IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: NAMBUYE, OKWENGU & KIAGE, JJ.A)

CIVIL APPEAL NO. 142 OF 2012

SAMUEL GRIFFITH KYALO MUTUKU .....APPELLANT

AND

EVANS KERAKA MOKAMBA .....RESPONDENT

*(An appeal from the judgment of the High Court Civil (**Maraga, J**) dated 26th November, 2010*

in

Civil Case No. 98 of 2006

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JUDGMENT OF THE COURT

The Respondent Evans Keraka Mokamba (the respondent) vide a plaint dated the 30th day of May, 2016 filed Nakuru HCCC 98 of 2006 against the appellant Samuel Griffith Kyalo Mutuku (the appellant) averring inter alia that on the 12th day of August, 2003, while he was riding on his motor cycle registration Number KAK 728U along Nakuru – Nairobi road, the appellant so negligently drove his motor vehicle registration number KAG 444P as particularized in the plaint, that he caused the said motor vehicle to collide with the respondents' motor cycle near Pine Breeze Hospital. As a result of the collision the respondent suffered injuries enumerated in the plaint in respect of which the respondent sought both special and general damages as particularized in the plaint.

The appellant resisted the respondent's claims vide a defence dated the 29th day of May, 2016 in which he absolved himself of any blame in the causation of the said accident. Instead, he shifted all the blame on to the respondent as particularized in the said defence, to which the respondent joined issue in a reply to defence dated the 2nd day of June, 2006.

Parties were heard on their merits. The evidence on behalf of the respondent was adduced through himself as PW1; P.C. Simeon Metto (P.C. Metto) as PW2; and William Kweyu (Kweyu) as PW3, while the appellant was the sole witness for the defence.

At the close of the trial the learned trial judge D. K. Maraga (now Chief Justice) evaluated and analyzed the record before him and apportioned liability at 15% as against the respondent and 85% as against the appellant. The learned judge then proceeded to assess the quantum of damages, allowing general damages for pain and suffering at Kshs.2,500,000.00; loss of earning capacity at Kshs. 3,000,000.00; special damages at Kshs.613,160.00. totaling Kshs.6,113,160.00 less 15% contribution leaving the net award at Kshs.5,196,186.00 with costs of the suit and interest at court rates.

The appellant who is aggrieved by the judgment is now before us on a first appeal. He had initially raised seven (7) grounds of appeal but abandoned ground seven (7) leaving six grounds for determination. It is alleged that the learned judge erred both in law and fact:-

1. by finding the appellant 85% liable for the accident subject matter hereof contrary to the evidence on record.

2. by finding the appellant 85% liable on the basis of contradictory evidence.

3. by disregarding the evidence of PW2, the police officer as to the point of impact.

4. by shifting the burden of proof to the appellant contrary to the law of evidence.

5. by failing to consider the evidence of the appellant which was consistent with the evidence of PW2 the police officer.

6. by relying on the evidence of PW3 who was not even present when the police arrived at the scene. Neither did he record any statement with the police.

Learned counsel I.J. Wamaasa for the appellant argued all the six grounds as one. It was his submission that since the respondent contended that the accident was in the right lane as one faces Nairobi from Nakuru direction, while the appellant alleged that it was in the left lane as one faces Nairobi from Nakuru direction, the learned judge needed independent evidence to resolve that controversy. In learned counsel's view, that independent evidence is found in the testimony of PW2 who stated clearly that according to the observations made by the police officer who attended the scene after the accident and on whose behalf PW2 produced the police file as an exhibit that the debris were in the middle of the road, meaning that the point of impact was in the middle of the road, which evidence agreed with the testimony of the appellant that the motor cycle was being driven in the middle of the road and explains why the damage on the appellant's motor vehicle was on the left front tyre and the respondent's injuries concentrated on his left.

Learned counsel also took issue with the learned judge's findings on the point of impact as the learned judge gave no reasons as to why he disagreed with the testimony of PW2. It is his submission that had the appellant been overtaking as had been alleged by the respondent and PW3, then the injuries on the respondent could have been frontal as motor cycles are not usually ridden in the middle of the road but on the sides. Lastly, PW3's evidence should not have been acted upon by the learned judge as PW3 admitted that he was not present when police attended the scene of the accident. Neither did he volunteer any information regarding the said accident to the police. It is also not known how he was traced to give evidence. Learned counsel urged us to find that there is therefore doubt as to whether PW3 saw the appellant's motor vehicle overtaking another vehicle when the accident occurred as he alleged.

To buttress his submissions Mr. Wamaasa cited the case of **Farah versus Lento Agencies [2006]1 KLR 123** for the holding *inter alia* that:-

"where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame."

In response to the appellant's submissions, learned counsel S. K. Mburu for the respondent submitted that the judgment of the learned judge was sound and unassailable because the evidence tendered by the

respondent in support of his case was fully corroborated by the testimonies of both PW2 and PW3; PW3 witnessed the accident; PW2 stated that the police file indicated that there were people who witnessed the accident but were unwilling to come forward to assist the police. The reluctance of such witnesses to assist the police in their investigations into the accident did not bar the respondent from bringing them to testify on his behalf. In his view, PW3 was one such witness. Lastly, that the learned judge gave reasons as to why he apportioned liability in the ratio given.

