REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 73 OF 2012

JUSTUS THAIRU..... APPELLANT

VERSUS

1. STEPHEN MWANGI KARANJA .....1ST RESPONDENT

2. JOHN KAMANGA & ANOTHER.....2ND RESPONDENT

(Being an Appeal from the Judgment/Decree of Honourables E. Bale, Principal Magistrate, Naivasha on 7th March 2012 Naivasha CMCC 906 of 2009)

JUDGMENT

1. The appellant herein Justus Thairu was the 1st Defendant in the lower court suit and the registered and or beneficial owner and driver of motor vehicle Registration Number **KAD 242X,** a **Tata Lorry.** The 1st Respondent Stephen Mwangi Karanja was a passenger in Motor vehicle Registration **KAS 302 A**, a Toyota *matatu* and the plaintiff, while the 2nd Respondent was the owner of the said Toyota *matatu*, and 2nd defendant.

2. On the 4th September 2009, an accident occurred involving the two vehicles along the Naivasha -Nairobi road whereof the 1st Respondent was injured. He sued both owners of the two vehicles for negligence and for compensation in general and special damages. The 1st defendant, now the appellant defended the suit but the 2nd Respondent neither filed a Memorandum of appearance nor a statement of defence. Interlocutory judgment was entered against the 2nd defendant, now the 2nd Respondent in default.

After the trial, the court found in favour of the 1st Respondent, apportioned – liability at 90% against the appellant and 10% against the 2nd respondent. A sum of Kshs.300,0000/= was awarded to the 1st Respondent in general damages and Kshs.3,200/= in special damages on the 7th March 2012.

3. The appeal hereof is against the findings on liability and *quantum* of damages.

Nine grounds of appeal are preferred. They however may be summarised into two, thus on liability and *quantum* of damages. The appellant urges this court to set aside and/or reverse the trial courts finding on liability and specifically on the apportionment of liability and reduce the sum of Kshs.300,000/= awarded as general damages as it is said to be inordinately high and unjustifiable relates of the injuries sustained by the 1st Respondent.

The appeal is opposed by the Respondents, and all parties have filed written submission in support of their rival positions.

4. **The Appellants Case And Submissions On Liability**

The appellant takes issue with the trial magistrate's findings that the 2nd Respondent who never defended the case was held liable to the extent of only 10%. It is submitted that the trial court In arriving at the above, it ignored to apply the provisions of **Order 10 Rule l6 of the Civil Procedure Rules** and the unrebutted evidence against the 2nd Respondent and thus arrived at a wrong finding favouring the 2nd Respondent.

It is further submitted that the evidence on record as tendered by the 1st Respondent (then plaintiff) and the police officer (PW2) was inadequate and could not support the findings of the trial court.

It is submitted that the 1st Respondent was under a duty to prove that the appellant owed a duty of care to him and that he breached the said duty and as a result of the breach, he suffered injury. Under cross examination, the plaintiff stated that he sued both owners the vehicles and he blamed both of them. The police officer stated that she could not tell where the point of impact was, whether or not in the middle of the road or not, and that the appellants, testimony was unchallenged by the 2nd respondent. The appellant stated that the 1st Respondent failed to prove breach of duty of care by failing to state what speed the vehicle he was in was moving at nor give an estimate of the speed of the other vehicle and on that submission the case ought to have failed as he did not discharge the burden of proving negligence against the appellant.

5. The appellant faults the trial courts holding that ordinarily when two vehicles collide, they are equally to blame unless otherwise shown and then moved to find the appellant 90% to blame. It is his submission that the finding on liability was not supported by sound evidence and that the trial court considered evidence by the 1st Respondent only and thus erred both in law and fact.

Several authorities were tendered in support of the above submissions. These are **Channan Agricultural Contractors Limited -vs- Fred Barasa Mutayi (2013)** KLR, **South Nyanza Sugar Co. Ltd -vs- Steccy Awoor Lawrence C.A. 151 of 2007 and Simon Muchenu Tako -vs- Gordon Osere (2013) KLR.**

The said authorities are in support of *quantum* of damages and will be addressed below.

