

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 29 OF 2011

MOHAMMED T/A AWALE TRANSPORTERS....APPELLANT

VERSUS

MERCY NJERI.....RESPONDENT

(An Appeal from the Judgment of the Senior Principal Magistrate Honourable A. Onginjo in Eldoret CMCC No. 494 of 2007, dated 14th January, 2010)

JUDGMENT

In the lower court, the appellant herein was the 3rd defendant while the Respondent was the plaintiff. There were other two defendants namely *Timothy Agunza Agona* and *John Kabiru*.

Briefly the Respondent's case is that on 13th November, 2005 and at around 6 p.m she was travelling in a matatu registration number KAQ 018A, a Toyota Hiace. She was from Bungoma heading to Eldoret. The 1st defendant was the driver of the said matatu while the 2nd defendant was its owner. The 1st defendant drove the said vehicle at a high speed. She was seated at the right rear seat of the vehicle. At a place called Baharini they met with an oncoming trailer of which was also at a high speed. The lorry was registration number KAL 820 M, owned by the Appellant herein. The two vehicles collided on the body of each's right side. As a result the Respondent suffered serious injuries which led to amputation of the right hand at the shoulder and rupture of the left eye globe leading to its total blindness.

The police investigated the accident and exonerated the lorry driver. They blamed it on the 1st defendant who was charged for careless driving. He pleaded guilty and was fined 5,000/- in default to serve 3 months imprisonment.

The trial court however apportioned liability to the 1st and 2nd Defendant at 75% and to the 3rd defendant at 25%.

In this appeal, the appellant avers that there were no basis for apportioning liability against the appellant at 25% as the evidence is clear that the 1st and 2nd defendants were 100% liable.

In making a determination in this appeal I have considered that the appellant appealed against *Mercy Njeri* as the only Respondent. 1st and 2nd Defendants were not made co-respondents. This scenario has left the court in a catch 22 situation in case it is to allow the appeal. This is so as by allowing the appeal the court would be saying 1st and 2nd defendants are 100% liable and yet were not heard in the appeal. This would amount to blaming them unheard. If I find for the reason they are not liable for the 25%, the Respondent will unfairly lose 25% of damages awarded and entitled to her, for a problem of which is not of her own making.

The tricky scenario has arisen due to failure of the appellant to make crucial parties who are directly affected by the appeal, part of it. Courts do not act in vain, and do not make orders which cannot be enforced. On this ground the appeal must fail. It is therefore hereby dismissed with costs to the respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of July, 2018

In the presence of:

Mr. Angu holding brief for Miss Keter for the Respondent

Mr. Mwelem – Court assistant