REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO.130 OF 2015

BETWEEN

DANIEL NYANDIKA KIMORI.....APPELLANT

AND

MONICAH ACHIENG OGOLA.....RESPONDENT

(An appeal from the judgment and decree of Hon. Z. Nyakundi (PM)

in Rongo PMCC No.178 of 2010 dated 5th June, 2012)

JUDGMENT

1. The Appellant **DANIEL NYANDIKA KIMORI** has filed this appeal against **MONICAH ACHIENG OGOLA,** who obtained judgment against him and was awarded general damages in the sum of Kshs.200,000/= and specials of Kshs.1420/=.

2. The background to this matter is that the Respondent was travelling in motor vehicle Registration No.KAQ 143 owned by the Appellant when it was involved in an accident with motor vehicle Reg. No.KAA 438U, and as a result she sustained injuries. The appellants joined the owner and driver of offending motor vehicle as Third Parties and interlocutory judgment was entered against them after having failed to enter appearance.

3. It was not disputed that the Respondent was a passenger in the appellant's motor vehicle which was travelling from Rongo to Kisii along the Migori-Kisii road. It is also common ground that when the motor vehicle was around **IYABE** area it was involved in an accident with motor vehicle Reg. **NO. KAA 438 U**. This matter was used as a test case to settle the issue of liability.

4. The respondent testified as PW1 – at the trial court and described how while travelling in motor vehicle **KAQ 143 F** she just heard a bang around IYABE area and –

> **"I cannot explain how the accident happened."**

5. She however told the court that:-

> **"I have sued the owner for the mistake of the driver because he was over speeding and was not moving straight."**

6. The appellant's driver (**SHEM MOMANYI MAYOYO**) who was driving the appellant's motor vehicle towards Kisii direction told the trial court that he saw motor vehicle Registration **No. KAA 438U** coming from **SUNEKA** direction. He described the motor vehicle as a pickup which was moving in a zigzag direction and initially was headed towards some people who were standing on the road side. It suddenly moved to the left as one faces Kisii direction, towards the appellant's motor vehicle, and despite the appellant's driver moving to his side (the left) the offending motor vehicle rammed into his.

7. Further the driver of the pickup (**i.e KAA 438U**) was charged on two counts of careless driving and driving a defective motor vehicle in a public road and fined with a default custodial sentence. The traffic case proceedings were produced as exhibit in court.

8. The appellant's counsel submitted that the issue of who was negligent and responsible for the accident was not satisfactorily considered by the trial magistrate as PW1 could not even explain how the accident happened. He also pointed out that although the respondent denied that the appellant's motor vehicle was moving at a high speed, she could not elaborate what the alleged speed was. He argues that in any event she did not see what transpired between the two motor vehicles prior to the accident, as she only heard a bang and lost consciousness.

9. Counsel argued that the trial magistrate did not give a concrete reason for establishing that liability largely lay with the appellant's driver, then apportioned only 30% liability on the errant driver.

10. It is further submitted that mere involvement of the appellant's motor vehicle in the accident was not ***prima facie*** evidence of the appellant's driver's culpability – he relied on the case of **SAMMY NGIGI MWAURA –vs- JOHN MBUGUA KAGAI [2006] e KLR – Civil Appeal no.177 of 2002 Eldoret** where the Court of Appeal stated –

> **"... A mere collision of two vehicles or of a vehicle and a person by itself without proof of negligence is insufficient for establishing liability ..."**

11. It is submitted that if the appellant's driver was negligent, he too would have been charged in court for a traffic offence – the fact that he wasn't, therefore absolved him from blame. Counsel pointed to the evidence of **PW3 (PC MWINYI**) who told the trial court that the appellant's driver **DANIEL OGEGA NTABO**, was not blamed for the accident.

12. The respondent's counsel submitted that the appellant failed to join the **Third Parties** to the appeal and serve them with the memorandum of appeal, which therefore renders this appeal incurably defective and a non starter on the issue of liability. He argues that once the court granted a notice to join the third parties and the respondent having been a passenger in the appellant's motor vehicle when it collided with the Third Party's motor vehicle, then the issue of liability and or contribution can only be determined as between the appellant and the Third Party as no evidence was adduced by the appellant at the trial to prove liability on contribution on the part of the respondents. Counsel draws this court's attention to **Order 42 Rule 12** which requires that an appellant serves the memorandum of appeal on every respondent.