6. **The 1st Respondent's case and submissions on liability**

It was submitted for the 1st Respondent (plaintiff in the trial court) that the trial court's finding on liability was proper and was based on evidence as tendered and the legal principles on proof of negligence consists of three essential elements, the duty of care, a breach of that duty, and damages caused by that breach that must have been caused by the defendants. Conduct, which conduct must have been the proximate cause of the damage. Several cases were cited in support of the above principles. **Franciah Njeri Grace -vs- Isaiah Ngarika Mundi and Another (2012)**

KLR and **David Nandwa -vs- Kenya Kazi Ltd (1982-88) I KAR 1178.**

It was submitted that the 1st Respondent in his testimony proved that the appellant as driver of the Lorry was negligent and failed to take a degree of care which was reasonable in the circumstances by moving into the path and lane of the 2nd Respondents motor vehicle thus caused the accident, that the Tata Lorry was to blame as it left its lane and collided with the *matatu* he was travelling in, and that evidence was not rebutted at all by any witness. The police officer (PW2) produced the investigation diary and recommendations by the investigating officer that the driver of the lorry charged for causing death by dangerous driving. He was indeed charged but the case had not been concluded by the time the trial courts case was heard.

7. The 2nd Respondent's case and submissions

The 2nd respondent submitted that the trial court's findings on liability and *quantum* were based on the testimony of the 1st Respondent and the appellant and was well analysed, and corroborated in all material aspects by the police officers investigations, findings and recommendations that:

> ***"the lorry driver left his lane and went to meet the innocent driver of the oncoming matatu."***
>
> ***He then recommended that the driver of the lorry to be charged with the offence of causing death by dangerous driving."***

8. **Analysis of evidence**

This court as the 1st appellate court is mandated to reconsider the evidence as tendered, evaluate itself and draw its own conclusions, bearing in mind that it neither saw nor heard the witnesses. However, the court is not bound to follow the trial court's findings of fact if it appears either that has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the cases generally. See **Selle and Another -vs- Associated Motor Boat Co. Ltd & Another EA 123 Page 126.**

In the case of **Mwanasokoni -vs- Kenya Bus Services Ltd and others (1982-88) I KAR 278** and followed in many other decisions, the Court of Appeal held that a court on appeal will not normally interfere with a Judges finding of fact unless it is based on no evidence, or on a misapprehension of the evidence, or it is shown demonstrably to have acted on the wrong principles in reaching that finding.

9. I have considered the pleadings in the trial court and evidence tendered by all the witnesses and the trial courts judgment.

The 1st Respondent (then plaintiff) in his testimony on cross examination stated that the vehicle he was travelling in, the *matatu* Registration Number KAS 302A was travelling on its correct left lane and was not overtaking and that it was the Tata lorry that left its lane and collided with the *matatu* while on its right lane.

The appellant was the driver of the lorry Registration Number. KAD 242 X testified that the *matatu* was trying to overtake another vehicle but when he applied brakes and hooted, it tried to go back to its lane during which it hit the lorry on its right side on its lane, and that he was charged with a traffic offence and he case was ongoing.

In his judgment, the trial Magistrate in analysing the evidence stated that the sketch plans of the accident scene were not produced for him to determine how far the Appellant had encroached onto the *matatu* lane, and on those reasons stated would hold not find the Appellant wholly to blame. I agree with the trial magistrate's holding that the 1st Respondent having been a passenger could not have contributed to the occurrence of the accident. He found the appellant 90% to blame and placed a 10% blame on the 2nd Respondent.

The evidence on record clearly indicates that the appellant's lorry is the one that left its right lane and moved onto the path of the *matatu* van thus caused the accident.

It is noted that the 2nd respondent, failed to defend the suit and in its place the only witness who shed light on how the accident occurred was the 1st Respondent (Plaintiff). The investigating officer recommended that the Appellant be charged with the traffic offence and indeed he was charged. The courts finds that failure of the investigating officer to produce a Sketch Plan of the accident scene to show the point of impact was not explained. And stated by the trial Magistrate, it would have assisted in determining how far the Appellant's vehicle encroached onto the 2nd Respondent's lane. The trial magistrate based the 10% contributory negligence on the 1st Respondents evidence only. In my view, this was not enough without further corroboration to place a 90% blame on the Appellant's vehicle.

The Appellant submitted that the1st Respondent did not prove that the appellant owed a duty of care to him, and that he breached such duty. The 1st respondent was a passenger in the 2nd respondent's vehicle. He was not in control of the vehicle. The two drivers of the two accident vehicles were under a duty to take reasonable and proper precautions in the use of the vehicles and their failure in different degrees, that caused the accident from which the 1st Respondent suffered damage that gave rise to a cause of action to the 1st Respondent. The court finds that the appellant did not call any corroborative evidence nor did the 1st Respondent, save the police officer who as stated above failed to point out the point of impact.

