



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 31 OF 2019

CLEOPHAS WANJALA WALEKWHWA

(suing through next of friend DORCUS NAMWAYA BARASA)APPELLANT

VERSUS

STEPHEN NYUTU NJENGA.....RESPONDENT

(Appeal from the judgment of the Senior Principal Magistrate's Court at Limuru, Hon. Njalale, SRM dated 1st February, 2019)

JUDGMENT

1. **CLEOPHAS WANJALA WALEKHWHA** (hereinafter **Cleophas**) sued before Senior Principal Magistrate's court at Limuru through his next friend **DORCAS NAMWAYA BARASA**. By that action Cleophas sought general and special damages in respect to an accident that occurred on 9th June, 2014.
2. On that day, Cleophas was travelling as a passenger on motorcycle registration number **KMDD 826A**. Cleophas pleaded before the trial court that the said motorcycle was carelessly driven, managed and/or controlled by **STEPHEN NYUTU NJENGA**, the respondent in this appeal. Particulars of that negligence alleged against the respondent that he was riding the motorcycle at excessive speed, failing to break or steer or manoeuvre the motor cycle, failing to observe the Highway Code and riding carelessly and recklessly.
3. The respondent was served with the summons and plaint and at the request of Cleophas interlocutory default judgment was entered in favour of Cleophas, by the trial court on 2nd October, 2017.
4. The case proceeded before the trial court by way of formal proof. The trial court by its judgment of 1st February, 2019 had the following to say on liability for the accident.

“LIABILITY

From the evidence as was adduced, the plaintiff blames the rider of the m/c. The PAR indicated that the case was still pending under investigations. There was no eye witness to describe how exactly the accident occurred. Nevertheless, the plaintiff was a pillion passenger. It has been claimed that he suffered severe head injury. Was he wearing a helmet? The court cannot tell. No sketch plans were given, evidence adduced states that the case is pending under investigation. I will therefore purely rely on the facts as were adduced before me. The next friend stated that the rider rescued himself causing the plaintiff to suffer full impact. With the evidence as adduced, I deem it fit to award liability at 30%:70% in favour of the plaintiff.”

5. That determination on liability aggrieved Cleophas. He has brought the following ground for consideration in this appeal:-

(a) The learned Magistrate erred in law and in fact in apportioning liability when there was no evidence to support the same.

(b) The learned magistrate erred in law and in fact by formulating and considering extraneous matters in finding apportioning liability.

ANALYSIS

6. The duty of this Court as first appellate court is to proceed with the appeal by way of retrial. That is, this Court is required to reconsider the evidence, evaluate it for itself and draw its own conclusion. See the case **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT**

CO. LIMITED & OTHERS (1968) EA 123.

7. As stated, Cleophas pleaded alleging negligence on the part of the respondent. Particulars of that negligence were itemized in detail in the plaint.

8. The trial court in considering the formal proof engaged in investigation on whether Cleophas was or was not wearing a helmet. The court even went further to fault Cleophas for not providing a sketch plan of the scene of the accident. The trial court should be reminded that, courts do not investigate. The courts determine suits on the issues that flow from the pleadings. In this case, the respondent did not file a defence. In this regard, I wish to refer to the case **JONES V. NATIONAL COAL BOARD (1957) QB 55** where Lord Denning stated:-

“In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens we believe, in some foreign countries.”

9. I dare say that system described in that case is the system we pay homage to.

10. Of concern in this appeal is that trial court exceeded what it was expected to determine after formal proof. This is because judgment on liability was entered when the respondent failed to defend the suit. What the trial was expected to do after receiving evidence at formal proof was to give judgment on quantum. And this, the trial court did, that is it quantified the claim for general damages and awarded special damage but these awards were reduced by what the trial court found was Cleopha's contribution to the negligence. The court, as seen above determined that Cleophas contributed 30% to the negligence.

11. That determination on contribution goes contrary to Order 10 Rule 6 of the Civil Procedure Rules. That Rule is in following terms.

“6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.” (emphasis mine)

12. From the above provision, it is crystal clear that the trial court was called upon to assess damages because liability was determined when interlocutory judgment was entered in favour of Cleophas. It is for the above reason the appeal wholly succeeds.

DISPOSITION

The judgment of this Court is:-

(a) The trial court judgment on liability is hereby set aside and is instead substituted with a holding that **STEPHEN NYUTU NJENGA** was 100% liable for the accident.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 17TH DAY OF FEBRUARY, 2022.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: MOURICE

FOR APPELLANT: MR. NJIRAINI

FOR RESPONDENT: NO APPEARANCE

COURT

JUDGMENT DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE