REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 129 OF 2010

POSTAL CORPORATION OF KENYA .....1ST APPELLANT

BARCLAYS BANK LIMITED ..... 2ND APPELLANT

VERSUS

DICKENS MUNAYI ….....RESPONDENT

(Being an appeal from the Judgment of Hon. G. A. Mmasi (Senior Resident Magistrate) in Eldoret Chief Magistrate's Civil Case No. 418 of 2009 delivered on 17th June, 2010)

JUDGMENT

The Appellants were the 1st and 2nd Defendants in Eldoret Chief Magistrate's Civil Case No. 418 of 2009. The Respondent who was the Plaintiff had sued for general and special damages (Ksh. 5,500/=), costs of the suit and interest thereon.

The trial court found the Appellants 100% liable. General damages of Ksh. 500,000/= and special damages of Ksh. 5,500/= were awarded. The Respondent was also awarded costs of the suits and interests thereon.

The Appellants were dissatisfied with the judgment and preferred this appeal. They raised six grounds of appeal as per the Memorandum of Appeal dated and filed on 13th July, 2010. They are:-

1. That the learned Magistrate erred in law and fact in finding the Appellant 100% liable for the accident against the weight of evidence adduced.

2. That the learned Magistrate erred in law and fact in awarding the Respondent general damages that were excessive in the circumstances.

3. That the learned Magistrate erred in law and fact in failing to find the Respondent 100% liable for the accident.

4. That the learned Magistrate erred in law and fact in failing to find that the Respondent had not proved his case on a balance of probability.

5. That the learned Magistrate erred in fact and law in failing to dismiss the Respondent's suit for want of proof.

6. That the learned Magistrate erred in fact and law by failing to take cognizance of the evidence tendered on behalf of the Appellants during the hearing of the defence case.

The said grounds may be summarized into two, namely;

(a) Whether the trial court erred in finding the Appellants 100% liable.

(b) Whether the quantum of damages awarded was inordinately excessive in the circumstances.

Counsel for the Appellants, M/s. Kalya & Co. Advocates filed written submissions on 22nd April, 2014. They are dated 1st April, 2014. They submitted as follows;

First, that if the trial court had properly analyzed the evidence on record, it would have found both the Plaintiff and the Defendants liable. Court was referred to the case of **HAJI -VS- MARAIR FREIGHT AGENCIES LTD (1984), KLR, 139** in which the Court of Appeal held that where it is proved by evidence that both parties are to blame and there are no means of making distribution between them, the blame can be distributed equally on each. Again in the case of **NDERITU -VS- ROPKOI & ANOTHER (2004) e KLR** the Court of Appeal held that where two motorists failed to exercise the degree of skill and care on the road, they are to be held equally liable for the accident. Also in the case of **QUSSUMAN DHAHIR MOHAMED & ANOTHER -VS- SALURO MOHAMED NAIROBI COURT OF APPEAL, CIVIL APPEAL NO. 30 OF 1997**, it was held that two drivers were equally liable for the accident. Further, in the case of **VALLEY BAKERY LTD & ANOTHER -VS- MATHEW MUSYOKI, NAKURU HIGH COURT CIVIL APPEAL NO. 74 OF 2001**, the court observed that in circumstances where it is not clear on what contribution both parties had made in the accident, both parties should be held equally liable for the accident.

On quantum, counsel submitted that a quantum of Ksh. 500,000/= was excessive in view of the injuries the Plaintiff had sustained. It was submitted that a figure of Ksh. 350,000/= would have sufficed.

Counsel for the Respondent, M/s. Manani, Lilan & Company Advocates submitted that the trial court rightly arrived at a finding that the Appellants were liable at 100%. It was submitted that it is the 2nd Defendant's driver who veered off the road and crossed into the Plaintiff's lane and hit him. That evidence was corroborated by PW3 who saw the accident happen. On the other hand, the driver of the subject motor vehicle who testified as DW1 did not call any witness to corroborate his assertion that it is the Plaintiff who crossed into his lane.

It was further submitted that DW1 was driving at a high speed (45 Km/h) in a built up area. As such, his vision was obstructed. To buttress this assertion, it was submitted that, had he been driving at a low speed, the Plaintiff would not have sustained such serious injuries.

On quantum, it was submitted that the same were reasonable given the injuries the Plaintiff sustained.

This being the first appellate court, its duty is to re-evaluate the evidence and draw its own conclusions but bear in mind that it has neither seen nor heard the witnesses. See **SUMARIA & ANOTHER -VS- ALLIED INDUSTRIAL LIMITED (2007) 2 KLR, PAGE 1-9 AT PAGE 8; JABANE -VS- OLIENJA (1986) KLR 661, AT PAGE 664; PETERS -VS- SUNDAY POST (1958) E.A., 424 (429); SELLER & ANOTHER -VS- ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS (1968) E.A., 123 (126)**

LIABILITY

The Respondent pleaded that on the material date, 18th December, 2006, while being carried as a pillion passenger on a bicycle along Eldoret-Kitale Road, at Huruma junction, the 2nd Defendant's driver drover motor vehicle registration No. KAR 529 L in a negligent manner that it lost control and hit him as a result of which he sustained severe injuries.

