



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 15 OF 2011

BETWEEN

CHARLES WESONGA MBINGIAPPELLANT

AND

CLEMENTINE ADERO OYUGI1ST RESPONDENT

SIMBA COLT MOTORS LTD2ND RESPONDENT

(Being an Appeal from the Judgment in Busia Chief Magistrate's Court civil case No.229 of 2008 by Hon. E.H. Keago - Senior Resident Magistrate).

JUDGMENT

1. The appellant herein, was the 1st defendant in the Busia Chief Magistrate's Court civil case number 229 of 2008. He had been sued for special and general damages due to a road accident involving motor vehicle KAG 966Q and the deceased who was a pedal cyclist along Busia – Kisumu road.

2. After the hearing of the case the learned trial magistrate made awards as follows:-

- a) Pain and suffering kshs.20, 000/=.
- b) Loss of expectation kshs.100000/=.
- c) Loss of dependency I will award kshs.300, 000/=.
- d) Special damages of kshs.49, 800.

The learned trial magistrate apportioned liability at 70:30% favour of the 1st respondent. After factoring in contribution, the balance was a sum of Kshs.328, 860/=. This is the sum that he entered judgment in favour of the 1st respondent.

3. The appellant was aggrieved by the ruling and filed this appeal. He was represented by the firm of Ashioya & Company Advocates. In the Memorandum of Appeal, the appellant set out two grounds of appeal as follows:

- a) The learned trial magistrate erred in law and in fact in failing to find that the weight of evidence militated against any liability in favour of the plaintiff/respondent.
- b) That the learned trial magistrate erred in law and in fact in failing to find that the evidence adduced at the trial substantially and wholly blames the deceased for the accident.

4. The 1st respondent was represented by the firm of F. Omondi & Company Advocates. He contended that the appeal lacked merit and prayed for its dismissal.

5. The appeal against the 2nd respondent was withdrawn.

6. When the matter came for directions on 28th March 2019, it was agreed by both counsel that the appeal would be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.

7. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

8. The appellant and his co-defendant did not testify in the trial. Ordinarily, the evidence adduced by the 1st respondent would have gone unchallenged. However, there were two versions of how the accident occurred. According to P.C Njalo Matano (PW2), the police record indicated that the accident occurred in the middle of the road. The record shows that the deceased veered into the road after the driver of motor vehicle KAT 966Q had hooted. The deceased pedal cyclist was therefore blamed for the accident.

9. The second version was in the testimony of Emmanuel Makokha (PW3). He claimed to have witnessed the accident. He blamed the driver of motor vehicle KAT 966Q for the accident. He said the driver was on high speed and that he hit the pedal cyclist and the impact threw him in the middle of the road.

10. The appellant would have shed more light as to what transpired had he testified. His failure to testify left the court with the 1st respondent's evidence. In instances where courts have difficulties in apportioning liability, parties have been held to be equally liable. the Court of Appeal decision in **Hussein Omar Farah vs. Lento Agencies Civil Appeal 34 of 2005[2006] eKLR** that:

In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.

In the instant case, the learned trial magistrate erred in apportioning liability at 70:30 in favour of the respondent. The liability in view of the evidence on record ought to have been 50:50 between the respondent and the appellant. I will therefore substitute the apportionment of the liability as stated herein above. There was no appeal against quantum of damages and the same will not be disturbed.

11. The appeal therefore succeed on liability. Each party will shoulder half costs both in the trial and this court.

DELIVERED and SIGNED at BUSIA this 20th day of November, 2019

KIARIE WAWERU KIARIE

JUDGE