



REPUBLIC OF KENYA



**Transline Co Ltd v Nunda (Civil Appeal 63 of 2022)
[2024] KEHC 2814 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2814 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 63 OF 2022
TA ODERA, J
MARCH 12, 2024**

BETWEEN

TRANSLINE CO LTD APPELLANT

AND

DAVINA TERESA NUNDA RESPONDENT

*(Being an appeal from the Judgment delivered by Hon. STELLA
ABUYA (CM) on 16th August 2022 in KISII CMCC NO 119 OF 2019)*

JUDGMENT

Background

1. This Appeal arises from the Judgment delivered on 4th June, 2021 in Kisii CMCC NO 655 of 2019 whereby the Appellant was found to have been 100% liable injuries sustained by the Respondent in whose favor an award was preferred as follows;
 - a. General damages at Kshs.150,000
 - b. Special damages at Kshs. 10,860
2. Aggrieved by the decision of the trial court filed this appeal based on the grounds that;
 - a. The learned Magistrate erred in law and misdirected herself when she failed to consider the appellants submissions on both points of law and facts.
 - b. The learned Magistrate’s decision was unjust against the weight of evidence and was based and was based on misguided facts and wrong principles of law and has occasioned miscarriage of Justice.



- c. The learned trial magistrate erred in law and misdirected herself when she failed to consider the provisions set out in the insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, Cap 405.
 - d. The learned Magistrate erred in law and in fact in finding that the defendants 100% liable in view of the evidence produced before the trial court especially the fact that the plaintiff failed to prove his case on liability.
 - e. The learned Trial Magistrate erred in law and in fact by awarding the Plaintiff/Respondent Kshs. 150,000 as general damages hence arriving at a wrong finding as regards the nature of injuries sustained by the Respondent.
 - f. The learned trial magistrate erred in law and fact by awarding the plaintiff an inordinately high quantum as damages in the circumstances of this case.
 - g. The learned trial magistrate erred in law and fact in awarding the plaintiff a sum that was so erroneous as to the estimate of general damages suffered by the plaintiff.
 - h. The learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on quantum and liability as well as the legal authorities relied upon in support thereof
 - i. The learned trial magistrate erred in law and in fact by overly relying on the respondent's submissions which were not relevant to the circumstances of the case
 - j. The learned trial magistrate erred in law and in fact by failing to consider conventional awards on cases of similar nature.
3. Based on the grounds of Appeal the Appellants sought for the following orders;
- a. That this appeal be allowed with costs
 - b. The Judgment delivered by the trial court on 16th August 2022 by Honourable Stella Abuya (CM) be set aside and a judgment of this court dismissing the suit against the Appellant with cost be entered.
 - c. The costs of this Appeal and those of the trial court be awarded to the Appellant.
4. The background of the matter is that the Respondent filed a suit against the Appellant vide a plaint dated 20th February, 2019 seeking general damages, special damages, costs of the suit and interests. To support his claim the Respondent alleged that on or about 18th March, 2018, while travelling as a pillion passenger on a motor cycle registration number KMDN 958, along Kisii-Migori road. When at Gesonso area, the Appellant's driver who was driving negligently on the said a motor vehicle Registration number KCB 155P registered in the name of the Appellant caused the said vehicle to collide with motor cycle she had boded and as a consequence the Respondent sustained injuries which included swelling of the occipital region, blunt trauma to the right hip, bruises on the right anterior left upper limb and bruises on the right lower limb. She thus prayed the Appellant to be held vicariously liable for the negligence actions of her driver.
5. In its Defense, the Appellant denied allegations against it and pleaded that if an accident had occurred the same was contributed by the negligence or recklessness of the Respondent and the rider and/or the owner of the motor cycle registration number KMDN 958 G.



6. The trial learned trial Magistrate upon hearing all the parties delivered its judgement date on 16th August, 2022 wherein it held as follows;

“I have carefully considered the evidence and the rival submissions. I find since it's not disputed that a Road Traffic Accident occurred on the date in question involving m/v reg.no. KCB 155P and Motor Cycle registration no. KMDN where the plaintiff was a pillion passenger and that the plaintiff sustained injuries as a result of the said Road Traffic Accident. I only have to determine the following issues:-

- a. Whether or not on the date in question the defendant was the registered owner of motor vehicle reg.no. KCB 155P.
- b. Who is to blame for the Road Traffic Accident?
- c. What damages is the plaintiff entitled to?

Issue 1

7. I find the plaintiff proved that on the date in question the defendant was the registered owner of m/v reg. no. KCB 155P as she produced a m/ v copy of records as an exhibit where it indicated that the defendant was the registered owner of the said Motor vehicle on the date of the Road Traffic Accident.

Issue 2

8. I find (DW1) the driver of motor vehicle reg.no. KCB 155P is wholly to blame for the Road Traffic Accident as he was over speeding and hit motor/cycle registration Number KMDN 958G where the plaintiff was a pillion passenger from behind.

9. On the other hand I find the defendant's defense that the rider of motor cycle reg.no. KMDN 958G and the plaintiff are to blame for the Road Traffic Accident as the rider joined the main road from a feeder road suddenly from the left side and the plaintiff was not wearing a helmet, she held the rider's shoulder and was talking to the rider is not proved and if that was the position the defendant could have enjoined the said rider of the said m/cycle as a 3rd party but they failed to do this and during cross-examination DW1 stated the rider joined the main road on the right side not the left side. Further still when the plaintiff was being cross-examination the issues of her talking to the boda and holding his shoulder did not arise.

