IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJ.A)

CIVIL APPEAL NO. 43 OF 2014

BETWEEN

KEFA OMANYALA INGURA …….... APPELLANT

AND

IBRAHIM OMERIKIT PAPAI ……..…. RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Busia, (Tuiyott, J.) dated 27th May, 2014

in

H.C.C.A. NO. 40 OF 2011)

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JUDGMENT OF THE COURT

1. On 14th September 2008, between 3.00 and 4.00 pm a road traffic accident occurred near Duka Moja along Moding/Kakemer murram road involving motor vehicle registration number KAL 126Y and Kefa Omanyala Ingura. Ibrahim Omerikit Papai was the owner and driver of that vehicle.

2. There after the appellant filed Busia PMCC No. 305 of 2009 and claimed damages for the injuries he suffered in the accident. After hearing the case, the subordinate court apportioned liability at 20/80% against the respondent and awarded Kes.460,000/= to the appellant as general damages. On appeal by the respondent, the High Court, (Tuiyott, J.) reversed that finding on liability holding that the appellant had failed to prove that the accident was due to the negligence of the respondent. On quantum, the learned Judge found that given the injuries the appellant had suffered, the award of Kes.460,000/= was reasonable and that he would not have disturbed it had he upheld the trial court's apportionment on liability. This appeal is against that High Court judgment.

3. From both his memorandum of appeal and his counsel's submissions before us, the appellant's complaint in this appeal is that the learned Judge failed to properly re-evaluate the evidence on record and thereby reached a wrong decision.

4. It is trite law from **Section 72D** as read together with **Section 79** of the Civil Procedure Act that in a second appeal like this one, the jurisdiction of the second appellate court is restricted to consideration of only points of law. Points of law include conclusions reached by the first appellate court upon re-evaluation of the evidence on record.

5. As we have stated, the appellant's complaint in this appeal is that as a result of failure to properly re-evaluate the evidence on record, the first appellate court reached a wrong decision. Our task is therefore to determine whether or not there is any merit in this complaint.

6. Our law reports are replete with decisions of this Court and the High Court, following the predecessor of this Court's decision in **Selle v. Associated Motor Boat Company Ltd, [1968] EA 123,** that a first appeal is like a re-trial. The first appellate court is obliged to exhaustively re-evaluate the evidence on record and reach its own conclusions. In doing so, however, bearing in mind that it did not have the advantage of hearing and seeing the witnesses testify to be able to assess the credibility of their evidence from their demeanor, the appellate court should be slow in reversing the trial court's findings of fact. See **Mwanasokoni v. Kenya Bus Services Ltd, [1985] KLR 931**.

7. The learned Judge of the High Court found that the determinant factor in this matter was the point of impact. That, in our view, is what led the learned Judge astray. There were several other factors. In both his amended plaint and oral testimony before the trial court, the appellant had attributed the cause of the accident to the high speed at which the respondent drove and the fact that the respondent veered to the appellant's side of the road and knocked him down. There was also the issue of whether the appellant was pushing or riding his bicycle. The appellant claimed he was pushing his bicycle as it had had a puncture. The respondent on the other hand claimed that the appellant was riding his bicycle in a zigzag manner.

8. Following the accident, the respondent was arraigned before the Chief Magistrate's Court at Bungoma. Traffic Case No. 1550 of 2008, on a charge of careless driving. He was, however, acquitted of that charge.

9. However, an acquittal in a traffic case does not absolve a party of negligence in a civil suit. See **Michael Herbert Kloss v. David Seroney & Others [2009] eKLR**. Conversely a person convicted of a traffic offence involving negligence can, in subsequent civil proceedings arising from the same accident, plead that another person also contributed to the cause of the accident. See this Court's decision in **Salim & Another v. Kikava [1989] KLR 531**.

10. After carefully reading the record, we agree with counsel for the appellant that the learned Judge reached a wrong conclusion as a result of his failure to properly re-evaluate the evidence on record.

11. Starting with the point of impact, which weighed heavily in the mind of the learned Judge, the police sketch plan of the accident, which was tendered in evidence in the said traffic case, was not produced in the subsequent civil case giving rise to this appeal. As pointed out, the accident occurred on a murram and obviously unmarked road. So when the witnesses talked of the right or left lane, they were, in their own assessment, obviously referring to the right or left part of the road.

12. In his testimony, the appellant stated that due to the high speed at which the respondent was driving, while negotiating the sharp corner at the scene of accident, the respondent veered to the appellant's side of the road and knocked him down. The appellant's witness, Rebecca Chemtai, PW4, corroborated that evidence. While admitting that the accident occurred at a sharp corner, the respondent on the other hand testified that the collision was *"in the middle of the road."*

13. Ada Ekwi Emo, who testified in the traffic case as PW2, supported the respondent's claim that the appellant was riding his bicycle in a zigzag manner. Besides the fact that his evidence cannot be

relied upon in the civil case as the appellant had no opportunity of testing it in cross-examination, he simply said that the collision was *"on the left side of the road."* He did not say whose left side of the road, the appellant's or the respondent's.

14. In his amended defence, the respondent never made mention of the appellant riding his bicycle in a zigzag manner. To the contrary, he actually stated in paragraph 5(f) thereof that the appellant was *"pushing the bicycle across the road without due care and attention."* So the respondent's claim that the appellant was riding in a zigzag manner was clearly an afterthought not supported by his own pleading.

15. On speed, it should be borne in mind that the respondent was taking a very sick child to hospital. The respondent himself said the child was "*unconscious*." That coupled with the fact that the respondent conceded in cross-examination that when he saw the appellant only six metres away, he hooted and braked and his vehicle left visible "*sliding marks*" on the road, it is clear that he was driving at high speed.

16. According to the learned Judge, the point of impact was indeterminate. This was despite the respondent's testimony that it was in the middle of the road. In the circumstances, we find the learned Judge did not adequately consider these other points. We therefore agree with counsel for the appellant that he reached an erroneous conclusion as a result of his failure to exhaustively re-evaluate the evidence on record.

17. Even if the learned Judge did not agree with the learned trial magistrate, on the respondent's own concession that the collision was in the middle of the road, the learned Judge should have held both parties equally liable. But as we have found, the collision was on the appellant's side of the road. Consequently, we allow this appeal, set aside the High Court decision and restore the trial court's judgment. The appellant shall have the costs of this appeal and those of the High Court.

DATED and delivered at Kisumu this 17th day of November, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR