REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 5 OF 2016

STELLAH MUTHONI.....APPELLANT

- VERSUS -

JAPHET MUTEGI.....RESPONDENT

(***Being an Appeal from the Judgment/Decree of Hon. A. Nyoike- SRM delivered on 31st March, 2016 in CHUKA PMCC NO. 73 OF 2014)***

J U D G ME N T

1. The Appellant was a pillion passenger on motor cycle registration number KMCT 153 Q on 9th July, 2012 when the said motor cycle was involved in a road traffic accident with the Respondent's motor vehicle registration No. KBQ 117 Y along Chuka - Kathwana road. The Appellant blamed the Respondent for the said accident. She thereupon filed suit before the Chuka Chief Magistrate's Court claiming damages for the injuries she sustained.

2. On his part, the Respondent filed a defence wherein he denied the occurrence of the accident, the particulars of negligence levelled against him and wholly blamed the driver of motorcycle registration No. KMTC 153 Q *("the motorcycle") for the accident.* After trial, the trial court made a finding that both the driver of the motor cycle and motor vehicle registration No. KBQ 117 Y (*"the said vehicle")* to liable at 50% - 50%. The trial court thereupon assessed damages at Kshs.105,750/- and allocated the 50% liability assigned to the driver of the motorcycle on the Appellant. The Appellant was therefore awarded 50 % of the damages assessed.

3. Aggrieved by that decision, the Appellant has appealed to this court setting out six (6) grounds of appeal which can be summarised into three (3) as follows:-

a) that the trial court erred in failing to hold the Respondent 100% liable.

b) that the trial court erred in holding the driver of the motorcycle 50% liable against the weight of evidence; and

c) that the trial court erred in shifting the blame attributed to the driver of the motorcycle upon the Appellant.

4. I have considered the record, the submissions of learned counsel and the authorities relied on. This being a first appellate court, it is imperative to review and re-evaluate the facts afresh with a view to arriving at own independent findings and conclusions (see **Selle .v. Associated Motor Boat Ltd & Others [1968] E.A 123).** In doing so however, this court must at all times bear in mind that it did not have the opportunity of seeing the witnesses testify to gauge their demeanor. This court further has to be

guided by the principles set by the Court of Appeal in the case of **Ephantus Mwangi & Anor .v. Dancan Mwangi Wambugu [1982-88] KAR 278,** that an appellate court will not normally interfere with a finding of fact by a trial court unless it is based on no evidence, or is based on a misapprehension of the evidence or the trial court demonstrably acted on wrong principles.

5. The first and 2nd grounds can be tackled together. Those were that; the trial court erred in failing to hold the Respondent 100% liable and in holding the driver of the motor cycle 50% liable. It was submitted on behalf of the Appellant that the trial court failed to consider the undisputed evidence of the Appellant. That the trial court misapprehended the standard of proof in civil proceedings when it held that the plaintiff had failed to make it possible to ascertain which of the drivers was to blame. It was further argued that on the authority of **James Gikonyo Mwangi .v. D.M. (Minor suing through his mother and next friend IMO) [2015] eKLR and Ntulele Estate Transporters Ltd & Anor. v.Patrick Omutanyi Mukolwe [2014] eKLR**, the trial court should not have held the driver of the motorcycle 50% liable without having been joined as a party. On the other hand, it was submitted for the Respondent that the Appellant did not testify to prove the allegations of negligence pleaded in the plaint in terms of **Muthuku .v. Kenya Cargo Services Ltd [1991] KLR 464**. That on the evidence on record, it was difficult to discern who was to blame for the accident and the most prudent thing to do is to apportion contribution at 50%: 50% as the trial court has done. The cases of **Haji .v.Marair Freight Agencies Ltd [1984] KLR 139, Postal Corporation of Kenya & Anor .v. Dickens Munayi [2014]eKLR and Anne Wambui Ndiritu .v. Joseph Kiprono Ropkoi & Anor [2014] eKLR** were relied in support of the said submissions.

6. The evidence before the trial court was that on the material day, the Appellant was a pillion passenger in the motorcycle travelling along Chuka Kathwana road. At Mbuiru Primary School, the Respondent's said vehicle was coming from the opposite direction when it lost control and came to the Appellant's lane and hit the motor vehicle whereby the Appellant suffered injuries. That the motorcycle was on its rightful side (left) but the said vehicle was overtaking another when it hit the motorcycle. In cross-examination the Appellant maintained that she was on board the motorcycle which was hit while on the left side which was its correct side on the road. That the rider tried to evade the said vehicle by moving out of the road but nevertheless the accident occurred. That the dusty conditions did not deter visibility as it was broad daylight at about 11.00 am. That was the only evidence before the trial court and it remained unshaken. The Respondent closed his case without calling any evidence.

7. On the foregoing evidence, the trial court made the following determination:-

> ***"Parties were not able to come to a consensus on liability, the Defendant as a matter of fact in his statement of Defence, lay the blame squarely on the driver of the motorcycle for failing to consider the safety of his/her passenger (Plaintiff) by among other things, failure to stop, slowdown, swerve or otherwise manage the cycle so as to avoid the accident. In my view, it is not reasonably possible to ascertain which of the drivers is to blame for the accident hence both shall be held equally liable. Liability shall be apportioned at 50:50 between the vehicle and the motorcycle (Underlining supplied).***

