REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 277 OF 2011

DAVID WANJUHI NJENGA……..…….APPELLANT

VERSUS

LIFESTONE NZUKI MUTUA…….…….....……..RESPONDENT

(Appeal from the original judgment and order in Thika Chief Magistrate's Court, Thika CMCC No. 39 of 2010 delivered on 23rd May, 2011 by Hon. B.A. Ndeda)

JUDGMENT

1. The respondent was on 2nd August, 2009 at around 7:20 p.m. cycling along Thika - Matuu road when he was knocked down by the appellant's motor vehicle registration number KAX 404G Suzuki station. He sustained injuries as a result of the said accident and lodged a claim for damages against the appellant. Judgement was delivered in his favour and liability apportioned at the ration of 70:30 between the appellant and the respondent respectively. He was awarded KShs. 300,000/= as general damages, KShs. 17,300/= as special damages and KShs. 9000/= being the doctor's attendance fee.
2. The appellant being dissatisfied with the aforesaid judgment filed this appeal and put forward the following grounds:

i. ***The learned magistrate erred in fact and in law by finding the appellant negligent to the extent of 70% without there being a basis upon which such a finding could be made.***
ii. ***The learned magistrate erred in fact and in law by finding that the appellant was negligent at all for the accident.***
iii. ***The learned magistrate erred in law and in fact in failing to appreciate that the burden of proof was on the respondent to prove his case on a balance of probability and not the appellant.***
iv. ***The learned magistrate erred in law and in fact in failing to appreciate that the evidence adduced by the appellant was not challenged and/or controverted by evidence from the plaintiff.***
v. ***The learned magistrate erred in law and fact in apportioning liability at 70: 30, against appellant without considering issues for determination before court.***
vi. ***The learned magistrate erred in law and fact in not giving sufficient consideration to the weight of evidence by the appellant.***
vii. ***The learned magistrate erred in law in failing to correctly apply the applicable principle of law in assessing damages payable to the respondent and awarding excessive general damages.***
viii. ***The learned magistrate erred in law and fact by failing to decide whether he is satisfied that the respondent had proved on a balance of probability that the accident was caused by the negligence on the part of the appellant.***
ix. ***The learned magistrate erred in law and fact by failing to consider the evidence and submissions of the appellant.***
x. ***The learned magistrate erred in law and fact by awarding special damages that were neither***

pleaded and/or proved by the respondent.

xi. ***The learned magistrate erred in law and fact in finding that the appellant was negligent because he conceded to occurrence of the accident.***

3. The above grounds can be summarised into two main limbs, namely: liability and quantum.
4. The appellant's main contention is that the trial magistrate erred in law and fact by apportioning liability on the ratio of 70:30 between the appellant and the respondent yet the respondent had failed to prove liability against the appellant on a balance of probability and further that the respondent's own document to wit discharge summary (P. Exhibit 1) in support of his case revealed that he was intoxicated at the time of the accident. The appellant submitted that the burden of proving the driver's negligence was on the respondent. That it was for the respondent to demonstrate that the driver should have anticipated the accident and failed to act reasonably to avoid the accident. On the issue of liability the appellant relied on the cases of ***Livingstone Otundo -v- Naima Mohamoud (a minor suing through her next friend Mohamoud Ali) Nairobi Civil Appeal No. 110 of 1986 and Eastern Produce (K) Limited -v- Christopher Atiado Osiro, High Court Civil Appeal No. 43 of 2001*** These authorities amplify that duty of care should be judged by what a driver should have anticipated.
5. The appellant also took issue with the trial magistrate's finding on quantum and contended that the award of KShs. 300,000/- as general damages was manifestly high. He argued that in awarding general damages, the trial magistrate should have limited himself to the injuries in the respondent's pleadings and considered the gravity or otherwise of the said injuries. The appellant laments that the respondent's injuries were minor and should have been awarded a lesser sum of money.
6. The respondent relied on the case of ***Veronica Kanorio Sabari (Legal Representative of Chabari M'Ngaruni) –v- Chinese Technical Team of Kenya National Sports & 2 Others, HCCC No. 376 of 1989 (Meru)*** and submitted the issue on liability that the burden of proof in civil matters is on a balance of probability as opposed to that of criminal matters where it is beyond reasonable doubt. He relied on the case of ***Boniface Waiti & Another -v- Michael Kariuki Kamau (2007) eKLR*** to urge that the driver should have driven the vehicle prudently to avoid the accident.
7. On the issue of quantum, the respondent submitted that the trial magistrate's finding was justifiable considering the age of the cited authorities and the rate of inflation on the Kenyan Shilling.
8. It is not in dispute that the respondent was knocked down by the appellant's suit motor vehicle and sustained injuries.
9. The respondent testified that he saw the suit motor vehicle being driven in a zigzag manner that it lost control and knocked him.
10. DW1 stated that he was driving up hill when he suddenly noticed the respondent cycling beside him. Upon swerving, he was knocked by the respondent.
11. My analysis of the evidence on record is that if DW1 was truly driving at a speed of between 50 and 60KPH he would have seen the respondent in good time. Further, considering his evidence that the respondent was beside him and there was no evidence as to an oncoming vehicle DW1 was better placed to avoid the accident. On the other hand had the respondent been in a sober state and properly dressed i.e. wore a reflector jacket he would have avoided the accident. In the circumstances I find that both parties should carry responsibility for the accident equally.
12. On quantum, I find the injury to the teeth was not pleaded nor proved. However, considering the nature of the injuries sustained by the respondent an award of KShs. 300,000/= is not excessive bearing in mind the rate of inflation on the Kenyan Shilling and the date of the accident vis a vis the cited authorities. Although the doctor's attendance was not pleaded I must acknowledge that the said was spent and the amount a doctor would charge can never be anticipated. I therefore award KShs. 17,430/= as special damages.
13. In view of the above, I set aside the judgment and substitute it with the following orders:

a. Liability be and is hereby apportioned on the ratio of 50:50 between the appellant and the respondent.
b. General damages of KShs. 300,000/= together with special damages of KShs. 17,430/= is awarded to the respondent less 50%. (i.e. General damages KShs. 150,000/= and special damages

8,715/=).

c. Costs of the case before the trial court awarded to the respondent based on the figure given in (b) above.
d. Each party to meet his own costs on this appeal

Dated, Signed and delivered in open court this 3rd day of November, 2014.

J.K.SERGON

JUDGE

In the presence of:

…… for the Appellant

…… for the Respondent