



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 20 OF 2010.

JOHN MBUGUA WAWERU ::: PLAINTIFF.

VERSUS

SAMWEL ETABO ASIKE:::DEFENDANT.

J U D G M E N T.

This appeal arises from the decision and judgment of the Resident Magistrate in Kitale CMCC No. 331 of 2007, in which the appellant, **John Mbugua Waweru**, who was the defendant therein was sued by the respondent, **Samwel Etabo Asike**, who was the plaintiff therein for damages arising from a road traffic accident which occurred on the 2nd April, 2007, along the Kitale-Kisawai Road.

It was averred in the plaint that the appellant was at the material time the registered owner of motor vehicle Reg. No. KWZ 055 which was on the material date so negligently driven, managed and/or controlled such that it lost control and hit the respondent who was lawfully cycling along the material road. As a result, the respondent suffered injuries, loss and damage for which he held the appellant responsible and prayed for special and general damages against him together with costs and interest.

The appellant filed a statement of defence in which he denied the material allegations made against him by the respondent and contended that if the accident occurred, then it was wholly occasioned and/or substantially contributed to by the respondent's negligence.

The appellant prayed for the dismissal of the case with costs.

At the trial, the respondent (PW1) testified alongside his three witnesses i.e. a clinical officer, **Chrisantus Masinde (PW2)**, a doctor, Dr. **Samwel Alunda (PW3)**, and a nurse, **David Mulimwa (PW4)**.

The defendant did not testify but called a witness in the person of **William Wanjala Murunga (DW1)**, his employee.

The trial court after considering the evidence adduced by both sides concluded that the appellant was to blame for the accident at a degree of 80% while the respondent took 20% of the blame.

The respondent received an award of Ksh. 150,000/= general damages for pain, suffering and loss of amenities less 20%. He also received special damages in the sum of Ksh. 4,700/=.

Ultimately, judgment was entered for the respondent against the appellant for Ksh. 120,000/= general damages and Ksh. 4,700/= special damages together with costs and interest.

Being dissatisfied with the decision, the appellant filed this appeal on the basis of the grounds contained

in his memorandum of appeal dated 23rd June, 2010.

At the hearing of the appeal, the appellant Was represented by the Learned Counsel, **Mr. Akenga**, while the respondent was represented by learned counsel, **Mr. Aresso**.

Both counsels opted to proceed by way of written submissions. These were filed on 28th May, 2014, by the appellant and on 16th June, 2014, by the respondent.

Having considered the rival submissions in the light of the grounds of appeal, the duty of this court was to re-consider the evidence and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In that regard, this court re-visited the evidence adduced at the trial by all witnesses aforementioned and established that the occurrence of the accident and the ownership of the material vehicle are factors which were not at all or substantially disputed. The basic issue that fell for determination was whether the appellant was responsible for the accident and if so, whether the respondent was entitled to damages and to what extent. With regard to liability, the opinion of this court is that there was evidence from the respondent (PW1) indicating that he was on his correct side of the road when the appellant's vehicle which was on the opposite side left its path and moved towards the path of the respondent and caused a collision between the vehicle and the bicycle. This led to the respondent suffering bodily injuries on his right leg, chest, hands and neck.

However, there was also indication from the appellant's employee (DW1) who was in the vehicle at the time that it was the respondent cyclist who entered their path and knocked their vehicle's side mirror in an attempt to avoid hitting some pedestrians. He (DW1) further indicated that their vehicle was stationary when it was hit by the cyclist.

There was no independent witness to the accident. It was the word of the respondent against that of the appellant's employee (DW1).

Since there was indication that neither the appellant nor the respondent was found to blame for the accident and charged with a traffic offence after police investigations, it followed that both of them had to share the blame in equal proportion i.e. 50:50. The 80% blame given to the appellant against the respondent's 20% at the conclusion of the trial was not justified by the evidence availed in court.

The finding of this court on liability is that both the appellant and the respondent were to blame for the accident in equal measure of 50% each.

The respondent was therefore entitled to damages from the appellant only to extent of the appellant's contribution to the accident.

With regard to the quantum of damages, the medical report by Dr. Alunda dated 27th June, 2007, indicated that the respondent suffered blunt trauma to the chest and bruises on both arms and legs. These injuries could not have been described as serious. They healed without any residential effect.

The award of Ksh. 150,000/= given by the trial court for the injuries was slightly high. This court would reduce and hereby reduces the same to Ksh. 100,000/=.

The special damages of Ksh. 4,700/= were duly established by the production of appropriate documentary evidence.

In the upshot, this appeal is allowed to the extent that the judgment of the trial court is set aside and substituted with judgment for the respondent for the total sum of Ksh. 104,700/= less 50% contributory negligence i.e. Ksh. 52,350/=.

Both parties shall bear own costs of the suit and the appeal.

Ordered accordingly.

[Delivered and signed this 2nd day of July, 2014.]

J.R. KARANJA.

JUDGE.