This is a first appeal from a trial by the High Court. Our obligation as a first appellate court is to reconsider the evidence, evaluate it and make our own conclusion though bearing in mind that we neither saw nor heard the witnesses who testified during the trial and that we should give an allowance for that. Further we are not bound to accept the learned judge's findings of fact where the trial judge has failed to consider particular circumstances or some relevant point in the case. See the case of **Sumaria and Another vs Allied Industries Limited [2007] 2KLR 1** wherein this Court held, *inter alia*, that:

> ***"Being a first appeal the court was obligated to reconsider the evidence, re-evaluate it and make its own conclusion. A Court of Appeal would not normally interfere with a finding of fact by the trial court unless;***
>
> ***(a) it was based on no evidence or***
>
> ***(b) it was based on a misapprehension of the evidence or***
>
> ***(c) the judge was shown demonstrably to have acted on wrong principle in reaching the finding he did."***

We have given due consideration to the record before us, in the light of the impugned judgment and the rival submissions set out above. In our view, only one issue falls for our determination namely, whether the learned judge fell into error when he apportioned liability at 15% as against the respondent and 85% as against the appellant as opposed to 50% as against either party.

Before arriving at the apportionment of liability in the ratio given, the learned judge reasoned thus:-

> ***"In this case I find that the plaintiff has, to a large extent discharged that burden. I do not believe the defendant's claim that he was in his lane. I have no doubt in mind that he attempted to overtake in the face of the plaintiff's on coming motor cycle and in an effort to avoid colliding with it head-on, he swerved to his extreme right. That explains why the plaintiff hit the left side of his vehicle and the defendant ended up off the road on his extreme right. If he was not overtaking as he wants us to believe, in the face of the plaintiff's on-coming motor cycle, he would have swerved to his left. There is no way he could have swerved to his right if he was not overtaking. I also find that he was in high speed. Having seen the plaintiff's motor cycle between 60 – 100 metres away, if he was not in high speed he could have safely taken evasive action."***
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> ***The plaintiff was, however, also to some extent to blame for the accident. Though he was riding on his side of the road, he did not take any evasive action. That the defendant's vehicle was too close when he noticed it is itself proof that he did not ride with due care and attention. Moreover he also failed to wear a helmet as the traffic regulations require. Had he won one, he may have not suffered head injuries. I do not accept PW2's evidence that the point of impact was in the middle of the road. If that were the case, the defendant's vehicle could not have ended up off the road on the right side as one faces Nairobi.***
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> ***Taking all these factors into account I find the plaintiff 15% and the defendant 85% to blame for the accident.***

We have considered the above reasoning in the light of the record before us and we are in agreement. It is undisputed that the appellant and the respondent were travelling in opposite directions. Both agree that

they were obligated to keep to their left. The respondent's assertion, as corroborated by the testimony of PW3, is that it is the appellant who intruded into his lane by overtaking a vehicle ahead of his (appellant's). The learned judge who was in a better position to gauge the credibility of the witnesses whom he saw and heard testify, believed the version of the respondent and PW3 that the appellant was overtaking another vehicle and that is why he did not swerve to his left. We find this reasoning plausible because had the appellant swerved to his left, he could have crashed into the vehicle he was trying to overtake. We find nothing in the appellant's testimony that offers any explanation as to why he never swerved to his extreme left to avoid the accident. The only plausible reason that could have possibly prevented him from so swerving is that given by the learned judge which we hereby affirm.

The learned judge rightly rejected PW2's testimony as to the location of the point of impact at the scene of the accident because he, PW2, was not the police officer who visited the scene and marked it. PW2 was simply given the police file to tender it in evidence as an exhibit. PW2's impression of the content of the police file could not therefore be employed to oust the testimonies of the appellant, the respondent and PW3 who the learned judge found witnessed the accident. PW2s evidence was rightly rejected by the learned judge. We affirm that rejection.

PW3's evidence was accepted as truthful by the learned judge because it corroborated that of the respondent as to why the accident occurred in the rightful lane of the respondent. There is also nothing in PW3's cross-examination that could suggest that he was a hired witness, as he gave a plausible explanation as to why the police officers never found him at the scene. It was because he had assisted in taking the respondent to hospital, a fact the respondent and the appellant confirmed in their testimonies that the respondent was assisted to hospital before the police visited the scene. PW3 was not challenged on his cross-examination that he met the respondent and willingly accepted to testify on his behalf. There was therefore nothing to suggest that had he been approached by the police to give a statement as to how he witnessed the accident he would not have volunteered one. The learned judge who heard and watched him testify in court believed him as a truthful witness. We have no reasons to doubt the basis for the learned judge forming that impression.

From the above reasoning, the totality of the evidence on the record pointed to the appellant as the party to bear the greatest blame for the accident. Had he not attempted to overtake the vehicle ahead of him when it was not safe for him to do so, he would have kept to his left or alternatively safely swerved to the extreme left to avoid the collision between his vehicle and the respondent's motor cycle. In view of the above assessment, we find nothing to suggest that there was uncertainty as to how the accident occurred. The evidence was crystal clear that it was the appellant who was largely to blame. We therefore find no reason to interfere with the learned Judge's apportionment of liability.

In the result and for the reasons given above, we find no merit in this appeal. The same is dismissed with costs to the respondent.

DELIVERED and DATED at NAKURU this 23rd day of February. 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL