



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT EMBU

HCA 97 OF 2008

**SAMWEL WANYOIKE KILU.....APPELLANT
VERSUS
DUNCAN WARURI KAMONI.....RESPONDENT**

JUDGEMENT

The Appellant herein one Samwel Wanyoike Kiilu was on 12/9/2005 cycling along the Embu-Mwea Road. It was between 6.00pm and 7.00pm. He was carrying a pillion passenger. The Respondent one Dancun Waruri was driving his motor vehicle Registration No. KAN 533G from the opposite direction. He told the trial court that he had his motor vehicle's headlights on. On reaching near a petrol station on his right side, he decided to divert and enter the petrol station. He said that he indicated to that effect. He said that as he was turning, the cyclist i.e. the Appellant herein came cycling straight on. According to the Respondent, the bicycle did not have its headlight on, nor was the cyclist wearing any reflective clothing. He braked the motor vehicle but the cyclist rammed into the left front side of his motor vehicle. The bicycle overturned and the Appellant and his passenger sustained some injuries.

They were taken to the nearby health centre where they were treated and discharged. The Appellant sustained a sprain on his left hip and some soft tissue injuries around the right elbow.

He filed a suit before the Wanguru Senior Resident magistrate's court seeking damages for the said injuries. The suit was heard and in a judgment rendered on 9/9/2006, the learned trial magistrate awarded the Appellant kshs.80,000/= as general damages and kshs.2,200/= as proven special damages. He apportioned the liability at 80:20 in favour of the Respondent. In his judgment, the learned trial magistrate in apportioning the liability stated

“In my view, the plaintiff's contribution was such that it was so substantial that had the defence not conceded 20% liability, I would probably have attributed less”.

The plaintiff was aggrieved by both the amount of damages and the apportionment of liability and hence the filing of this Appeal. He proffered 4 grounds of Appeal and urged the court to set aside both the finding on liability and also the damages. He urged this court to enter judgment in his favour as prayed in the plaint.

The learned trial magistrate in apportioning liability found that the Appellant did not have reflective clothings and further that the bicycles' headlights was not on as at the time of the collision. I have no cause to interfere with that finding of fact. Indeed had the headlight been on, the defendant/respondent could have spotted the bicycle before starting to turn into the petrol station and the collision could have

been avoided.

I have carefully considered the evidence before the trial court, the grounds of Appeal raised herein and the written submissions filed by both counsel. I must mention here that the pillion passenger who was with the appellant did also file a separate claim. He was awarded kshs.80,000/= as general damages. On Appeal, I upheld that figure but interfered with the apportionment of liability. The injuries on the pillion passenger in the other case were also similar to the Appellant's and that would explain why they were awarded the same amount in general damages. My finding is that the kshs.80,000/= was in no way excessively low as submitted by the Appellant's counsel. There is no set formula to be used in awarding damages. The trial court is expected to be guided by relevant precedents presented before it and the nature of the injuries suffered by the Plaintiff. The rest is left to the discretion of the trial court. The Appellate court will not normally interfere with such an award unless it is satisfied that the discretion was not exercised judicially, that the trial court considered extraneous matters in arriving at the award ,or failed to consider some important materials and therefore arrived at the wrong award. In this case, I do not see such a misdirection by the learned trial magistrate. The award was in my considered view neither inordinately high, nor inordinately low.

It was in my view adequate given the nature of the injuries sustained. I will therefore not interfere with it and uphold the same. The circumstances surrounding the accident were the same and so liability must therefore also be the same.

As I said in the earlier Appeal, the Defendant/Respondent should have been more watchful and if his headlights were on, he could have seen the Appellant in good time and the accident could have been avoided. I will therefore interfere with the apportionment of liability and adjust the same to 60:40 in favour of the Respondent instead of the 80:20 as apportioned by the learned trial magistrate.

This Appeal therefore succeeds only in part. I set aside the apportionment of liability of 80:20 and substitute thereof the ration of 60:40 in favour of the respondent. The Appellant will therefore get 40% damages instead of 20% as awarded by the trial court.

Since the Appeal succeeded in part, I order that each party bears its own costs of this Appeal. The order on costs before the trial court to remain the same. Orders accordingly.

W. KARANJA
JUDGE

Signed by the above but delivered and dated at Embu this 15th day of March, 2011 by the undersigned.

M. WARSAME
JUDGE