The Respondent testified as PW2. He stated that he was riding on his brother's (Maxwel Mbaisi) bicycle and were on the left side of the road facing Webuye. The vehicle was being driven from Webuye towards Eldoret. It overtook another vehicle and in the process pulled to their lane and hit the bicycle. He lost

consciousness and was admitted in hospital for a week.

PW3, Maxwell Mbaisi Munayi testified that he was carrying PW2 on his bicycle. At Huruma junction, there was a Nissan coming from the Kitale junction. Behind it was a Postal Corporation vehicle. The latter overtook the Nissan. As it was overtaking, it pulled to the side they were riding along. Its side mirror hit PW2 and he fell on his forehead. He stated that the vehicle registration number was KAR 529 L. He also stated that they were riding on the left side of the road facing Webuye direction.

PW4, No. 53610 Police Constable Lucy Okumu then in traffic duties, Eldoret confirmed that an accident did in fact occur on 18th December, 2006 involving the Respondent and motor vehicle No. KAR 529 L Toyota Hilux Pick-up belonging to Postal Corporation. She cited the scene to be at the junction of Huruma Estate, Nyathiru area which is a busy spot since there is a bus stop. She testified that the cyclist was riding towards the Huruma Junction. She said that the case was being investigated by PC. Ann. At the time of her testimony, nobody had been charged with a traffic offence and the case was still under investigations.

The defence called one witness (DW1) one Dickens Wamalwa Nyongesa who was the driver of motor vehicle registration No. KAR 529 L. His testimony was that he was driving from Malaba to Eldoret. He was on his left side. At Huruma area, there was a bus stage and it was congested with vehicles (jam). There was an oncoming matatu heading to Bungoma. It stopped on its lane. On his lane, there was another matatu behind the stationary one. At the scene was also a cyclist with a pillion passenger. The cyclist was attempting to overtake the stationary matatu. He braked and bent behind the matatu. The pillion passenger pulled his head to see what was happening ahead. By then the cyclist had pulled to the right side where he (DW1) was. The pillion passenger was then hit by the side mirror of the vehicle.

DW1 blamed the cyclist for pulling to his lane. He also stated that he was not charged with a traffic offence.

In cross examination, DW1 stated that the area was built up. He said that he was driven at a speed of 40-45 Km/hr at the time of the accident and that the road was clear. He stated that that speed was not excessive.

It is factual that the Plaintiff called two witnesses, himself and PW3 who was carrying him on his bicycle. Both witnesses gave similar account of what transpired at the scene.

On the other hand DW1 was the sole witness for the defence. He was also alone in the vehicle at the time of the accident. In this regard, it is hard to expect of him to have called a witness to corroborate his evidence.

My concern is the casual manner in which PW4 presented her evidence. To start with she was not the investigating officer. Then, she failed to present the case file which would have unravelled the nature and measure (extent) of the investigations conducted by the police. All she said was that the case was still pending under investigations and no one had been charged with a traffic offence. These facts were reflected in the police Abstract form (P. Exhibit 7) which the witness produced.

But I graple with the question; why did the police not find it prudent to draw a sketch plan/map of the scene of the accident? Although, the police did not arrive at the scene immediately after the accident, both PW3 and DW1 were available to point out to them how the accident occured at the scene. There were also other onlookers who probably could have shed light to the police on how the accident occurred.

In my view, it is only a sketch plan of the scene that could clearly map out how the accident occurred and particularly where the point of impact was. The lack of this crucial piece of evidence leads me to doubt the entire evidence of PW2 and 3. It also casts benefit to the defence case that probably it could as well be the Respondent who pulled to his lane.

In any case, if really DW1 was to blame for accident, and considering the nature of the injuries PW2

sustained, why did the police not find it prudent to charge DW1 with a traffic offence.

Of worthwhile noting is that PW4 testified on 11th February, 2010 whereas the accident occurred on 18th December, 2006. That is approximately three and a half years down the line. No explanation was given by PW4 as to why the investigations had not been completed thus far, yet the witnesses who were involved in the accident were available.

Furthermore, in her own testimony, PW4 did not clearly articulate how the accident occurred. All she testified was as follows;

> ***"The accident involved motor vehicle KAR 539 R (accurate registration number not given) Toyota Hilux Pick-Up belonging to post office and a pedal cyclist Dicken. It is busy site as it is near a stage. The junction is to Huruma estate, Nyathiru area. The pedal cyclist was cycling towards Huruma junction. He was hit by the vehicle. He sustained serious injuries on the head and left leg."***
>
> ***(emphasis mine).***

From the excerpt, it is apparent that the cyclist was riding to join the junction. This then shutters PW1 and 3's evidence that they were on the main road heading towards Webuye.

