



REPUBLIC OF KENYA

High Court at Kisumu

Civil Appeal 164 of 2009

OSMAN BASCEL J. A.....1ST
APPELLANT

PUT SARAJEVO GENERAL ENGINEERING CO LTD.....2ND
APPELLANT

VERSUS

JULIUS OCHIENG

OWUOR.....RESPONDENT

JUDGMENT

The memorandum of Appeal filed on 2nd November 2009 boast of nine (9) grounds. The net effect of the said grounds are on liability and quantum. When this matter came up for hearing the parties agreed to file written submissions.

This accident occurred on 30th November 2007 around 2:00 p.m. along Usenge Bondo TTC gate. The respondent was pedal cycling back to work. According to the evidence he presented at the lower court he was cycling on the left side of the road and when knocked he landed on the right hand side of the road. The vehicle pushed him across the road.

As a consequence of the said accident the respondent sustained the following injuries:-

- (a) **Dislocation of the left ankle joint**
- (b) **Dislocation of the right shoulder joint**
- (c) **Blunt injury to the left jaw**
- (d) **Blunt injury to the right thigh**
- (e) **Blunt injury to the head**
- (f) **Blunt injury to the chest**
- (g) **Blunt injury to the left rib**
- (h) **Blunt injury to the right arm**
- (I) **Blunt injury to both knees**

The appellant on the other hand denied that it caused the accident and argued that although the accident occurred the respondent signed a hand written agreement exonerating the appellant.

The trial court after considering the evidence before it apportioned liability at 60% to 40% against the appellant. It further awarded the appellant general damages of Kshs. 160,000/=.

Having carefully perused the proceedings and the submission by both counsels it is imperative at this juncture to determine the question of liability.

The respondent in his evidence in Chief said:-

“I was cycling on the left hand side of the road. I landed on the right hand side of the road. The vehicle pushed me across the road. I really cannot explain how I got to land on the right hand side of the road”.

On cross examination he said:

“I was from Sina panga, which is on the right hand side of Bondo Usenge Road. I was cycling on the left hand side and vehicle was on coming. The accident was on the left hand side of Bondo Usenge road”.

From the above testimony it is apparent to me that the respondent was pedal cycling on the left hand side of the road. This was the same direction that the vehicle was on coming. So who was on the wrong?.

It must obviously be the respondent. It is common knowledge although sometimes not common to all that in this country the vehicles keep the left hand side rule always. If as admitted by the respondent that he was on the left hand side then he was clearly on the wrong side of the road. His admission that he cannot understand how he landed on the right hand side of the road buttresses my findings.

There is also exhibit D 1. The agreement dated 11th December 2007 was signed about eleven (11) days after the accident. It is signed by the respondent, plaintiff, Ondeje Oganyo his brother and Lazarus Mwilu DW1.

This document was produced without any objection by the respondent. The same clearly implicates the respondent as the cause of the accident.

Further nowhere in the proceedings has it been suggested that the same was produced under duress or any undue influence.

For the foregoing reasons I do not find any basis for the trial court to have found the appellant 60% liable for the said accident. This ground therefore succeeds.

The next issue raised by the appellant was that the court failed to take into account that the respondent did not establish the ownership of the vehicle. I respectfully disagree.

DW1 Lazarus Mwilu who signed the agreement dated 11th December 2007 earlier own alluded is the same witness who testified on behalf of the appellant. Why would he sign an agreement and testify on behalf of the appellant if indeed the motor vehicle did not belong to the appellant? I do hold that the motor vehicle K A W 491 G belonged to the appellant.

On the issue of quantum it is now a trite law that this court shall only interfere with the trials courts finding if the same is manifestly excessive or low or if the court took into account some irrelevant factors in arriving at the said decision. I do not find the award of Kshs. 160,000/= being manifestly low or high. The same was reasonable in light of the injuries and the authorities relied on by the parties.

In conclusion therefore having found that the respondent was responsible for the said accident I do therefore set aside the trials courts findings on negligence and substitute it with a finding that the respondent was 100% negligent for the said accident.

Consequently, I find this appeal meritorious. I shall allow the same by setting aside the lower courts judgment and the attendant consequences . The appellant shall have costs of this appeal.

Dated, signed and delivered at Kisumu this 24th day of October 2012.

**H.K. CHEMITEI
JUDGE**

In the presence of:

Nyanga for menezes for the appellant

Olel for Madialo for the respondent

HKC/aao