



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 59 OF 2018

SECILINA GATAVI PETER.....APPELLANT

VERSUS

JASPER GITONGA MUGAMBI.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of *Hon. B. M. Kimemia (SPM)* delivered in Runyenjes Civil Suit No. 14 of 2017.
2. By way of background, the appellant instituted suit against the respondent in the lower court seeking special and general damages following injuries she sustained in an accident whose occurrence she blamed on the respondent's negligence.
3. In her plaint filed on 17th February 2017, the appellant pleaded that on 19th August 2016, she was being conveyed as a pillion passenger on motor cycle registration number KMCM 779B (the subject motorcycle) along the Embu-Runyenjes Road when the respondent negligently drove and or managed his motor vehicle registration number KBL 093W permitting it to loose control and to hit the subject motorcycle as a result of which she was thrown on the road and sustained injuries.
4. In his statement of defence filed on 18th March 2017, the respondent admitted occurrence of the accident but denied that he caused it by negligent driving as alleged in the plaint and put the appellant to strict proof thereof. He averred that the accident was caused and/or substantially contributed to by the negligence of the appellant and the rider of the motorcycle she was riding on. The particulars of the appellant's alleged negligence were pleaded in paragraph 5 of the defence but they were denied in the appellant's reply to the defence dated 10th May 2017.
5. The court record shows that on 26th June 2018, following a consent by the parties, the trial court ordered that its determination on liability in Civil Suit No. 14 of 2017 which gave rise to this appeal will be applicable and binding on Runyenjes SPMCC No. 44 of 2017.
6. I have perused the proceedings in SPMCC No. 44 of 2017 which were included in the record of appeal in this appeal. I have noted that in its judgment, the trial court followed the parties' consent entered in Civil Suit No. 14 of 2017 and applied its finding on liability in that case to SPMCC No. 44 of 2017 and then proceeded to assess the quantum of damages payable to the plaintiff in that case. I have also noted that the causes of action in the two cases arose from the same accident. The plaintiff in SMPCC No. 44 of 2017 was the rider of the motorcycle in which the appellant was a pillion passenger when the accident occurred.
7. Turning back to this appeal, the record shows that after a full trial, the trial court rendered its decision on 25th September 2018 and apportioned liability equally between the appellant and the respondent in the ratio of 50:50. The appellant was aggrieved by the trial court's decision on liability hence this appeal.
8. In her memorandum of appeal filed on 25th October 2018, the appellant advanced four grounds of appeal in which she principally complained that the learned trial magistrate erred in law and fact in finding that she contributed to the occurrence of the accident for riding on a motorcycle whose rider did not have a driving licence without considering the circumstances in which the accident occurred.
9. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed.
10. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. The duty of a first appellate court is well settled. It entails revisiting, re-evaluating and considering afresh the evidence presented before the trial court for the appellate court to make its own independent conclusions bearing in mind that unlike the trial court, it did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage. See: *Selle & Another V Associated Motor Boat Company Limited, [1968] EA 123*; *Peters V Sunday Post Limited, [1958] EA 424*.

11. It is trite that though an appellate court has mandate to interfere with findings of fact made by a trial court, this mandate should be exercised cautiously and only when it is clear that the trial court's decision or finding of fact was not based on any evidence or was based on a misrepresentation of the evidence or on wrong legal principles. See: *Sumaria & Another V Allied Industrial Limited, [2007] 2 KLR 1; Makube V Nyamoro, [1983] KLR 403.*

12. I have given due consideration to the grounds of appeal, the evidence adduced before the trial court and the parties' rival written submissions and the authorities cited. Having done so, I find that the only issue arising for my determination in this appeal is whether the learned trial magistrate erred in her finding on liability.

13. In order to resolve this issue, it is important to revisit the evidence that was presented before the trial court. The proceedings of the trial court contained in the supplementary record of appeal shows that in support of her case, the appellant testified as PW1 and called one additional witness, PW2 who was the rider of the motorcycle involved in the accident. The respondent testified as DW1 in support of the defence case.

