

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Appeal 96 of 2008
PIUS MURIITHI NDAMBIRI.....APPELLANT
VERSUS
SUSAN WANJIRU KARANI.....RESPONDENT

J U D G M E N T

The Appellant herein was a Pillion passenger on a bicycle which was riding along the Mwea-Embu road at Ngurubani township. From the evidence adduced before the trial court, it was between 6.00-7.00 p.m. but most likely towards 7.00 p.m. because vehicles on the road were said to have had their headlights on.

The Respondent herein was driving his motor vehicle Registration No. KAN 533G along the same road but from the opposite direction. The defendant decided to divert from the main road into a petrol station which was beside the road. He told the court that he allowed the oncoming motor vehicles to pass before he started driving into the petrol station. He admitted that he did not see the bicycle in question before he diverted as it did not have its head light on. He also said that it was moving at a fast speed and so it rammed into his motor vehicle damaging the left hand side indicators. The bicycle overturned and the rider and the pillion passenger were injured. They were taken to the hospital where they were treated for some soft tissue injuries. The learned trial magistrate after hearing the evidence adduced before him entered judgment against the defendant and awarded the plaintiff KShs.80,000. He also found the plaintiff 80% liable for the accident. He awarded 80,000 Sh. as general damages. The plaintiff was displeased by the said judgment and he filed this Appeal. Counsel nonetheless dropped the ground on quantum of damages, and argued his appeal on liability. He urged this court to find the Defendant/Respondent wholly liable for the accident and thus exonerate the Appellant from any liability.

I have considered the 3 grounds of Appeal along with the evidence adduced before the trial court and the written submissions by both counsel. The collision between the bicycle and the Respondent's motor vehicle is not disputed. It is not disputed either that it happened on the Appellants correct side of the road. According to the Respondent, he did not see the cyclist because he did not have the head light on. In my view however, if the Respondent had his lights on as he stated, there was no reason for him not to have seen the cyclist in good time. Had he done so, the accident would have been avoided.

The only issue in this Appeal is the liability and the apportionment of the same. As rightly found by the learned trial magistrate, both parties herein were responsible for the collision. According to the Magistrate however, the cyclist was 80% liable because he did not have his light on and also because the Appellant herein was distracting him.

In my view however, the defendant/Respondent was also equally to blame because he ought to have seen the cyclist in good time if his headlights were on. I do nonetheless find the apportionment of liability here a bit lop-

sided. I will therefore interfere with the same and adjust it to a ratio of 60:40 in favour of the Respondent. The fact that the defendant/Respondent failed to join the cyclist as a 3rd party would not affect the plaintiff claim in any way. It just means that the defendant would have to solely shoulder the responsibility arising out of the accident.

The Appeal therefore succeeds only in part. I set aside the apportionment ratio of 80:20 and substitute thereof one of 60:40. The Appellant will therefore get 40% damages awarded by the trial court instead of 20% as ordered by the learned trial magistrate.

Orders accordingly.

W. KARANJA
JUDGE

Delivered, dated and signed at Embu this 6th day of July 2010.

In presence of:- Ms. Njeri for Ms. Thungu for Respondent.