



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Appeal 82 of 2008**

**PATRICK KIPTOO .....1<sup>ST</sup> APPELLANT**

**TOPHILL ACADEMY .....2<sup>ND</sup> APPELLANT**

**AND**

**JOHN EWOI .....RESPONDENT**

***[Being an appeal from the judgment of the Senior Resident Magistrate, Hon. G.A. Mmasi, dated 22nd July, 2008, at Eldoret Chief Magistrate's Court in CMCC No. 541 of 2004].***

**JUDGMENT**

This appeal is by **Patrick Kiptoo** and **Top Hill Academy**, the Defendants in the original action, from the judgment and decree of the Senior Resident Magistrate, (**G.A. Mmasi**) in Eldoret Chief Magistrate's Court Civil Case Number 541 of 2004. (**John Ewoi =vrs= Patrick Kiptoo and Top Hill Academy**). In that action, the respondent, **John Ewoi** pleaded, *inter alia*, that the 1<sup>st</sup> defendant's driver, agent, employee, and or servant drove vehicle registration number KAK 891 P, so carelessly and recklessly that it lost control and knocked him down thus, occasioning him serious injuries.

In the particulars of negligence, the respondent stated that the said vehicle was driven carelessly and recklessly. It was driven at an excessive speed; without due regard to the nature of the road; that the driver failed to stop, swerve, slow down and/or in any other way to act so as to avoid the accident; that the driver failed to take, any measures to establish the vehicle's road worthiness; that he failed to heed the presence of other road users including the respondent; that he permitted and or caused the said vehicle to knock down the respondent and that he drove the said vehicle without considering the safety of the respondent. The respondent also pleaded the doctrine of *res ipsa loquitur*.

In the particulars of injuries, the respondent stated that he had a bruised and swollen forehead, tender neck, chest and spinal column; tender and swollen upper arm; swollen and tender left hip and left thigh and tender and swollen tender toe.

The appellants denied the respondent's claim, particularly the negligence and the injuries alleged. Without prejudice, the appellant pleaded, *inter alia*, that the respondent was wholly to blame for negligence if the accident indeed occurred. In the particulars of negligence, they stated, *inter alia*, that the respondent emerged and entered into the main road carelessly and recklessly; that he caused the accident by his negligent, careless and reckless cycling into the main road on the wrong lane; failing to ensure the road was clear before entering it; causing the accident by hitting and damaging the said vehicle on the left side; failing to control, brake or stop the bicycle; failing to apply emergency brakes, failing to see

oncoming vehicles and cycling without lights reflectors and other traffic signs.

At the trial, the respondent testified and called **Dr. Samuel Aluda**. (P.W.2) and P.C. **William Keitanny** (P.W.3). The respondent stated that on the material date, as he was riding his bicycle to Eldoret from Moiben, he was hit by the appellant's vehicle at Chepkanga area. He pleaded that the driver of the said vehicle hit him as he overtook other vehicles. He sustained injuries and the same vehicle took him to Moi Teaching and Referral Hospital where he was treated and discharged the same day. He blamed the driver of the said vehicle for the accident.

**Dr. S. Aluda** told the trial court that the respondent had blunt trauma on the neck, chest and spinal column; his right upper hand was swollen and tender with bruises; the left hip and thigh were swollen and tender and had bruises; the left knee was also swollen tender and had bruises and so was the right small toe. He produced a medical report of those injuries.

P.C. **William Keitany** of Eldoret Police Station testified that he investigated the traffic case and issued a police abstract to the respondent. In his view, as the said vehicle was being driven on the main road from Iten to Eldoret, a pedal Cyclist emerged from a feeder road on the left and rammed into the said vehicle on its left side.

The 1<sup>st</sup> appellant (D.W.1) testified at the trial and so did one **William Kiptoo Chemweno** (D.W.2). The 1<sup>st</sup> appellant stated that he drove the said vehicle on the said road on the material date when, at 8.30 p.m., at Chepkanga area, a cyclist emerged from the left side abruptly and hit the said vehicle on its left side. The cyclist fell on the left side on the grass verge. He further told the court that he was on his correct lane when the cyclist hit the vehicle. He stopped the vehicle and took the cyclist to Moi Teaching and Referral Hospital and after treatment, paid for his transport home. He blamed the cyclist for the accident as, according to him, he had no head lamps or reflectors and was not careful.

The Learned Trial Magistrate held that the respondent had proved his case against the appellants whom he held 100% liable and awarded to the respondent Kshs 300,000/= general damages for pain and suffering and Kshs 2,000/= as special damages. The appellant was not satisfied and has appealed to this court on some 16 grounds. The main issues raised in the appeal are:-

- 1). That the learned trial magistrate's findings were not in accordance with the evidence;
- 2). That their defence and evidence were not considered by the trial magistrate;
- 3). That the respondent was to blame for the accident and the trial magistrate should have so found.

