REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL APPEAL NO. 105 OF 2013.

MUMIAS SUGAR CO. LTD :::::::::::::::::::::::::::::::::::::: APPELLANT.

VERSUS

YUSUF SWAKA WANGA :::::::::::::::::::::::::::::::::::::: RESPONDENT.

J U D G M E N T.

1. The respondent/plaintiff filed Civil Suit No. 165/2012 at Butere Law Courts against appellant/defendant claiming special and general damages arising from road traffic accident which took place on 25th August, 2012.

2. The defendant/appellant filed defence dated 14th February, 2012 denying all the allegations pleaded.

3. The plaintiff/respondent called 3 witnesses. The defendant/appellant called 3 witnesses. The trial court after analyzing and evaluating the evidence held the defendant 100% liable and assessed special and general damages amounting to (Ksh. 450,000/= general and Ksh. 6,500/= special) Ksh. 456,500/=.

4. Being dissatisfied with the said decision, the appellant lodged an appeal setting out 9 grounds namely:-

(i) That the learned trial magistrate erred in law and fact in failing to dismiss the respondent's suit in the lower court as he had not proved his case on a balance of probability;

(ii) That the learned trial magistrate erred in law and fact in holding the appellant 100% liable for the alleged accident when there was no sufficient evidence to that effect;

(iii) That the learned trial magistrate erred in law and fact by failing to evaluate the injuries sustained by the respondent and on the medical chits and/or reports;

(iv) That the learned trial magistrate erred in law and fact in making an award in general damages of Ksh. 450,000/= that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the respondent;

(v) That the learned trial magistrate erred in law and fact in awarding the respondent special damages of Ksh. 6,500/= that were not proved to the required standard in law;

(vi) That the learned trial magistrate erred in law and fact in disregarding relevant evidence on record hence resulting to a wrong decision;

(vii) That the learned trial magistrate erred in law and fact in failing to consider the appellants'

submissions and legal authorities relied upon in support thereof;

(viii) That the learned trial magistrate erred in law and fact by over relying on the respondent's submissions and legal authorities which were not relevant and without addressing his mind too the circumstances of the case;

(ix) That the learned trial magistrate's decision albeit, a discretionary one was plainly wrong.

5. Being a first appeal, it is the duty of the court to assess and re-evaluate the evidence before lower court bearing in mind that the court has neither seen nor heard the witnesses. See – **NBI HCCA 152/03 Stat Pack Industries Vs. James Mbithi.**

- Selle &Another vs. Associated Motor Boat Co. Ltd. & Others 1968 EA 123.

6. The appellant and respondent filed and exchanged submissions and left top court to determine the appeal on submissions and evidence on record.

7. The 2 twin issues are that; who was to blame for the accident and whether the award was inordinately high?

8. The appellant argued grounds 1, 2 and 6 as one and grounds 3, 4, 5, 7, 8 and 9 together.

9. The defence submit that the defence proved via its witnesses that the respondent was hit by motor vehicle KBC 943U but not Motor vehicle KAV 822 K and that he lied that he was hit by same KAV 822K. Further respondent lied as he had already testified that he had alighted from the motor vehicle and was standing 5 metres off road as the motor vehicle KAV 822K could not hit him in the circumstances.

10. DW1 and DW2 testified that it is motor vehicle KBK943M which squeezed itself to pass and it hit respondent who was trying to stop it. The respondent never called any of his 5 passengers as witnesses. The police never charged anyone with a traffic offence thus driver KAV 822K was not to blame.The appellant therefore submit that the trial magistrate was wrong to hold appellant 100% liable.

11. On quantum, the appellant submit that award of Ksh. 450,000/= was inordinately high in the circumstances of the injuries disclosed and comparing to the other award on same injuries as demonstrated by cited authorities.

12. Further, the appellant submit that the only disclosed injuries vide Kakamega PGH was fracture of Pelvic only but respondent pleaded broken leg and waist. It is thus submitted that there was no prove of the injuries sustained. The appellant thus prays for appeal to e allowed with costs.

13. In rejoinder, the respondent submits that liability issues was between appellant and respondent and not driver of motor vehicle KBK 943U who was not enjoined. He relied on the case of **BGM HCA 25/011 WANYONYI VS. SHIKUKU** where court held that "**the court**" cannot hold liable a non party for negligence. The respondent submits that the court should follow same holding and uphold the holding by the trial magistrate.

14. On quantum, the respondent submits that the injuries inflicted on the respondent were serious and thus the award not inordinately high. In any event the cited authorities were supporting the award. The respondent then prays for dismissal of the appeal with costs.

15. The court has assessed and analysed evidence on record after thorough perusal. The appellant says he was beside the road indicating to motor vehicle KAV 822K to stop. He got from the car. A lorry KBK 943U passed and as their car KAV 822K rushed to follow lorry it knocked him (plaintiff) as he was infront of it. However, PW1 testified that the motor vehicle KBK 943U drove away and hit plaintiff as it tried to escape. The plaintiff was opening the rear door. It also hit KAV 822C.

16. DW2 testified that he was with respondent and while alighting the lorry hit him and caused damage to KAV 822C.

17. In the pleadings, the plaintiff blamed defendant for overtaking without regard to other road uses that knocking him while on the other hand. The defendant blames plaintiff for walking on the road carelessly and motor vehicle KBK 943U driver for driving without due care and attention plus at excessive speed thus occasioning an accident. The police did not charge anybody out for the accident nor were sketch maps produced. The investigating officer was not called.

18. The defendant blamed 3rd party and the plaintiff but failed to take out third party proceedings against some third party. The court attributed 100% blame on the defendant.

19. The evidence on record is a trade for blame game between the plaintiff and the defendant witnesses DW1 and DW2.

20. The plaintiff though he claims to have been hit by defendant's motor vehicle, he does not demonstrate that he did anything to avoid the accident. He says he was on the front of the defendant's motor vehicle when he was hit. This narration would not exonerate him 100% but share a measure of the blame. On the other hand the defendant DW1 and DW2 thought attempting to blame a party they never joined they are not consistent in their testimony as found by trial magistrate.

21. In the premise, the court ought to have apportioned liability as between the parties, plaintiff and the defendant. The plaintiff in my view to share 30% and the defendant 70%.

22. On Quantum, I have reviewed the evidence tendered on injuries and cited authorities and I find that the award of Ksh. 450,000/= of general damages was valid in the circumstances and same was not inordinately high. The special damages was pleaded and proved. The court thus finds for the appellant to the extent that liability is adjusted and apportioned to 70:30 in favour of the respondent and the award of Ksh. 450,500/= is reduced by 30%.

23. The appellant is awarded 30% of total costs to be award in the appeal herein.

Orders accordingly.

SIGNED, DATED and **DELIVERED** at **KAKAMEGA** this **5TH** day of **OCTOBER**, 2016.

C. KARIUKI.

JUDGE.

In the presence of:-

..... for the Appellant.

..... for the Respondent.

..... Court Assistant.