



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 125 OF 2017

ISAAC ONYANGO OKUMU.....APPELLANT

VERSUS

JAMES AYERE.....1ST RESPONDENT

HALIMA MOHAMMED.....2ND RESPONDENT

(An appeal arising from the judgment and decree of the Hon. Cheruto C. Kipkorir,

Senior Resident Magistrate (SRM), in Mumias PMCCC No. 119 of 2014 of 19th October 2017)

JUDGMENT

1. The suit at the primary court was initiated by the appellant herein against the respondents for general and special damages arising from a motor traffic accident involving him and a motor vehicle owned by the 2nd respondent and driven by the 1st respondent. The respondents filed a joint defence in which they essentially denied liability, and alleged contributory negligence.

2. The trial court took evidence from both sides, and eventually resolved the issue of liability at 60:40 in favour of the appellant. It was resolved that the appellant contributed to the accident. It was noted that the point of impact or collision was at the rear of the tractor, the accident vehicle, meaning that it was the appellant who veered onto the road and knocked the tractor. It was also noted that the appellant did not have the requisite licence for riding a motorcycle and that the tractor driver, the 1st respondent herein, had not been prosecuted for the accident, even though a notice of intention to prosecute had been served on him. General damages were awarded at Kshs. 600, 000.00 and Kshs. 11, 440.00 special damages.

3. The appellant was aggrieved by the determination on liability and lodged this appeal. In the appeal he seeks that liability be apportioned at 100%. He raised three grounds of appeal, which I reproduce here below:

(a) The Learned Trial Magistrate erred in law and fact in apportioning hefty contributory negligence against the appellant without any or sufficient evidence;

(b) The Learned Trial Magistrate erred in law and fact in predicating her judgment on liability on theories and hypothesis that flew in the face of the evidence before her; and

(c) The Learned Trial Magistrate erred in law and fact in apportionment of liability as to amount to an erroneous exercise of judicial discretion.

4. According to the plaint on record, it is pleaded that the 1st respondent had hit the appellant who was on a motorcycle that was stationary on the Mumias-Bungoma Road. In the defence, it is alleged that the appellant failed to give way to the respondents' vehicle, riding on the middle of the road, ramming into a moving vehicle, among others.

5. At the oral hearing, the appellant testified that he had parked his motorcycle off the road, when the tractor veered off the road and knocked him off his motorcycle. He asserted that he was not riding the motorcycle at the time. The appellant called a police officer from the Mumias Police Station, who produced the P3 form and the police abstract of the accident, and testified that that the rear left tyre of the tractor turned on the motorcycle which was parked beside the road. He indicated that after investigations were concluded the driver of the tractor was to be charged, but never was. The 1st respondent testified that the motorcycle was parked by the roadside with its carrier on the road and the front too was on the road. The appellant was on top of the motorcycle chatting with other individuals. When other vehicles hooted the appellant

rudely moved his motorcycle and in the process he hit the rear side of the tractor that the 1st respondent was driving. Faced with that evidence, the trial court, found both drivers to blame and assessed liability at 60:40 as earlier indicated.

6. The matter for me to determine is whether there was any justification for the trial court to come to that conclusion.

7. The appellant, who testified as a PW1, stated as follows with regard to how the accident occurred:

“I was opposite Mama Watoto Supermarket where I had parked KMCK 802S Yamaha. I was seated on it. I was off the road when a tractor came from Mumias-Lukoye road, lost control and knocked me ... It swerved from the road and knocked me ... I blame the driver of the tractor for the accident for being careless and for not being on the lookout (sic). He left the road and knocked us from the off road lane.”

8. To support his case, he called PW2, a police officer from the Mumias Police Station, who handled the matter after it was reported at that station. The officer stated:

“Accident occurred within Mumias township along Lukoye junction ... The tractor was joining the junction when the rear left tyre turned on the motorcycle which was stationery (sic) as the rider was sitting on the motorcycle which was parked besides the road.”

9. On his part, the 1st respondent explained the circumstances as follows:

“When I reached Mama Watoto a motorcycle at the junction (sic). He had parked and the carrier was on the road, the front was on the road and rider was on top of it. He was chatting with other people and he was lying on a motorcycle (sic). I did hoot for him to move. I did stop and I hooted. He looked at me and he said I could pass the other side. The other cars hooted and he moved rudely, the motorcycle did, he did come back and hit me on my rear when he fell and he was shouting I help him ... The motorcycle caused the accident. He parked at the junction and he did hit himself at the rear will (sic) of the tractor. Point of impact was the rear part of the tractor. Tractor was on the road ... I did stop and hooted and moved only while he had moved as he did not balance well on his motorcycle and he fell.”

10. After reviewing the evidence, the trial court appeared to find both sides culpable, with greater liability attaching on the 1st respondent, ostensibly because the traffic police officer had intended to prosecute him. The court said, with regard to liability:

“I have also considered the manner the accident occurred. The plaintiff and the defendant gave different versions of the same. It is clear from the evidence of the police officer that the point of impact was at the rear of the vehicle which corroborates the evidence of DW2. The police abstract also shows that the matter was pending under investigation. The driver conceded he was issued with a notice of intended prosecution. The police officer in his evidence indicated that the driver was to be charged but that did not come to pass. I did find the evidence of both parties very plausible. The plaintiff also admitted that he did not have a driving licence. Prima facie the lack of a driving licence can lead me to presume that the plaintiff did not know the skills required of rider in the circumstances he was in. I will thus apportion liability in the ratio of 60:40 in favour of the plaintiff.”

11. The question that I have to grapple with is whether the trial court can be faulted for coming to the conclusion that it did in that matter.

12. Let me start from the outset by stating that in cases such as the present, where it is alleged that two vehicles collided or came into contact, for what emerges here is a collision between a tractor and a motorcycle even though the motorcycle did not actually come into contact with the tractor but its rider did, is to draw a sketch of the scene of the accident, showing the relative positions of the vehicles at the material time. That would have helped to clear the air as whether or not the tractor veered off the road and hit the appellant while resting on his motorcycle which was parked off the road. That would have shed light on the narratives of all those who were party to the event. Unfortunately, the police officer who was seized of the matter does not appear to have drawn such a sketch to back his oral evidence. That then left the trial court with the two versions of the two rival sides, both of which sounded credible and reliable. The trial court had the witnesses before her, she saw and heard them and based on that came to the conclusions that she came to.

13. It is an established principle of law that where there is no concrete evidence to determine who is to blame between two drivers, both should be held equally liable. That position was stated in *Hussein Omar Farah vs. Lento Agencies* [2006] eKLR, *Matunda Fruits Bus Services Ltd vs. Moses Wangila & another* [2018] eKLR and *Eliud Papoi Papa vs. Jigneshkumar Rameshbai Patel & another* [2017] eKLR. It was pointed out that the existence of conflicting versions does not mean that nobody was to blame as a collision almost always involves fault on the part of both sides.

14. In my view, that appears to be the case here. The trial court was faced with two conflicting versions of how the accident occurred. Both sides insisted that fault lay with the other side. Neither of the parties could establish fault of the other party, and police evidence was not helpful. The ideal situation should have been that the court should have held the appellant and the 1st respondent equally to blame as it could not tell who was the sole author of the collision. The trial court gave some benefit to the appellant for the reasons it gave. I do not find that the trial court fell into any error in so doing. Consequently, I do not find any basis for interfering with the determination of the trial court on the issue of liability.

15. As the entire appeal turns on the issue of liability, in view of my conclusion above, it transpires that the appeal before me is not merited. I hereby dismiss the same. There shall be no order as to costs.

W. MUSYOKA

JUDGE