REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 91 OF 2010

MOI UNIVERSITY STAFF BENEVOLENT FUND …… APPELLANT

VERSUS

JOHN KEYA ……..... RESPONDENT

(An Appeal from the Judgment and decree of the Principle Magistrate Honourable G. A. M'MASI (SRM), in Eldoret CMCC No. 807 of 2006, dated and delivered on 24.08.2010)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree of the Chief Magistrate's court at Eldoret dated 4th May, 2010. The appellant was the defendant in the suit in the lower court while the respondent was the plaintiff.
2. The respondent had sued the appellant claiming general and special damages for injuries sustained in a road traffic accident whose occurrence he blamed on the negligence of the appellant's driver, agent and or servant in the manner in which he drove, managed or controlled motor vehicle registration No. KAS 027P.

   In the particulars of negligence pleaded in paragraph 5 of the plaint dated 3rd May 2006, the respondent claimed that the appellant's driver negligently caused the accident by driving at a very high speed in the circumstances; drove without proper care and attention; drove a defective motor vehicle and in a zigzag manner; failed to adhere to traffic rules and regulations; failed to keep a proper look out or have due regard for other road users especially cyclists; failed to slow down, brake, stop, swerve or in any other way avoid the accident; caused the motor vehicle to veer off the road and violently hit the plaintiff.

3. It was the respondent case that as a result of the said accident, he sustained the following injuries;

   (a) Blunt head injury which caused brain concussion.

   (b) Compound fracture on the left femur

   (c) Compound fracture of the right tibia

   (d) Blunt chest injury

   (e) Multiple cuts on the face

   (f) Blunt injury on the right knee joint.

4. In its statement of defence dated 11th October, 2006, the appellant denied the respondent's claim in its entirety and put him to strict proof thereof.

   In the alternative, the appellant pleaded that if the accident occurred which was denied, it was solely or substantially contributed to by the negligence of the cyclist and the plaintiff (respondent).

5. After a full trial, the learned trial magistrate in her judgment dated 4th May, 2010 entered judgment for the respondent against the appellant on liability at 100% and awarded him general damages in the sum of Kshs. 600,000/- for pain, suffering and loss of amenities and special damages in the sum of Kshs.2,000. The respondent was also awarded costs of the suit and interest from the date of judgment.
6. The appellant was dissatisfied with the lower court's decision. It thus proffered an appeal to the High Court on both liability and quantum of damages. In the memorandum of appeal filed on 3rd June 2010, the appellant raised six grounds which can be condensed into the following four main grounds:-

   (i) That the learned trial magistrate erred in law and fact in finding that the appellant was 100% liable for the accident while as the respondent had not proved his case on a balance of probabilities.

   (ii) That the learned trial magistrate erred in law and in fact by failing to take into account the evidence adduced by the investigating officer and the submissions presented by the appellant.

   (iii) That the learned trial magistrate erred in law and in fact in finding that the Estate of the late *John Gakure* ought to have been joinegithd as a 3rd party.

   (iv) That the learned trial magistrate erred in law and infact by making an award in general damages that was excessive in the circumstances of the case.

7. The appeal was prosecuted by way of written submissions; those of the appellant were filed on 4th November, 2014 while those of the respondent were filed on 7th July, 2015. The submissions mainly reproduced the evidence tendered before the trial court and advanced the rival positions taken by the parties in the appeal.
8. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. As the first appellate court, I have the duty to re-evaluate and reconsider the evidence presented before the trial court in order to draw my own conclusions bearing in mind that I neither saw nor heard the witnesses.

   See: ***Selle V Associated Motor Boat Company ltd (1968) EA 123; Williamson Diamonds ltd V Brown (1970) EA I.***

9. I have considered the grounds of appeal, the rival submissions filed by the parties, the evidence adduced before the trial court and the judgment of the learned trial magistrate.

   Having done so, I find that from the evidence presented to the lower court, it is common ground that an accident occurred on 27th January, 2005 at about 10 a.m along the Nakuru-Eldoret road involving motor vehicle Registration No. KAS 027P which was owned by the appellant; that the appellant was a pillion passenger on a bicycle whose rider one *Kerefa/Kefa* died after the accident and that the respondent survived but sustained severe injuries. It was also not disputed that the motor vehicle was being driven by DW1 who was employed by the appellant as a driver.

10. What was seriously contested was the claim that the accident in question was occasioned by the negligence of DW1 in the manner in which he was driving the appellant's motor vehicle. After considering the evidence tendered by the parties, the learned trial magistrate made a finding that the respondent having been a pillion passenger could not have contributed to the causation of the

accident and held the appellant 100% liable for the injuries sustained by the respondent.

