IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, AGANYANYA & VISRAM, JJ.A)

CIVIL APPEAL NO. 168 OF 2007

BETWEEN

FRANCIS MBURU NJOROGE.....APPELLANT

AND

PETER KABIBI KINYANJUI.....1ST RESPONDENT

AFRICA MEDIA LTD.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Nairobi (Osiemo, J) dated 27th June, 2000

in

H. C. C. C. No. 2643 of 1986)

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JUDGMENT OF THE COURT

By a plaint dated and filed in the High Court on 16th July, 1986, and amended on 27th August, 1987, the respondents, ***Peter Kabibi Kinyanjui*** and ***Africa Media Ltd*** (plaintiffs in the High Court) claimed general and special damages for injuries and material damage sustained by the respondents arising out of a motor vehicle accident on the night of 5th and 6th January, 1986.

At about 1.00 am on that night, the first respondent was driving his motor vehicle registration no. KWJ 588, owned by the 2nd respondent, along the main Kikuyu-Ndenderu Road in the direction of Ndenderu when the appellant's motor vehicle registration no. KQZ 288 appeared from a minor road, the Mwimuto/Wangige Road, and collided with the respondents' motor vehicle, extensively damaging the same, and causing severe injuries to the driver, the 1st respondent herein.

The material paragraph in the plaint states as follows:

"5. On or about the night of 5th and 6th January, 1986 at 1.00 am the first Plaintiff was lawfully driving his motor vehicle registration number KWJ 588 owned by the second Plaintiff along the Kikuyu/Ndenderu Road in the direction of Ndenderu when the Defendant suddenly, carelessly and negligently entered into the said Kikuyu/Ndenderu Road from the Mwimuto/Wangige Road and so managed and/or controlled his said motor vehicle registration number KQZ 288 that he caused or permitted the same to violently collide with the second plaintiff's said motor vehicle.

PARTICULARS OF NEGLIGENCE OF THE DEFENDANT

The Defendant was negligent in that he:-

(a) Suddenly joined the major Kikuyu/Ndenderu Road without first ascertaining or ensuring that it was safe so to do.

(b) Failed to maintain any or proper lookout.

(c) Drove too fast for that stretch of the Road.

(d) Drove along the wrong side of the road.

(e) Failed to have or keep any or sufficient or effective control over his said motor vehicle.

(f) Failed to swerve or otherwise manage or control his said motor vehicle so as to avoid colliding with the Plaintiff's vehicle."

In his amended defence dated 15th October, 1987, the defendant denied liability, stating as follows in paragraph 3 of the defence:

"3. The defendant states that the said accident was caused or substantially contributed to by the first plaintiff.

PARTICULARS OF FIRST PLAINTIFF'S NEGLIGENCE

(a) Driving too fast;

(b) Driving on a part of the highway where he had no right to be, to wit, in the middle lane of the three lanes on that part of the Highway where he should not have been.

(c) Failing to notice the defendant's vehicle negotiating a turn into the main road.

(d) Not driving on his (the plaintiff's) correct lane of travel.

(e) Driving on to his (the plaintiff's) wrong side of the road.

(f) Failing to notice or to pay heed to the fact that bigger vehicles turning into Kikuyu Ndenderu Road may occupy a certain portion of the middle box lane.

(g) Failing to have any sufficient or effective control over his motor vehicle.

(h) Failing to swerve or otherwise manage or control his motor vehicle as to avoid the collision."

On 1st December, 1994, the parties recorded a consent order as follows:

"1. Judgment for the first plaintiff against the defendant in the sum of Shs.49,740/= being special damages.

2. Judgment for the second plaintiff against the defendant in the sum of Shs.173,095/= being special damages.

3. Judgment for the defendant against the plaintiff *(sic)* ***jointly and severally in the sum of Shs.49,000/= as special damages.***

4. Suit to proceed to trial on liability and quantum of general damages in respect of the first Plaintiff."

The issues before the High Court were accordingly narrowed down to (1) liability and (2) quantum of damages payable to the 1st respondent. The learned Judge, having heard two witnesses for the respondents, including an eye-witness (James Waweru, PW 3), and one witness from the appellant, concluded, on a balance of probability, that the appellant was substantially negligent in causing the aforesaid accident, and apportioned liability as to 80% against the appellant and 20% against the 1st respondent. He then awarded Kshs.520,000/= less 20% (net Kshs.416,000/=) as general damages for injuries sustained by the 1st respondent.