13. He also invokes provisions of **Rule 72 (1)** of the Court of Appeal rules to buttress the point.

14. Counsel has cited the decision in **HARRISON WAFULA KHAMALA –VS- ISAAC NDARWA KIARIE (2016) e KLR** where the Court of Appeal held that if an appellant wants the Appellate court to make adverse findings against the **Third Party**, then that party must be served.

15. It is further argued that liability and proof of negligence is joint as between the appellant and the **Third Parties**. Counsel argued that for the collision to have occurred, then, both drivers must have been negligent. He referred to the decision in **JOYCE MUMBI MUGI –VS- THE CO-OPERATIVE BANK OF KENYA AND OTHERS CIVIL APPEAL AT NYERI NO.214 OF 2014**, where the Court of Appeal said –

"... It was proved or admitted that the vehicles driven by the 2nd and 3rd respondents collided. Vehicles when normally driven on the correct side of the road and at a reasonable speed do not run into each other. It was therefore for the 2nd and 3rd respondents to explain how the two vehicles which were being driven on opposite sides of the road came to ram into each other. They each gave self serving explanations with each claiming that it was the other who was overtaking a vehicle in-front of him.... The learned judge was unable to say who was to blame for the accident as between the 2nd and 3rd respondents, but that was not reason for dismissing the appellant's claim."

16. Counsel has also referred to the case of **BONIFACE WAITI & ANOTHER -VS- MICHEAL KARIUKI KAMAU (2007) e KLR page 8** para 4 where the court held that:-

"The defendant as a driver was expected to drive prudently and be on the lookout for trouble-shooters on the road, be vigilant and most importantly to be able to control the vehicle to bring it to a safe stop in the event of an emergency he did not do so..."

17. The Respondent's counsel argues that in the present scenario, the appellant's driver failed to stop the vehicle in good time, veer off the road to avoid collision as he was driving at a high speed.

18. The respondent's counsel also pours cold water on arguments raised by the appellant regarding the conviction of the other driver saying it is erroneous to rely on the traffic proceedings to try and escape liability. He has referred to the case of **PHILLIP KEIPTO CHEMWONO & ANOTHER -vs- AUGUSTINE KUBENDE [1982-88] 1 KAR 1036 at 1039 to 40** where the Court of Appeal stated that a Judge ought not to read the proceedings in the traffic case as if the evidence recorded was the final position in the case and it would be premature to conclude that even prima facie case of contributory negligence could not be established.

19. The major issue for determination is whether it was sufficiently established on a balance of probabilities that the appellant's driver largely contributed to the accident.

20. The only reason given by the trial magistrate for apportioning a heavy part of liability on the appellant is that PW1 said the motor vehicle was being driven at a high speed and that the appellant's driver owned the Respondent a duty of care.

21. While the trial court's observation about duty of care true, there is nothing in the Judgment pointing out how the appellant's driver breached this duty of care.

22. From the Respondent's evidence, she said she blamed the appellant's driver for driving at a high speed. Whereas it would be unreasonable to expect a passenger in a public service vehicle to have the eyes constantly trained on the speed gauge- it is reasonable to expect such a passenger to elaborate by description the meaning of what she considered as a high speed. Certainly a witness can describe the movement of motor vehicle as very fast, fast moderate, slow very slow.

23. In giving such description the witness could make reference to perhaps the circumstance which propelled her to conclude that a motor vehicle was being driven at an excessively fast upon circumstance,

(a) The pace at which they whizzed past objects along the road such as trees and other motor vehicles.

(b) The behaviour of the motor vehicle when the driver attempted to brake or stop there was no evidence presented to the effect that the appellant's driver failed to brake the evidence presented was that the driver tried "Moving to his side". Wasn't that swerving away to try and avoid being hit by the errant vehicle?

