



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CIVIL APPEAL NO. 57 OF 2018**

**DAVID NYAGA.....APPELLANT**

**VERSUS**

**SAMUEL KITHINJU.....RESPONDENT**

**JUDGMENT**

1. The appeal herein arises from the judgment of Hon. V.O. Nyakundi Senior Resident Magistrate, dated the 26<sup>th</sup> day of September, 2018 in Civil Suit No. 6 of 2013. In the said suit, the respondent who was the plaintiff, filed the plaint dated the 14<sup>th</sup> day of January, 2013 against the appellant in which he claimed general and special damages arising out of a traffic road accident that is said to have occurred on the 30<sup>th</sup> day of January, 2010 along Mutunduri – Kianjokoma road, at Mutunduri area within Embu County.

2. In the plaint, the respondent averred that on the material date, the appellant who was the owner/driver of motor vehicle registration No. KXG xxx Toyota Station Wagon so negligently, carelessly and/or recklessly controlled and/or managed the aforesaid motor vehicle that he caused it to knock down the respondent as a consequence of which he sustained injuries and thus suffered loss and damage.

3. The particulars of negligence on the part of the appellant and those of special damages are set out in paragraphs 5 and 6 of the plaint respectively.

4. The appellant denied the claim vide the defence filed on the 8<sup>th</sup> May, 2018. He admitted that he was driving motor vehicle KXG xxx on the material day and as stated in paragraph 4 of the plaint, but denied that he was negligent as alleged. He averred that contrary to the negligence attributed to him, it is the rider of unregistered motor cycle on which the respondent was a passenger who was extremely negligent and careless.

5. The particulars of negligence of the rider were particularized in paragraph 3 of the defence. He urged the court to dismiss the respondent's claim with costs.

6. The matter proceeded with the appellant and the respondent calling one witness each and in its judgment delivered on the 26<sup>th</sup> September, 2018, the trial court entered judgment for the respondent on liability at 100% as against the appellant and awarded general and special damages at Kshs. 600,000/= and Kshs. 8,200/= respectively. The respondent was also awarded the costs of the suit.

7. The appellant being dissatisfied with that judgment filed the appeal herein and has listed nine (9) grounds of appeal in the memorandum of appeal dated the 22<sup>nd</sup> October, 2018.

8. When the appeal came up for hearing, the court gave directions on filing of submissions which directions the parties duly complied with. The court has considered the said submissions, and the grounds of appeal.

9. This being the first appellate court, its duty is well set out in the case of **Selle & Another Vs Associated Motor Boat Company Limited & Others [1968] EA 123** thus: -

*.....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court.....is by way of retrial and the principles upon which this court acts inside an appeal are well settled. 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 or heard the witnesses and should make due allowance in this respect.....*

10. The court has re-evaluated the evidence adduced before the trial court as its expected of it.

11. There is no doubt that the respondent's cause of action is based on the tort of negligence. The burden of proof was on him to proof his

case on a balance of probabilities. In the case of Miller Vs Minister of Pensions [1947] 2 All ER 372, the court had this to say about the burden of proof;

*That degree is well settled. It must carry a reasonable degree of probability; but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: we think it is more probable than not, the burden is discharged; but, if the probabilities are equal, it is not. Thus, proof on a balance of preponderance of probabilities means of a win, however narrow. A draw is not enough. So, in any case in which the Tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.*

12. The court has perused the memorandum of appeal and the grounds enumerated therein. It is clear that the appeal is on liability only. The appellant has not challenged the quantum of damages in any way. As already stated the appellant and the respondent called one witness each. In his evidence, the respondent stated that on the material day, he was at Mutunduri stage and was standing on the left side of the road facing Manyatta in the company of his friend one David Muchira when he heard a loud bang and he realized that a vehicle had hit him. The vehicle was coming from Manyatta and after the impact, he fell in a ditch. He identified the vehicle as registration No. KXG xxx Toyota Station Wagon. He sustained injuries to the right leg and was taken to Embu Provincial Hospital for treatment.

