REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 75 OF 2012

(Appeal aising from the Judgment of

[HON. P. ACHIENG, SRM] delivered on

27.7.2012 in the Chief Magistrate Court at

Kakamega in Civil Case No. 147 of 20011)

ZACHARIAH SHIYENZI CHIBO ……. APPELLANT

V E R S U S

ELPHAS OYUGI ONELE ……. 1ST RESPONDENT

CAR & GENERAL KENYA LIMITED …….. 2ND RESPONDENT

J U D G M E N T

The appellant was involved in a road traffic accident on the 21.3.2011 along the Kisumu-Kakamega road at Amalemba area. He was a pedal cyclist and the accident vehicle was registration number KBD 849 W Nissan Pickup driven by the 1st respondent. The trial court apportioned liability at 50:50 and that triggered the filing of this appeal.

The appellant's grounds of appeal are that the trial court erred in law and fact by apportioning liability at **50:50** when the evidence on record showed that the 1st respondent was to blame for the accident, that the trial court took into account irrelevant factors hence making a contradictory finding on liability, that the trial court did not consider the appellant's pleadings and testimony and that the trial magistrate entered in the arena of being a witness when she held that motorcycles are usually driven at a high speed at the place where the accident occurred.

Parties agreed to have the appeal determined by way of written submissions. The submissions for counsel for the appellant expounds on the above grounds of appeal. The submissions explain the plaintiff's evidence before the court and maintain that the appellant was hit off the road. There was evidence that the 1st respondent was charged with the offence of driving a defective motor vehicle and he was fined KShs.5,000/=. The trial court misunderstood the appellant's evidence and concluded that he was a motorcyclist yet he was a pedal cyclist. The court concluded that motorcycles are driven at a high speed at the place where the accident occurred which is a straight stretch yet there was no evidence as to the speed at which the appellant was cycling. The 1st respondent's contention that there was a stationary

matatu was not proved. Counsel for the appellant is of the view that the respondents ought to have been held 100% liable.

On his part counsel for the respondent submitted that the finding of the trial court were proper and urged the court to dismiss the appeal. The appellant did not establish the point of impact and his evidence was not sufficient. The trial court noted in its judgment that given the evidence on record it was impossible to tell who was to blame for the accident. Counsel relies on the case of **BERKLEY –STEWARD VS WAIYAKI [1982] I KAR 1118** and that of **BAGWANJI RAJA V SWARAN SINGH 1962 EA 288.**

The record of the trial court shows that only two witnesses testified namely the appellant and the 1st respondent. The appellant's evidence was that on the 21.3.2011 he was heading towards Kakamega town riding his bicycle along the Kisumu-Kakamega road. He was on the left side of the road but off the tarmac. When he reached at Amalemba a vehicle came from behind and hit him. He was injured and admitted at Kakamega General Hospital from 21.3.2011 up to 5.4.2011. He blamed the accident on the 1st respondent. The rest of the evidence related to the injuries he sustained. According to him there was no other vehicle in-front of him and he was hit from behind.

On his part the 1st respondent testified that on the material day he was driving motor vehicle registration number KBD 849 W coming from Kisumu heading to Kitale. When he was approaching Amalemba stage he saw a matatu about 200 meters away. The matatu was on the left hand side of the road and it was stationary. He indicated showing that he was to overtake the matatu. There was a murram road on the left side of the road and a cyclist appeared from the road and crossed ahead of the matatu. The cyclist had not seen the 1st respondent. He tried to apply emergency brakes and swerved but the accident occurred at the middle of the road as the distance was too close. He stood about 10 meters from the point of impact.

The trial magistrate awarded the appellant **KShs.400,000/=** as general damages and apportioned liability at **50%** against the plaintiff and **50%** against the defendant. The appellant contends that the trial magistrate was wrong on her apportionment of liability and that the evidence on record was in favour of the appellant. From the evidence on record it is clear that the police file or anyone from the relevant police station who was conversant with the accident testified. It was therefore the appellant's word against that of the 1st respondent. I do agree with the submission by the counsel for the respondent that it was incumbent upon the appellant to prove his case. I do find that the appellant simply rushed his case and closed it without bringing enough evidence. The court could not have simply believed the appellant's evidence that he was hit from behind and not believe the evidence of the 1st respondent that the appellant crossed the road ahead of a stationary matatu. Further the trial court could not have concluded that the point of impact was off the road yet there was no independent evidence to prove that. Such evidence could have easily been adduced had the appellant called somebody from the relevant police station to produce the police file. Similarly the contention that the 1st respondent pleaded guilty to a charge of driving a defective vehicle cannot be taken to attribute 100% liability on the respondent. A vehicle can be found to be defective in many instances such as having faded colour, broken side mirror, cracked windscreen or if does not have reflectors. It has to be proved that the defects on the motor vehicle were the cause of the accident. For instance if it was found that the accident vehicle had defective brakes or if the accident occurred at night and the vehicle had no lights. I do find that the trial court did not enter into the arena of being a witness as all what the trial magistrate did was to make an observation as to the manner in which motorcycles are driven at that particular area. I do find that that observation did not prejudice the mind of the magistrate and did not matter whether the appellant was a pedal cyclist or a motorcyclist.

The appellant further contends that he ought to have been awarded cost although that is not one of the grounds of appeal. Since the trial court held both parties liable in equal portions I do find that its decision not to award costs was fair. I do not need to interfere with the findings of the trial court. Given the evidence on record I do agree with the findings of the trial court that it was difficult to conclusively establish who was to blame for the occurrence of the accident.

In the end, I do find that the appeal lacks merit and the same is hereby dismissed. Each party shall meet his own costs of this appeal.

Delivered, dated and signed at Kakamega this 26th day of June 2013

SAID J. CHITEMBWE

J U D G E