REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

Civil Appeal No. 20 Of 2015

FORMERLY NAKURU CIVIL APPEAL NO. 115 OF 2012

(Being an Appeal from Naivasha SPMCC No. 669 of 2010 - E. Boke, PM)

MULTIPLE HAULIERS (E.A.) LTD……....…….APPELLANT

-VERSUS-

D M K (Minor suing thro his

next friend and father D K M……..….....……RESPONDENT

J U D G M E N T

1. This is an appeal arising from the Judgment of the lower court apportioning liability between the parties at 50:50% and an eventual award in damages to the Respondent in the sum of Shs 500,000/=.

2. The facts of the case were that on 1st June 2012 the Respondent was riding his bicycle along Naivasha-Mai Mahiu road. An accident occurred involving the said cyclist and the Appellant's vehicle KAG 246 GZA 6699. Through his pleadings and evidence the Respondent contended that the accident was occasioned by the negligence of the Appellants driver who knocked down the cyclist who was lawfully cycling on his rightful lane ahead of the vehicle.

3. For their part the Appellants put up a defence that laid blame on the part of the cyclist for negligence, including in alia, cycling in a zigzag fashion and encroaching into the path of the Appellant's vehicle.

4. The Appellant in the Amended Memorandum of Appeal raised four grounds of appeal as follows:-

"a) THAT Learned Trial Magistrate erred both in law and in fact by apportioning liability at 50:50% as between the Appellant and the Respondent contrary to the evidence on record.

b) THAT Learned Trial Magistrate erred both in law and in fact by disregarding the Appellant's evidence on record.

c) THAT Learned Trial Magistrate erred both law and in fact by shifting the burden of proof to the Appellant.

d) THAT Learned Trial Magistrate erred both in law and in fact by awarding the

Respondent a sum of Shs 500,000/= general damages which was excessive in the circumstances and did not reflect the injuries sustained by the Respondent."

5. The Respondent's amended cross appeal raises four grounds of appeal as follows:

"a) THATthe learned Magistrate erred both in law and facts in in failing to award future medical expenses when the same were pleaded and proved.

b) THAT the learned Magistrate erred both in law and in fact inapportioning liability at 50:50 when the appellant witness had absolved the respondent of any negligence.

c) THAT learned Magistrate erred both in law and fact in making an award on quantum of damages which was so in ordinately low as represent an entirely erroneous estimate of the compensation to which the respondent was entitled to owing the nature of the injuries sustained and the residual disabilities thereto.

d) THAT learned Magistrate erred both in law and fact in failing to appreciate that the appellant witness evidence was contrary to the appellant pleadings, incoherent, contradictory, not truthful and was a clear departure from the appellant pleadings."

The parties agreed to dispose of the appeal by way of written submissions.

6. The gist of the Appellant's arguments in respect to liability is captured in a paragraph which quotes the trial magistrates finding and stating:-

"Having found that the Respondent had lost balance and suddenly swerved into the path of the Appellant's vehicle thereby leading to the accident despite DW1's efforts to trying to hoot and swerve to the right, it is strange how the learned magistrate came to the conclusion that the Appellant's driver contributed 50% liability."

7. The Appellant contends that the onus of proving negligence on the part of the Appellant lay with the Respondent but was not discharged hence the suit should have been dismissed. The Appellant contends that in finding liability against the Appellant at 50% the trial magistrate shifted the burden of proof to the Appellant. The Appellants abandoned the ground challenging the quantum of damages.

8. For his part the Respondent opposed the appeal. Reiterating his evidence at the trial, the Respondent submitted that appellate court will not interfere with the apportionment of liability unless an error of principle by the trial court is demonstrated, or where the trial court had plainly erred. They relied on the case of **Vyas Industries –Vs- Diocese of Meru [1982] KLR 114**. They also cited several authorities in support of the argument that where concrete evidence is lacking on the manner in which an accident occurred between 2 parties, both should be held equally liable.

9. Among the Court of Appeal decisions cited are **Nyeri Civil Appeal No. 328 of 2005 W. K.** (**Minor suing through next friend and mother L.K.) –VS- Ghalib Khan Neer Construction and Nairobi Civil Appeal 34 of 2005 Hussen Omar Farah – Vs- Lento Agencies**. The Respondents in discounting the Appellant second ground of appeal referred to the record of proceedings and text of the judgment to demonstrate that the Appellant's evidence was indeed taken into account. The Respondent's also underscored the Appellant's duty towards the Respondent cyclist.

10. The Respondents also stridently defended the award of Shs 500,000/= damages. With regard to the cross-appeal, the Respondent only argued ground 1 concerning the claim for future medical expenses in respect of which no pronouncement was made by the court. It was the Respondent's contention that the claim had been proved through the evidence of the Respondent's father and the medical report indicating the need for further medical care. It was Respondent's assertion that this evidence stood uncontroverted. Two persuasive authorities by the High Court were relied on.

