



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

**CIVIL APPEAL NO. 24 OF 2012**

**(Being an appeal arising from judgment and Decree of Kitale Senior Principal Magistrate**

**J.N. Nang'ea delivered on 25/10/2012 in CMCC No. 128 of 2008)**

**S.S.F. COMPANY LTD .....1ST APPELLANT**

**MUNTHIANI MBUI.....2ND APPELLANT**

**VERSUS**

**MOSES WAFULA KWANUSU .....RESPONDENT**

**JUDGMENT**

1. According to the plaint filed on 16/5/2008 by the respondent, he was involved in a road traffic accident along Misikhu/Matunda road at Bondeni area on 31/3/2007 when motor vehicle Reg. No KAU 751E Mercedes Benz Lorry owned by the 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> Appellant veered off the road and hit him from behind as he pushed his bicycle uphill. He sustained serious injuries and was rushed to the hospital while unconscious.

He sustained the following injuries;

- a) Lost the right ear**
- b) Bruises on left side of the head**
- c) Internal brain bleeding**
- d) Bruised left knee**
- e) Closed chest injury**

2. The respondent blamed the appellant for the said accident as the driver of the said lorry was negligent. On its part the appellant filed a defence denying the charge and laid blame severally at the door of the respondent.

3. The parties then proceeded to full trial when the court found that the appellants were 100% liability and proceeded to awarded the respondent general damages of Kshs 500,000/- as well as costs and interest.

Before dealing with the issues raised in the appeal, it is worthwhile to summarise the facts as raised by the parties during trial.

4. **PW1 the respondent** testified that on the material day at around 5.30 pm he was heading home and was pushing his bicycle uphill. Suddenly he heard a moving sound from behind and he was hit by the appellants lorry. He lost consciousness and recovered after 5 days at Kitale District hospital. According to him he was pushing his bicycle on the left side of the road but on the outside. He produced the treatment notes to back up the injuries he sustained. He said that the appellant's driver did not hoot or warn him or at all so as to avoid the accident.

5. **PW3 Linus Ligare** produced the P3 form on behalf of the respondent. He confirmed the injuries sustained by the respondent and that he was hospitalized at Kitale District hospital between 31/3/2007 and 4/4/2007.

6. **PW4 Ronald Sitati** testified that they were relaxing outside Buidni hotel with one old man. He saw the respondent riding his bicycle and crossed Nzoia bridge and he alighted. He was carrying 8 kg of maize and as he neared the hotel he saw a lorry painted red and yellow in colour from behind hit the respondent from behind. The front tyres according to him hit the respondent and dragged the bicycle for some distance. The lorry stopped 50 metres from the scene. Both the appellant's lorry and the respondent were on the left side of the road. He rushed to the scene with others and managed to rescue the respondent and was taken to the hospital. He also testified in the traffic case against the 2<sup>nd</sup> respondent who was found guilty.

9. **PW5 Dr James Chege** produced the medical legal report on behalf of the respondent which he prepared on 6/8/2007. He enumerated the injuries as captured in the plaint.

10. **PW7 PC Eliud Martim** produced the police Abstract form. He testified that he visited the scene with other police officer and according to their findings the cause of the accident was the lorry driver and not the respondent. The 2<sup>nd</sup> respondent was charged with the offence of careless driving and fined Kshs 4000/-.

The appellant did not offer any defence and closed their case.

### **Analysis and Determination**

11. None of the parties filed written submissions despite being granted the opportunity to do so. The appellant appeal inclines on two issues and question. According to the appellant there was no justification for the trial court having arrived at liability of 100% against the appellant against the evidence on record. On quantum they argued that the same was excessive in the circumstances.

12. It is trite law that this court shall only interfere with the finding of the trial court if the same were found to be excessive, too low or premised on a wrong principle of Law.

13. On the question of Liability, apart from the defence on record, the appellant did not call any witnesses. It falls therefore that the only evidence is of the respondent. As to whether the accident occurred is not in dispute. How then did the accident occur and who caused it.

14. From the perspective of the respondent who was aged 77 years he had just crossed the bridge at Nzoia river and had already alighted and was pushing his bicycle. He was on the left but outside of the road. Suddenly he heard some roar and was hit from behind and was unconscious and found himself at the hospital.

15. This line of argument was not contested. It is therefore true that he was hit from behind. That evidence was supplied by PW4 who was able to see the events as he relaxed with his friends outside Buidni hotel. In fact he went ahead to testify in the traffic case against the 2<sup>nd</sup> appellant.

16. Taking into consideration the above facts and more particularly that he was hit from behind, there was therefore sufficient reason why the 1<sup>st</sup> appellant ought to have been more carefully to the road users ahead of him.

17. There was allegation that the respondent was riding in a zigzag manner. The same remained an allegation. Nothing was shown to that effect. Further the fact that the 2<sup>nd</sup> appellant was fined in the traffic offence prima facie suggest that he was indeed the actor of the accident. Consequently I do find that the 100% liability against the appellant as found by the trial court was justified.

18. On the question of quantum

***Lord Morris of Borth -y- Gest in the case of West(h) & Sons Ltd Vs Shepherd (1964) AC 326 at Page 345 stated.”***

***“..... But money cannot review a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general; method if approved. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated of comparable awards. When all this is said it still must be that awards which are awarded are to a considerable extent conventional ....”***

19. Dr Njenga conceded that the respondent sustained soft tissue injuries to his head, report ear tube and left knee and loss of the right ear lube . He classified the injuries as grievous bodily harm and that there was no permanent disability.

20. I note that the trial court record on the Nakuru case of ***Hosea Kipruto Cheptum Vs Dickson Ndicho Kimani NKR High Court No 335 of 1998***. The injuries however were serious in that matter as there was compound fracture of the skull. In the instance case there wee no fractures but simply soft tissue though they were considered greivous.

21. I therefore find the award of the sum of Kshs 500,000/- excessive viz viz the injuries herein. The respondent by the time of seeing Dr Njenga was already healed save for the scars.

22. I would therefore reduce the quantum from Kshs 500,000/- to Kshs 300,000/- which I find sufficient and reasonable in the circumstances.

23. In the premises I do allow the appeal as follows;

- a) Liability at 100% against the appellant**
- b) General damages reduced from kshs 500,000/- to Kshs 300,000/-.**
- c) Special damages remains untouched.**
- d) The appellant shall get half cost of this appeal.**

**Orders accordingly.**

Delivered this 2<sup>nd</sup> day of March, 2017.

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**H.K. CHEMITEI**

**JUDGE**

**In the presence of:**

**Miss Bartilol for Respondent**

**Analo for appellant**

**Court Assistant - Kirong**