



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 143 OF 2015

(Being an appeal arising from Judgment and Decree in Eldoret Chief Magistrate's Court in Civil Suit No. 782 of 2010 delivered by H. Barasa Principal Magistrate)

SAMUEL GUDU.....APPELLANT

VERSUS

TOM MAKAMU MUKANGAI.....RESPONDENT

J U D G M E N T

1. The respondent had sued the appellant at the lower court claiming damages pursuant to a road traffic accident that occurred on 11/5/2010 along Kisumu road near Ndalat junction within Eldoret town. The respondent was riding motor cycle Registration No. KMCH 186 L while the appellant was driving motor vehicle Registration No. KBJ 863L.

2. As a result of the accident the Respondent sustained the following injuries;

1. Fractures of two upper incisor teeth.
2. Right thigh was swollen and tender
3. Right knee was swollen and tender with a lacerated wound.
4. Fracture of the right femur.

3. The above findings were as per the medical legal report prepared by Dr S.I. Aluda. In his second medical legal report Dr Z. Gaya found the injuries as follows;

1. Closed head injury with concussion
2. Fracture two upper incisor teeth
3. Fracture right femur
4. Injury to right knee with lacerated wound.

4. After hearing both parties the trial court awarded the respondent general damages of kshs 500,000/=, special damages of Kshs 194,951, totaling kshs 694, 951. It also found that both parties had contributed equally to the accident, that is 50:50 basis on negligence.

5. That decision has prompted this appeal and the same is essentially premised on two grounds namely the question of liability and damages. The appellant opine that the 50% liability apportioned against him was erroneous given the circumstances of the accident.

6. Dealing with this issue first, it appears from the evidence by the respondent that the appellant approached Kisumu road from the Rivatex junction and without looking and ensuring that there were no motorist on the main highway and simply drove and thus hit the respondent and his passenger.

7. The appellant on the other hand states that already he had joined the highway (Kisumu) and was in the process of accelerating and gaining momentum when he was hit by the Respondent.

8. None of the parties called any independent witness .The respondent did not call the pillion passenger he was carrying.
9. The police officer (PW2) who came and produced the police abstract did not help neither. He stated that he did not carry out any investigations and that the officer who had been assigned that duty was transferred to Wajir. Worse still he did not produce any sketch map showing whether the police visited the scene or not.
10. It was not enough to state the the appellant was found culpable or simply the matter was still pending investigations. As it were, even at the time of PW2 testifying the appellant had not been charged with any traffic offence.
11. Who then caused the accident, which admittedly took place? In the absence of any independent witness, and more particularly traffic police report, I think the trial court was right in apportioning liability equally. None of them was able in my view to convince the court his innocence.
12. As regards quantum, I have seen the injuries enumerated by both Dr. Aluda and Dr. Gaya and they are similar in nature. Dr Gaya opined that the respondent had suffered 12% disability.
13. The injuries were serious and this is exemplified by the fact that the respondent had to undergo another surgery while the matter was pending in court.
14. I have considered the two authorities of *Ali Abdalla Mbarak Vs Sagdish Udan HCCC No. 3 of 2002 at Mombasa* and *Paul Kipsang Koech & Another Vs Titus Osule Osore Civil Appeal No. 6 of 2012 Bungoma*, and I do agree that they are almost in tantom with the situation at hand.
15. Consequently without going into other periphery issuers raised by the appeal, on the two issues of liability and quantum I find the holding by the trial court appropriate and I could not agree more. The question of negligence was equal on both sides especially in the absence of a credible independent witness.
16. In the premises, this appeal as well as cross appeal are hereby dismissed with no orders as to costs.

Delivered, signed and dated at Eldoret in open court on this 19th day of October, 2018.

H.K. CHEMITEI

JUDGE

19/10/18