This being a first appeal, I am duty bound to reconsider and re-evaluate the evidence which was adduced before the trial court and draw my own conclusion. In doing so, I should bear in mind that I did not have the advantage of the trial court of seeing and hearing the witnesses testify and should give allowance for that. (See **Selle and Another =vrs= Associated Motor Boat Co. Ltd [1968] E.A. 123.**)

The Court should also be slow to disturb findings of fact of the trial court (See **Peter =vrs= Sunday Post Limited [1958] E.A. 424**). I must therefore examine with care whether the findings of fact by the Learned Trial Magistrate were not based on the evidence adduced before her or whether there was misapprehension of the evidence or that the Learned Trial Magistrate acted on wrong principles in arriving at those findings of fact.

On the issue of the ownership of the suit motor vehicle, the following evidence was adduced before the trial court. As at the time of the accident, 10<sup>th</sup> April, 2004, the vehicle was registered in the name of one **Richard K. Kipkalya**. **William Kiptoo Chemweno** (D.W.2), however testified that he bought the said vehicle on 21<sup>st</sup> January, 2003. He produced an agreement to buttress that evidence. So, notwithstanding that the said vehicle was registered in the name of **Richard K. Kipkalya**, it, in reality, as at the time of the accident, belonged to D.W.2. The latter subsequently transferred the vehicle to an entity called

**Chemweno Top Hill Academy** on 18th August, 2004.

The evidence, which was accepted by the trial court therefore demonstrated, on a balance of probability, that the said vehicle did not belong to the 2<sup>nd</sup> appellant as at the time of the accident. It is also not clear from the evidence whether the 2<sup>nd</sup> appellant is a legal entity capable of being sued. At page 121 of this record of appeal, there is a Certificate of Registration in the name of **Chemweno Top Hill Academy** which certificate was issued on 21<sup>st</sup> August, 2001. It is evident that that is the style D.W.2 uses for his business. It is just a business name used by D.W.2. The respondent did not demonstrate the nexus between the 2<sup>nd</sup> appellant and the said vehicle and therefore the accident. Without the nexus, the suit against the 2<sup>nd</sup> appellant was not competent and should have been struck out. The appeal by the 2<sup>nd</sup> appellant must therefore succeed on that point.

There is however no doubt that **Patrick Kiptoo Suter** and **Patrick Kiptoo** refer to one and the same person, namely the 1<sup>st</sup> appellant. He admitted in his testimony that on the material date he drove the said vehicle and had an accident at 8.30 p.m. . He acknowledged that the vehicle belonged to D.W.2. So, in my judgment, the suit against him was competent.

Did the respondent prove negligence against the 1<sup>st</sup> appellant on a balance of probability? He testified that he was riding his bicycle on the Moiben Eldoret road when, at Chepkanga, he was hit by the said motor vehicle which was overtaking other motor vehicles thereby sustaining the said injuries. He blamed the driver of the said motor vehicle. His own witness, P.C. **William Keitany** (P.W.3), however, sharply contradicted him. The latter blamed the respondent for the accident. He said as follows in examination in chief:-

**“The motor vehicle was heading from Iten from (sic) Eldoret Town. On reaching at the scene, the pedal cyclist emerged from a feeder road on the left side of the road. He emerged from Bore’s farm.”**

And in cross-examination, he stated as follows:-

**“The cyclist was to blame for the accident. The cyclist was to blame as he was on the lane of the motorist. I did not charge the driver because the cyclist is the one to blame. The cyclist went underground ....”**

Given the testimony of P.W.3, it is not easy to appreciate why the learned trial magistrate held the 1<sup>st</sup> appellant 100% liable. In her own words:-

**“The court has observed that from the evidence of P.W.1 and P.W.3, the police officer who visited the scene, the driver of the accident motor vehicle was overtaking while speeding and in the process of overtaking, he knocked the plaintiff who was a pedal cyclist. The Court has observed that the defendants are 100% to blame for causing the accident and occasioning the plaintiff the injuries he sustained.”**

Obviously, the Learned Trial Magistrate, misapprehended the evidence of P.W.3 and therefore arrived at an incorrect conclusion. The Learned Trial Magistrate was in the premises not entitled to find the 1<sup>st</sup> appellant 100% liable for the accident. I will therefore interfere with the Learned Trial Magistrate’s findings on liability.

