



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 17 OF 2017**

**KENYA POWER & LIGHTING CO. LTD.....APPELLANT**

**VERSUS**

**MARY WAMBUI KIERS.....RESPONDENT**

*(Being an appeal from the Judgment/Decree Hon. Lizah Gicheha, Senior Principal Magistrate, Nakuru Delivered on 2<sup>nd</sup> February 2017 in Nakuru CMCC NO. 1315 of 2012)*

**JUDGMENT.**

1. The Appellant was dissatisfied with the trial Court's findings and judgment that its rider was equally liable in negligence following an accident that occurred on the 15<sup>th</sup> May, 2012 involving its motorcycle Registration No. KAV 929 E and a pedestrian, the Respondent along Geoffrey Kamau road within Nakuru Town.

2. The Respondent sustained serious injuries. Upon hearing the case, the trial court held both the appellant and the Respondent to have equally contributed to the accident, and assessed general damages for pain and suffering at Shs.650,000/= and Special damages at Shs.9,550/=.

This appeal is against the matter of liability as well as the quantum of damages that is stated to be excessive. Both parties filed written submissions to urge their respective positions.

**3. LIABILITY.**

There is no dispute as to the occurrence and or ownership of the accident motorcycle; but the manner in which the accident occurred.

As the first appellate court, I am under a duty to analyse and re consider the evidence adduced before the trial court and subject it to a fresh examination to come up with own findings and conclusions – **Kiruga Vs. Kiruga & another (1988) e KLR.**

4. It is trite that when a court finds that the evidence adduced by both parties is not clear as to which party caused the accident or contributed to its occurrence, the court will apportion liability equally, or at ratios it may deem fit – **Civil Appeal NO. 608 of 2007 Julius Omido Chanda and another Vs. Samson Nyaga Kinyua.**

**5. THE EVIDENCE**

Evidence before the trial court was that the Respondent was a pedestrian who, at the time of accident was either crossing the road or was waiting to board a vehicle along the said road when the appellant's motorcycle hit her, felling down both herself and the rider. She was injured.

6. **The Respondent** testified as **PW1**. Her evidence was that she was waiting for a vehicle at the left side of the road as one faces Nakuru town when a motorcycle hit her breaking her left leg. Other than testifying that the motorcycle was wrong, no details as to how the rider was negligent were tendered.

7. On the other hand, on cross-examination, it was her evidence that she was hit as she was crossing the road, when she stated **“my feet were the ones on the tarmac.**

and again stated

**“I was knocked in the middle of the road. It was not my fault”**

and further testified that

**“I wasn’t crossing when I was knocked. I had finished crossing”.**

8. The Investigating Officer did not testify nor was the investigation report produced to the trial court, yet **PW2**, a police officer who produced the police abstract testified that the respondent was to blame for the accident without any document or evidence to support the assertion.

9. **The rider of the motorcycle** testified as **DW1**. He acknowledged having seen the respondent crossing the road on a no pedestrian crossing section, and a truck on the right lane, stating that he saw the pedestrian when she entered his lane as she spoke on the phone at a distance of five (5) metres, and despite applying brakes, he hit her.

10. It was his testimony that the pedestrian was hit on the left side. He denied that the pedestrian was hit at the bus stage but on the road as she attempted to cross. He blamed the pedestrian. On cross examination, he too had different testimonies as to how he hit the pedestrian.

He stated that the pedestrian was running while speaking on phone, and that there was no stage at the scene. Though he stated to have recorded a statement at the police station, none was produced to the court, nor was the investigation report.

11. Faced with the above totally conflicting evidence, and without the investigation report, the trial court in its judgment made a finding that that without the investigating officer’s report, and as a result of the two conflicting evidence on liability, and there being nothing before the court to show why the police blamed the respondent, the best the trial court could do was to apportion liability equally.

I have considered the opposing parties submissions and the evidence.

### **ANALYSIS AND FINDINGS.**

12. The appellant agrees that both PW1 and DW1 gave contradictory and conflicting evidence as to the manner the accident occurred.

