



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO 6 OF 2018

SHAH RAMJI PUNJA LTD.....APPELLANT

VERSES

GEORGE NAMBILI WANYONYI.....RESPONDENT

(BEING AN APPEAL FROM THE DECISION OF HON. P BIWOTT IN KITALE

CMCC No. 114 OF 2015)

BETWEEN

GEORGE NAMBILI WANYONYI.....PLAINTIFF

VERSES

SHAH RAMJI PUNJA LTD.....DEFENDANT

JUDGEMENT

1. On the 5th day of **June, 2014** the Respondent was a pillion passenger in motor cycle registration number **KMDC 292K** along Endebes/Kapkoi road. The same was involved in an accident with Motor vehicle Registration number **KAH 182S** owned by the Appellant. The said vehicle was driven and or managed by the Appellant's agent and or servant.
2. As a result of the accident the Respondent sustained serious bodily injuries which included **segmented fracture mid shaft left femur, soft tissue injuries on the thigh, forehead, blunt injuries to the anterior chest wall and soft tissue injuries of the left elbow joint.**
3. The Respondent then filed suit claiming both general and special damages. The trial court on liability apportioned it at 70%:30% in favour of the Respondent as against the Appellant. The Appellant being dissatisfied has filed this appeal on both damages and liability. The lower court awarded a total sum of kshs. 800,000 as general damages and kshs. 18,000 as special damages.
4. The grounds of appeal basically revolve around this question of liability and quantum. The Appellant content that liability ought to have been apportioned entirely against the Respondent as the evidence as presented indicates that the cause of the accident was the motorcycle rider. The Appellant submitted that it was the said rider who was charged with the traffic offence and fined.
5. The Respondent on his part is satisfied with the court's decision and submitted that it took all the factors into consideration and that the apportionment of liability was fair and reasonable in the circumstances.
6. The court has perused the trial courts proceedings and especially the evidence as presented. The court has equally read extensively the submissions on record and respectfully does not need to reproduce them here for want of space and time. Suffice to state that each seemed as expected to blame each side for the cause of the accident which was generally not denied.
7. The nature of injuries and the extent as suffered by the Respondent was not contested as per the evidence on record especially the clinical officers report as well as the medical legal report.
8. How and who caused the accident ought therefore to be interrogated so as to establish this question of liability. There is no doubt that the accident involved both the canter lorry and the motorcycle which was ridden by one Titus. According to the Respondent it was at a junction

and it entered the road suddenly. When he was cross examined he admitted that he did not wear any reflective jacket and he had no helmet. He said that the lorry was parked at the road and it entered the road abruptly.

9. **PC VINCENT NYAKUNDI** from the Kitale traffic base though not the Investigating Officer described the police findings when they carried out the investigation. He said that the rider was charged with riding an uninsured motorcycle and was fined Kshs. 10,000. He said that the rider was overtaking the lorry when the accident occurred. On re-examination though he admitted that he did not visit the scene.

10. The Appellant's driver **PATRICK SIMIYU WEPUKHULU** testified that he had been stopped by the police on a road block where he was checked and allowed to leave. Suddenly the rider rode the motorcycle and hit his vehicle on the rear wheel and he fell on the ditch. He together with the passenger were injured and taken to the hospital after sustaining some injuries. He blamed the rider who according to him was riding very fast. He said that he had indicated his signals.

11. It appears therefore in my view that the main question is where did the accident occur? Did it occur as soon as the Appellant's driver left the road block or as he entered a junction as claimed by the Respondent?

12. It must be noted that the rider was not brought into the case by the Appellant nor more importantly by the Respondent. The police on their part did not draw any sketch plan to indicate the scene and the other related features. Neither were inspection reports for both the vehicle and the motorcycle produced to show the extent of the damages as well as the main spots of damage.

13. In the absence of the above pieces of evidence, the court shall be called upon to rely on what is available on record. The fact that the motorcycle rider was charged and convicted of the offence *prima facie* shows his blameworthiness. Although not enjoined in the suit he carried part of the blame as rightfully found by the trial court.

14. PW3 evidence does not help much in terms of liability as it is apparent and was admitted so by him that he did not visit the scene neither did his police colleagues. He was nevertheless right to suggest that the Respondent should have sued the motorcycle rider.

15. The respondents when cross examined stated as follows;

“the rider was on moderate speed. The lorry was parked by the road and entered the road abruptly to hit us....”

16. This lent's creten to the evidence by the Appellant's driver that he had just left the police road block when he was hit from behind. However, in the absence of the police sketch map it becomes difficult to reach a conclusion that it was really within the precincts of the road block.

17. In the opinion and finding of this court the two drivers were to blame for the accident. There was no independent professional evidence produced by either sides. The police abstract simply showed that the rider of the motorbike was charged with the offence of riding an uninsured motorcycle and not careless driving which perhaps would have indicated the question of liability.

18. Consequently, and based on the above reasoning I find that both the Appellants and the Respondent were to blame for the accident and I hereby apportion liability at 50:50 basis.

19. On the next issue of quantum, the nature and extent of injuries sustained by the Respondent were not contested. There was the element of future treatment taken into account by the trial court as well as proven special damages.

20. This court will not interfere with the damages awarded by the trial court unless the same is manifestly too low or too high and or founded on wrong principles of law. (See **AKAMBA PUBLIC ROAD SERVICES LTD V. OMAMBIA. CIVIL APPEAL NO 89 OF 2010 (2013) EKL.R.**)

21. The court has perused the injuries sustained by the Respondent as well as the authorities relied on by the parties at the trial court and the reasoning thereof and it is my considered view that the award should not be disturbed. The same is reasonable in the circumstances taking into consideration the element of the contributory negligent above.

22. It must also be taken into account that the Respondent much as he blames the Appellant equally contributed to the injuries by failing to wear a helmet as well as riding on uninsured motor cycle. The helmet may have mitigated the injuries and the reflector jacket may have warned the Appellant's driver.

23. For the foregoing reasons this appeal is allowed as follows;

(a) The lower courts judgment on liability is hereby set aside and substituted with liability of 50% against the appellant and 50% against the Respondent.

(b) The award of damages as found by the trial court is upheld save to state that the same shall be subject to the 50% apportionment as well.

(c) The Appellant shall have half costs of this appeal as well as at the lower court.

Dated, signed and delivered in open court at Kitale this 10th day of February 2020.

H. K. CHEMITEI

JUDGE

10/2/2020

In the presence of:

Ingosi holding brief for Babu for Appellant

No Appearance for respondent

Court Assistant – kirong

Judgement read in open court.