUS**

**DOUGLAS OMBAGI ONDIEKI.....1ST RESPONDENT**

**CAPITAL MOTOR CYCLE MANUFACTURING LTD.....2ND RESPONDENT**

*[Being an appeal from the judgement and decree dated 5th September 2017 in the Chief Magistrate's Court in Civil Suit No 99 of 2015, Douglas Ombagi Ondieki v Stephen Omambia]*

**JUDGEMENT**

**INTRODUCTION**

1. The appellant has appealed against the judgement and decree in which the first respondent was awarded shs 2,984,000 as damages together with costs; arising out of a motor vehicular accident

2. The respondent has opposed the appeal both in respect of liability and quantum of damages. He has urged the court to dismiss the appeal with costs.

**FINDINGS ON THE GROUNDS OF APPEAL IN RESPECT OF LIABILITY**

*3.* In this court the appellant has raised seven grounds of appeal in his memorandum. In grounds 3, 6 and 7 the appellant has faulted the trial court both in law and fact in finding that the appellant was 100 per cent to blame for the accident. The evidence of the appellant was that he was an ICT officer with the NHIF. He was travelling from Kisii to Nairobi; and while at Ololulunga a motor cycle came from a feeder road and hit his car from the left side. He blamed the motor cyclist for the accident for not checking the road before entering. While under cross examination, the appellant testified that there was a slight bend at the scene of accident. He further testified that the scene of accident was clear. He also testified that he saw the motor cycle enter the main road from the feeder road. The appellant continued to testify that: *' I may have noticed it from the periphery. When I saw the motor cycle, I hit my brakes. I could not avoid the accident even at 30 KPH……...I do not recall whether [sic] motor cycle landed.'*

4. Furthermore, when the appellant was asked as to where the other victim had landed, the appellant answered that *' long silence- I do no recall but I think it was in front of the vehicle.'*

5. The appellant called a police officer, No 235617 IP Moses Onyango [DW 2], who was the deputy traffic base commander. He testified that he was not the investigating officer. As he was testifying, DW 2 did not have the police file and for that reason he was unable to tell the finding of the investigating officer in respect of this accident. There was CPL Banda, who witnessed to the accident, but was not called as witness. It is him who made the entry concerning the accident in the occurrence book [OB].

6. The evidence of the respondent was that he was an apprentice mechanic and on the material day he was taking a propeller for repair. He then went to the road and took a motor cycle as a pillion passenger. While en route a vehicle came from behind and hit them; with the result that he was thrown up, while the motor cycle rider was thrown to the side. His head landed on the vehicle's wind screen. He became unconscious and later he learned he was in hospital after two months.

*7.* The trial court faced with these conflicting versions of the accident; believed the version of the 1st respondent. That trial court then found that: *"With the acknowledgement that one of the victims fell on the windscreen. It is clear that the hit was direct. If it had been on the left side as the defendant would have me believe. It would have been more probable that the victims would have landed off the road on the side."*

*8.* The trial court also found that the appellant's version was correct. In particular it found that "*the velocity that hit the motor cycle to the*

*extent of lifting the plaintiff high for him to land on the windshield was high. The defendant must have been speeding."*

As a result, the trial court entered judgement for the 1st respondent with costs.

***9.*** I have re-assessed the entire evidence as a first appeal court. As result, I find that the appellant failed to call a material witness namely Cpl Banda, who according to DW 2 was at the scene of the accident. It was also the evidence of the appellant that there were several witnesses including a police officer; in respect of whom, he categorically testified that he was not going to call and never called them. In the circumstances, I hereby draw an adverse inference that had he called Cpl Banda, he might have given evidence favourable to the respondent. *[ see Kilgoris Civil Appeal No. 1 of 2018, High Court at Narok, paragraph 61]*

10. After re-assessing the entire evidence, I find that the appellant was 100% to blame for the accident. I therefore confirm the magisterial finding that the appellant was totally liable for the accident.

**FINDINGS IN RESPECT OF THE GROUNDS ON QUANTUM**

11. In grounds 4 and 5 the appellant has faulted the trial court both in law and fact for awarding shs 484,000 as special damages as the same were not pleaded and proved. I find from the plaint in paragraph 5 that special damages were pleaded. They were alleged to be in relation to treatment and transport expenses, cost of securing the doctor's services and future medical expenses, which in total are in the sum of shs 492,000, except future treatment expenses, which were to be adduced during the hearing.

12. According to the evidence of the 1st respondent he spent the following sums of money. First, shs 400, 000, being treatment in hospital, in respect of which he produced receipts as exhibit Pexh-2A and B. Second, shs 4,000, being the fees charged by the medical doctor, who prepared his report [exhibit 5A and B]. Third, Shs 500, being the search fee in the motor vehicle registry [exhibit Pex-6A and 6B]. The total sum of money comes to Shs. 404,500, being proved special damages. The settled law in this regard is that special damages must be pleaded and proved. It therefore follows that the magisterial finding that the 1st respondent is entitled to shs 484,000 is not supported by evidence. As a result, I hereby set it aside.

13. As regards, general damages the trial court awarded shs 2,984,000 less shs 404,500, the latter being proved general damages, which now is shs 2,500,000.

The respondent sustained the following injuries.

Severe head injury due to blunt impact managed in ICU for 10 days

Compound fracture of the right femur.

Fracture of the of the right ankle joint [potts fracture]

Fracture of both tibia and fibula

Commuted fracture of the lateral left side [potts fracture]

*14.* As at the date of examination on 20/04/2015, following the accident which had occurred on 17th January 2015, the examining doctor [Dr Ezekiel Ogando Zoga] concluded that the respondent after treatment was still confused and also found that the lower limbs had healed with malunion making his bones weak and susceptible to re-fracture on minimal force. The doctor found the respondent was in a wheel chair. He then assessed his permanent disability at 60%. He finally, stated that "*Long term complication likely to loss of cognative function and post traumatic epilepsy."*

15. In respect of general damages, counsel for the appellant submitted that the damages awarded were manifestly excessive and should be reduced to a sum of shs 1,000,000. He referred this court to *Robert Gitau Kanyiri v Charles R. Kahiga and two others [2010] eKLR*, in which the court awarded shs 1,000,000 as general damages. I have considered the submissions of both counsel and the authorities cited. I have also taken into account the loss in value of the shilling over the years. As a result, I have come to the conclusion that the award of shs 2,500,000 was manifestly excessive and warrants reduction. I therefore reduce the award to shs 1,600,000.

16. The upshot of the foregoing is that I hereby award shs 1,600,000 as general damages and shs 404,500 as special damages.

17. The appellant's appeal on liability is hereby dismissed. His appeal on quantum is hereby allowed as shown above.

18. Each party to bear his own costs.

**Judgement delivered in open court this 17th day of December, 2018** in the absence of both the appellant and the respondent and in the presence of Court Assistant Kasaso.

**J. M. Bwonwonga**

**Judge**