REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 153 OF 2003

BENSON ATIKA ……..……..……..…….. APPELLANT

VERSUS

MARY NJERI ……..……..… RESPONDENT

(Being an Appeal from the Judgment and decree in Eldoret CMCC. No. 1876 of 1995 (MR. V. W. WANDERA (SRM) delivered on 11th December 2003)

JUDGMENT

This appeal is against the decision of the Senior Resident Magistrate at Eldoret delivered on the 11th December 2003 in **ELDORET CMCC. NO. 1876 OF 1995** in which the appellant, **BENSON ATIKA** had been sued by the respondent, **MARY NJERI** for damages arising from a road traffic accident which occurred on the 2nd March 1995 along the Eldoret-Nakuru road involving the appellant's motor vehicle registration No. KAE 595.

In her pleadings, the respondent contended that on the material date she was walking along the verge of the road at Burnt Forest when the appellant negligently drove is vehicle such that it veered off the road and knocked her down. As a result, the respondent (plaintiff) sustained severe bodily injuries and filed this suit claiming both general and special damages against the appellant (defendant).

The appellant's defence was a denial of ownership of the material vehicle, a denial of the occurrence of the accident and a contention that if the accident occurred, then it was not due to the negligence of the appellant but due to the sole and contributory negligence of the respondent.

The appellant also denied that the respondent suffered any injuries and contended that if the respondent was injured due to negligence on the part his (the appellant's) employee, then the said employee exceeded the scope of his employment and was on a frolic of his own.

The appellant therefore prayed for the dismissal of the respondent's case with costs.

In her testimony, the respondent/plaintiff (PW1) stated that she was walking off the road on the right side of the material road when she was suddenly hit from the rear by the appellant's/defendant's motor vehicle. It was raining at the time and the appellant's vehicle was supposed to be on the left hand side of the road.

The plaintiff said that after being hit, she remained at the scene unconscious but the driver of the vehicle alighted and took her for treatment at Burnt forest. She sustained a fracture on the right leg and pain on the right hand. She was treated at Burnt Forest and at the Uasin Gishu Memorial Hospital and was later examined by **DR. MWAURA (PW3)** who prepared a medical report. The said doctor testified that he examined the plaintiff on the 27th June 1995 and prepared the necessary medical report which he produced in Court. **DR. SAMSON NDEGE (PW4)**, had examined the plaintiff on the 2nd March 1995 at the Moi Teaching and Referral Hospital. He attended her, prepared the prescription for her and compiled her discharge summary.

The plaintiff stated that she reported the accident to Tarakwa Police. A police abstract and a P3 form were then issued to her.

The plaintiff attributed the accident to the defendant saying that the defendant drove his vehicle on the wrong side of the road and hit her.

CPL. RICHARD ROTICH (PW2), was at the material time attached to Tarakwa Police Station. He confirmed that the accident was reported to them on the 4th March 1995. It was reported that the plaintiff had been hit by a vehicle. Later he (PW2) learnt that the driver of the vehicle was the defendant.

Cpl. Rotich filled the necessary police abstract and investigated the accident. He visited the defendant's place of work and was informed by the defendant that he (defendant) had come to terms with the plaintiff. The plaintiff confirmed to Cpl. Rotich that she was negotiating with the defendant.

When he testified before the trial Magistrate, the defendant **(DW1)** stated that on the evening of the 2nd March 1995 he was driving the material motor vehicle from Nairobi to Eldoret. He reached the Burnt forest area at about 6.00 p.m. when it was raining and chilly. He spotted an oncoming public service vehicle (matatu) coming from Eldoret. The two vehicles by-passed each other and after a kilometer and a half way, the defendant noticed the plaintiff lying down on the right side of the road facing Eldoret. She was off the road. He noticed that she was moving and on calling her, she responded. He stopped his vehicle, alighted and approached her. She informed him that she could not walk and requested for assistance to reach Burnt Forest where she would find her two brothers. She could not walk on one leg. He supported her into his vehicle and took her to Burnt Forest Shopping Centre where her brothers were located in a butchery. The brothers requested him to take her for treatment at Eldoret where her husband worked with KCC.

The defendant said that he took the plaintiff and her two brothers to Eldoret and left them at the Uasin Gishu Memorial Hospital. He did not bother to find out what was wrong with the plaintiff's leg and what had happened to it. After three months, he was approached by a man claiming to be the plaintiff's husband. The man claimed for compensation for the plaintiff. He did not understand what was meant as he had assisted the plaintiff on humanitarian grounds. The man left but after some time Cpl. Rotich (PW2) arrived at his (defendant's) office and asked for details of a purported road accident and his (defendant's) particulars.

The defendant learnt that Cpl. Rotich was from Tarakwa Police Station with which he (defendant) had no dealings.

The defendant said that he was alone on the material date and contended that he did not knock down any lady or anybody else on that day. He stated that he could not have failed to report the accident if it had occurred and further contended that the suit against him was malicious and that he had previously not known the plaintiff or her brothers.

The learned trial Magistrate considered all the foregoing evidence by the plaintiff and the defendant and found as a fact that the plaintiff had indeed sustained a fracture of one of the bones at the ankle joint.

With regard to the cause of injury, the learned trial Magistrate had the following to say:-

"It is my view that the plaintiff's evidence was not challenged by the defendant with any vigour at all. Her testimony remained firm and unshaken after cross-examination. The plaintiff testified that she was walking on the right side of the road when the defendant's motor vehicle came from the rear and hit her causing her to fall on the road and sustained injuries in her right leg. The plaintiff did not have any reason to tell lies to this Court. The defendant did not prove to this Court that the plaintiff was malicious in anyway. The defendant told the Court that he went out of his way to assist the plaintiff on humanitarian grounds. He stated that he did not find out from the plaintiff what may have caused the injury. I do not find the defendant sincere at all."