11. Given the above, it is my finding that this appeal turns on the determination of the question whether the trial magistrate erred in law or fact in holding the appellant 100% liable for the accident and if the answer to this question is in the negative, whether the quantum of damages awarded to the respondent was manifestly excessive or unreasonable given the injuries sustained by the respondent.
12. In his evidence, the respondent who testified as PW1 narrated how the accident in which he was injured occurred. He testified that on the material date, he was a pillion passenger on a bicycle whose cyclist was riding towards Eldoret town; the cyclist had already joined the left lane of the road from a junction before he heard the noise of screeching brakes from behind them. On turning back, he saw a Nissan motor vehicle approaching which was about 30 metres behind them. It was being driven in a zig zag manner. The vehicle hit the bicycle from the rear killing the cyclist instantly. He survived but he lost consciousness on impact. When he regained consciousness, he was admitted at Moi Teaching and Referral Hospital.
13. On his part, DW1 who was the appellant's driver denied that he was to blame for the accident. He claimed that he was driving at a speed of 50KPH towards Eldoret town when a cyclist who had a pillion passenger suddenly joined the main Nakuru –Eldoret road from the Kaptagat junction without ascertaining that it was safe to do so; that at the time there was an oncoming vehicle proceeding towards Nakuru direction and to avoid a head on collision with it, the cyclist immediately joined the left lane which his motor vehicle was on and that though he tried to swerve, stop or otherwise avoid hitting the bicycle, he was unsuccessful as his vehicle was already too close to the bicycle. In his evidence under cross examination, he claimed he was about 10 metres from the Kaptagat junction when the cyclist joined the main road,; that he was at the time driving at a fast speed; that he did not hit the bicycle from the rear but that it was a head on collision as the cyclist turned to face Nakuru direction.

14. DW2 who had been conveyed as a passenger in the appellant's motor vehicle testified that he was at the material time seated at the front passenger seat and that he saw how the accident happened. According to him, the accident happened on the extreme left side of the road as one faces Eldoret direction; that the cyclist had joined the main road and immediately proceeded to the left lane on which the vehicle was being driven.

15. DW3 the police officer who investigated the accident only claimed that in the course of his investigations, he visited the scene, drew a sketch plan and opened an inquest file recommending that the late pedal cyclist be blamed for the accident. He also testified that on his recommendation, an inquest was conducted at the end of which the trial court made a finding that the appellant's driver was to blame for the accident and that he ought to be charged with the offence of causing death by dangerous driving.
16. Having carefully evaluated the evidence on record, I find that it is not disputed that the accident occurred on the left lane of the road as one faces Eldoret direction. The evidence on record shows that the junction the cyclist emerged from was on the right side of the road. That being the case, it is clear that the cyclist had already joined the main road and had proceeded on the left lane (facing Eldoret) before the accident occurred. Infact, according to the respondent, by the time the accident occurred, they had covered about 30 metres from the junction.
17. I am unable to believe the evidence presented by the appellant's witnesses because DW1 and DW2 who claim to have been eye witnesses to the accident gave contradictory accounts of how the accident occurred. DW1 claimed that the cyclist on getting into his lane made an aboutturn and changed direction to face Nakuru direction but DW2 in his evidence only said that the accident occurred because the pedal cyclist joined the main road from a junction when the appellant's motor vehicle was approaching on the same lane. He did not say that he saw the cyclist making an about turn to face Nakuru direction. He did not also mention that there had been a vehicle travelling towards Nakuru direction at the time as alleged by DW1.
18. In addition, I agree with the respondent's counsel's submissions that the claim by DW1 is completely unbelievable because if the cyclist had intended to proceed towards Nakuru direction, he would have simply joined the lane to Nakuru which was on the right lane when one faces

Eldoret direction meaning that since the vehicle was being driven on the left side, the accident would not have occurred.

I also wonder how it would have been practically possible for the cyclist to be on the left lane, make a turn around to face Nakuru direction but still remain on the left lane which is where all the witnesses agreed the collision occurred. It is also in my view ludicrous to claim that the cyclist would have deliberately made such a turn to face an approaching oncoming vehicle which was only a few metres away. For the above reasons, I am not satisfied that DW1 was a credible witness.

19. That said, I wish to point out that DW1 as a driver was supposed to keep a proper look out for other road users and if infact he had been driving at a speed of 50 Kph, he would have been in a position to control his vehicle and avoid hitting the bicycle.

The truth of the matter is that the appellant was driving at a very high speed as he admitted in his evidence under cross examination and this is why despite applying emergency brakes as evidenced by the screeching noise and the presence of skidmarks, he was unable to stop or control the motor vehicle. The impact of the accident illustrated by the instant death of the cyclist and the very severe injuries sustained by respondent is further testimony to the high speed the appellant's vehicle was being driven. I therefore agree with the learned trial magistrate's finding that the appellant's driver was to blame for the accident for driving at a high speed without keeping a proper look out for other road users and thus failed to slow down or stop the vehicle in time to avert the accident.