14. In her evidence, PW1 recalled that on 19th August 2016, she was riding on the subject motorcycle as a pillion passenger along the Embu-Meru Road near Runyenjes Court when a motor vehicle hit the motorcycle from behind. In cross examination, she denied having contributed to the accident in any way.

15. PW2 on his part confirmed that at the time of the accident, PW1 was his pillion passenger. He recalled having seen an oncoming motor vehicle and another one behind him which was being driven in a zigzag manner. He moved off the road but the vehicle behind them followed them off the road and hit his motorcycle causing their fall.

16. Upon cross-examination, he admitted that he did not have a driving licence and his motorcycle did not have any insurance cover. He also admitted that he did not give PW1 either a helmet or a reflector.

17. In countering the appellant's case, the respondent blamed PW2 for the accident claiming that he caused the accident by joining the main road from a feeder road without regard to other road users and thereby hit his vehicle on the left side.

In his evidence on cross-examination, the respondent admitted that as a result of the accident, he was charged and convicted of the offence of careless driving.

18. In making her finding on liability, the learned trial magistrate referred to the provisions of the *High Way Code* and the *Traffic Act* which *inter alia* requires pillion passengers of motorcycles to wear protective helmet and reflective jackets and that motorcycle riders should have a valid driving licence. She also referred to the *Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya* which requires that motorcycles should be insured against third party risks. Upon making those observations, she proceeded to make her finding on liability at page 44 of the record as follows:

“Therefore, with the plaintiff having testified she was had not [sic] worn any reflective jacket and a helmet and with PW2 confirming the same and adding that he was not a holder of a driving licence for he had not attended any driving school and also that his motorcycle was not insured [sic] and further during his cross examination by stating that he had put the plaintiff's life at risk, I therefore, on liability, find the plaintiff to be 50% liable and the defendant 50% liable for she nonetheless had the duty of care to the other road users.”

19. After my independent appraisal of the evidence on record, I agree with the appellant's submissions that the learned trial magistrate misdirected herself in apportioning liability between the appellant and the respondent equally at the ratio of 50:50 having found as a fact that the appellant was a pillion passenger on the subject motorcycle when the accident occurred. Being a pillion passenger, she was not in control of how the motorcycle was being managed or controlled and she could not have contributed in any way to the occurrence of the accident.

20. It is evident from the record that the learned trial magistrate also failed to take into account PW2's evidence that the motorcycle was hit from the rear when it was already off the road by the vehicle which was being driven by the respondent in a zigzag manner.

21. The fact that the appellant had not worn a helmet or a reflective jacket and that PW2 had not taken out mandatory insurance cover for the motorcycle and did not have a driving licence at the material time may be matters that would constitute traffic offences but they had no bearing on causation of the accident in question.

22. Besides, the respondent admitted in cross-examination that as a result of the accident, he was charged and convicted of the offence of careless driving. This admission coupled by the rest of the evidence regarding how the accident occurred leaves no doubt that the respondent was wholly to blame for the accident. The learned trial magistrate therefore erred in apportioning liability on the appellant when the evidence clearly showed that the accident was solely caused by the respondent's carelessness in driving motor vehicle registration number KBL 093W.

23. My foregoing findings lead me to the inevitable conclusion that this appeal is merited and it is hereby allowed. The trial magistrate's finding on liability is consequently set aside. It is substituted with a finding on liability in favour of the appellant against the respondent at 100%.

24. Given that the trial court's finding on liability was adopted in SPMCC No. 44 of 2017 and it has now been set aside by this court, this court's determination on liability shall be applicable to Runyenjes SPMCC No. 44 of 2017.

25. On costs, the law is that as a general rule, costs follow the event but they are at the discretion of the court. The order that best commends

itself to me on costs is that the appellant is awarded costs of the suit in the trial court but each party shall bear his/her own costs of the appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of November 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Kiplagat for the respondent

No appearance for the appellant

Ms Mwinzi: Court Assistant