24. It is with greatest of respect that I must point out that what the respondent's counsel has done is to give evidence in his submissions. The respondent never alluded to the driver's failure to stop the vehicle

or to veer off the road to avoid the collusion- she never saw anything and confirmed that the she could not explain how the accident occurred.

25. In any event, speed alone cannot cause an accident. It must be demonstrated that the motor vehicle moved at such a pace that it became impossible for the driver to control therefore avoid the accident. Although the respondent claimed that the appellant's motor vehicle was not moving straight-(perhaps it is this statements which one can glean from that the pace at which the bus was moving made it difficult in adequately control it

26. In this instance the evidence availed suggests that even as the appellant's driver tried to avoid the errant motor vehicle by moving to his side, motor vehicle KAA 4384 came hurtling towards him and his vehicle. Surely there was lesser fault demonstrated as against the appellant's driver.

27. This then leads to the issue concerning the traffic proceedings and what the respondent has said. I think his case is easily distinguishable from the decision in **PHILIP KEIPTO CHEMWONO (*Supra*)** because in that case there was a good defence on contribution to warrant the court express sentiments that the judge cannot just rely on evidence in the traffic proceedings. Further, in the present case, the appellant's was not just relying on the traffic proceeding to avoid liability. He described in detail, how the accident occurred, and what he did to try and avoid it in vain. The traffic proceedings simply bolstered what the appellant's had stated in evidence.

28. Certainly as observed by the Court of for Appeal, vehicles do not just knock each other on the road especially when going towards opposite direction. However the fact that they got to collide is not prima facie proof that both drivers were negligent. There are or many circumstances when the driver despite exercising all the care and caution under the sun still finds that the other vehicle has left its proper path and came to the path of the other vehicle - this is largely what happened here. No wonder the case of **SAMMY NGIGI MWAURA –vs - JOHN MBUGUA CA 177 of 2002 (ELD)** observed that a mere collision of motor vehicle is not proof of negligence.

29. I also agree that every driver must be on the look-out for errant road users to be prepared to take evasive action. Indeed it was his being on the look-out that enabled the appellant's driver to see the errant motor vehicle as it approached and he tried to avoid it by moving further away on his side of the road. "***I moved to my side***"

30. From what is presented the appellant driver at least timed to swerve to avoid the collision by moving to his side. However, swerving alone may not have been enough, he needed to also demonstrate that he tried to brake or even stop so as to avoid coming into contact with the other motor vehicle. The standard to be applied on a prudent driver was set in the case of **EMBU ROAD SERVICES v RIIMI (1968) E.A. 22** which stated that in order to escape liability the driver has to show that :-

a. There was a probable cause of the accident

b. The explanation should be consistent with the absence of negligence

c. It has to be shown that although that although perfect action is not expected of the driver, nonetheless he has to show that the emergency was so sudden that he could not have taken any amount of corrective measure expected of a competent driver.

This was not forthcoming from the appellant who could have slowed down or braked to avoid the injurious contact and to that extent contribution was properly invoked.

31. The question then is just what proportion of contribution should the appellant have borne? Can this court l visit liability on the Third Parties?

The Appellant had obtained leave to join the Third Parties, yet on appeal the Third Parties were loudly absent.

Order 42 Rule Criminal Procedure Rules provides:-

> ***"After the refusal of a Judge to reject the appeal under Section 79B of the Act, the Registrar shall notify the Appellant who shall serve the memorandum of Appeal on EVERY (my emphasis) respondent within seven days of the receipt of notice from the registrar."***

32.I agree with the Respondent's counsel that the issue of liability and / or contribution can only be determined between the Appellant and the Third Party as there was no evidence attributing contribution on the Respondents. In deed the cause of ***HARRISON WAFULA KHAMALA -vs-ISAAC NDARWA KIARIE (supra)*** offers a useful guide where the Court of Appeal commented as follows:-

> ***".... the appellant faulted the Learned Trial Magistrate for failing to find that the third party contributed to the occurrence of the accident. That notwithstanding, the appellant did not serve a notice of appeal upon the third party..... If the appellant wanted this court to make adverse findings against the Third party in the High Court matter, nothing would have stopped him from serving him with a notice of appeal. The appellant decided to leave out the Third Party and served the notice of appeal upon the Respondent only. In the circumstances we cannot make adverse findings against a person who is not a party to this appeal, not having been afforded an opportunity to be heard."***

33.The present situation is on all fours with what the Court of Appeal noted in the **Khamala** case. The appellant had a very good opportunity of passing the burden of liability largely to the Third Parties had they been served with the memorandum of Appeal – unfortunately the failure to do so has resulted in a costly omission – I adopt the sentiments by the Court of Appeal in the **Khamala** case.