11. This court on a first appeal is obligated to evaluate the evidence adduced at the trial and draw its own conclusions, giving allowance however to the fact that it never saw nor heard the witnesses testify (**See Selle –Vs- Associated Boat Co. [1968] EA 123; Peters –Vs- Sunday [1958] EA 429**).

12. The key complaint by the Appellant is that the Trial Magistrate erred by finding liability at 50:50 whereas no proof of culpability was adduced against the Appellant. I have perused the lower court judgment. First, it is evident from the contents of the judgment that the trial court went to great lengths to weigh the conflicting evidence of the parties. On that score the court cannot be faulted.

13. With regard to the finding of liability at 50:50, it is necessary to read the judgment in full as well as the evidence. It is not enough as the Appellants appear to do, to quote only the passage at page 34 which states:

> **"The position now remains that plaintiff was overtaken by a trailer or trailers, he lost control of the bicycle or lost balance and rode out of his bicycle lane towards the road and in the process, DW1's motor vehicle was already near, DW1 hooted, applied brakes trying to avoid plaintiff but it was too late the collision occurred. Plaintiff also told the court that heard a hoot and looked back this is also another possibility that made him to lose balance of the bicycle." (sic)**

14. In the next paragraph the court proceeded to state:

> **"DW1 was behind plaintiff and had a better view of him than plaintiff. He was under duty to ensure that he passed plaintiff safely by keeping proper distance for him because DW1 admitted that he saw plaintiff well before the accident riding outside the road on the cyclist lane. But if DW1 was more careful he would have avoided the plaintiff even if he swerved to the road because plaintiff was not in high speed. But had plaintiff also not lost balance or swerved to the road, DW1 would not have found him because I have ruled out claim that DW1 veered off the road. I am therefore convinced that both plaintiff and DW1 were equally to blame."**

15. The logic in the foregoing reasoning cannot be faulted. The nature of the evidence before the court supports the conclusions arrived at, on my own evaluation. In the circumstances described in the evidence of both parties, it was impossible to hold one party more liable than the other (See **W. K. suing through next friend & mother L.K. –Vs- Ghalib Khan Neer Construction)**. In that case a young girl aged 11years was knocked down by a vehicle while crossing a road – almost having completed crossing the road. The defendant claimed that the minor ran into the road and was caught by the right rear of his vehicle, but admitted that the driver had seen her by the road side before starting to cross. The Court of Appeal stated:-

> **"This was a case of conflicting evidence and the finding of the trial judge that the Appellant had not proved negligence and that had she proved her claim he would have apportioned liability 90% against and 10% against the 1st Respondent shows in decision."**

16. The Court of Appeal allowed the appeal restating the dictum in the case of **Haji –Vs- Marair Freight Agencies Ltd [1984] KLR 139** that:-

> **"Where it is proved by evidence that both parties are to blame and there are no means of making a reasonable distribution between them, the blame can be apportioned equally on each."**

17. I think the same position obtains here. The Plaintiff and the accident vehicle driver contributed equally to the accident. It was not possible to assign higher liability against the Respondent when the Appellant had also admittedly seen him in time ahead of him and was unable to avoid running into the Respondent when he lost control of his bicycle. I agree with the findings of the trial magistrate on the apportionment of liability.

18. Equally, by the same reasoning I think it is misdirection for the Appellants to assert that by apportioning liability at 50:50 the trial court shifted the burden of proof to the Appellant. The trial court took the correct approach in the circumstances of the case. That said, only one issue remains, the 1st ground of the Respondents cross petition. Having looked at the evidence of the Respondent, it is not disputed that the doctor's prognosis in the medical report foresaw the recurrence of certain complications and necessity for medical treatment for the Respondent. This was quantified at Shs 50,000/= in the plaint.

19. Both the Respondent and his father stated in their evidence that the Respondent suffers from chest pains. Although he claimed that the Respondent had "gone back in many occasions for review" the father did not tender any evidence of this treatment. Nor did the Respondent refer to such treatment sessions in his evidence.

20. Although I agree with the Respondent that the trial court should have pronounced itself on that claim, it seems to me merely speculative as the Respondent after one year of the accident did not tender evidence that he had sought medical attention. The fact that he had subsequent aches and pains in the chest does not mean that he was entitled to sessions of physiotherapy (presumably for the fractured leg). That is also a matter that required that the medical report sets out in detail the regularity and cost of sessions required rather than throwing in a global sum as happened in this case.

21. The claim was not justified on the evidence adduced and I do reject that ground of the cross-appeal. In the result the appeal and cross appeal are both dismissed with costs.

Delivered and signed at Naivasha this **21st** day of **September, 2015.**

In the presence of:

For Appellant

For Respondent

Court Assistant - Stephen

C. W. MEOLI

JUDGE