



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL NO.51 OF 1999**

**BETWEEN**

**1. EDWARD MUTUNE KIMATU**

**2. GEOFFREY KIMATU MBUVI** (suing as legal representatives of the estate of

**KIMATU MBUVI (DECEASED).....APPELLANT**

**AND**

**PATRICK WAMBUA JOHN.....RESPONDENT**

**(Being an appeal from the Judgment of Hon. C.D. Nyamweya, SRM in Kangundo Civil Case No. 280 of 1998 dated 19<sup>th</sup> March 1999)**

**JUDGEMENT**

1. Before the subordinate court, the appellant's driver was found 90% liable whilst the Respondent was found 10% for an accident that took place on 13/4/96 in which the deceased died. It was pleaded in the plaint that the Respondent was riding on a bicycle along the Masii-Tawa Road when the appellant's driver negligently drove Motor Vehicle registration number KAA 312 causing it to veer off the road and hit the bicycle from behind. Thereafter the Respondent filed suit and was awarded a total of Kshs. 220,000/- as general damages for pain and suffering and loss of amenities subject to 10% contribution.
2. The Appellant denied the accident and pleaded in the alternative that if the accident did take place then the Respondent was wholly or substantially to blame as he was riding a bicycle in the middle of the road and failed to give way for the appellant so as to avoid the collision. He also alleged that the plaintiff is vicariously liable for the actions of his agent and / or servant.
3. This appeal is on liability and quantum and being a first appeal, this court is required to re-evaluate the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the trial court. The court should bear in mind that it neither saw nor heard the witnesses testify (see ***Peters v Sunday Post Ltd [1958] E.A 424***).
4. The thrust of the appellant's case on the issue of liability, set out in the memorandum of appeal dated 19<sup>th</sup> April 1999 and amended on 19<sup>th</sup> October, 2016, is that the trial magistrate misdirected himself in disregarding the weight of evidence and submissions on liability and consequently came to the wrong conclusion. Counsel for the appellant, submitted that the trial magistrate failed to consider the fact that he noted in the trial that the respondent's evidence was unreliable. On assessment of damages, he submitted that the award was excessive and proposed a figure of Kshs 60,000/- for soft tissue injuries. He relied on the case of ***Sokoro Saw Mills Ltd v Grace Nduta Ndungu (2010) eKLR***. In response, counsel for the respondent, submitted that it is not disputed that the motor vehicle was behind the bicycle and the bicycle was on the left side of the road .According to DW2's testimony the motor vehicle was very close to the bicycle when it hooted thus the driver did not keep a proper distance. In his view, the evidence that the Respondent jumped off the bicycle should be rejected since DW1 only looked when he heard the driver hoot. He submitted that the trial court did not consider any irrelevant factor in apportioning liability. On the award of damages, the learned counsel submitted that the trial court could not be faulted, for in the case of ***Kalenjin Auto Hardware Limited & Another v Philip Wakaba, Eldoret CA 75 of 2003***, Kshs 220,000/- was awarded for similar injuries.
5. Two issues arise for determination in this appeal. The first issue is whether the trial magistrate reached the correct decision in finding the appellants 90% liable for the accident. The second issue is whether the trial court applied the correct principles in arriving at the quantum of damages.
6. I will deal with the issue of liability first. The respondent's key witness was Muinde Mangau (PW 2) who recalled that on 13.4.96 at about 4pm, he was along the Masii- Tawa Road when a bicycle with two people was on the left hand side off the road, almost one metre. He saw the vehicle behind the bicycle and it was trying to avoid pot-holes and hit the people on the bicycle and the passenger was thrown off the

road but the cyclist crashed on impact.

7. Joseph Mutunga Maithya (DW 1) recalled that on the material day he saw one pillion passenger on the edge of the road and the pillion passenger looked back after the vehicle KAA 312N hooted then he jumped off the road. As a result the cyclist lost balance and entered the road and was knocked down. That the respondent was never knocked by a vehicle. Had the pillion not jumped off, no accident would have occurred.

8. The trial court found that because the evidence of DW1 was contradictory, it could not be believed that the respondent jumped off the moving bicycle. The learned magistrate came to the conclusion that the respondent could not have jumped off the moving bicycle but was thrown off the bicycle because the edge of the road was steep and therefore he could not move off the road. The DW1 also agreed that the edge of the road was steep. He found that the driver of the vehicle was more to blame for he had a more lethal weapon.