8. Under sections 107 and 108 of the Evidence Act, Chapter 80 of the Law of Kenya, it is the party who alleges the existence of a fact that must prove it. The standard of proof required in civil proceedings is on a balance of probability. The Appellant had in her plaint pleaded various particulars of negligence against the Defendant including, failing to control the said vehicle and keep it from knocking the motor cycle the Appellant was on; failing to have effective control of the said vehicle; causing the said vehicle to knock the motorcycle in which the Appellant was on board; and failing to control the said vehicle as to avoid the said accident. The Appellant appeared and testified on oath that she was on board the motorcycle when the said vehicle hit them while wrongly trying to overtake another vehicle on a bend. That evidence was neither controverted nor challenged. Even in cross-examination, the Appellant remained firm. It was her case that while on board a motorcycle she was hit by the Respondent's vehicle which was being driven on the wrong side of the road. To my mind, she had discharged her burden and the evidentiary burden had clearly shifted to the Respondents since the Respondent called no evidence to rebut the Appellant's narration, the burden rested on him and the Appellant had proved her case as required by law. The trial

court misdirected itself when it considered the averments in the defence wherein the Respondent blamed the motor cyclist but failed to consider that no evidence was called by the Respondent to prove those averments. The trial court was clearly in error when it held that it was not possible to ascertain who of the two drivers was to blame. Clearly, the driver of the motor vehicle had been effectively flamed and had not discharged the blame that had been proved on him by the testimony of the Appellant.

9. The other strange thing was the apportioning of 50% liability on the driver of the motor cycle. It is trite law that a court can not make orders against someone who is not a party before it. When a party in a proceeding makes an allegation against another who is not a party, it is incumbent upon the party making the allegation to join such a party into those proceedings. This is the purpose of Order 1 Rule 15 of the Civil Procedure Rules. That rule provides:-

> ***"15(1). Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-***
>
> ***a) that he is entitled to contribution or indemnity; or***
>
> ***b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and,***
>
> ***c) .....***
>
> ***shall apply to the court within fourteen days after the close of pleadings for leave of court to issue a notice (hereinafter called a third party notice) to that effect and such leave shall be applied for by summons in chambers exparte supported by affidavit."***

It is therefore the party who claims some relief or contribution in the case of a defendant who should join a third party.

10. In the case of **James Gikonyo Mwangi .v. D.M (supra)** the court held the defendant who had failed to pursue third party proceedings 100% liable. In **Ntulele Estate Transporters Ltd & Anor .v. Patrick Omutanyi Mukolwe (supra),** the court faced with a similar situation held:-

> ***"Secondly, having failed to join the estate of the motorcyclist as a party to the proceedings, I do not think any blame could be attributed to a party who had not been joined in the proceedings . In the case of Benson Charles Ochieng & Anor .v. Patricia Otieno HCCA 69 of 2010 (UR) the court held:-***
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> ***"The trial court could not have apportioned liability between the appellants and a person who was not a party to this suit. This court is unable to agree with the Appellant's argument which was to the effect that the Respondent ought to be blamed for not joining the third party into the proceedings. This cannot be because it is the Appellants who will bear the consequences of any failure to include the third party into the proceedings.***
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> ***Mutatis Mutandis, in the present appeal, it is the Appellants who were to face the consequences for failure to join the motorcyclist to the suit. Having failed to join that party, the argument as to contribution of negligence fail."***

11. In the present case, although the Respondent made allegations against the motor cyclist and obtained orders to join him as a third party, he failed to pursue those proceedings. Having failed to join the motor cyclist, the Respondent was not entitled to any relief of contribution against a motor cyclist whom he had not joined in the suit. In any event, he had offered no aota of evidence to prove any of the particulars of negligence set out in the statement of defence to shift the blame from himself. So long as there was no evidence led on those particulars, they remained just that, mere allegations of no probative value. Accordingly, the trial court erred in holding that the mere existence of allegations of negligence in the defence against the motor cyclist bound the court to rule against the motor cyclist. Further, since the

motorcyclist was never joined as a party, no orders or reliefs could be made against him.

12. The cases relied on by the Respondent are distinguishable from the present case. In the case of **Tombe Tea Factory Ltd .v. Samuel O. Arake [2010**] **eKLR,** the court found that there were a set of facts which raised a prima facie inference that the accident was caused by the negligence of either the Appellant, the deceased or both. There was no eye witness in that case. In the present case, the Appellant was not only an eye witness and testified, her evidence which overwhelmingly pointed liability on the Respondent was neither rebutted nor challenged. In **Postal Corporation of Kenya & Anor .v. Dickes Munayi case (supra),** there was evidence that the pillion passenger pulled his head to see what was happening ahead whereby he was hit by the side mirror of the oncoming vehicle. In the present case, it is the Respondent's vehicle which was being driven on the wrong side of the road that hit the motorcycle on which the Appellant was riding. In the **George Ndiritu Kariamburi .v. Joseph Kiprono Ropkoi case (supra),** there was no evidence to ascertain at what point the motorcyclist who perished in the accident was at the time of the accident. That is not the case with the present appeal Here the Appellant an eye witness clearly narrated how the accident occurred. The two grounds therefore succeed.

13. The next ground is that the trial court erred in assigning the liability of the motorcyclist to the Appellant. I have already found that it was wrong for the trial court to make a relief against a person who was not a party to the proceedings. As if it was not enough, the trial court extended that liability to the Appellant. There was no pleading at all that the Appellant had contributed to the occurrence of the accident. No evidence at all was led to prove that fact. That being the case, it was clearly wrong on the part of the trial court to have apportioned 50% liability on the Appellant. That ground also succeeds.

14. Accordingly, the decision of the trial court on liability was founded on no evidence at all and cannot stand. The appeal is hereby allowed. The finding of the Appellant of 50% liability is hereby set aside and substituted with judgment against the Respondent at 100% liable. The award of damages as assessed by the trial court remains. The costs of the Appeal to the Appellant in any event.

DATED and Delivered at Chuka this 13th day of December, 2016.

A. MABEYA

JUDGE