



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL APPEAL NO. 10 OF 2017

*(Being an appeal from the judgement of Hon. M.I.G Moranga in Civil case No.114 of 2010)*

ZEL AGENCIES.....1<sup>ST</sup> APPELLANT

SAMWEL CHEGE.....2<sup>ND</sup> APPELLANT

REUBEN IRUNGU.....3<sup>RD</sup> APPELLANT

VERSES

PATRICK OTUYA.....RESPONDENT

BETWEEN

PATRICK OTUYA.....PLAINTIFF

VERSES

ZEL AGENCIES.....1<sup>ST</sup> DEFENDANT

SAMWEL CHEGE.....2<sup>ND</sup> DEFENDANT

REUBEN IRUNGU.....3<sup>RD</sup> DEFENDANT

JUDGEMENT

1. The Respondent was involved in a Road Traffic Accident that occurred on the 15<sup>th</sup> March, 2009 along Eldoret - Kitale road which involved Motor Vehicle Registration Number **KBF 189E**, matatu which he was travelling in as a fare paying passenger and Motor Vehicle Registration Number **KBD 269 Q** also a matatu.

2. As a result of the said accident he sustained serious bodily injuries namely, **blunt injury to the right eye, loss of 3 lower incisor teeth, compound fracture of the left tibia and fibula, blunt injury to the anterior chest wall and soft tissue injuries of both hands.**

3. The Respondent was rushed to various hospital where he was admitted and treated. He thereafter filed suit against the Appellants for both general and special damages. He attributed negligence on the Appellant for driving the vehicle at a higher speed without due care and regard to other road users. He blamed the Appellants for causing the accident generally.

4. The Appellants filed their defences and attributed negligence on the motor cyclist and specifically Motor Vehicle registration number KBD 269Q. The Appellants however did not bring third party proceedings against the owners of the said Motor Vehicle.

5. The matter proceeded to full trial and the court attributed 100% negligence on both Motor Vehicles. The court then assessed general damages at kshs. 800,000 in favour of the Respondent.

6. The said decision has prompted the Appellants to file this appeal which essentially attacks the findings of the court both in **quantum and liability.**

7. There is no dispute from the evidence on record that the respondent was a fare paying passenger in Motor Vehicle Registration Number KBF 189F matatu. According to his evidence the said vehicle was being driven at a high speed and it knocked a cyclist who died on the spot. He generally blamed the 2<sup>nd</sup> Appellant who was driving the said vehicle.

8. **PW2 DR PAUL RONO** produced the medical reports in respect to the Respondent prepared at Moi Teaching and Referral Hospital, St Luke's hospital as well as Mediheal Hospitals.

9. **PW3 STEPHEN OMUSE** the Executive Officer of this court produced related files numbers **79 and 80 of 2012** over the same accident in which the courts had made awards to the claimants.

10. **PC GEOFFREY MECHEGE** from Moisbridge police station traffic department produced the police file in respect to the accident on behalf of **P.C MAKOKHA** who investigated the matter. He confirmed the occurrence of the accident but exonerated the Appellants from the accident. He instead blamed the deceased cyclist for causing the accident.

11. The Appellant on their part called one **INSPECTOR ANDREW MACHERU** from Moisbridge police station. He narrated how the accident occurred and how the two vehicles collided and that the deceased cyclist caused the accident.

12. The parties were then ordered to file written submissions which this court has perused with the attendant attached authorities. The twin issues to be decided is who caused the accident and the question of quantum which according to the Appellant was too high in the circumstances.

13. The duty of this court is to evaluate the evidence on record and come up with an independent finding noting that this court did not have the benefit of seeing the witnesses like the trial court. The court stated in **PETERS VS. SUNDAY POST LIMITED (1958) E A 424.**

***“whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has placing gone wrong, the appellate Court will not hesitate so to decide. “Watt v. Thomas (1947) ALLER 582; (1947) A.C 484 applied”***

14. The Respondent blamed the driver of the Motor Vehicle he was in for causing the accident as he drove on a high speed without regard to other road users. The police officers who testified namely PW 4 and Dw1 seemed to have varied perspectives. Pw4 blamed the driver of Motor Vehicle Registration Number KBD 269Q and not that of the Appellants.

