



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 75 OF 2011

MICHAEL MUASYA

KASWII ANTHONY MUASYA APPELLANTS

VERSUS

PETER M. WAMBUA RESPONDENT

(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Machakos of Civil Case No. 940 of 2008 dated 18th April 2011)

(Before B. Thurania Jaden J)

R U L I N G

1. The 1st Appellant, **Michael Muasya** and the 2nd Appellant, **Kaswii Antony Muasya** were sued as the rider and the owner respectively of motorcycle registration No. **KBA 073 X**.
2. The Respondent had instituted the suit as the legal representative of the estate of **Mary Kavulu** (deceased) who was involved in a fatal road accident with the said motor vehicle. The Respondent blamed the accident on what he termed as the negligent manner that the motorcycle was being managed at the material time.
3. The Appellants denied the Respondent's claim. They blamed the accident on the deceased. In the alternative, the Appellants stated that the motor cycle was at the material time under the control of a stranger who had stolen the same.
4. After a full hearing, the trial magistrate entered judgment in favour of the Respondent for Kshs.150,000/=General Damages on 100% liability basis.
5. The Appellants were dissatisfied with the said judgment and appealed to this court on the following grounds:-
 1. **"The learned magistrate misdirected himself in law and fact by holding that the 1st Appellant was the rider of the offending motorcycle when in fact all the evidence on record did not support this finding.**
 2. **The learned magistrate erred in law and fact by disregarding the evidence adduced by the Appellants and the police officer which evidence was not controverted by the Respondent thereby arriving at an erroneous finding on liability.**
 3. **The learned magistrate erred in law and fact by shifting the burden of proof from the Respondent to the Appellants thereby arriving at an erroneous finding on liability."**

6. The appeal was canvassed by way of written submissions which I have duly considered.
7. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. See for example **Selle –vs- Associated Boat Co. Ltd (1968) EA 123**.
8. The first ground of appeal faults the trial court’s holding that the 1st Appellant was the rider of the motorcycle. The only eye witness, PW2 **Rhoda Mbithe**, an aunt to the deceased, is that she saw the accident happen. Although PW2 gave the details of motorcycle Registration Number **KBE 073E** as the one that hit the deceased, PW1’s evidence fails to identify the rider of the motorcycle. The 2nd Appellant testified as DW2 and denied having been the motorcycle’s rider at the material time. There is therefore merit in this ground of appeal.
9. On liability, PW2’s evidence was that the motorcycle swerved off the road and hit the deceased who was on the roadside. The evidence of the police officer, PW3 **PC Enock Wanyonyi** blames the motorcycle rider for the accident. According to his evidence which is based on the contents of the investigation file, the rider lost control and the motorcycle veered off the road and hit the deceased who was about five metres away from the road. The evidence of the investigations carried out corroborates the evidence of PW2.
10. According to the evidence of the 1st and 2nd Appellants, they did not witness the accident. Their evidence boils down to blaming the accident on one **Gilbert Mutinda Kavini** who is said to have taken the motorcycle without authority. The Appellants evidence did not therefore touch on how the accident occurred. The evidence of PW2 and PW4 on how the accident occurred remains uncontrovered.
11. There is no evidence on who the rider of the motor cycle was. However, the 2nd Appellant has not denied ownership of the motorcycle. The Appellants did not take out any third party proceedings against one **Gilbert Mutinda Kavini** who they blamed for the accident. He who alleges must prove. The Respondent managed to prove their case against the 2nd Appellant on the ownership of the motorcycle. The Appellants on a balance of probability failed to prove the existence of any third party.
12. On liability, the evidence on record proved on a balance of probabilities that the motorcycle was 100% to blame for the accident. The 2nd Appellant was the owner of the motorcycle. Consequently the Respondent was vicariously liable for the accident.
13. As stated by the Court of Appeal in **KBS vs Humphrey (2003) KLR:-**

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence in the contrary, presumption arises that it was driven by a person for whose negligence the owner is responsible.”

14. With the foregoing, the appeal by the 1st Appellant succeeds with costs. The appeal by the 2nd Appellant fails with costs.

B. THURANIRA JADEN

JUDGE

Dated and delivered at **Machakos** this 5th day of June, 2015

B. THURANIRA JADEN

JUDGE