10. I find the defendant vicariously liable for the negligent act of his driver (DW1).

11. It against this decision that the Appellant filed this Appeal. This court with the consent of all the parties directed that the Appeal to be disposed of by way of written submissions. The Appellants filed the written submission through the learned counsel on 16th January, 2024, while the Respondent's submissions were filed on 4th December, 2023.

The Appellants Submissions

12. The learned counsel for the Appellant filed a memorandum of appeal challenging both liability and quantum but in their submissions filed herein dated 5.1.24 it was indicated that “the appeal can be summed up to the sole issue of liability”. It is thus clear to me that the issue of Quantum has been abandoned by the appellant.

13. Counsel submitted that even though the Respondent had blamed the Appellant's driver for the accident, she did not call any witness to corroborate her version of how the accident occurred. On the



other hand he submitted that the Respondent called the driver of the bus and PC Kenneth walumbe who led evidence to show the driver and the pillion passenger were to blame for not being careful on the road and for the respondent holding the riders shoulders while he was riding thus rendering him unable to properly control the motor cycle properly and also joining the road without care.

14. The learned counsel equally submitted that the investigating officer according the OB entry placed blame on the rider of the motor cycle. He thus concluded that from the said testimonies, it was manifestly clear that the respondent did not prove her case to the required standard as was determined by the trial court.
15. The learned counsel on with prejudice this court submitted that should this court in any event find that the Appellant may have contributed in occasioning the accident, which is denied, then it is only fair that there be an apportionment of liability between the appellant and the respondent. The learned counsel relied on the case *Lakhamshi vs Attorney General* (1971) EA 118 120 (as was quoted in the case of *Calistus Juma Makhanu vs Mumias Sugar Co. Ltd and another* (2021) eKLR.
16. The learned counsel for the Appellant equally submitted that the trial court did not take into account all relevant and material factor in finding appellant was to blame for the accident.
17. He thus urged this court to allow the Appeal and set aside the Judgement to the trial court.

The Respondents Submissions

18. On liability, the learned counsel submitted that the evidence of DW1 and DW2 was superfluous since they were blaming the rider of the motor cycle who was not party to the suit and whom was not enjoined to the suit as a third party as provided under Order 1 Rule 15 of the Civil Procedure Rules, 2010. He underscored that the Respondent being a pillion passenger was in control of the motor cycle and thus cannot be blamed in any manner for the Accident. The Learned counsel reiterated that the finding of the trial court that the Appellant was 100% liable was sound.

Issues of Determination

19. Having analyzed the grounds of Appeal, reviewed the written submissions filed by the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the issues of determination are.

a. Whether the trial court erred in its finding that the Respondent was 100% liable for the offense.

Analysis and Determination

20. This a first appellate court and it is the duty of this court is to re-evaluate the evidence on record and come to its own conclusion bearing in mind that it did not have an opportunity to see the witnesses as was held in the case of as was held in the case of *Gitobu Imanyara & 2 others V Attorney General* (2016) eKLR, to wit;

“..... Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

21. Whether the trial court erred in its finding that the Respondent was 100% liable for the offense.
22. According to the Appellant the trial court erred in finding that it was 100% liable to the accident that led to the injuries suffered by the Appellant. It contended that if this court was inclined to finding that



- the Appellant was responsible for the accident then, it should consider that the respondent contributed to the accident.
23. The Respondent on the other hand reiterates the findings of the trial court that the Appellant through its witnesses had shifted blame to the rider of the motor cycle who was not party to the suit and thus there was no way the Respondent was going take the blame on behalf of a party who was not in the suit.
 24. I have considered the two positions held by the two parties as well as the findings of trial magistrate that I have summarized herein above and in my view, the learned trial magistrate did not err when she apportioned 100% liability on the Respondent for reasons that the motor cycle rider was not a party to the suit as he had not been sued by the respondent nor had he been enjoined to the proceedings as a 3rd party by the appellants.
 25. When I considered the testimonies of the Appellant witnesses it is true that in their evidence, DW1 and DW2 appeared to fault the motor cycle rider for the accident saying that appeared suddenly from a feeder road without notice thus causing the collision. If this was the Appellant's position, then they ought to have joined the rider as a 3rd party under Order 1 Rule 15 of the Civil procedure Rules 2010 so that the issue of who between the Appellant , the rider and the respondent was to blame for the accident could be determined by the trial court. The Appellant did not do so. In any event, police abstract also indicates that the case is under investigations; it does not blame the rider. Nothing would have stopped the who issued the police abstract state that the rider was to blame for the accident if indeed he was. The learned trial magistrate thus was correct by appreciating this fact and in proceeding to apportion liability on appellant solely and not the rider and the respondent.
 26. Equally as correctly submitted by the learned counsel for the Respondent as a pillion passenger, the respondent was not in control of the motor cycle and there was nothing he could have done either to cause or to avoid the accident. The claim that the Respondent was holding the rider while he was driving was not corroborated by any witness. Further whether or not the Respondent put on or did not put reflective jacket and protective helmet was an irrelevant issue to be considered by the learned trial magistrate as same did not have any bearing on the issue of how the accident occurred.
 27. Though the respondent claimed that the trial court erred in ignoring the authorities cited, I find no merit in this submission as the learned trial magistrate in her judgment clearly indicated that she had considered the submissions made by each of the parties.

Conclusions

28. From the forgoing therefore I find no merit in the Appeal and thus I proceed to dismiss the same with cost to the Respondents.
29. It is so ordered.

T.A ODERA

JUDGE

12.3.24

Delivered virtually via teams platform in the presence of;

N/A for appellant -

N/A for respondent -

Court assistant – Oigo