It is not always the rule as stated by the trial magistrate, that whenever two vehicles collide, there is an assumption that both must be equally to blame as submitted by the appellant. Evidence had, and circumstances leading to the collisions must be considered for a fair percentage of contributory negligence to be arrived at.

10. This court has considered all the evidence and the judgment of the trial court and authorities as tendered.

It is the court's finding that in the absence of evidence by way of sketch plans as to where the two vehicles collided, and that ought to have been determined by production of a sketch plan of the accident scene, and not withstanding the evidence of the 1st Respondent, and absence of evidence by the 2nd Respondent, the 10% contributory negligence placed upon the 2nd Respondent was on the lower side. No evidence was tendered by the 2nd Respondent or the 1st Respondent as to what evasive action the driver of the 2nd Respondents vehicle took to try and avoid the collision. To that extent, this court shall allow the appeal and set aside the trial court's finding on contributory negligence and proceed to apportion the same at 60% against the Appellant and 40% against the

2nd respondent herein.

11. The 1st Respondent was awarded a sum of Kshs.300,000/= in general damages. He had sustained head injury with deep cut on the occipital and left pariel region and soft tissue injuries to the chest, right knee joint, right leg and right upper limb. There is no dispute on the nature and extent of the injuries. The appellant submits that the said sum is inordinately high and being guided by authorities purposes a reduction to Kshs.150,000/=.

The Respondents have urged the court to find the award adequate.

I have considered authorities tendered in support of the trial courts award by the respondents as well as the appellants authorities.

In **Samuel Hure Murge -vs- Moses Kiirui Kamau and Another, HCCC No. 6779 of 1991**, an award of Kshs.450,000/= was granted for cuts on shoulders, loss of consciousness, severe head injuries and hypersonic and respiratory embossment.

In **Samuel Mwangi Kamau -vs- Jospeh M. Kimemia (2004) KLR, the court** awarded the plaintiff Kshs.1,000,000/= for injuries to his left hand dislocation and fractured left leg and a head injury with hospital admission for two months and a permanent disability of 50%.

I have looked at other authorities availed by the respondents. They are irrelevant to the extent of the injuries sustained by the plaintiff's therein -as the injuries are not only different but more serious than what the 1st respondent sustained.

The appellant availed three cases.

Channan Agricultural Contractors Limited -vs- Fred Barasa Mutay – (2013)KLR where the court awarded Kshs.150,000/= for blunt injury to the chest, head and cut wound to the left leg on the 30th October 2013.

In **Peter Ambani Shrindwa -vs- Gordon Osore (2013) KLR** an award of Ksh.120,000/= was granted for injuries to the nose with bleeding, blunt injury to the chest, blunt injury to the right hip, bruise wound and on the right knee – in November 2013 – by three Judges of Appeal.

12. An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. See **Bashir Ahmed Butt -vs- Uwais Ahmed Khan (1982-88) I KAR 5**.

In awarding the 1st Respondent the sum of Kshs.300,000/= for pain and suffering,the trial court considered several authorities as availed by counsel for both parties. The authorities by the 1st respondent involved more serious injuries than sustained by the 1st respondent while those by the appellants involve much less injuries.

The 1st respondent as seen from Dr. Kiamba's medical report are mainly soft tissue injuries that healed well without any permanent disability. I am satisfied that the trial court considered the nature and extent of the injuries and arrived at the award – which based on the authorities availed. It is neither inordinately high or low to warrant this court's interference. It is quite clear that the trial court correctly exercised its discretion based on the medical evidence produced. For those reasons, the award on damages for pain and suffering will all not be interfered with.

13. Having said so, I would allow this appeal on the issue of negligence as stated in grounds 1-6 and set aside the trial courts contributory negligence percentages and substitute the same, to the extent that the Appellant shall bear 60% blame while the 2nd Respondent shall bear 40% contributory negligence.

The award on general damages shall be confirmed at Kshs.300,000/= to the 1st Respondent.

Costs and interest in the lower court and in this appeal shall be borne proportionately by the Appellant and the 2nd respondent.

It is so ordered.

Dated, signed and delivered in open court this 9th day of November 2015

JANET MULWA

JUDGE