



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL 173 OF 2011

EASY COACH LIMITED.....PLAINTIFF

VERSUS

DINAH HABWE OMUTSALI.....DEFENDANT

J U D G M E N T

1). The respondent herein was a fare paying passenger in motor vehicle Reg. No. KAH 435M (herein referred to as 'matatu') on 10-10-2004 plying Kisumu Ahero road when it collided with the appellant's motor vehicle Reg. No. KAR 855M (bus). As a consequence of the said accident the respondent sustained the following injuries:

- a. **Fracture of the left acetabulum with articular fragments.**
- b. **Posterior dislocation of the left hip joint and posterior head of the left femur.**
- c. **Dislocation of the right hip joint.**
- d. **Cut wound and bruises of the left knee.**

2). After full trial the trial court found the appellant 100% liable and awarded the respondent general damages of Kshs. 1 million together with special damages as well as costs and interest. This has provoked this appeal.

3). The 5 grounds contained in the appellant's ground can be summarised as follows:

- a. **the damages awarded were excessive in the circumstances,**
- b. **the court failed in apportioning liability .**

4). There was no dispute that the respondent was involved in the accident. There was no disputed also that she was travelling in the matatu on the material day and that as a result of the said accident she sustained serious bodily injuries enumerated above. PW2 the doctor as well as PW4 stated as much regarding the injuries. PW3 the police officer produced the police abstract. He told the court that he did not know who caused the accident as there was no investigation report by the police.

5). In the absence of an independent witness the question of liability falls on the rival evidence of the respondent and the applicants witness. According to the respondent the accident was caused by the bus driver who was trying to avoid pothole. She said that they were not trying to overtake as there was another vehicle behind them.

6). The driver of the bus PW1 told the court that:

“I was doing about 40 Kph. I had passengers, I was on my left side of the road, a motor vehicle

came from the opposite behind another carrying timber- pickup. The Nissan was following the pickup. Nissan was KAH. The Nissan overtook the pickup and we collided with the Nissan. I was on my left side. The Nissan was 70 meters away when I saw it.....”.

7). The trial court blamed the bus driver and believed the respondent for “she had nothing to gain”. I do not think this was a legitimate reason in apportioning liability. As stated in **Makube -VS- Nyamuro [1983] KLR 403** the court shall interfere with the court's finding of facts only when the court acted on a wrong principles of law. In this case I do not think that the respondent's evidence was to be taken wholeheartedly the way the trial court did. Definitely the respondent was to gain from the proceeds herein.

8). Now that there was no other independent witness it was the duty of the court to use its discretion based of course on the evidence on record. In **Baker -VS- Market Harborough Industrial Cooperative Society Ltd 1953 1WLR 1472** Lord Denning had this to say:

“Everyday, proof of the collusion is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alone and neither chose to give evidence, the court would unhesitatingly hold both to blame. They would not escape liability simply because they court had nothing by which to draw any distinction between them”.

9). In the case at hand both the matatu driver and the bus have to carry the blame. This was an accident that occurred in the afternoon. There was clear visibility and nothing was shown to the court that there was any obstruction in anyway. In the premises and by reasons given above I find that liability ought to be apportioned between the two. I therefore set aside the 100% liability against the appellant arrived to by the court and order each to shoulder 50% liability.

10). I have anxiously looked on the element of quantum. The injuries sustained by the respondent were serious as per the doctor's report. I have equally perused the parties rival authorities. Having analysed the same I shall not disturb the quantum of Kshs 1 million arrived to by the trial court as it was arrived at based on proper legal grounds.

In the premises I shall allow the appeal as follows:

- a. **Liability shall be shared equally by the appellant and the defendant on equal basis, that is 50:50.**
- b. **The quantum of Kshs. 1 million shall remain as found by the trial court save that the appellant shall shoulder 50% and for avoidance of doubt Kshs. 500,000/=.**
- c. **Special damages to remain at Kshs. 49,366/=.**
- d. **The appellant shall have ½ costs of this appeal and in the lower court.**

Dated, signed and delivered at Kisumu this 18th day of February, 2015.

H.K. CHEMITEI

JUDGE