



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 78 OF 2015**

*(An appeal arising from the judgment and decree of the Hon. GN Sitati, Resident Magistrate (RM), in Mumias PMCCC No. 331 of 2013 of 29<sup>th</sup> August 2015)*

**HAYER BISHAN.....APPELLANT**

**VERSUS**

**SAMWEL OPANDA.....RESPONDENT**

**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 bicycle on which he was the rider 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 appellant.

2. The trial court heard three witnesses from the appellant's side and one from the respondent's side. The respondent stated that the appellant's lorry reversed and knocked him down. That account was confirmed by his pillion passenger. PW3 was a police officer who produced police investigation records that indicated that the lorry reversed into the respondent. 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 injuries to his chest, shoulders and right ankle. He was treated as an outpatient. 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 respondent who rode his bicycle onto the parked lorry. He said the appellant hit the left front tyre of the lorry.

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. Liability was apportioned at 50:50. The court awarded two sets of figures for general damages. The body of the judgement refers to Kshs. 100, 000.00, while the final tabulation has a sum of Kshs. 120, 000.00. Specials were awarded at Kshs. 5, 000.00.

4. The appellant was aggrieved by the decision and lodged this appeal. He has raised only one ground, on liability. 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 for a collision of two vehicles, as between two drivers or riders, 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 the principles stated in the above cases apply in the instant case? The respondent cyclist testified that he was riding his bicycle, when the appellant's lorry suddenly reversed and hit his bicycle. That testimony was supported by that of his pillion passenger. The police also testified that they conducted investigations, which appeared to support the respondent's version of the events. The appellant did not call the person who had control of the vehicle on the material day. Instead, he called a person who claimed to have been at the scene. His case was that the respondent rode his bicycle into a stationary lorry. I agree with the trial court. The evidence on what exactly happened is not altogether clear. What is clear is that there was a collision, and the respondent was injured. The principles that I have stated in paragraph 5 above are designed for such facts as the ones that the trial court was faced with. The correct principles were applied.

7. 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 22<sup>ND</sup> DAY OF MAY, 2020**

**W. MUSYOKA**

**JUDGE**