



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL APPEAL NUMBER 13 OF 2011**

**(Being an appeal arising from the judgment and decree of Hon . M.N. Gicheru .**

**in Kitale CMCC No. 327 of 2010.)**

**SAMWEL . G. NGANGA.....APPELLANT**

**VERSES**

**BENSON WANJALA MASINDE.....RESPONDENT**

**JUDGEMENT**

1. The appellant herein was aggrieved by the decision of the trial court dated 8<sup>th</sup> march 2011 has appealed against the same on basically two grounds namely : on liability and on quantum.

2. The brief background of this matter is that the respondent who was riding his bicycle and carrying a pillion passenger on the 22<sup>nd</sup> march 2010 along Mumias road within Kitale town was involved in a road traffic accident. The appellants driver was driving his motor vehicle registration number KAE 043V, lorry.

3. As a consequence of the said accident the pillion passenger died and the respondent sustained serious bodily injuries. The said injuries were.

- a. **triple fracture e of the left pubic bone and dislocation**
- b. **single fracture of the right pubic bone and dislocation at pubis.**
- c. **.fracture of the left ischial bone.**
- d. **multiple pelvic factures**
- e. **loss of consciousness**
- f. **brain concussion**
- g. **swollen and tender bruises of the right ribs and muscle.**
- h. **bruises of the right elbow.**
- i. **bruises of the right forearm**
- j. **bruises of right shoulder.**

4. The respondent attributed negligence on the part of the appellant and in particular that he was negligent in driving the said lorry hence caused the accident. He prayed for general and special damages.

5. The appellant on his part equally attributed negligence on the part of the respondent accusing of riding the bicycle and carrying a pillion

passenger without due regard to other road users and specifically the appellant's driver.

6. The matter proceeded to full trial where parties testified and called their respective witnesses and produced the relevant exhibits. The summary of the matter at the trial court is worth reproducing herein.

7. **PW1 the Respondent** testified of how he was riding his bicycle on the material day. According to him the respondent's driver attempted to overtake him and in the process hit him. He lost consciousness and sustained the injuries explained earlier above.

8. **PW2 PC FELICIT RONO** from the kitale traffic police testified on behalf of his colleague who was on leave. According to the findings the accident occurred when the respondent attempted to overtake another cyclist who was carrying fertilizer. He stated that the lorry driver was to be charged with causing death by dangerous driving. The matter was still pending awaiting the AGs instruction.

9. **PW3 DR. SAMUEKL CHEGE NJENGA** examined the respondent and produced the medical legal report which showed that the respondent had suffered serious fractures. He assessed incapacity at 50%.

10. The appellant through one FRANCIS BARASA who was the driver of the said lorry defended himself by stating that indeed he did not witness the accident but got to know when he was stopped by a crowd and told that he had hit someone. Because of the violent crowd he sought refuge at the police station and notified the appellant.

11. **DW2 AGGREY WANYAMA WEKESA** testified that he works as an in charge of matatus plying Eldoret –Kitale stage and that on the material day he saw two cyclists riding on the road towards Endebess. The first one was carrying fertilizer and the second one was carrying a passenger. The second cyclist attempted to overtake the first one and in the process was pushed away and the pillion passenger was hit and run over by the lorry. He blamed the respondent for the accident.

12. The parties went ahead to produce the exhibits by consent including the second medical opinion by Dr Gaya.

13. At the hearing of this appeal the court directed that the same be disposed by way of written submissions which the parties did and the court has had the advantage of reading the same.

14. It is trite law that at the level of appeal the court is expected to review the evidence afresh with a view of arriving at a decision with a rider that it did not have the advantage of conducting the trial and therefore getting to see the demeanour of the parties and their witnesses. The court is expected to deal with the evidence on record and not to introduce any extraneous matters. **See ABOK JAMES ODERA T/A ODERA & ASSOCIATES . VS. JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES (2013) Eklr.**

15. As stated above the two limbs to this appeal are quantum and liability. I propose to deal with the issue of liability first. The appellant has argued that the trial court misdirected itself at apportioning liability against the appellant at 100% despite overwhelming evidence to the contrary.

16. The occurrence of the accident was not disputed by all the parties. The appellant's driver however stated that he did not see it but was alerted by the crowd. The respondent on the other hand stated that the lorry hit him while it tried to overtake them .

17. From the evidence of the respondent, the police officer and DW2 it appears that clearly that there was another cyclist who was carrying fertilizer and according to DW2 the respondent was attempting to overtake. It appears that the lorry was equally attempting to overtake at the same time.

18. The respondent stated that:

***“...overtaking a bicycle that was carrying fertilizer. It moved in a zigzag manner . this made the lorry hit me.”***

19. DW2 stated similar story and in my view there was negligence also on the part of the respondent. That position is buttressed by the fact that it is acknowledged that he was attempting to overtake another cyclist who was carrying a heavy burden while he was also carrying a passenger. Had he been careful not to attempt overtaking the accident perhaps would not have occurred.

20. What then is the extent of the respondent's liability? I think it may not be much compared to the appellants. The appellant's driver had to be told by a crowd that he had caused an accident. It was acknowledged that this was a highly populated area and it would be unbelievable that the appellant would be involved in an accident and would not know.

21. As found by the trial court the appellants driver would have been more careful to other road users especially the respondent who was ahead of him. He was in my view in a better position to avoid the accident. I do not think that the respondent would hit the fellow cyclist to the extent that he cannot control the bicycle.

22. The sum total of the findings by this court is that the respondent should at least share the burden of responsibility in the accident. I therefore hold him responsible to the extent of 10% and the appellant 90%.

23. Turning to the issue of quantum, it was suggested that the award by the trial court was excessive compared to the injuries suffered by the Respondent.

24. I have perused the two medical reports produced in evidence by the parties and I find the injuries sustained by the respondent serious.

The respondent surfer incapacity which was almost permanent and would require future treatment.

25. The court has equally perused the competing authorities on quantum and I do find the award of ksh. 800000 by the trial court reasonable in the circumstances. Taking into consideration the contributory negligence above I find that the award given should not be disturbed.

26. For the foregoing reasons the appeal is hereby allowed as follows:

**a. The lower courts judgement is hereby set aside and substituted by an order that liability is apportioned between the appellant at 90% and the respondent 10%.**

**b. The award of ksh. 800,000 being general and special damages is hereby sustained save that the same shall be apportioned at the above percentage.**

**c. The respondent shall have the cost at the lower court but reduced by the above 10%.**

**d. Cost of this appeal in the cause.**

**Delivered, Signed and dated at Kitale this 13<sup>th</sup> day of May, 2019.**

**H.K.CHEMITEI**

**JUDGE**

**13/5/19**

**In the presence of:**

**Bungei for Respondent**

**No appearance for the Applicant**

**Court Clerk – Kirong**

**Judgment read in open court.**