



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
CIVIL APPEAL NO.40 OF 2015

(Being an appeal from the judgment and decree of Hon. P. C. Biwott, Senior Principal Magistrate dated and delivered on 13th day of August 2015 in Kitale Chief Magistrate's Court Civil case No. 98 of 2011)

PHANICE NYABATE OYIENGO.....APPELLANT

VERSUS

GEOFFREY KIPLAGAT KORIR.....1ST RESPONDENT

JOSEPH KIMANI MUNGAI.....2ND RESPONDENT

DISMAS MUCHURU.....3RD RESPONDENT

JUDGMENT

The appellant was a pillion passenger in a motorcycle Reg. No KMCA 586N TVs Star riding along Kitale-Eldoret road on 27/11/2010 when the same collided with Motor vehicle Reg No. KAT 576 N Toyota Matatu owned by the 2nd respondent but driven by the 3rd respondent near show ground junction. As a result of the said accident the appellant sustained the following injuries;

- 1) Cut wound on the right knee about 15 cm x 0.25 cm**
- 2) Cut wounds on the right leg about 3cm x 0.25 cm and 14 cm x 25 cm**
- 3) Bruises on the right knee reduced flexin movement of right knee joint by about 20%.**

After trial the court apportioned liability at 50:50% against both the appellant and the respondents. The appellant was dissatisfied hence this appeal. Before delving into the grounds as raised by the appellant in the memorandum of appeal, its worth to review the evidence as presented during trial.

PW1 the appellant testified that she was travelling to Mois Bridge at around 11 am vide a motor cycle to when a Nissan motor vehicle came from the Eldoret junction and turned to the right without a warning. It collided with the motorcycle whereby she sustained the injuries enumerated above. She went ahead to produce the treatment notes as well as other pieces of evidence. She equally produced the police abstract and the medical legal report. She blamed the driver of the vehicle for simply turning without any warning hence hitting the motor cycle.

PW2 John Koima produced the discharge records on behalf of Dr Lupesa of Kitale District Hospital.

PW3 Dr Samuel Chege Oyiego produced the medical legal report which he had prepared which he opined that the injuries sustained by the appellant were of soft tissue in nature.

On their part the respondents through **DW1 Joseph Kimani Mungai** the owner of the motor vehicle testified that he was not at the scene as the 3rd respondent was driving the said vehicle. He said that he went to check the vehicle during inspection and that the motorbike rider was charged.

DW2 Dismus Muchuru was the driver who testified that as he was heading to the show ground he slowed down for a lorry from Kitale direction to pass. A rider then came overtaking the lorry but he was unable to pass as it was a corner and he lost control and hit the lights of his vehicle. He took off leaving the passenger. He blamed it on the motor cycle rider as he was reckless when overtaking. He said that it was the lorry that pushed him and he hit his vehicle.

Analysis and Determination

The substantive issue raised by the appellant in her Memorandum of appeal is the question of liability. The trial court did apportion liability on an equal basis between the appellant and the respondent. The trial court argued that both the motor vehicle driver as well as the motorcycle rider were to blame. The appellant's argument though is that why apportion liability against the motorcycle rider who was not a party to the case and infact nobody brought him as a party or a 3rd party ?

On is part counsel for the respondent submitted in favour of the trial court's decision. Infact he argued that already the respondent has satisfied the decree and has paid the entire decretal sum as ordered by the court.

This court is required to re-evaluate the evidence afresh and arrive at an independent finding with full knowledge that it did not have the benefit of seeing the parties testify as well as their witnesses.

Clearly there is no dispute as to whether or not an accident occurred. Secondly its equally not disputed that the appellant sustained injuries. The only issue is who caused the accident and to what extend.

From the appellant's evidence she clearly blame the 3rd defendant who according to her “ **turned to the right without warning.**” That was all. The 3rd respondent on the other hand blamed the motorcycle rider who failed to notice a lorry which the 3rd respondent was waiting for it to pass so that he could in turn head to show ground. Both parties acknowledge that there was a junction hence clearly there ought to have been extra care.

The police who came did not help things either, that is, they did not take any necessary sketch plans and the only evidence produced was the police abstract which indicated that the motorcycle rider was charged with the offence of riding a motorcycle without a driving licence.

In light of the above who should carry the blame? It has been argued strongly by the appellant that the respondent ought to have taken out 3rd party proceedings against the motorcycle rider and that the court erred when it apportioned blame on him without being enjoined.

I have perused the evidence on record and what is clear from the evidence is that there were indeed other actors who were not brought on board namely the motorcycle rider and the alleged lorry as per the 3rd respondent testimony. However who was to bring on board the motorcycle rider? Was it the appellant or the respondent? In my view either of the parties owed to have made the application. This is so because the appellant was not the motorcycle rider but merely a pillion passenger. She was not in control of the motorcycle and was not therefore to be in a position to know what was transpiring ahead. Further the motorcycle rider was not called to testify. I find therefore that despite the respondent not applying for the 3rd party proceedings the court was right in arriving at the decision to apportion blame.

More importantly, the appellant conceded that she was riding the motorcycle with another passenger

called Evalyne. This admission on its own is sufficient to indicate that she was acting unlawfully. It is expected that there ought to be a single passenger on the motorcycle commonly known as 'boda boda'. By riding on it, the three of them including Evalyne endangered their lives something which as an adult she owed to have known. Perhaps the rider because of the two passengers he was carrying caused him not to be in a position to control the motorcycle.

More significantly also the said rider was charged with the offence of riding a motorcycle without a licence. Although this was down played by the respondent, the same in my view is significant as it goes to demonstrate that there was every probability that he was not duly authorised and the reason why he carried two passengers.

Be it as it may there was no reason why the appellant failed to enjoin him as a party. Being in control of the motorcycle he squarely carried the blame and I do not find the argument that it was the duty of the respondent to bring him as the 3rd party plausible.

The appellant was a mere passenger and not the driver and there was no reason why she did not sue the rider.

The apportionment of liability by the trial court even in the absence of the said motorcycle rider was factual as it appears that he had some responsibility to shoulder and I do not think that it would have been proper to have the respondent shoulder the blame alone. As indicated earlier even if the blame was not apportioned the appellant should have carried some liability for riding on a motorcycle with another passenger with full knowledge that there always ought to be one pillion passenger.

The sum total of my finding is that this appeal is disallowed . The same is dismissed with costs to the respondent.

Delivered this 31st day of January, 2017.

H.K. CHEMITEI

JUDGE

In the presence of:

Kiarie for Kaosa for the Respondents

No appearance for the Applicant

Court Assistant – Kirong/Silvia