



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CIVIL APPEAL NO. 195 OF 2017**

**BETWEEN**

**BISHAR ALI.....APPELLANT**

**AND**

**DISMUS KAMAU MWANGI.....1ST RESPONDENT**

**VERONICAH KAMINJA.....2ND RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Kikuyu CMCC No. 358 of 2015 by Hon. G. Onsarigo(RM) on 16<sup>th</sup> November, 2017)*

**JUDGMENT**

1. **BISHAR ALI** (*hereinafter referred to as Appellant*) sued **DISMUS KAMAU MWANGI** and **VERONICAH KAMINJA** (*hereinafter referred to as Respondents*) in the lower court claiming damages for personal injuries he suffered on 14<sup>th</sup> May, 2015 when he was allegedly knocked down by the 2<sup>nd</sup> Respondent's motor cycle number KMCU 908Q which the 2<sup>nd</sup> Respondent allegedly rode negligently.

2. The Appellants filed a joint statement of Defence denied the claim and/or blamed the Appellant for contributing to the accident.

3. In a judgment delivered on **16<sup>th</sup> November, 2017**, the trial court apportioned liability at 50%:50% as against both Respondents and awarded damages in the sum of Kshs. 700,000/-.

**The Appeal**

4. The Appellants being dissatisfied with the lower court's decision preferred this appeal and on 15.12.17 filed the Memorandum of Appeal dated 11.12.17 which mainly faults the Learned Magistrate for apportioning liability equally.

5. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities.

**Analysis and Determination**

6. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See **Selle & Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**). It then behooves this court to summarize the evidence that was tendered before the trial court.

7. In addition, the Court of Appeal in **Ndiritu Vs – Ropkoi & Another EALR 334** O'Kubasu, Githinji & Waki JJA, held that the appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence, or a misapprehension of evidence, or where it is shown that the trial court acted on wrong principles of law in arriving at the findings he did.

8. I have perused the entire record of appeal and considered the submissions of counsels for both parties. I note that the appeal revolves around liability.

9. The Appellant testified that he was walking off the road when the accident occurred. A police officer who testified stated that the 1<sup>st</sup>

Respondent lost control and knocked down the Appellant who was off the road. The 1<sup>st</sup> Respondent did not deny that an accident occurred but stated that he was overtaking a matatu when he knocked down the Appellant.

10. The evidence on record is that of the Appellant as against that of the 1<sup>st</sup> Respondent. The evidence by the 1<sup>st</sup> Respondents, even in the absence of the police file clearly demonstrates that when he set to overtake the matatu, he failed to keep a proper look out, to see the Appellant in time thereby causing the accident and ought to have borne total responsibility for the occurrence of the accident

#### **DISPOSITION**

11. In view of the finding I have made, the appeal partially succeeds and liability is apportioned at 100% in favour of the Appellant as against the Respondents jointly and severally.

12. Respondents shall bear the costs of this appeal.

**DELIVERED AND SIGNED AT KIAMBU THIS 25<sup>th</sup> DAY OF October 2019**

**T. W. CHERERE**

#### **JUDGE**

#### **Read in open court in the presence of-**

Court Assistant - Nancy

For the Appellant -N/A

For the Respondents - N/A