20. Regarding the complaint that the trial magistrate erred in failing to place any reliance on the evidence of DW3, I wish to observe that though the trial court made reference to DW3's recommendation that the deceased was to blame for the accident, I find that the trial magistrate cannot be

faulted for not relying on the DW3's evidence because the witness did not lay any foundation for his aforesaid recommendation other than apparently relying on the accounts given by DW1 and DW3. He claimed to have drawn a sketch plan of the scene but he did not produce it in evidence to show the exact position of the motor vehicle after the accident, the bicycle and the accident victims juxtaposing them with the location of the junction in question.

21. On my part, I do not give any weight to DW3's evidence considering that it was admitted by all the witnesses including DW1 that DW3's opinion that the cyclist was to blame for the accident was overturned by a court of competent jurisdiction which after conducting an inquest determined that DW1 negligently caused the accident and ought to be charged with the offence of causing death by dangerous driving. From the evidence on record, it is apparent that DW1 was acquitted of the charges on technical grounds.
22. Finally, I with respect do not find any substance in the appellant's complaint that the trial magistrate erred in finding that the Estate of the late *John Gakure* ought to have been joined as a third party. The record does not show that the trial court made any such finding. The court made what appears to have been an observation in passing that the appellant did not enjoin the deceased's Estate as a 3rd party in the suit but this observation did not form the basics of any finding. It had no bearing on the court's finding on liability.
23. In view of the foregoing, since it had been admitted that DW1 was driving the appellant's motor vehicle in the course of his employment when the accident in which the respondent sustained injuries occurred, there is no doubt in my mind that the appellant being his principal was vicariously liable for his negligent acts.

It is not disputed that the respondent was a pillion passenger who had no control over how the bicycle was being managed. I therefore agree with the learned trial magistrate that he could not have contributed to the causation of the accident.

Consequently, I have come to the same conclusion as the trial magistrate that the appellant was 100% liable for the injuries the respondent sustained in the accident.

24. On quantum, as stated earlier, the record shows that as a result of the accident the respondent suffered multiple severe injuries. According to the pleadings and the medical reports produced by PW2 and PW4 (supposed to be PW3) the respondent sustained the following injuries;

    (i) A Blunt head injury

    (ii) A compound fracture on the left femur

    (iii) A compound fracture on the right tibia

    (iv) A Blunt chest injury

    (V1) Multiple cuts on the face

    (vii) Blunt injury on the right knee joint

    He was admitted at the Moi Teaching & Referral hospital for about 6 months. He was semi-comatose for an undisclosed period of time.

25. It is important to point out at this juncture that an award of damages is at the discretion of the trial court. For this reason, it is trite law that an appellate court should not as a general rule interfere with an award of damages unless the award was either too high or inordinately low as to lead to an inference that it amounted to an erroneous estimate. The court would also interfere with an award of damages if it is satisfied that it was based on wrong legal principles.

    See: ***Kemfo Africa Limited & another V libia & Another (No.2) (1987) KLR 30; Arky Industries Ltd V Amani [1990] KLR 309.***

    In view of the injuries suffered by the respondent, the question that arises for my determination is whether an award of general damages in the sum of Kshs.600,000 can be said to have been excessive or unreasonable as contended by the appellant?

    There is no doubt that the injuries sustained by the respondent were severe and life threatening. He lost consciousness after the accident and was hospitalized for treatment for slightly over six months. According to PW2's prognosis, the injuries would last for a lifetime and the respondent required specialized treatment for 5 years.

26. After considering the proposals made by each party on appropriate quantum of damages and authorities cited in support, the learned trial magistrate found Kshs. 600,000 to be adequate compensation for the respondent's pain, suffering and loss of amenities.

    Given the severe nature of the injuries sustained by the respondent which he may have to contend with for the remainder of his life, it cannot validly be said that the said award was excessive or unreasonable.

    I cannot also say that the award was either manifestly high or too low or that it was based on wrong legal principles. The award was in my view quite modest but since it was not based on wrong legal principles, I have no reason to interfere with it since I cannot substitute my discretion for that of the trial court. From the record, I am also satisfied that special damages of Ksh 2,000 were strictly pleaded and proved as required by the law.

27. For all the foregoing reasons, I find no merit in this appeal. I uphold the lower court's judgment. Consequently, i accordingly dismiss the appeal in its entirety. The appellant shall bear the

respondent’s costs both in the lower court and in this appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 8th Day of October, 2015

In the presence of:

Lesinge court clerk

No appearance for the Appellant

No appearance for the Respondent