In essence, the learned trial Magistrate found the defendant to have been responsible for the plaintiff's injuries in as much as he hit the plaintiff with his vehicle. Consequently, Judgment was entered in favour of the plaintiff against the defendant for general damages at kshs. 200,000/= and special damages at Kshs. 1,000/=. Costs of the suit and interest were awarded to the plaintiff.

Being dissatisfied with the Judgment of the learned trial Magistrate, the defendant preferred this appeal on the following grounds:-

1. That, the learned trial Magistrate erred in law and fact in holding the appellant liable without any or any sufficient evidence in that regard having been adduced.

2. That, the learned trial Magistrate erred in failing to hold that the appellant's motor vehicle Reg. No. KAE 595 was never involved in a road accident as alleged or at all.

3. That, the learned trial Magistrate erred in law and fact in failing to hold that the respondent's injuries were not consistent with being hit by a motor vehicle.

4. That, the learned trial Magistrate erred in law and fact in arriving at a decision which was evidently against the weight of the evidence on record.

M/S. KHAYO, learned Counsel, submitted on behalf of the appellant that there was no sufficient evidence to find the appellant liable. There was no medical notes from the Burnt Forest Clinic where the respondent was initially treated. The respondent was found on the road by the appellant while unconscious. She did not know the vehicle which hit her. She alleged that some people noted down the registration numbers of the vehicle but none of those was called to testify. There was no report of the accident to the police.

M/s. Khayo, contended that there was no evidence of liability against the appellant and noted that the learned trial Magistrate appreciated that it was hard to resolve the issue since no eye witness testified. With reference to the evidence of the investigating officer (PW2), M/s. Khayo, said that the investigations were carried out two weeks after the accident and that it was indicated that the appellant could not be charged for failure to report an accident since he was negotiating with the respondent yet the respondent did not refer to such negotiations, neither was there confirmation of the same.

As regards the injuries sustained by the respondent, M/s. Khayo submitted that the same were inconsistent with being hit by a motor vehicle and that without the initial treatment notes, it become clear that the respondent did not suffer any injuries on the material date. The appellant could not therefore be held liable in any way.

In response to the appellant's arguments in support of the appeal, the respondent through learned Counsel **MR. OMBOTO**, submitted that the respondent's case was proved on a balance of probabilities. The respondent's evidence showed that the respondent was hit from the rear by a vehicle. The accident was reported to the police and a police abstract was issued. The abstract showed that the appellant was responsible for the accident.

Mr. Omboto, submitted that, even though the appellant alleged to have acted as a good Samaritan, his evidence was analysed by the learned trial Magistrate and disregarded. The learned trial Magistrate found that the appellant was no truthful and that the respondent was injured and also that the accident was caused by the appellant. Mr. Omboto contended that it was proved that the appellant was negligent and that he did not act as a good Samaritan. Further, the appellant's allegation of having been a good Samarian was an afterthought as the medical reports produced herein as well as the produced treatment notes from Burnt Forest Clinic showed that the respondent suffered injuries as a result of a road accident.

The rival submissions have been considered by this Court whose primary duty is to revisit the evidence afresh and form its own conclusion bearing in mind that the trial Court had the advantage of seeing and hearing all the witnesses.

In that regard, the evidence adduced at the trial Court by both the appellant and the respondent has already been reconsidered hereinabove. Having done so, the opinion of this Court is that the occurrence of the accident and the ownership of the material motor vehicles were factors which were not substantially disputed.

The police abstract coupled with the respondent's own testimony established that indeed the accident occurred on the material date and that the respondent suffered injuries as a result. The medical reports by Dr. Mwaura and Dr. Lodhia showed that the injuries were concentrated on the right ankle and had healed without any significant residual effect.

With regard to culpability, it was evident that the respondent was hit from the rear and may not have seen the vehicle approaching. However, she clearly stated that the driver of the vehicle alighted from it and assisted her. She strongly implied that the said driver was the appellant and insisted that she did not frame him. She blamed him for driving on the wrong side of the road and hitting her. She was believed by the learned trial Magistrate who disbelieved the appellant's evidence suggesting that he was a victim of his own good act of assisting the respondent who was found on the road unconscious.

Although the learned trial Magistrate lamented that the matter was difficult to resolve due to the unavailability of eye witness from both sides, he nonetheless found the evidence of the respondent more credible than that of the appellant.

The learned trial Magistrate was in a better position than this Court to make a finding based on credibility. He saw and heard the witnesses. This Court sees no good reason to interfere with his findings on the appellant's culpability and liability.

In **OGOL VS. MURITHI [1985] KLR 359**, it was held by the Court of Appeal that in considering evidence an appeal Court should be mindful of the advantage enjoyed by the trial Judge who saw and heard the witnesses and that the Judge was in a better position to assess the significance of what was said and equally important what was not said. It is trite law that an appellate Court would not interfere with those findings, by the lower court which were based on the credibility of witnesses unless no reasonable tribunal would make such findings or it was shown that there existed errors of law (**See, NATIONWIDE ELECTRIAL INDUSTRIES LTD VS. PRIME CAPITAL AND CREDIT LIMITED CIVIL APPEAL NO. 50 OF 2002 AT NAIROBI (C/A**).
The upshot of all the foregoing observations by this court is that this appeal is devoid of merit on all grounds. It must and is hereby dismissed with costs to the respondent.

J. R. KARANJA
JUDGE

[Delivered and signed this 3rd day of March 2011]
[In the presence of Mr. Khayo for appellant and Mr. Omboto for Respondent]