



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 71 OF 2017

(An appeal arising from the judgment and decree of the Hon. MI Shimenga, Resident Magistrate (RM), in Butere PMCCC No. 275 of 2013 of 15th June 2017)

EVANS ISAIAH NAMUKUNDA.....APPELLANT

VERSUS

BENSON MBAISI..... RESPONDENT

JUDGMENT

1. The suit at the trial court was initiated by the appellant herein against the respondent, for general and special damages, arising from a motor traffic accident involving motorcycle on which he was riding and a motor vehicle owned and controlled by the respondent. The respondent entered appearance and filed a defence, in which he denied liability and attributed negligence on the appellant.
2. The trial court heard three witnesses from the appellant's side and one witness from the respondent's side. After taking everything into account, the trial court found the respondent not liable for the accident as the appellant had not established that he was the person riding the subject motorcycle, and if he did, he did not have driving license. On damages the trial court stated that it would have awarded Kshs. 200,000.00 as general damages.
3. The appellant was aggrieved by the award and lodged this appeal. His case, according to the memorandum of appeal, is that the trial court erred in finding that he had not proved his case to the required standard, in holding that he was negligent, was not supposed to be on the road, in disregarding the evidence of the police officer who testified, and in failing to evaluate the evidence tendered to it by the appellant. He avers that the trial court relied on extraneous matter in arriving at its final conclusion, came into the wrong conclusions and failed to consider the submissions made by the appellant.
4. The trial court dismissed the suit before it on two alternative principal grounds. The first was that the appellant had not proved that he was the person who was riding the motorcycle at the material time, for he did not provide identification documents, when the court gave him time to. The court also took into account the evidence he gave on his hospitalization, where he appeared to be unsure of how long he remained in hospital, how much he incurred there as expenses, among others, to find that he could not possibly have been the rider of the motorcycle. The second was that even if he was the rider he had not driving license and he had no business being on the road at all.
5. The appellant told the court that he was the one riding the motorcycle on the left side of the road towards Shianda from Mwitoti, when they were hit by the other vehicle. He stated that he lost consciousness and did not know how he ended up in hospital, and did not know how he was discharged. He called PW3, a police officer, Corporal Maurice Agoro, who testified that the accident was reported at the station, it involved the appellant and a motor vehicle belonging to the respondent. He did not visit the scene, and investigations were said to be still going on. The witness for the respondent testified that he was driving the subject vehicle when it was in collision with the motorcycle. It happened on his left side of the road, and the motorcycle was entering the road. He stated that it was motorcycle that hit his vehicle. He said there was a Land Rover ahead of him, which was able to evade the motorcycle. He made a report at the police station and traffic officers went to the scene. He stated that the persons on the motorcycle were taken to the hospital.
6. The question then is whether there was an accident and who it involved. There is no doubt at all that an accident did happen on the material day between the two motor vehicles. Of the witnesses who gave evidence, two claimed to have been in control of the two motor vehicles involved. It would appear that the only reason that the trial court dismissed the appellant as the rider of the subject motorcycle was the fact that he did not produce some form of identification when asked to produce it during cross-examination. I note that the matter was not adjourned when the appellant failed to produce identification, and he went on to be cross-examined. If there was need for him to provide identification, the court ought to have adjourned the matter to give him time to do so. The issue of his identification was not raised as a primary issue, and, therefore, I find that it could not be concluded that he was not who he was not saying he was merely because he could not produce identification documents at cross-examination. He gave evidence that placed him at the scene of the accident.

7. The trial court considered the fact that the appellant did not have a driving license, according to his testimony, to find that he had no basis for claiming against the respondent. No authority was cited. In *Kennedy Macharia Njeru vs. Packson Githongo Njau & another* [2019] eKLR, it was remarked that the fact that a motorcycle rider had no driving license had nothing to do with the cause of the accident, and that would mean that a party's suit ought not to be dismissed solely on that account.

8. Based on the above, I find that the trial court erred in dismissing the appellant's case on those two grounds. Standard of proof in civil cases is on a balance of probability. He asserted to be the person that he was. His identity was not challenged in the pleadings, nor at the commencement of the oral hearing when he was presented as a witness, but during cross-examination. The defence did not adduce any evidence that suggested that he was not the rider of the subject motorcycle, neither did his witnesses suggest that he was not the rider.

9. I shall deal with the issue of liability. Much of the testimony of the appellant tallied with that of the respondent's driver. The accident occurred on the left side of the road as one drove towards Shianda, and it involved a motorcycle with two persons on it. The versions given by the two sides had some variations. The appellant took the position that he was on the road keeping to his left side, when the respondent's vehicle hit his motorcycle. The respondent took the position that the collision happened on the left side of the road alright, but the appellant was entering the road without observing traffic regulations, hence the collision. A police officer testified, but his evidence was limited to production of a police abstract. He did not produce a sketch plan of the accident area. In the absence of a sketch of the accident area to guide the court, we are left with the testimonies of the two drivers. The respondent's driver said that traffic police officers came on the scene, and took measurements, but no one was charged. If indeed, the police had found that the appellant was wrongly entering the road they would, no doubt, have charged him with some offence. The fact that no one was charged would suggest that the collision occurred on the road and it was not being attributed to any of the two sides involved. 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 s. 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 the appellant should, therefore, be apportioned on the basis of 50:50.

10. On quantum, the trial indicated that it would have awarded Kshs. 200, 000.00 were it to find the respondent liable, since the injuries sustained were largely to the soft tissues. No authorities were cited.

11. The injuries pleaded were blunt injuries to the head leading to loss of consciousness, and injuries to the neck, to the back and right hip. The other injuries were abrasions to the upper lip and bruises to the lips, right hand and right buttock. The injuries pleaded are consistent with what is stated in the medical report by Dr. Charles M. Andai, dated 26th June 2013. Dr. Andai testified at the trial and described the injuries as moderately serious. In *Ndungu Dennis vs. Ann Wangari Ndirangu & another* [2018] eKLR, the court awarded Kshs. 100, 000.00 for moderately serious soft tissue injuries. In *Jyoti Structures Limited & another vs. Joash Abongo Owuor* [2019] eKLR, the court awarded Kshs. 150, 000.00 for moderately serious soft tissue injuries, similar to those suffered by the appellant. Consequently, I award Kshs. 150, 000.00 as general damages for the soft tissue injuries suffered, plus Kshs. 6, 950.00 being the proven special damages.

12. In the end I shall allow the appeal herein for the reasons given above. Damages are awarded in terms of paragraph 11 above, subject to contributory negligence in terms of paragraph 9 above. The appeal herein is allowed to that extent. The appellant shall have the costs here and at the court below.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE