

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CIVIL APPEAL NO. 27 OF 2021

(Formerly KAKAMEGA HCCA NO. 155 OF 2018)

JAMES VULIMU MBAJA.....APPELLANT

VERSUS

ANVI EMPORIUM LIMITED.....1ST RESPONDENT

JOANES OGENDO OMUOM.....2ND RESPONDENT

(Being an appeal from the original judgment and decree of Hon. RM Ogal, Principal Magistrate, of 30th October 2018, in Hamisi PMCCC No. 23 of 2017)

JUDGMENT

1. The suit at the primary court, in Hamisi PMCCC No. 23 of 2017, was initiated by the appellant herein against the respondents, for general and special damages, arising from a road traffic accident on 19th December 2016, where a motor vehicle, belonging to the respondents, KCB 987W, lost control, veered off its course and hit the appellant, who was riding on a motorcycle KMDL 273E, along the Kakamega-Kisumu Road, causing serious injuries on him. The appellant attributed negligence on the part of the respondents. The respondents filed a defence, in which they denied liability and accused the appellant of being the sole cause of the accident or having contributed to it.

2. At the oral hearing 5 witnesses testified, 1 for the appellant and 4 for the respondents. PW1, the appellant, described how the accident happened, and blamed the respondents for the accident, for driving at high speed. DW1, the 2nd respondent, was the driver of the accident vehicle. He testified that there was no collision between the 2 vehicles, instead the appellant's vehicle slid and he rolled, and eventually hit his vehicle. He said that the appellant was riding on the wrong side of the road. DW2, Doris Cheron Chirchir, was a passenger on the respondent's vehicle. She described how the appellant was riding his motorcycle at speed, when he hit a heap of soil on the side of the road, slid and rolled, and the motorcycle skid towards their vehicle, and stopped just right next to their vehicle. She asserted that the motorcycle did not hit the respondents' vehicle. DW3, Clement Ogutu Owenje, was an insurance investigator who handled the matter. He described the general layout of the accident scene, and narrated the material that he gathered after he interviewed eyewitnesses. DW4, Zacheri Usudi, was an eyewitness, who was 10 metres from the accident scene. He saw the appellant lose control of his motorcycle, hit a heap of soil, and the motorcycle slid on the ground and rested on the other side of the road without coming into contact with the respondents' vehicle.

3. After reviewing the evidence adduced at the trial, and other material on record, the trial court, upon finding that an accident had occurred between the appellant and the respondents, was unable to assign liability to either of the two sides, and found both to be equally to blame, and apportioned liability at 50:50. General damages were awarded at Kshs. 500, 000.00, special damages at Kshs. 51, 500.00, future medical costs at Kshs. 162, 000.00. After subjecting the general damages and future medical expenses to contribution at 50% the general damages were reduced to Kshs. 250, 000.00 and future medical expenses to Kshs. 81, 000.00. The total award came to Kshs. 382, 500.00.

4. The appellant was aggrieved by the decision, and lodged this appeal. His case, as articulated in his memorandum of appeal, dated 16th November 2018, is that the trial court erred in finding that the appellant had not proved negligence on the part of the respondents, failed to find the respondents liable jointly and severally for the accident, by apportioning liability at 50:50, failed to find that the respondents failed to prove negligence on his part as alleged in their defence, and that the respondents were in full control of the circumstances leading up to the said accident.

5. Directions were taken on 30th September 2020, for disposal of the appeal by way of written submissions. Both sides have complied with those directions by filing their respective written submissions. I have read through the same and noted the arguments made therein.

6. The appeal really turns on only one ground, liability. The trial court was of the view, from the material placed before it, that it was unable to determine, who, between the two sides, was to blame for the accident, and, therefore, found the two to be equally liable, and apportioned liability at 50:50. The position taken by the trial court is the law on the subject. It is trite that where there is no concrete evidence to establish who is to blame as between two drivers, both should be held equally liable. See *Isaac Onyango Okumu vs. James Ayere & another* [2019] eKLR, *Michael Hubert Kloss & another vs. David Seroney & 5 others* [2009] eKLR, *Salmin Mbarak Awadhi vs. Emma Nthoki Mutwota* [2017] eKLR, among others. Liability between them should be apportioned on the basis of 50:50.

7. The appellant faults the conclusion that the trial court came to. However, he has not cited any law to me that demonstrates that the trial court fell into any error. The appellant alleged that the respondents' vehicle hit him. The respondents presented 3 witnesses who were present at the scene: PW1, PW2 and PW4. They described how the accident occurred. From their statements, and in my assessment, they demonstrated that the appellant was the author of his own misfortune. The evidence was that he was riding his motorcycle at speed, lost control of it and hit a heap of soil and the cycle crashed to the ground. It is not the respondents' vehicle which knocked him down. I would have found, on a balance of probability, that the appellant was wholly liable for what befell him, and dismissed his suit. It is my view that the

trial court was magnanimous to him. However, there is no cross-appeal, and, therefore, the determination by the trial court on liability should stand.

8. I, therefore, find no merit in the appeal before me, and I do hereby dismiss the same, with costs to the respondents.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF
SEPTEMBER 2021**

W. MUSYOKA

JUDGE