9. Looking at the evidence in its totality, it becomes apparent that both the Appellant's driver and the respondent were riding on the left side of the road hence the impact.

10. In the circumstances of this case, I find that both the Appellant and the respondent were equally to blame for the accident. It is most likely that the Appellant's driver did not take a keen interest when driving on the road. The Respondent was also careless as the bicycle he was riding on attempted to overtake the vehicle from the left side instead of overtaking it from the right side. I say so because the trial court observed that the Respondent was not truthful in saying that he was moving on the right side. In the circumstances the blame for the accident ought to have been shouldered equally between the Appellant and the Respondent. The trial magistrate therefore erred in heaping 90% of the blame for the accident on the Appellant. The appellants' appeal on the issue of liability succeeds. The appellants will only shoulder 50% liability for the accident. Even if the Appellant was found to have entirely contributed 90% to the accident, the Respondent ought to have carried some blame. It was therefore erroneous for the trial court to hold the appellants 90% liable considering that the bicycle rider contributed to the accident. The Respondent should equally shoulder the 50% liability.

11. One of the issues raised in the memorandum of appeal concerns the purpose of pleadings. In *Esso Petroleum Company Limited v Southport Corporation* [1956] AC 218, Lord Normand observed that, "*The function of pleadings is to give fair notice of the case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them.*"

12. In *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 Others* NRB CA Civil Appeal No. 219 of 2013 [2014] the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) Limited v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:

***[I]t is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.***

13. In *Simon Muchemi Atako and Another v Gordon Osore* NRB CA Civil Appeal No. 180 of 2005 [2013] eKLR, the Court of Appeal, citing *Uganda Breweries Ltd Vs Uganda Railways Corporation* [2002]2EA 634, accepted the view that departure from pleadings that did not cause a failure of justice was acceptable where the party had a fair notice of the case it had to meet and the departure was a mere irregularity.

14. In this case the Respondent pleaded in the plaint that, "[T]he plaintiff was a lawfully riding on a bicycle" and he and his key witness, PW 2, testified that the plaintiff was a pillion passenger. The appellant faulted the trial magistrate, saying that she did not consider the evidence vis-à-vis the pleading and clear submissions by the appellant on this point. A **pillion** is a defined according to the Collins English Dictionary as a secondary pad, cushion, or seat behind the main seat or saddle on a horse, motorcycle, bicycle or moped. Can departure from the pleadings be said to be a mere irregularity" I must answer in the positive. The appellant defended the case on the basis that the respondent was a passenger and his evidence was led on that basis. The issue was specifically raised in the respondent's pleadings before the subordinate court. There is a clear difference between riding a bicycle and riding on a bicycle. I therefore find and hold that there was no departure of the respondent's from the pleadings the evidence and the ground must therefore fail. Indeed vide paragraph 4 of the Respondent's plaint it was pleaded that the Respondent was riding on a bicycle and hence he was a pillion passenger.

15. On the issue of the amount awarded as damages, I note that there is no dispute as to the injuries suffered by the Respondent. He produced a medical report that was produced by consent.

16. In awarding the Respondent general damages of Kshs. 220,000, the trial magistrate stated that:

**"I have considered that the cited cases bears more relevant injuries to the instant case.... The defendant did not make any submissions. I have considered the submissions by the plaintiff and the level of inflation prevailing and number of years that have passed since the called awards were made and I award the plaintiff the sum of Kshs. 220, 000."**

17. I find no fault in the reasoning of the magistrate. He considered the authorities that had been placed before him in reaching his decision. Neither the appellants nor the Respondent have demonstrated that the trial magistrate acted outside the laid down principles in awarding the general damages. There is therefore no basis for finding that the award was inordinately high as alleged by the appellants.

It is noted that special damages for Kshs.4,150/= was awarded as same were pleaded and specifically proved. I see no reason to interfere with the same.

14. In view of the finding I have reached on liability, I allow the appeal and substitute the judgment of the subordinate court on liability with

a finding of 50%:50%. The award on general damages and special damages remains undisturbed.

Each party shall bear their own costs of the appeal.

It is so ordered.

**Dated and Delivered at Machakos this 6<sup>th</sup> day of December, 2018.**

**D.K. KEMEI**

**JUDGE**