REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO. 63 OF 2019

CALISTUS JUMA MAKHANU……...……..…..….APPELLANT

VERSUS

MUMIAS SUGAR CO. LTD….……...…….…1ST RESPONDENT

ISAAC SUMBA SHEUNDA……....…….2ND RESPONDENT

(Arising from the judgement and Decree of Hon. G.P Omondi SRM in Bungoma CMCC No. 358/2014 delivered on 3/7/2019)

JUDGEMENT

The appellant (plaintiff in the lower court) was on 8th February, 2014 lawfully riding a Motor Cycle along the Webuye-Malaba Road when he was knocked by the defendants Motor Vehicle at Kanduyi area. He sustained injuries whereupon he sued the defendants jointly and severally for general damages, special damages, costs of the suit and interest.

The defendants (respondents herein) filed their defence and attributed the occurrence of the accident, if any, to the plaintiff/appellant.

The appellant testified as PW1. he stated that he was riding a Motor Cycle along Webuye-Malaba road when he was involved in accident with Motor Vehicle Registration Number KBR 632T which was joining the Kanduyi-Bungoma road. That he sustained injuries. He blamed the driver of KBR 632T for not giving him way.

PW2 was PC Kevin. Stated in cross examination that the Police File was lost. That the matter was referred to insurance and that according to the abstract the rider was to blame.

PW3 was Dr. Kubasu from Webuye County Referral Hospital. He produced the medical which showed the injuries sustained by the appellant.

DW1 Bilali Muse was a passenger on the Motor Vehicle. He stated that the Motor Vehicle was branching off the highway joining the Bungoma road. He did not see the Motor Cycle approach. He was startled by a loud bang on the left rear side.

DW-2 was Corporal jane, she produced the police file. She stated that both the Motor Cycle and Motor Vehicle were inspected and had no previous defects. She stated that the Investigation officer who was already on transfer had recommended that the driver was not to blame. On cross examination, she stated that the Motor vehicle was to give way.

DW 4 the 2nd defendant. He stated that he was the one driving the Motor Vehicle when he was hit by the appellant as he turned to Bungoma town from Kanduyi. That he had indicated and joined from the Highway.

DW5 Tom Lukuru Ojwang who stated that he was seated with DW4 in the front cabin when the accident occurred. He blamed the rider/plaintiff for the accident.

The court delivered its judgement on 3/7/2019 dismissing the appellants suit for failure to proof his case to the required standards.

Aggrieved by the dismissal, the appellant appealed on the following grounds;

1. That the learned trial magistrate erred in law and fact in failing to evaluate the evidence tendered by both the plaintiff and the defence and thereby arriving at a wrong conclusion.

2. The learned trial magistrate erred in law and fact by considering only the evidence of the respondent and his witness and disregarding the plaintiff evidence and his witnesses.

3. The learned trial magistrate erred in law and fact by not applying the principle of res ipsa loquitor and hence arriving at a wrong decision on liability.

4. The trial magistrate erred in law and fact by not considering the standard of prove in civil cases hence arriving at a wrong principle of law.

The appeal was disposed of by way of written submissions and the parties filed their respective submissions for determination by the court.

The appellant submits that its appeal is only on liability alone. He submits that the trial court erred by dismissing his claim on recommendation that the investigating officer recommend that the appellant who was the rider was to be charged.

That the dismissal of his case was erroneous as it was based on the Investigating officer's recommendation. That the judgment was not in tandem with the evidence adduced at trial. The appellant further submits that if the court doesn't find conclusive evidence on who to blame, the court should have apportioned liability.

On ground 1, the respondent submits that the trial court's evaluation of the evidence was fair and reasonable, the plaintiff/appellant did not prove his case on a preponderance of probability and therefore the court cannot be faulted.

As regards ground 2, the respondents submit that it was the duty of the police to charge the rider (appellant). That the failure by the police to charge does not absolve him from blame and does not make him a competent rider noting that he did not at the time of the accident possess a licence or a Certificate of Insurance. That the appellant had no formal training on riding.

