

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 394 OF 2008 CONSOLIDATED WITH CIVIL APPEAL NO. 395 OF 2008

KEL CHEMICALS LIMITEDAPPELLANT

VERSUS

PHILIP MACHARIA MWANGI1ST RESPONDENT

MOSES MAKAU MBITHI2ND RESPONDENT

*(An appeal from the Judgment and decree of the Hon. F.N. Nyakundi Senior Resident Magistrate Court in Thika CC No. 933 of 2007)
delivered on 1st July, 2008)*

JUDGMENT

These appeals are consolidated. The two respondents were injured as a result of a road traffic accident that took place on 14th July, 2007 along Thika- Garissa road. The respondent in Civil Appeal No. 395 of 2008, Moses Makau Mbithi was a pedal cyclist while the respondent in Civil Appeal No. 394 of 2008, Philip Macharia Mwangi was in his pillion passenger.

The evidence adduced before the lower court was that while the two respondents were riding towards Garissa direction motor vehicle registration No. KXH 237 started overtaking another vehicle when it collided with the bicycle causing the injuries sustained by the two respondents. The respondents blamed the driver of motor vehicle registration No. KXH 237 for driving at a high speed and coming towards their direction. The driver was also blamed for not hooting or giving any signal. It is the respondents' evidence that the cyclist was off the road and next to a trench and therefore could not swerve to the left. The accident is said to have taken place at about 6.30 p.m. when darkness had started to set in but the bicycle light were on.

On the other hand, the appellant called one witness who was the loader in the lorry at the time the accident is alleged to have taken place. He denied that there was any accident at all. They did not knock any cyclist.

The learned trial magistrate in his judgment concluded that there was sufficient evidence to hold the appellant liable for the negligence of its driver. He attributed 20% contributory negligence on the part of the pedal cyclist. On whether or not there was an accident, the trial magistrate relied on the testimonies of the two respondents. There were also the copies of police accident abstract produced by both the appellant and the respondents, which indicated the respondents were injured during the accident as their names appeared therein.

Based on that evidence, the evidence of the defence witness was discounted as being untrue. As the appellate court it is my duty to evaluate the evidence adduced before the trial court and come to independent conclusions. This I have done.

For reasons unknown the defence witness called by the appellant wanted to mislead the court but the evidence adduced by the respondents was overwhelming. The trial court was right to have attributed 20% contributory negligent on the part of pedal cyclist that is, Moses Makau Mbithi in Civil Appeal no. 395 of 2008. He saw the lorry approach because he said its parking lights were on. It is true that he may have been off the road but he did not state that he swerved to avoid the collision with the lorry.

On the other hand the lorry driver decided to overtake another vehicle while the cyclist was approaching from the opposite direction. There is no doubt that he could see the cyclist and his passenger because it was not dark then and in any case the cyclist told the court his light was on. The driver was not called to give evidence and therefore the evidence of the respondents that the lorry was speeding and the driver did not hoot remains uncontroverted. Proof of a civil claim is on a balance of probability and that test was achieved by the two respondents.

On quantum the two respondents suffered soft tissue injuries. Doctor George Karanja examined both respondents and produced their medical reports showing the injuries sustained. There was no permanent disability of any nature. Several authorities were cited in arriving at the figures set out in the judgment in the lower court.

I have perused the judgment and related them to the awards made. The appellate court may interfere with the awards made by the lower court but only if satisfied that the court acted on wrong principles of law or had misapprehended the facts, or made wholly erroneous estimate of awards payable as related to the injuries sustained. Further, interference may be invoked where the award is inordinately too high or too low in the circumstances of the case. The appellant has not demonstrated any of the above guidelines to warrant this court interfere with the awards made by the trial court. In the circumstances, I find that the two appeals are lacking in merit and therefore dismissed with costs to the respondents.

Dated, signed and delivered at Nairobi this 18th day of April, 2018.

A. MBOGHOLI MSAGHA

JUDGE