Aggrieved by that decision, the appellant is before this Court in this second and final appeal. He has presented the following five grounds of appeal:

"1. The Learned trial Judge erred in law and in fact in making a finding on liability at 80% against the Defendant.

2. The Learned trial Judge erred in law and in fact in failing to consider the evidence in the traffic proceedings and the Appeal in respect thereof wherein the Appellant was found to have not caused the suit accident.

3. The Learned trial Judge erred in law and in fact in awarding the Respondent a sum of Kshs.520,000/= as general damages for pain and suffering which figure in any event was highly exhorbitant.

4. The Learned trial Judge wrongly exercised his discretion in arriving at the figure of Kshs.520,00/= as an adequate compensation for pain and suffering in favour of the Respondent as he did not show that he was guided by any authorities.

5. The Learned trial judge erred in law and in fact in failing to make a finding on the Appellant's counter- claim though this was one of the issues for trial and in respect of which substantial and uncontroverted evidence had been adduced."

In his submissions before this Court, Mr. T. T. Tiego, learned counsel for the appellant, essentially complained about the learned Judge's apportionment of liability, arguing that the 1st respondent was largely to blame for the accident – almost upto 80%. He relied on the proceedings and judgment of the High Court in Criminal Appeal No. 1131 of 1986 arising out of the same accident, where the learned Judge (Tanui, J) quashed the conviction of the appellant, and found him not guilty of the charge of driving a motor vehicle without due care and attention contrary to ***section 49 (1)*** of the Traffic Act. With regard to quantum, Mr. Tiego submitted that an award of Kshs.250,000/= was the maximum the first respondent was entitled to given the nature of the injuries sustained by him. Finally, Mr. Tiego argued that the learned Judge had erred in not considering the appellant's counter-claim.

Mr. G. Imende, learned counsel for the respondents, argued, on the other hand, that the issues of special damages having been settled by consent (including the counter-claim), the only issues before the trial court related to liability and quantum of damages payable to the 1st respondent. He defended the learned Judges finding of fact on liability, and the award on quantum, arguing that the injuries sustained were serious. He relied on the cases of ***Charles Ndirangu vs. John W. Ngiri H.C.C.C. No. 1052 of 1989*** and ***Meshack Allan Olang vs. Erick Gowi H.C.C.C. No. 2371 of 1990***.

What is evidently clear in this case is that the 1st respondent was travelling on the main road, and it is the appellant who came from the minor road, attempting to join the main road, when the accident

happened. In dealing with such a situation, the learned trial Judge expressed himself as follows:

"A driver on the main road may be negligent if he did not or could not stop in time in order to avoid an obstacle on his path way but as** (sic) **greater duty of case** (sic) **must lie on the driver of the vehicle coming out on to the main road who should only do so when he would cause no obstruction to the users of the main road. This was stated in the case of Fernandes vs. Noronha [1969] E.A. 506 at page 511."

The learned trial Judge saw and heard the witnesses, and his conclusion is based on an eye-witness account that the appellant failed to stop at the junction before entering on to the main road. His counsel went to considerable lengths to show that there was no "stop" sign at the junction, only a "yield" sign, and that the appellant was justified in entering into the main road when he did so. The trial Judge did not think so, neither do we. A "yield" sign does not entitle anyone to enter into the main road, unless the same is clear and safe for entry. Apportionment of blame is a discretionary matter, and it is not for us to interfere with unless it is clearly wrong, based on no evidence at all or if the wrong principle is applied. This is not the case here. The learned Judge relied on evidence before **his** court, and found for the respondents on a balance of probability. He is not bound by the judgment of proceedings in a criminal trial, where the burden of proof is "beyond reasonable doubt" – completely different from the civil burden of "balance of probability".

With respect to the quantum, given the seriousness of the injuries suffered by the 1st respondent, again we are unable to interfere with the discretion of the learned Judge, as we have not found it to be so disproportionate to what had been awarded in cases cited to him. We are of the view that an award of Kshs.520,000/= (less the 20% contribution) for multiple fractures of the femur, fractured ribs, radius and index fingers was reasonable.

Finally, with regard to the issue of the appellant's counter-claim, we are of the view that this matter was clearly settled by the consent order, and the same was not as issue before the trial Judge.

Accordingly, and for the reasons stated, we are of the view that there is no merit in this appeal, and we dismiss the same with costs to the respondent.

Dated and delivered at Nairobi this 9th day of December, 2011.

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR