



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 48 OF 2017

KENNEDY MACHARIA NJERU.....APPELLANT

VERSUS

PACKSON GITHONGO NJAU.....1ST RESPONDENT

JOHN MUTYAUHORU MUGO.....2ND RESPONDENT

JUDGMENT

1. The appellant had filed a case against the respondents seeking damages for injuries sustained as a result of a road traffic accident on 17/05/2016 along Mwea-Embu road. That he was a pillion passenger on motorcycle KMDV 205Q when the respondent's driver drove motor vehicle KBR 387N recklessly and negligently that it lost control and collided with the motorcycle thereby occasioning him serious injuries.

2. In its judgment, the trial court held that the rider of the motorcycle was not licensed to ride a motorcycle and if he had been transported by a competent rider, the said accident may not have occurred. The court apportioned liability at 70 % against the appellant and 30% against the respondents. On the issue of quantum, the court confirmed that the appellant sustained comminuted fracture of the right hand and soft tissue injuries and awarded him general damages of Kshs.600,000/= and special damages of Kshs.18,340/=.

3. The appellant has appealed against the said judgment on liability.

It is based on two grounds namely;

a) The Learned Senior Principal Magistrate erred in law by apportioning liability in the ratio of 70:30 thus holding the appellant 70% liable for causing the accident against the weight of the evidence.

b. That the learned Senior Principal Magistrate erred in law by failing to exercise his discretion judicially.

The appellant prays that the appeal be allowed with costs.

4. That the judgement on liability delivered on 31.10.2017 be set aside and the court re-assess and re-evaluate the same.

5. The appellant had filed a plaint claiming;

a) General damages of Kshs. 18,340.00

b) Costs of the suit

c) Interests on (a) (b) and (c) above

d) Any other orders that this court may deem fit.

6. The appellant had given the particulars of negligence on the part of the defendant's servant and or agent as follows;

a. Driving with no regard to other users of the road especially the plaintiff

b. Driving on the wrong side of the road

- c. Failure to stop or swerve in order to avoid causing the accident
- d. Disregard of the traffic highway code
- e. Losing control of the motor vehicle and hitting motor cycle registration number KMDV 205 Q.
- f. Causing the accident
- g. Veering off the road and hitting motor cycle registration number KMDV 205 Q on its lane.

7. The defendants in their statement of defence dated 23.1.2017 denied the plaintiff's claim. They blamed the plaintiff and gave particulars of negligence.

- a) Failing to put on a protective helmet and a reflective jack in breach of traffic rules and the Highway code of conduct.

8. Particulars of negligence on the part of owner/cyclist and/or agent of motorcycle KMDV 205 Q.

- i) Failing to keep to the far left of his lane hence as required by the traffic regulations.
- ii) Riding on the wrong side of the road hence crossing into the path of motor vehicle KBR 387 N, therefore causing the accident.
- iii) Riding motor cycle KMDV 205Q at an excessively high speed.
- iv) Placing himself as a pillion passenger in a situation that was patently dangerous.
- v) Failing to exercise due care and attention to himself, the pillion passenger and other road users.
- vi) Failing to provide a helmet and a reflective jacket to his pillion passenger.

9. The appellant adduced evidence that on 17.5.2016 he was going to Embu and was given a lift by his friend who was riding a motor cycle registration number KMDV 205 Q. On the way at Mwea P.C.E.A church they met with the respondents motor vehicle which was going towards Nairobi. The motor vehicle was registration number KBR 387 N and was at the time overtaking another vehicle and came onto their lane.

10. The vehicle knocked down the motor cycle. The appellant sustained injuries and when he came to he found himself at the hospital.

11. The plaintiff sustained injuries on the right hand and right leg. He blamed the driver of the motor vehicle as he was carelessly overtaking.

12. The respondents adopted the evidence of police constable (PC) Kibati adduced in civil suit 176/2016 in which he stated that the rider of the motor cycle was not licenced to ride the motor cycle. The trial Magistrate relied on that evidence to apportion liability.

13. The respondents called DW1 who was the driver of KBR 387 N and testified in civil suit 176/2016 and his evidence was adopted in civil suit No.177/2016. He had testified that the motor cycle left its lane and collided into his motor vehicle. In cross examination he admitted that there was a hand cart which was ahead of him going towards Nairobi.

