



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 11 OF 2017

(Being an Appeal from the Judgement of Hon. P C Biwott in Civil Case No. Kitale CMCC No. 268 of 2014)

BEATRICE BARASA & ANOTHER.....APPELLANTS

VERSES

THOMAS KIPLAGAT LOBETA & ANOTHER.....RESPONDENTS

JUDGEMENT

1. The late **PATRICK EBAGOLE**, the husband to the appellant died in a road traffic accident that occurred on the **25th April, 2014** along Kitale /Webuye junction. He was a pillion passenger aboard Motor Cycle Reg. No. **KMCJ 735K** which collided with Motor Vehicle Reg. No. **KUX 552** Datsun pick-up owned and driven by the 1st Respondent.
2. As a consequence of the said accident the said person sustained serious bodily injuries and was taken to the hospital but succumbed to his injuries several days later. The Appellant, his widow, instituted proceedings at the lower court claiming general and special damages on her behalf and on behalf of his estate.
3. The matter proceeded to full trial and the trial court in its judgement apportioned liability at 50:50 between the Respondent and the owner of the Motor Cycle in which the deceased was riding. The court awarded general damages of **ksh.2,383,420** and special of kshs.126,315.
4. The centrality of this appeal is on the question of liability in which the trial court apportioned 50% against the motor cyclist and thus technically blaming the Appellant for the same.
5. The court ordered this matter to be canvassed by way of written submissions which I have perused extensively.
6. The Appellant in her submission has reduced her 7 point grounds of appeal to one namely that the trial Magistrate erred in law and fact by entering judgment on liability at 50:50 per cent between the respondent and the cyclist and by making a finding on judgement against a person who was not a party to the suit.
7. As indicated above there was no contest on damages and therefore this court shall not spent much time over the same.
8. **PW1 BEATRICE BARASA** the Appellant was not at the scene but she produced the documents and the exhibits in which she showed her relationship with the deceased, the extent of his estate and the dependants.
9. **PW2 YONAH MASINDE** testified that he was at the scene at the material time where he saw the Respondent's vehicle driven at a high speed and recklessly. As a consequence of that it hit a motorcyclist who was carrying a pillion passenger. Both of them felt down and were injured. He essentially blamed the driver of the motor vehicle for causing the accident.
10. **PW 3 CORPORAL FELICITY RONO** from Kitale police station on behalf of the Base Commander produced the police abstract in which it was indicated that none of the parties involved were charged for any traffic offence since none was found to be blameworthy.
11. The Respondent **THOMAS KIPLAGAT LOPETA** testified and closed his case without calling any witness. He admitted that the accident indeed occurred and blamed the motorcyclist for coming to his lane as it avoided another vehicle.
12. It must be noted that from the evidence on record the Respondent did apply for third party proceedings against the owner of the motorcycle which application was allowed but there is no evidence that he was served.
13. Having stated so and having gone through the parties submissions, the issue at hand is whether this court can interfere with the findings

of the trial court which blamed a third party and apportioned liability and yet he was never served.

14. The provisions of **Order 1 rule 15(1) of the Civil Procedure Act** grants the liberty to a defendant to enjoin a third party to a suit in the event that it feels aggrieved. The trial court indeed granted and the appellant did not raise any objection.

15. From the judgment of the trial court, the Appellant was blamed for not enjoining the said 3rd Party despite the witnesses testifying to that. Clearly, I agree with the appellant that this was misdirection by the court for the simple reason that there was no obligation to do so. In fact that was settled when the Respondent brought in the 3rd Party proceedings.

16. The record of the trial court showed that the matter was adjourned at least thrice because the said 3rd party had not been served by the Respondent.

17. There seemed to have been an attempt to serve him albeit through registered post. In my view this was a lazy way of service. There was no attempt at least to serve him personally or by advertisement. The Respondent thus closed his case without calling the said party.

18. Even so, going through the evidence of the respondent, I find that he admitted that he was to blame for the accident. He said that;

“I stopped at the junction before the accident happened. The motorcycle hit my car on the side. The motorcycle had right of way. I explained the accident to my lawyer. I blame motor cycle rider not the pillion passenger. The passenger was innocent. I and the rider maybe blamed jointly.”

19. The last part of the above quote speaks a lot. He admitted the blameworthiness yet it was incumbent upon him to bring into the case the 3rd Party. Although in his submission counsel for the respondent states that the 3rd party was brought into the matter and thus the trial court was right in apportioning liability, I find that the same is preposterous for the simple reason that the 3rd party to the extent that he was never served is a stranger in the proceedings. Nobody knows his existence and whereabouts and even if he carried some blame how the Appellant can execute the judgement against him.

20. In a nutshell, I do find this appeal meritorious on that ground namely that it was wrong for the trial court to apportion liability to a 3rd party who was merely introduced into the matter but not formerly invited.

21. In the case of **PAOLO BENIVENGA V. GILBERT AMINO (1986) e KLR**, the court held that;

“In his evidence, the defendant admits all the above but contends that the motor cycle was driven at high speed and hit the front bonnet of his car. If so, the defendant could have joined the rider as a party to claim contributory negligence and indemnity. However, he has not done so. “

22. I believe the situation obtaining herein is the same. The Respondent ought to have taken pragmatic steps to bring on board the motorcyclist but not to merely bank in the application and assumed that he should be blamed by the court. A mere mention by the witnesses and the respondent that he contributed to the accident was not enough without his presence or at least evidence that he was served and failed to attend court.

23. Consequently and for the reasons stated above I find the appeal meritorious. Since there was no issue about the damages, I find no reason to interfere with.

24. The appeal is hereby allowed, the judgment on liability as found by the trial court is set aside and order that the Respondents jointly and severally are 100% liable for the accident.

25. The Appellant shall have the costs of this appeal and at the lower court.

Dated, signed and delivered at Kitale in open court this 5th day of November, 2019.

H. K. CHEMITEI

JUDGE.

5/11/2019

In the presence of:-

Bungei holding brief for Gachok for Appellant

Kimani for Respondent – Absent

Court Assistant – kirong

Judgment read in open court