On cross-examination again, PW4 stated that the motor vehicle was "*coming from Eldoret headed for Kitale*". This again contradicted DW1 that he was driving towards Eldoret.

With such sharp contradictions, it behoved the Plaintiff to set the record straight in re-examination as to how the accident occurred and which party was on which side of the road.

For the foregoing reasons, I am clear in my mind, that it is difficult to tell the extent to which each party (Respondent and Appellants' driver) contributed to the accident. And as rightly submitted by counsel for the Appellants, when the court is in doubt on the extent of contribution by either party, the most prudent thing to do is to apportion the contribution at a ratio of 50% :50%. I therefore entirely concur with the findings in the cited cases of **HAJI -VS- MARAIR FREIGHT AGENCIES LTD (1984) KLR, 139** in which the Court of Appeal held;

> ***"Where it is proved by evidence that both parties are to blame and there is no means of making a reasonable contribution the blame can be apportioned equally on each ….."***

In the **NDERITU -VS- ROPKOI & ANOTHER** case (Supra) the Court of Appeal at Nyeri observed that the court had been provided with scanty evidence of how the accident had occurred. It arrived at a finding that both the driver of the motor vehicle and the cyclist were to blame by failing to exercise the degree of care and skill expected of them on a public road. It then proceeded to apportion liability at 50:50%.

A similar scenario was presented as in the case of **OSSUMAN DHAHIR MOHAMED & ANOTHER -VS- SALURO MUHAMED** (Supra).

The best comparison fits in the case of **VALLEY BAKERY LTD & ANOTHER -VS- MATHEW MUSYOKI** (Supra) in which the court stated;

> ***"The evidence on record in respect of what actually took place on the material day is thus contradictory and completely at variance with each other. This court will resolve the contradiction apparent in the evidence adduced by the 2nd Appellant and the Respondent by apportioning liability on a 50:50 basis."***

As I have already noted, the evidence of the Plaintiff and defence case was contradicted by PW4. There was also very scanty evidence given by PW4 as to how the accident occurred. The trial court failed to

give regard to these issues and instead found the Appellants to be liable at 100%. This was a misdirection on her part. It is my view that both parties should share the blame equally.

On quantum, the Respondent suffered the following injuries;

- Head injury – became unconscious immediately after the accident.
- Swollen scalp and forehead.
- Cut wound on nose.
- Three (3) cut wounds on upper lip.
- Compound depressed fracture of the skull.
- Swollen, tender and tearing left eye.
- Deep cut wound on right leg with a swollen thigh.
- Loss of two (2) teeth.

The Respondent was also admitted to hospital for a week. By no means, the injuries he sustained were serious.

The court was referred to the following cases by counsel for the Appellant.

1. **ABSOLOM ONGANY ANYILLA -VS- MOUNT ELGON ORCHARDS LTD & ANOTHER (2004) e KLR** in which Ksh. 250,000/= was awarded for severe head injury with concussion for three (3) weeks, right hemi paresism and loss of left incissors.

2. **SILA TIREN & ANOTHER -VS- SIMON OMBATI OMIAMBO (2014) e KLR** in which Ksh. 450,000/= was awarded for head injury, swollen scalp, bleeding from left ear and left nostril and a fracture of the left temporal bone with mastoid involvement.

Counsel for the Appellant then urged the court to find an award of Ksh. 350,000/= as reasonable compensation for pain, suffering and loss of amenities.

Counsel for the Respondent on the other hand submitted that the award of Ksh. 500,000/= was adequate compensation. The court was not referred to any case law.

Assessment of damages is discretionary on the trial court. An appellate court will not disturb the award given unless the same is inordinately too low or high that it must be erroneous. An appellate court will also not disturb the award unless the court failed to take into account relevant factors or considered irrelevant factors when arriving at the figure.

In the instant case, taking into account the nature of the injuries the Respondent sustained and the inflationary trends, I find that the award of Ksh. 500,000/= for general damages made was fair and adequate compensation for pain, suffering and loss of amenities. I have no reason of disturbing it.

Special damages of Ksh. 5,500/= were proved and the same shall remain undisturbed.

In the end, I allow this appeal in respect of the finding on liability. I set aside the judgment of the learned trial Magistrate and substitute it with the following award.

(a) Liability is apportioned between the Respondent and the Appellants on 50:50 basis.

(b) General damages of Ksh. 500,000/= are upheld. The Respondent will get 50% less being 250,000/=.

(c) Special damages remain at Ksh. 5,500/=.

(d) Since the Appellants were partially successful in this appeal, they shall get half of the costs of the appeal.

(e) The Respondent shall however get full costs of the suit in the lower court.

(f) Interests on damages are payable from the date of delivery of the trial court Judgment.

It is so ordered.

DATED and **DELIVERED** at **ELDORET** this 11th day of November, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Miss Andisi holding brief for Kalya for the Appellants

Miss Mufutu for the Respondent