There is no doubt that the respondent/pedestrian failed to exercise due care while crossing the road. But, did the appellant’s rider exercise adequate care to other road users, in the circumstances?

13. Any user of a highway is under an obligation to exercise reasonable care to other road users, expected of a reasonable man/woman. The rider having admitted that he actually saw the respondent crossing the road, and having seen a truck on the right side, the rider was expected to have foreseen that the pedestrian may suddenly jump onto the road attempting to cross, and thus exercise more reasonable care.

14. Though it was the rider’s evidence that he drove at a speed of 15-20KPH, that may not be the reality as no evidence was adduced to that effect, and the impact would not have caused the serious injuries she sustained. If indeed the rider was at the slow speed as stated. Further, in as much as the rider testified that the accident occurred on the road, and not at the stage/curb, no sketch map of the scene was produced before the trial court.

15. It is trite that any party who wishes the court to give judgment as to its legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist – **Evidence Act, Section 107 – D.T Dobie & Co. (K) Ltd Vs. Wanyonyi Wafula Chebukati (2014) e KLR.**

16. It is trite, further, that an appellate court is not necessarily bound to follow the trial court’s findings of fact if it appears either that the court clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally – **Selle Vs. Associated Motor Boat co. (1968) EA.**

17. In **Mwanasokoni Vs. Kenya Bus Services (1982-88) 1 KAR 870** the court held that

**“-----it will not lightly differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses; and will only interfere with them if they are based on no evidence; or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did-----”,** it is clear that both the pedestrian/respondent and the rider failed in their duties while on and/or crossing the road.

18. I have not seen any submission by the appellant or demonstration that the trial court did not take into account the relevant evidence or if it did, did not properly analyse the same and thus arrived at a wrong finding.

19. Having stated as above and having in mind the holding in **Livingston Otundo Vs. Naima Mohammed ( a minor who had sued though her next friend MOhammad Ali) (1990) e KLR** that

**“-----the appellant’s duty of care should have been judged by what ought reasonably to have anticipated in this regard and then consider what course of action he would have taken to ensure that no accident occurred-----”**

20. The case **PW Vs. Peter Muriithi Ngari (2017) e KLR** is very apt The court rendered that

**“The driver and pedestrian owe a duty of care to others as road users. The appellant should be vigilant enough to observe the wider view of the road including any intervention from both sides of the road, and the respondent to observe the old age traffic practice “Look right, look left, look right again” before crossing the road”.**

21. On the basis evidence before the court, the trial magistrate apportioned liability at 50:50 basis.

In the circumstances, I too would have arrived at a similar findings and determination based on the material placed before the court. I find no merit in the appeal on liability. It is dismissed.

## **22. QUANTUM OF DAMAGES**

This arm of the appeal against quantum of damages is misplaced. The appellant seeks that:

**(2) That this Honourable court do assess the damages that ought to have been applicable in the case before the lower court had the respondent succeeded.**

23. I say so because, in her judgment delivered on the 2<sup>nd</sup> February, 2017, the court awarded a sum of Kshs.650,000/= to the respondent as general damages, and Shs.9,550/= in special damages and proceeded to apportion the same at 50:50 basis, thus entered judgment for the plaintiff (respondent) against the defendant (appellant) at Kshs.329,775/= plus costs and interests.

24. Clearly, the appellant’s appeal on quantum has no sound legal standing; is not challenged, and as urged by the respondent, is a reasonable award in view of the injuries sustained by the respondent. The awards are upheld.

**25. Accordingly, I find the appellant’s appeal without merit. It is dismissed with costs to the respondent.**

**DELIVERED,**

**SIGNED AND DATED ELECTRONICALLY AT KERUGOYA THIS 1<sup>ST</sup> DAY OF OCTOBER, 2020**

**J.N. MULWA**

**HIGH COURT JUDGE**

### **ADVOCATES:**

· M/s Murimi Ndumia Mbago & Muchela Adv.

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### **NAKURU.**

· Ms. Mboga G.G. & Co. Adv.

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### **NAKURU.**