



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 148 OF 2016

WELLS FARGO LTD.....1ST APPELLANT

DOMINIC MUDAIDA.....2ND APPELLANT

VERSUS

MAXINE BOSIBORI GEKE.....RESPONDENT

(Being an appeal from the Judgment delivered on 15th March, 2016

by Hon. E.K. Osui (PM) Milimani Commercial Courts

in CMCC No. 5782 of 2014)

JUDGMENT

1. The Appellants were sued by the Respondent in the lower court who claimed damages arising out of a road traffic accident involving motor cycle registration No KMCA 762X belonging to the 1st Appellant and the 2nd Respondent being the rider. At the conclusion of the trial judgment was entered for the Respondent for 692,123/= subject to liability of 10% against the Respondent and 90% against the Appellants.

2. The Appellants were dissatisfied with the said judgment in respect of the apportionment of liability and filed the Appeal herein.

3. The Appeal was canvassed by way of written submissions which were also highlighted before me.

4. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

5. During the hearing in the lower court, the Respondent, Maxine Bosibori, testified (PW2) on how the accident occurred. Her evidence was that she was crossing Mombasa road at Imara Daima area when the motor cycle came at a high speed and hit her. She blamed the cyclist for emerging from between motor vehicles that had stopped for pedestrians to cross the road. She further testified that the accident occurred at a place usually used as a crossing point by pedestrians.

6. The Respondent further testified that there was no foot bridge or zebra crossing at the accident scene and therefore no other place to use to cross the road. She denied having been on the phone while crossing and further stated that the cyclist did not hoot.

7. Dominic MUDAIDA the motor cycle rider conceded that the accident happened but blamed it on the Respondent. His evidence was that he

was heading towards Mlolongo while the Respondent was in a group of people who were crossing the road but that the Plaintiff lagged behind while talking on the phone. That he had slowed down and hooted severally and eventually swerved off the road. He further blamed the Respondent for crossing the road at a point where there was no zebra crossing or footbridge.

8. These were the only witnesses at the scene at the material time who testified. The only other evidence from the scene is through the investigations carried out as per the police abstract produced as an exhibit. The police abstract does not blame any of the parties for the accident and reflects the same as "pending under investigations".

9. From the Respondent's evidence, it would appear once the other vehicles using the road stopped for pedestrians to cross, she started crossing with the other pedestrians. It would also appear she did not see the cyclist before it was too late. On the other hand, the cyclist though he was on the road conceded to having seen the Respondent and other pedestrians crossing at about 50 metres away while he was at a speed of about 50-70 KMPH then he applied brakes and slowed down and tried to stop and to avoid hitting them.

10. There is no independent evidence in support of either of the parties who blame each other for the accident. It is however apparent that each of them contributed to the accident. The pedestrian was crossing the road at an area that was not designated and therefore ought to have been more cautious. On the other hand, the cyclist saw the people crossing and with the speed and distance he has given he seems to have had an opportunity to stop in time. I would apportion liability at 70% against the Appellant and 30% against the Respondent.

11. The Respondent was awarded Ksh.450,000/= as general damages, Ksh.150,000/= future medical expenses and Ksh.169,020/= special damages. There was no award for loss of future earning capacity contrary to the submissions made by the Appellants' counsel. The total award comes to Ksh.769,026/= which when subjected to 30% contribution comes to 538,318/=.

12. The upshot is that the Appeal is allowed to that extent. Consequently, the judgment of the lower court is set aside and substituted with a judgment in favour of the Respondent (Plaintiff) for the sum of Ksh.538,318/= interest and costs in the lower court. The Appeal having been partially successful, each party to bear own costs of this Appeal.

Dated, signed and delivered at Nairobi this 29th day of May, 2020

B. THURANIRA JADEN

JUDGE