



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 135 OF 2017**

*(Appeal originating from the Judgment of Hon. KELLY RM at Nakuru in civil case Number 913 of 2015)*

**LOICE NGANGA.....APPELLANT**

**VERSUS**

**ANDREW KIPCHUMBA CHERUTICH.....RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This appeal arises from civil suit no.913 of 2015 filed by the respondent against Appellants seeking general and special damages for injuries sustained on 23<sup>rd</sup> January 2015. Liability was apportioned at 70%:30% in favour of the appellant. Judgment was entered for the plaintiff against the defendant for kshs 98,000 with interest from the date of judgment.

2. The appellant was dissatisfied with the finding of liability and courts decision to decline award of costs.

Grounds of appeal are as hereunder:-

1. That the trial magistrate erred in finding the appellant 30% liable for the accident.
2. That the trial court magistrate in not considering pleadings, evidence and submissions filed on behalf of the appellant
3. That the trial magistrate erred in declining to award costs.

The appellant urged the court to review and/or set aside the judgment.

**APPELLANT'S SUBMISSIONS**

3. The appellant submitted that evidence on record show that the Respondent was lawfully driving motor vehicle registration number KAQ 066X 648K along Nakuru –Kabarak road. She slowed down at junction to Ravin and subsequently hit the appellant's motor vehicle registration No.KBD 648K. The appellant blamed the respondent for not hooting and putting flashlights to indicate intention to overtake the appellant. Appellant submitted that her evidence is corroborated by evidence of DW1 a police officer who testified that the appellant indicated that she was turning right. The appellant blamed the respondent for failing to keep safe distance. The appellant urged the court to find the respondent 100%.

4. On costs, the appellant cited **Republic v Rosemary Wairimu Munene** where the court held as follows:-

**“The basic rule on attribution of costs is that costs follow the event. It is a well-recognized principle that costs follow the event for purposes of compensating the successful party for the trouble taken in prosecuting or defending the case.”**

5. The appellant submitted that costs should follow the event and the said rule should not be departed from without exercise of good grounds. He urged court not to disturb award on damages as they were proved on balance of probabilities.

**RESPONDENT'S SUBMISSIONS**

6. The respondent opposed the appeal and argued grounds 1, 2 and 3 together. Counsel for respondent submitted that the trial magistrate directed herself correctly by finding the plaintiff liable for the accident. The respondents view is that the trial magistrate was lenient and should have held the plaintiff 50% liable. He submitted that evidence on record show that the police did not visit the scene immediately and that sketch plan was not drawn and that it is the sketch plan which could have shown point of impact as noted by the trial magistrate. He added that the respondent was not charged with a traffic offence despite the fact there were extensive damage on appellants vehicle. He submitted that the burden of prove lay with the appellants who failed to discharge.

7. He submitted that the circumstances of the accident are not clear and that plaintiff failed in his duty of helping the court in discharging its duty.

8. Respondent cited 5 authorities which include *Haji vs murair freight agencies ltd [1984] eKLR* where the Court of Appeal held that where it is proved by evidence that both parties are to blame but there is no means of distribution between them, the blame can be distributed equally on each and *Nderitu V Ropkoi & Another [2004] eKLR* where the court pf appeal held that two motorists failed to exercise the degree of skill and care on the road, they are held equally liable for the accident.

9. On court's decision not to award costs, the respondent submitted that section 27(1) which provide that costs and incidentals shall be in the discretion of the court or judge and that the costs of any action, cause or any matter shall follow the event unless the court or judge for good reason direct otherwise.

### **ANALYSIS AND DETERMINATION**

10. On liability. He added that he held brakes and swerved. There is however, no sketch plan produced to confirm skid marks. The respondent admitted that he knocked the appellants vehicle from behind. I note that he indicated that he was not driving at fast speed and that he flushed lights thrice and hooted at the appellants vehicle. The distance he first saw the Appellants vehicle slow down and indicate intention to turn is not however indicated in both the appellants and respondents evidence. The appellant was required to indicate at safe distance and the respondent was required to keep safe distance, which would enabled him control the vehicle in the event that a vehicle ahead slowed down for any reason. Evidence here is scanty. Absence of sketch plan compounded the lack of clarity.

11. I agree with court of appeal decisions cited above to the effect that in such circumstances it would be appropriate to apportion liability. I do not however agree with argument that circumstances of this case dictate equal apportionment of liability. The appellant testified that on impact, her vehicle turned to the direction she was driving. The impact was massive which suggest fast speed on part of the respondents vehicle. My view is that the respondent was to blame to a greater extend. However, in the absence of evidence on distance at which the appellants started indicating intention to turn, it is not clear whether she gave warning at safe distance. The appellant has not therefore demonstrated that the respondent was wholly to blame. Authorities cited indicate the need for equal apportion but evidence adduced in this case tilts substantial blame on the respondent. It would not therefore be proper to apportion liability equally. I find the apportionment of 30:70 in favour of plaintiff justifiable in the circumstances and uphold the same.

12. On the issue of costs, there is no dispute that the costs of a suit shall follow the event unless the court shall for good reason direct otherwise.

13. I wish to consider whether the trial court gave sufficient ground for declining to award costs. Record show that the trial magistrate declined to award costs on the ground that no demand notice was issued by the appellants prior to filing suit.

14. On perusal of the evidence of record, I do not see any evidence in respect demand notice.

15. My view on the need to issue a demand notice is to notify the other party of the intention to institute a suit and give the other party an opportunity to settle the claim if not contested to avoid unnecessary cost in litigation. In the instant suit, the respondent may not have been served with any demand notice as it does not appear in the record of appeal but it is not disputed that they defended the suit after being served with summons to enter appearance. Even if the respondent had not been served with a demand notice before institution of this suit, there would still have been litigation on this dispute.

16. The question that begs therefore is, did trial magistrate exercise judicial discretion fairly by denying the plaintiff cost on grounds of failure by the appellants to issue a demand notice? My answer would be no. If the respondent had admitted liability on being made aware of this suit, then I would say that the exercise of discretion was fair.

17. From the foregoing, it is evident that the suit was strenuously defended and the cost of litigation should have followed the event. I therefore find that the trial magistrate erred in denying the appellants cost therefore set aside the order on cost.

### **FINAL ORDERS**

1. Decision on liability and quantum is upheld.
2. Costs of this suit both in the trial court and on appeal to the appellants.

**Judgment Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of March 2019.**

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**RACHEL NGETICH**

**JUDGE**

**In the Presence of:-**

Schola Court Assistant

Nancy Njoroge Counsel for Appellant

No appearance for Respondent