34.As regards quantum of damages the appellant's counsel argued that the sum awarded was not justified and was inflated. He insists that the most that Respondent should be awarded is Kshs. 100,000. The medical report by Doctor Ajuoga indicated that the Respondent suffered bruises on the upper jaw, losing 4 upper canine teeth, a fracture of the tibia borne, and cerebral concussion. However on cross examination **EZEKIEL ZOGA (PW2)** who produced the medical report on behalf of **DR.AJUOGA** confirmed that based on the treatment notes used to compile the medical report there was no indication of loss of upper canine teeth and the X-ray also showed incomplete fracture of the libia .

35.**DR. DAVID WAIROTO (DW1)** who testified on behalf of the appellant also examined the Respondent and confirmed that she had a fracture of the tibia bone and at the time of examination she had healed without any disability. The witness explained that he did not note any loss of upper teeth and the severe injuries were the fractured tibia and the concussion.

36.It is correct that the trial court did not indicate the basis of awarding the sum of Kshs. 200,000/= for general damages. I have considered the injuries confirmed are the fractured tibia, concussion and bruises on the head. Dr. Ajuoga's report described the fracture as Potts Fracture which is defined in the online medical dictionary as a fracture of the lower part of the fibula after accompanied with injury to the tibia (See www.merriam – webster.com).

37.Is a Potts fracture a simple one or a compound fracture – as far as the medical dictionaries explain is fracture of the article joint. I think even Dr. Wairoto explained that a compound fracture refers to a fracture where the skin at the fracture's site is broken and the bone sticks through the skin, whereas a simple fracture refers to the broken bone with no skin broken (orwound) at the site. In this instance Wairoto said the Respondent had an open fracture – where the bone was communicating with the skin, so it was a compound fracture hence the decided cases Respondent counsel has referred to which address compound fracture injuries BUT I take note that in the case of ***JANET OPIYO & ANOR =vs= STEPHEN TUWEI (2012) eklr***. The residual effects and treatment were far more extensive and involved (a) fixing of internal plates (b) seven (7) month later, there was no union of the broken leg – so yes similar injuries, but different results.

The same applies to ***STEPHEN KAMAU WANDERI & ANOR =vs= GLADYS WANJIKU KUNGU***

(2006) – same limbs involved but there was extensive loss of skin and the Respondent even had to undergo skin grafting. That would explain the high awards in this case.

38.The appellant's counsel on the other hand referred to the case of ***VERONICA AWET TURWELL =vs= THE A. G. HCC NO. 2048 OF 1996*** decided in 1997 which awarded general damages of Kshs. 60,000/= and J***OSEPH KABER & ANOR =vs= GEORGE KIRUMBA KANGWARA AND OTHERS (2006) eKLR*** which awarded Kshs. 75,000/= for fractured arm.

39. It is noted that the decisions cited by counsel are almost ten years old. I am also keenly aware of the position stated in the case of **BUTT versus KHAN [1981] KLR 389** which stated that

> ***"...An appellate court will not disturb 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 aspect, and so arrived at a figure which was inordinately high or low..."***

Taking into account the rate of inflation, the dwindling value of the Kenya Shillings and of course the injuries involved. I think an award Kshs. 200,000/- reduced by the 30% contribution already visited on the Third Party is reasonable and not inordinately high. The upshot is that the appeal fails and is dismissed

The appellant shall bear costs of the appeal.

DATED, SIGNED and DELIVERED at MIGORI this 11th day of November, 2016

H. A. OMONDI

JUDGE