

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 41 OF 2002

RAPHAEL MUTHIANI.....APPELLANT

VERSUS

PATRICK WAMBUA MUASYARESPONDENT

(This being an appeal against the judgment of the Hon. Ms. G.P. Ngari, District Magistrate II (Professional as they then were) at Thika Chief Magistrate's Court in CMCC No. 202 of 1993 delivered on 8th day of November, 2001)

JUDGMENT

This old appeal was filed way back in the year 2002. It followed a judgment of the lower court delivered on 8th November, 2001 whereby the respondent herein was awarded a sum of Kshs. 70,000/= general damages for injuries sustained as a result of a road traffic accident. The appellant was aggrieved by the said judgment and filed this appeal.

In the record of appeal the appellant complained that the lower court was wrong to have held the appellant 70% to blame against the overwhelming weight of evidence, and for failing to consider the entire evidence on a balance of probabilities. Had the lower court considered the respondent's admission that he is the one who hit the appellant's vehicle with his bicycle, that he had a clear view of the respondent's motor vehicle at all times and therefore had the opportunity to avoid the accident, and that he asked for forgiveness from the appellant and further that the police abstract placed the blame on the respondent, he would have arrived at a different verdict on the issue of contributory negligence and would have held the respondent wholly to blame.

In the alternative, the appellant complained the award of Kshs. 70,000/= by way of general damages was unreasonably high in the circumstances considering *inter alia* the nature and degree of alleged injuries.

As required of me I have considered the evidence adduced in the lower court. In terms of liability there was no doubt that the appellant's motor vehicle was turning to the left when the collision occurred. What this would mean is that the appellant had overtaken the cyclist before the collision took place.

The following is what the lower said in that regard,

“What I gather is that there is no dispute that the defendant herein was negotiating a corner into a feeder road to his home. I also find that the co cyclist was in front of plaintiff and had passed the feeder road. I take it therefore that the defendant should have been on the look out to see the plaintiff. Plaintiff also should have noted the oncoming motor vehicle and once it overtook him then he should have noted its movement. I find that he also contributed to the incident in question. I enter judgment on liability at 70:30 against the plaintiff.”

The analysis of the trial court in that regard appears reasonable. There were two cyclists following one another. One having passed the junction which the appellant was turning into should have alerted him, that is the appellant, that the respondent was following suit and therefore had the duty to slow down to allow the respondent pass the junction before he turned to enter.

What happened is that, the appellant crossed the path of the respondent after overtaking him. The respondent must have seen the appellant turning and therefore had an opportunity to apply brakes and avoid the collision. The police abstract and the OB entry according to P.W. 3 PC. James Mwangi, showed that the collision took place when the appellant was turning to the left. The respondent did not notice the indicators and both parties agreed that no police action should be taken. The police accident abstract however, indicated that the appellant should have been charged. The appellant was therefore more to blame in the circumstances, and the apportionment of liability in my view was correct.

The evidence of P.W. 2 Dr. Ronald Kaale set out the injuries sustained by the respondent and was of the opinion that these were soft tissue injuries.

The lower court indicated it had looked at the authorities cited and the awards made. In the end the award of Kshs. 70,000/= appeared reasonable. On my part I agree that was the most reasonable award and I have no reason to interfere with the same. The award was also correctly reduced by 30% contributory negligence on the part of the respondent.

I see no merit in this appeal which is hereby dismissed with costs to the respondent both in the lower court and in this appeal.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE