



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 65 OF 2014

BETWEEN

SINOHYDRO CORPORATION LIMITED APPELLANT

AND

GEORGE OTIENO WAUDI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Obina, PM in the Chief Magistrates Court at Kisumu in Civil Case No. 147 of 2013 dated 27th May 2014)

JUDGMENT

1. In the subordinate court, the respondent claimed that he was riding a motorbike registration number KMCG 370X Bajaj along Kisumu-Nairobi road when the appellant's motor vehicle registration number KBH 719V lost control and knocked the respondent off the motorbike causing him to sustain bodily injuries, loss and damage. After hearing the matter the learned magistrate apportioned 80:20 in favour of the respondent and awarded Kshs. 200,000/- and Kshs. 1,500/- as general and special damages respectively. The resulting judgment has now precipitated this appeal.
2. The grounds of appeal are encapsulated in the memorandum of appeal dated 19th June 2014. The thrust of the appeal as urged by Mr Odhiambo, learned counsel for the appellant, is only on the issue of liability. Counsel faulted the court for the manner it appreciated the evidence and held the appellant substantially liable. He contended that the respondent was largely to blame for the accident. He submitted that the learned magistrate failed to take into account the fact the respondent was charged and convicted for having an expired driving licence and riding an uninsured motorbike. Counsel stated that although the traffic police officer (PW 3) testified, she did not produce the police investigation file hence the court could not determine the extent of liability between the parties.
3. Mr Oyuko, learned counsel for the respondent, supported the finding of the subordinate court. He contended that the appellant did not call any evidence to rebut the respondent's case and the court apportioned liability properly. He pointed to the testimony of the police officer (PW 3) supported the learned magistrate's conclusion.
4. As this is a first appeal, I am called upon to examine and evaluate the evidence and reach an independent conclusion bearing in mind that I did not hear or see the witnesses testify (see ***Selle and Another v Associated Motor Boat Company Ltd & Others [1968] EA 123***). *In order to test the evidence it is necessary to outline the evidence as it was presented before the subordinate court.*
5. The respondent (PW 1) told the court that on 5th November 2012, he was riding his motorbike with a

pillion passenger from Nyalenda going to Nyamasaria. He was riding on the left side facing Nyamasaria. As he was proceeding, the appellant's lorry was on the left side facing Kisumu coming from Nyamasaria headed to Kisumu. He told the court that the lorry left its side came onto his lane and knocked him causing him to land on the left side of the road. PW 1 further stated that the appellant's driver did not signal that he was leaving his side of the road. When cross-examined, PW 1 stated that he saw the lorry when it was about two metres away as there was another lorry ahead of him.

6. The evidence of Sergeant Anne Kosgei (PW 3) which was adopted from Kisumu CMCC No. 146 of 2013 confirmed that the accident took place and the particulars of the vehicles involved and persons injured. In addition, she confirmed that the respondent was charged with having an expired licence and driving an uninsured motorcycle.

7. In the judgment, the learned magistrate concluded as follows;

The rider was on his left side of the road facing Nyamasaria. The lorry was being driven from Nyamasaria towards Kisumu. For unexplained reasons, the driver of the lorry left his side of the road and veered into the rider's path. He is largely to blame for the occurrence of the accident. It may be true that the rider had an expired licence and did not have insurance, but that cannot be said to have contributed to the accident. The rider saw the lorry from a distance. In fact, he saw it knock another vehicle before it came into contact with the motorcycle. He had the opportunity to avoid the collision. He did not so swerve, probably because of his speed.

8. In light of the testimony of PW 1, I cannot fault the learned magistrate from reaching the conclusion and apportioning liability as he did. PW 1's direct testimony was unrebutted and the learned magistrate correctly observed that the offences the respondent was charged with had nothing to do with the occurrence of the accident. Since there was direct testimony as to the occurrence of the accident there was no need for PW 3 to produce the court file.

9. The appeal lacks merit and is dismissed with costs.

DATED and DELIVERED at KISUMU this 30th day of June 2016.

D.S. MAJANJA

JUDGE

Mr Odhiambo instructed by Otieno, Yogo, Ojuro and Company Advocates for the appellant.

Mr Oyuko instructed by Amos O. Oyuko and Company Advocates for the respondent.