REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL 2 OF 2007

HAYER BISHAN SINGH & SONS CONSTURCTION….APPELLANT

VERSUS

PAUL ODUOR OGOLA…….……
RESPONEDNT

J U D G E M E N T

The Appellant, Hayer Bishan Singh & sons Ltd, is a limited liability company registered in the Republic of Kenya and owned a motor vehicle Reg. No. KAR 914 Y which was involved in a road traffic accident on the 7th June 2004 while being driven by its driver along the Siaya-Luanda Road.

The vehicle hit and knocked down the Respondent. **Paul Oduor Ogola,** who was at the time riding a bicycle and who suffered bodily injuries as a result.

The Respondent contended that the vehicle was so carelessly and/or negligently driven by the Appellant's such that the accident occurred.

The Respondent therefore filed a suit against the Appellant claiming general damages.

The Appellant filed a statement of defence denying the ownership of the material vehicle, the occurrence of the accident and the allegations of negligence made against itself.

The Appellant contended that if the accident occurred, then it was caused by the negligence and carelessness of the Respondent.

The Appellant therefore prayed for the dismissal of the Respondent's suit.

After the hearing of the matter before the Principal Magistrate at Kisumu, the Appellant was held liable to an extent of 80% while the Respondent shouldered the remaining 20% of the blame.

The learned Principal Magistrate awarded the Respondent general damages in the sum of Kshs. 120,000/= less 20% i.e. Kshs. 96,000/= together with costs of the suit.

Being dissatisfied with the judgement of the learned Principal Magistrate, the Appellant filed this appeal

on the basis of the grounds contained in the memorandum of appeal dated 19th January 2007 drawn by the firm of Andhoga Staussi & Company Advocates.

The grounds are the following:-

(i) The learned trial magistrate erred in law and fact by failing to apportion liability accordingly.

(ii) The learned trial magistrate erred in law and fact by entering judgment for the Respondent against the weight of the evidence.

(iii) The learned trial magistrate erred in law and fact by awarding damages that was not commensurate with the injuries sustained by the plaintiff.

The grounds were argued on behalf of the Appellant by learned counsel, M/S Staussi and were opposed on behalf of the Respondent by learned counsel Mr. Omaya.

This court is obliged as a first appellate court to re-examine and re-evaluate the evidence with a view to making its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses **(see Selle & Another –VS- Associated Motor Boat Co. Ltd & Others [1968] E.A 123 and Ephantus Mwangi & Another –VS-Duncan Mwangi Wambugu [1982-88] 1 KAR 278)**.

In the Ephantus Mwangi case, the Court of Appeal observed that:-

"**A Court of Appeal will not normally interfere with a finding of facts by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding he did".**

Herein, the Respondent's case was based on the evidence of the Respondent **Paul Oduor Ogola (PW 2) and John Aginga Odongo (PW1).**

The Respondent testified that at the material time he was charcoal vendor and on the material date he was heading towards Kisumu along the Luanda-Siaya Road. Ahead of him was John

(PW 1) and opposite the road there was a pick up motor vehicle heading towards Siaya. The vehicle suddenly turned and knocked him down. He suffered injuries on the forehead, left knee, chest and hand and was taken to hospital at Siaya. He produced a treatment card (PEX 5) and a P3 form (PEX 6). He reported the accident at Siaya police station and was given a police abstract (PEX 3). He was later examined by **Dr. Opeya** who compiled a medical report (PEX 7). He blamed the Appellant's driver for the accident since he left his side of the road and knocked him (PW 2) as well as **John (PW 1).**

John (PW 1) testified that he was on the left side of the road riding his bicycle towards the Luanda market when the Appellant's vehicle left its side of the road, veered to his side and knocked him down. He suffered injuries to his head, chest, face, elbow, right forearm and waist.

He was taken to hospital by the same vehicle and admitted to the Siaya District Hospital. He was transferred to New Nyanza General Hospital after three months and remained there for eleven months. He produced the medical notes (PEX 1 a-e), the P3 form (PEX 2) and the police abstract (PEX 3). He was examined by Dr. Opeya who compiled a report (PEX 4).

He said that the Appellant's vehicle was at a high speed when it knocked him and the Respondent down. He blamed the driver for the accident in that the vehicle was driven at a fast speed when it veered off its side and veered to his side.

The Appellant's evidence comprised that which was adduced by its driver **Kaulus Oduor (DW 1),** a doctor **(DW 2)** and a police officer **(DW 3).**

The driver **(DW 1)** testified that he was driving the material motor vehicle heading to Siaya from Kisumu. He had an assignment at Siaya police station at 4.00 am. He reached Owilla trading center at about 5.30 a.m when he spotted a black object coming towards his vehicle from the opposite direction. He was on his left side of the road. The right side of the road had potholes. It was still dark but his vehicle had lights. He applied brakes and swerved to the right side of the road but his vehicle's front indicator light collided with the Respondent whom he took to hospital and who was unconscious but without any physical injuries. He (DW 1) produced a police abstract (D.EX 1).

Dr. Dan Omondi (DW 2) examined a victim of the accident but it is not clear from the available record whom between the Respondent (PW 2) and John (PW 1) was examined.

The only medical report traceable in the file is that compiled by Dr. John C. Opeya (i.e. P.EX 7).

The confusion may be attributable to the fact that this case was consolidated and heard together with another which is a subject of a different appeal.