13. On his part, the appellant admitted being the owner of motor vehicle KXG xxx and that he was involved in an accident at 7.00 pm on, the 31<sup>st</sup> January, 2010 at Mutunduri. He stated that the accident occurred on the right side of the road as you face Embu – Meru road. That he hit a motor cycle and not a person though he admitted that two people were injured after the accident, the respondent being one of them. He denied negligence on his part but attributed the accident to the rider of the boda boda which was coming from the opposite direction and was swerving from right to left side.

14. On the 18<sup>th</sup> July, 2018, the respondent filed a further witness statement in which he stated that he was standing on the left hand side of the road as one takes the direction of Manyatta and on the right hand side as one faces the direction of Mutunduri when the accident occurred. That he suddenly saw a motor vehicle from the direction of Manyatta which had veered toward where he was standing and since it was too close, he had no time to react. The motor vehicle hit him and threw him in a drainage. He blamed the appellant for driving very fast in a built up area. He denied that he was riding on a motor cycle.

15. In his submissions, the appellant submitted that the respondent's evidence was not corroborated and that he did not tell the court what happened before he was hit by the accident motor vehicle. That the appellant claims that his motor vehicle was hit by a motor cycle and consequently the respondent was injured and that since there are two versions of the cause of the accident, the appellant's version seem more believable than that of respondents. He further submitted that if the respondent was hit by the motor vehicle as he claims, then he would have suffered multiple injuries and not a single fracture.

16. On his part, the respondent submitted that the appellant's vehicle veered off the road and knocked him down while he was on the right hand side of the road as he faces Mutunduri road. On the issue of the motor cycle, the respondent contended that the appellant ought to have enjoined the rider as a party to the suit, which he failed to do, and that it is too late in the day for the appellant to raise issues of an alleged third party being liable for the accident.

17. The court has considered those submissions. Though the appellant submitted that the respondent's evidence was not corroborated, it is my considered view that the respondent adduced sufficient evidence to sustain his claim. First, it was his evidence that he was standing on the right hand side of the road as he faces the direction of Mutunduri when the accident occurred.

18. The appellant was driving towards Mutunduri and therefore the respondent was on the appellant's right side. The appellant in cross-examination admitted that the accident occurred on the right side of the road as one faces Embu – Meru road. In view of the afore-going, the court is persuaded by the evidence and the submissions of the respondent to the effect that the appellant veered off the road and hit the respondent.

19. On the appellant's version to the effect that his motor vehicle was hit by a motor cycle, the court has perused a copy of the Police Abstract which is among the documents that were produced as exhibits.

20. The appellant herein did not object to the production of the same. It shows that the accident involved motor vehicle registration No. KXG xxx and a pedestrian. There is no mention of motor cycle at all. If indeed a motor cycle was involved, nothing would have been easier than for the appellant to apply for a separate police abstract capturing the details of the motor cycle if he strongly felt that there was a motor cycle involved. It has not been alleged that the police failed to capture the right details in the Police Abstract. To that extent the respondent's version seems to me more believable than that of the appellant.

21. Secondly, the appellant seems to blame the rider of the alleged motor cycle for the accident. The respondent herein was just but a pillion passenger on the motor cycle. It has not been alleged that he contributed to the occurrence of the accident in any way. In his evidence, the appellant gave the name of the owner of the motor cycle. Further, in his defence, he attributed negligence to the said owner but did not find it necessary to enjoin him as a party in the initial suit by taking out third party proceedings. **Order 1 Rule 15 of the Civil Procedure Rules** states: -

*Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —*

*(a) that he is entitled to contribution or indemnity; or*

*(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or*

*(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party, or between any or either of them, shall apply to the Court within fourteen (14) days after the close of pleadings for leave of the Court to issue a notice to that effect and such leave shall be applied for by summons in chambers ex parte supported by affidavit.*

22. It is unfortunate that the appellant, despite blaming the rider of un-identified motor cycle for the accident, did not apply for issuance of a third party notice, yet, he even knew the owner of the alleged motor cycle. The court therefore cannot attribute any negligence to a person who is not a party to the suit even if the appellant had adduced sufficient evidence against him.

23. In the circumstances, the court finds and holds that the learned magistrate did not err in finding the appellant liable for the accident. As already stated, the appellant has not challenged the quantum of damages in his appeal.

24. In the end, the appeal is hereby dismissed as it has no merits. The costs of the appeal are awarded to the respondent.

25. The respondent will also have the costs in the lower court.

26. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent