



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 3 OF 2017

(Being an appeal arising from Judgment and Decree in Kitale Chief Magistrate's Court CMCC 166 of 2014 delivered by P.W. Wasike Resident Magistrate on 26/01/2017)

GESUKA JOEL.....APPELLANT

VERSUS

OLIVER CHEMWILE MAKHASO....1ST RESPONDENT

MBUGUA TABITHA.....2ND RESPONDENT

J U D G M E N T

1. The 1st respondent was a fare paying passenger in motor vehicle Registration No. KBL 197B Matatu which was plying Kitale- Eldoret road and which was involved in a road traffic accident near Kapkoi area on 18/7/2012. The said Matatu had a head on collision with motor vehicle Registration No. KBH 082 Isuzu canter Lorry. The Matatu motor vehicle was owned by the 2nd Respondent whereas the canter lorry owned by the appellant herein.
2. The 1st Respondent as a consequence of the said accident sustained serious bodily injuries as enumerated in the plaint. He was treated at Kitale District hospital and later discharged. He then filed suit at the lower court claiming general and special damages.
3. The trial court found both drivers of the motor vehicles equally liable. On quantum he was awarded general damages of kshs 120,000.
4. The substance of the appellant's appeal is essentially on liability. Both parties herein filed written submissions and I have had occasion to peruse the same.
5. In the related matter number Kitale Civil Appeal No. 23/2016, the court found that the trial court ought to have apportioned liability at 85% against the 2nd Respondent and 15% against the appellant. This was the same accident the only difference was the claimant therein who was equally a fare paying passenger in the matatu Vehicle.
6. Looking at the evidence as presented by the parties during trial, the 1st Respondent blamed the matatu driver essentially for talking on his mobile phone while driving right from Moi's Bridge to Kapkoi. He blamed the lorry too driver for he would have avoided the accident.
7. PW2 the traffic police officer equally blamed the matatu driver who unfortunately died on the spot. According to the police, he would have been charged with a traffic offence had he survived the accident.
8. Based on the reasons therefore advanced in the Civil Appeal No. 23 of 2016, this court still holds the same view that the 2nd Respondent should shoulder 85% liability and the appellant 15% as there was no demonstration on the latter to show that he tried to avoid the accident. As a matter of fact they did not call any witness including the canter lorry driver.
9. On quantum I find the general damages of kshs 120,000/= granted to the 1st Respondent reasonable and I shall not disturb.
10. In the final analysis this appeal partially succeeds. Liability is apportioned at 85% against the 2nd Respondent and 15% against the appellant. The general and special damages awarded shall be apportioned on the same basis. Each party shall bear their own costs in this appeal. At the lower court the 1st Respondent shall have the costs against the appellant and the 2nd Respondent based on the above percentages.

Orders accordingly.

Delivered, signed and dated at Kitale this 10th day of December, 2018.

H.K. CHEMITEI

JUDGE

10/12/18

In the present of:

Wanyonyi for Onyinkwa for the Appellant

Okile for 1st Respondent

NO appearance for 2nd Respondent

Court Assistant - Kirong

Judgment read in open court.