

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL APPEAL NO. 79 OF 2015

(An appeal arising from the judgment and decree of the Hon. GN Sitati, Resident Magistrate (RM), in Mumias PMCCC No. 332 of 2013 of 25th August 2015)

HAYER BISHAN.....APPELLANT

VERSUS

ROMANO DADY SILARESPONDENT

JUDGMENT

1. The suit at the trial court was initiated by the respondent herein against the appellant, for general and special damages, arising from a motor traffic accident involving a bicycle, on which he was a pillion passenger, and a motor vehicle owned and controlled by the appellant. The appellant entered appearance and filed a defence, in which he denied liability and attributed negligence on the cyclist on whose bicycle the respondent was a passenger.
2. The trial court heard four witnesses from the respondent's side and one from the appellant's side. The respondent stated that the appellant's lorry emerged suddenly from a compound on to the road on which they were traveling, and knocked them down. That account was confirmed by the pedal cyclist. PW3 was a police officer who produced police investigation records that indicated that the lorry knocked the appellant and the rider down. No one was charged, and the matter was marked as pending under investigations. The last witness was Dr. Andai. He stated that the respondent had blunt injuries to his chest and right shoulder. The doctor's opinion was that he sustained moderate soft tissue injuries. DW1 was an employee of the appellant. He was not the driver of the subject lorry but he said that he was at the scene. He said it was the cyclist who rode his bicycle onto the parked lorry. He said the hit its left front tyre.
3. The court was persuaded that the circumstances of the accident were not very clear, although they were clear enough that there was a collision between the two vehicles. However, the court noted that the respondent was not the rider of the bicycle in question, and apportioned liability at 100% against the appellant. The court awarded Kshs. 100, 000.00 general damages. Specials were awarded at Kshs. 5, 000.00.
4. The appellant was aggrieved by the decision and lodged this appeal. He has raised two grounds, on liability and quantum of damages awarded. He pleads that the trial court did not apply the correct principles.
5. It is trite that where there is no concrete evidence to establish who is to blame as between two drivers, both should be held equally liable. See *Isaac Onyango Okumu vs. James Ayere & another* [2019] eKLR, *Michael Hubert Kloss & another vs. David Seroney & 5 others* [2009] eKLR, *Salmin Mbarak Awadhi vs. Emma Nthoki Mutwota* [2017] eKLR, among others. Liability between them should be apportioned on the basis of 50:50.
6. Do those principles apply in the instant case? The respondent herein was not riding the bicycle in question, he was a mere passenger. The issue of liability being apportioned between him and the appellant should not arise. The appellant should have sought to have the cyclist enjoined as a party, if he was to insist on attributing liability on him. I am not persuaded that the trial court fell into any error.
7. On quantum, I note that the appellant did not file any written submissions. All I have are the grounds of appeal. The respondent had sustained soft tissue injuries. The appellant has not urged his case through written submissions, consequently I shall not disturb the trial court's findings on quantum.
8. In the end, I do not find any merit in the appeal before me. I shall accordingly dismiss it, with costs.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF MAY, 2020

W. MUSYOKA

JUDGE