Given the testimony of P.W.3, in my judgment, liability should have been apportioned at 40%:60% in favour of the 1<sup>st</sup> appellant. I have come to that conclusion because P.W.3 visited the scene the following day and was therefore not an eye witness. Nevertheless, he explained the basis upon which he arrived at his conclusions, one of which was the location of the broken pieces of glass. I have also found the 1<sup>st</sup> appellant to blame because, his own testimony demonstrated that he had the opportunity to avoid the accident when he saw the respondent at a distance of 10-15 metres before colliding with him. He could have applied emergency brakes but he did not. With regard to the respondent, he pleaded

negligence against the appellants and enumerated particulars thereof in his plaint. I have already referred to those particulars in this judgment. At the trial, he testified that the 1<sup>st</sup> appellant knocked him as he overtook other vehicles and was therefore careless in the manner he was driving.

The record however, shows that the particulars of negligence were denied by the 1<sup>st</sup> appellant in his statement of defence. Instead, he blamed the respondent for the accident and enumerated particulars of the respondent's negligence which included the following:-

- Emerging and entering suddenly carelessly and recklessly at night into the left lane of the main road;
- Causing the accident by hitting and damaging the vehicle on the left side on its left lane on the main road;
- Causing the accident by negligence careless and reckless cycling into the main road on the wrong lane and cycling a bicycle with no lights reflectors and without other traffic signs warning or observations that other road users would have used to avoid accidents of such a nature under the circumstances;

The record does not show that the respondent filed any reply. He did not in any other way deny the said averments of the 1<sup>st</sup> appellant. Although his silence may be interpreted as a joinder of issue upon the defence, it would have been prudent for the respondent to traverse the allegations of negligence enumerated against him. The failure to traverse the particulars of negligence in my view weakens the respondent's denial of the same at the trial in his oral evidence. In this regard, it is significant that he did not expressly deny, in his testimony, the 1st appellant's allegations of cycling a bicycle with no lights, reflectors and without other traffic signs, warnings or observations that other road users would have used to avoid the accident. The failure to respond to the 1st appellant's allegations of negligence in a reply and the testimony of the respondent's 2nd witness (D.W.2) in my view buttress my finding that the respondent was more to blame than the respondent for the accident. With regard to quantum, the appellant did not specifically allege that the sum awarded by the learned Trial Magistrate was inordinately high as to represent an entirely erroneous estimate of the damage suffered by the respondent. They did not also allege that the trial Magistrate proceeded on wrong principles or that she mis-apprehended the evidence in some material respect and so arrived at a figure which was inordinately high (see *Kenfrom Africa Limited t/a Meru Express Service, Gathongo Kanini =vrs= A.M. Lubia and Olive Lubia [1982-88] 1 KAR 727*, *Ilango =vrs= Manyoka [1961] E.A. 705*, *Lukenya Ranching & Farming Co-operative Society Limited =vrs= Karototo [1970] E.A 44*, **David Kiplagat & Another =vrs= Peter Okabe Rongo C.A. No. 68 of 2004 – Eldoret (UR)** and **Butt =vrs= Khan C.A No. 40 of 1977 (UR) [1982 – 88] 1 KAR 51**

In the premises, I have no basis upon which I can interfere with the learned Trial Magistrate's assessment of damages.

In the end, I do allow the appeal by the 2<sup>nd</sup> appellant and set aside both the judgment which adjudged the 2<sup>nd</sup> appellant liable to the respondent in negligence and which awarded damages in the respondent's favour. In lieu thereof, I strike out the respondent's claim against the 2nd appellant in its entirety.

The assessment of general damages of Kshs 300,000/= for pain and suffering made by the learned trial magistrate is upheld save that it is subject to the apportionment of liability determined above at 40% and 60% against the 1<sup>st</sup> appellant and the respondent respectively. On that basis, the sum to be paid to the respondent by the 1<sup>st</sup> appellant is Kshs 120,000/=. The special damages of 2,000/= are also apportioned on the same basis and the sum of special damages now payable to the respondent is Kshs 800/=. The net sum payable to the respondent by the 1<sup>st</sup> appellant is Kshs 120,800/=.

Interest on general damages will accrue at court rates from the date of the judgment of the Learned Trial Magistrate while interest on special damages will accrue at the same rate from the date the suit was filed in the subordinate court.

The 1<sup>st</sup> appellant has partly succeeded. I award him 1/3 of the costs of the appeal.

The legal status of the 2<sup>nd</sup> appellant was not ascertained. I therefore make no order as to its costs both in the Lower Court and in this appeal with respect to the 2<sup>nd</sup> appellant.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS**

**6<sup>TH</sup> DAY OF NOVEMBER, 2012.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**

**Mr. Cheptarus** for the appellant and **Ms Nyamwega** for the respondent.

**F. AZANGALALA**

**JUDDGE**

**6/11/2012.**