14. The appellant filed submissions and stated that the appellant proved his case against the respondents. He relies on **JOSHUA OTIENO RATEMO VS. ALICE ACHIENG OTIENO [2018] eKLR.** He also relied on **Samuel Stephen Were Suing as The Representative Of Jared Ochieng Obuogo (Deceased) Vs. Sukari Industries Limited [2016] eKLR,** deceased was riding a motorbike along the Uriri-Ndhiwa road when the respondent's driver negligently drove a Holland tractor and trailer and collided with the motor bike resulting in his death. Despite the evidence produced by the Appellant, the trial court dismissed the Appellant's case on the ground that he had failed to prove negligence against the tractor driver on the balance of probabilities. On Appeal, Justice Majanja set aside the trial court's judgement and held the respondent fully liable. He stated that;

"..... It is well established that the standard of proof in civil claims is on the balance of probabilities. This means that the court will assess all the evidence advanced by each party and decide which case is more probable. This is consistent with the provisions of section 107 (1) of the Evidence Act (Chapter 80 Laws of Kenya) which provides;

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

In this case, the burden on the appellant before the trial court was to prove on the balance of probabilities that the respondent was negligent and therefore liable for causing the accident. There is no doubt that there was a collision between the motor bike and the tractor The question is whether the appellant proved negligence. This is a case where there was conflicting evidence on both sides and in this respect. I recall the words of Spry, VP in Lakhamsi Vs. Attorney General [1971] E. A 118, 120 that;"

15. It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.

16. The appellant submits that the trial Magistrate ignored the evidence produced in court and prays that judgement be set aside.

17. This being the last appellant court it has a duty to re-evaluate the evidence that was tendered before the trial, assess it and make its own finding. This was stated in **Seller Vs. Associated Motor Beat Co., Ltd [1968] E.A. 123.**

18. From the grounds of appeal the only issue raised is liability. I will deal with the issue and consider the decisions on the issue.

In **MICHAEL HUBERT KLOSS & ANOTHER V DAVID SERONEY & 5 OTHERS [2009] eKLR**

On the issue of determination of liability in road traffic accident, the Court of Appeal proceeded to state;

The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....”

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”

19. In determining liability the court must consider the facts of the case and come to a conclusion as to what mostly contributed to the cause of the accident. The court will consider the manner of driving, identify the person who was at fault and place the blame on him. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

20. The plaintiff in this case testified that it is the driver who was trying to overtake from the opposite direction who hit their motor cycle. The driver of the motor vehicle KBR 387 N testified that it is the rider of the motor bike who left his lane and collided into his motor vehicle. DW1 did not give any reason why the motor cycle suddenly left its lane. This evidence is not convincing. On the other hand PW1 testified that DW1 was overtaking other motor vehicles and left his lane and collided with them.

21. In cross examination, DW1, admitted that there was a handcart ahead of him on the left side moving towards Nairobi direction. It is expected that this being a hand cart it was moving slowly and there is a possibility that the DW1 was in the process of overtaking the hand cart, moved to the lane of the motor cycle and collided with it.

22. The appellant’s testimony has proved on a balance of probability which is the standard of proof in civil cases that what contributed to the cause of this accident was the manner of driving by DW1. The fact that the motor cycle rider had no driving licence had nothing to do with the cause of the accident. The plaintiff discharged the burden of proof as required under **Section 107 of the Evidence Act**, that the DW1 was to blame for the accident for driving the vehicle in a negligent manner as pleaded in the plaint.

23. In **Tom Obita Ndago & Another Vs. Alfonse Omondi Otieno [2015] eKLR** where the court considered an allegation by the defence during trial in the lower court that the river was carrying an excess passenger could have caused the accident was refuted by the appellate court which stated;

“Thus the rider and his passengers weight was not the reason why the riders motor cycle fell but the fact that the 1st appellant hit them”.

24. This is the same situation here, the cause of the accident was the respondents driver (DW1) who overtook and in the process hit the motor cycle which was properly being driven on its lane but not because the river had no driving licence.

25. I find that the trial Magistrate erred by failing to consider the evidence and arrived at a decision which was against the weight of the evidence.

26. The appeal on liability has merits. I allow the appeal and order that the judgement on liability be set aside. There will be judgement for

the appellant on liability against the respondents at 100%. I award the costs of appeal to the appellant.

Dated at Kerugoya this 29th Day of July 2019.

L. W. GITARI

JUDGE