P.C. Fremene (DW 3) of Siaya police station confirmed that the material accident was reported at the station and was investigated by one P.C. Tarus, he (PW 3) produced the necessary police file.

The learned Principal Magistrate considered the foregoing evidence in its totality and on liability concluded thus:-

"**I have considered the above very carefully in as much as DW 1 admits knocking down the plaintiff.**

I am opined plaintiff was contributory. It was a bit dark and he was riding a bicycle without lights……. I think I should apportion liability at 20%:80% in favour of the plaintiff".

In arguing ground one of the appeal, learned counsel for the appellant, stated that there was evidence showing that the accident occurred in the dark and that it was foggy at the time.

Counsel further said that the police abstract showed that the time was 5.30 a.m. Consequently, the learned trial magistrate in apportioning liability failed to fully appreciate the fact of time.

On the other hand, the learned counsel for the Respondent argued that according to the evidence of PW 1, the accident occurred at 6.30 a.m. when there was already light although it was raining. He said that PW 1 was knocked down while he was on the correct side of the road.

Ground two may be considered alongside ground one and in respect thereof, the Appellant's learned Counsel argued that not only was it erroneous for the Learned Trial Magistrate to opposition liability but also for him to have found that the Appellant's driver (DW1) was at all liable. Counsel argued that the Respondent's case was inconsistent as compared to that of the Appellant. Counsel pointed out that the police record indicated that it was the Respondent's brother rather than the Respondent who was involved in the accident and that there was inconsistency in the evidence of the Respondent and PW1 regarding the presence of other people at the scene of the accident at the material time.

On his part, Counsel for the Respondent argued that the police abstract confirmed the Respondent's involvement in the accident. He further argued that the police record reproduced in the supplementary record of appeals is incomplete and omits certain vital facts.

Having reconsidered the evidence adduced in the trial Court in the light of the grounds of the appeal and the arguments in support and opposition thereto and having regard to the issue of liability, this Court is satisfied that the occurrence of the accident and the Appellant's ownership of the material motor vehicle were undisputed facts.

This Court is also satisfied that the Respondent was a victim of the accident in that he was one of those

who were knocked down and injured by the Appellant's vehicle.

Although the Appellant's driver (DW1) implied that the accident involved only one cyclist, he acknowledged that the Respondent was hit and taken to hospital where he sought treatment even though no physical injury was visible.

The driver also indicated that the Respondent assisted him to take a second victim to hospital. This was a confirmation that the accident involved the Respondent and another. This was also confirmed by the police abstract [P. Ex. 3] and the medical report by Dr. Opeya [P. Ex. 7].

As to culpability, it was obvious that the police investigations (if any) did not reveal anything substantial. The investigating officer did not testify.

P. C. Fremene [DW3] merely produced the police file which was incomplete and unreliable. The police abstract [P. Ex. 3] indicated that the matter was pending under investigations. The evidence that remained for consideration regarding the cause of the accident was that of the Respondent [PW2] and his witness [PW1] as well as that of the Appellant's driver [DW.1].

What comes out of the evidence of the three witnesses is that the accident occurred early in the morning hours while it was still dark. That is why the Appellant's driver (DW1) had his vehicle on full light and that is why the Respondent talked of light from his bicycle. The Respondent's witness [PW1] also talked of lights from his bicycle. Given that the vehicle and the bicycles had their lights switched on at the time, this Court fails to comprehend the Learned trial Magistrate finding that the Respondent was riding a bicycle without lights during hours of darkness. It was this very finding that led the Learned trial Magistrate to conclude that the Respondent was 20% to blame for the accident.

The evidence by the Respondent and his witness [PW1] indicated quite clearly that they were hit and knocked down by the Appellant's vehicle while they were on their correct side of the road. This fact was not substantially disputed. It had the effect of showing that the Appellant's driver was on the wrong side of the road when he hit the Respondent. It was also stated by PW1 that he (driver) was driving at a high speed.

High speed in unfarvourable circumstances coupled with driving a vehicle on the wrong side of the road are both elements of negligence.

Consequently, this Court would hold the Appellant, fully liable for the accident. The finding of the Learned trial Magistrate in apportioning liability and holding the Appellants liable at 80% was against the weight of the evidence and erroneous.

With regard to general damages for pain and suffering, this Court does not consider a sum of KSh.120,000/= to be manifestly excessive in the light of the injuries suffered by the Respondent i.e. blunt injuries to the head, chest and neck, bruises on both arms, laceration on the right knee and left knee and dislocation of the left knee joint [see P. Ex. 7].

In the case of **Kemfro Africa Ltd. t/a Meru Express Vs. A. N. Lubia & Another [1982-88] 1 KAR 777**, the Court of Appeal stated:-

"**The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."**

Apply the foregoing principle, this court finds no reason to interfere with the Learned Principal Mahistrate's assessment of damages in the sum of Kshs.120, 000/=.

In the end result, this appeal fails and is dismissed. However, the finding of the Learned Principle Magistrate on liability is substituted with liability at 100% against the Appellant.

The award of Kshs.120, 000/= general damages together with costs of the suit is confirmed.

The Respondent will have the costs of the appeal .

Ordered accordingly.

[Delivered and Signed at Kisumu this 2nd June 2009]

J. R. KARANJA

JUDGE

JRK/va