On ground 3, it is submitted that the doctrine of *res ipsa loquitor* did not apply in favour of the plaintiff. That the doctrine had not been pleaded and therefore the rule that parties are bound their pleadings came into play. That the appellant's allegation of negligence against the respondents were rebutted.

This appeal is against liability. As a first appellate court, this court is under duty to subject the evidence to a wholly fresh and exhaustive scrutiny and make its own conclusions, while having in mind the fact that it did not have the benefit of seeing and hearing the witnesses testify.

The Court of Appeal for East Africa took the same position in ***Peters v Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:

> ***It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.***

The appeal is limited to the trial courts finding that the appellant had failed to prove his case to the required standards. This court after carefully analyzing the record, the rival submissions tendered by respective counsel is of the view that the issue presenting itself for determination is whether the trial court properly analyzed the evidence before dismissing the appellant's case.

At the center of passionate argument here is whether the investigating officer after having carried out investigations found the appellant solely responsible for causing the accident hence the dismissal of his suit. It is not disputed that the appellant was charged vide Bungoma traffic case No. 1022 of 2014 where he pleaded guilty and was cumulatively fined Kshs 10,000/= for the offences of riding a Motor Cycle without a certificate of insurance and riding a Motor Cycle without Rider's Licence.

The borne of contention is whether the admission of guilt by the appellant in the Traffic case tilt the scales in favour of the respondents in the suit giving rise to this appeal.

The record shows that one when P.C Kevin testified on behalf of the investigating officer who had already been transferred, he said; ***law was that the Motor vehicle was to give way to the rider to pass before joining the route to town***.

The said witness further testified that he could not produce the police file because it was lost. He relied on the Police abstract (Exh 3) and the Occurrence Book Entry produced as Exh 7.

On the respondent's part DW2, a police officer from the same station as PW2 stated that the driver was not to blame. When cross examined, she stated that the Motor vehicle was to give way.

This is a case where 2 expert witnesses cannot agree on one conclusion. The only point of convergence in their testimony is that the Motor Vehicle was to give way. Clearly, the plaintiff's police witness shifted blame to the defendants and vice versa. None of them visited the scene, the Investigating officer was said to have gone on transfer therefore their evidence in the court's opinion was only limited to merely affirming what the investigating officer had recorded in his file.

Both of them were agreeable that the rider/appellant was charged with a traffic offence relating to possession of a rider's licence and insurance. No charges were preferred relating to being reckless and or careless on the road.

This court notes from the driver (DW4's) evidence that he moved the Motor Vehicle from the scene of the accident immediately. He states he used the same Motor Vehicle to ferry the appellant to hospital and left it at the Police Station for inspection to be carried out. It is therefore highly improbable that the sketch plan would be of much help unless a reconstructed scene would have been presented.

In the case of ***Lakhamshi Vs Attorney General,*** *(*1971) E A 118, 120 Spry VP observed as follows;-

> ***"It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents, it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.***

Similarly, in the case of ***Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Anor (2004)eKLR,*** the Court of Appeal, (O'Kubasu Githinji & waki JJ. A) while apportioning liability equally held;

> ***we have considered the submissions of both counsel, the authorities cited before us and we are persuaded by Mr. Mwangi learned counsel for the appellant that we must interfere with the judgment of the superior court. There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50***

This court having analyzed the evidence on record, the rival submissions and having undertaken a fresh scrutiny of the evidence, as required of a first appellate court, the court finds that in the circumstances of the case, it was not possible to come up with a conclusion on who to occasioned the accident. What is however not in dispute is that an accident occurred involving both the appellant and the defendants motor vehicle on a public road. From the evidence on record, it is clear both or one of the parties were negligent leading to the accident. Both did not exercise the due diligence and skill expected when driving/riding on a public road.

In the circumstances, the liability is hereby apportioned at the ratio of 50/50. Special damages of Kshs 11, 960/= awarded in the lower court shall be upheld, the general damages of Kshs 1,300,000/= that could have been awarded is hereby awarded such that the appellant is entitled to Kshs 650,000/= together with interest thereon at court rates from date of judgment in the lower court.

The appeal is therefore allowed to the extent and each party shall bear own costs of the appeal.

DATED at **BUNGOMA** this 26th day of May, 2021.

S.N RIECHI

JUDGE