15. On the other hand, DW1 blamed the KBF 189F vehicle driven by the 3<sup>rd</sup> Appellant which in the process hit Motor Vehicle Number KBD 269Q. The owners and driver of Motor Vehicle KBD 269Q were not made parties to the case despite the Appellant threatening in their defence.

16. The said DW1 said in cross examination that ***“the circumstances are that KBF 189E hit the other KBD 269Q after hitting the pedal cyclist”***.

17. PW4 on the other hand said that ***“the motor vehicle KBF 189E was never charged in relation to the accident. The driver of the vehicle KBF 189F was not in any way to be blamed for the accident.”***

18. The Investigating Officer did not testify and it was then left to the two police officers to give the versions of their evidence which clearly supported whoever called them.

19. The court has looked at the traffic file which was produced in court by the Executive Officer of this court since it had been relied earlier on in the other similar suits. The court has seen the sketch plan as per the report of the Investigating Officer **P.C Makokha**. To appreciate what the said Investigation Officer stated and found in his conclusion, it is necessary to quote verbatim a portion of his report.

***20. He said “...it happened that there were two vehicles being driven to opposite directions , one driver by the name REUBEN IRUNGU was driving his M/V KBF 189E TOYOTA HIACE matatu with passengers on board towards Moisbridge and PETER KAMAU was driving his Motor Vehicle Registration Number KBD 269Q Toyota Hiace matatu also with passengers on board towards Kitale .When they reached at the scene of the accident at a junction at Kapkoi hill ,before they bypassed each other ,one cyclists by the name SAMUEL NJEHIA NJOROGI emerged from that junction from a marram road without observing the flow of vehicles on the main highway . By bad luck both vehicles were too close and about to bypass each other. He was knocked by both the vehicles killing him on the spot. Due to the impact both vehicles lost control and hit each other head on collision. They both landed on the left side of the road towards Kitale.”***

21. Looking at the above quotation, this court concludes that both drivers were to blame for the accident. The deceased cyclist was to blame for causing the accident for he failed to observe the main road he was entering or crossing. Similarly, the Appellants as well as the driver of the other vehicle failed to observe that it was possible in the usual traffic flow and in particular a junction road for another road user to emerge which in this case was the deceased.

22. It was observed in the above report by the Investigating Officer that the two vehicles collided for being too near each other. None of the drivers testified and it was left for the Respondent who said that the driver was driving at a higher speed.

23. It is therefore the finding of this court that both the drivers of the two vehicles contributed equally to the accident. The pedal cyclist had the greatest responsibility for the accident as deduced from the evidence on record by the parties. Unfortunately, he died and his estate was

not enjoined in the case.

24. In the premises, this court attributes liability between the two owners of the vehicles at 50% against the cyclist at 50%. Further the appellant shall shoulder liability at 25% for the reason that the two motor vehicles were at fault.

25. In the absence of the driver or owner of Motor Vehicle Reg. No. KBD 269Q being made a party either by the Appellant or the Respondent, they have themselves to blame as nothing barred them from doing so.

26. On the question of quantum, the court has perused the medical reports produced by the Respondent which were essentially not contested. Although it is argued by the Appellant that the injuries were not serious, I do not think so. The case of **MBOGO & ANOTHER VS. SHAH 1968) E.A. 93** set the grounds for an Appellate Court interference with the findings of the trial court. It states;

***“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”***

27. Considering the findings on liability above, the trials court award is not excessive or too high in the circumstances nor the trial court considered extraneous matters in arriving at the amount as claimed by the Appellant. This court shall therefore not disturb the findings by the trial court as it took into account the prevailing economic situation viz a viz the authorities cited by the parties.

28. In the premises, this appeal is allowed as follows;

**(A) The trials courts findings on liability is hereby set aside and liability is apportioned as hereunder;**

**(i) The deceased pedal cyclist or his estate, if any,50%**

**(ii) The Appellants jointly and severally at 25 %**

**(iii) The Respondent 25%**

**(B) The award of damages as well as special damages as found by the trial court is sustained.**

**(C) The Respondent is hereby awarded 25% of the above damages.**

**(D) The Respondent shall have 25% of the costs both at the lower court and on this appeal.**

**(E) The Appellant shall not have any costs both in the lower court and at the high court.**

29. Orders accordingly.

**Dated signed and delivered in open court at Kitale this 8<sup>th</sup> day of April, 2020.**

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**H. K. CHEMITEI**

**JUDGE**

**8/04/2020**