REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KISII

CORAM: A.K. NDUNG'U J.

CIVIL APPEAL NO. 266 OF 2011

DAVID KABESA.....1ST APPELLANT

AWADH YUSUF..... 2ND APPELLANT

VERSUS

HARRIET KEMUNTO MOKUA ..... RESPONDENT

(Being an appeal from the judgment and decree delivered by Hon. J. Macharia (SRM) dated 17th day of November 2011 in CMCC No.100 of 2008 Nyamira)

JUDGEMENT

1. This is an appeal against the decision of the trial court finding both appellants 100% liable for a road traffic accident that occurred on 11 th June 2008 and awarding the respondent damages totalling to Kshs. 168,300/=.

2. The duty of a first appellate court as stated in the oft cited case of ***Selle vs Associate Motor Boat Co. [1968]EA 123*** is to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it neither saw nor heard the witnesses and should make due allowance for that fact.

3. The background of this appeal is that the respondent sued the appellants for damages following a road traffic accident that occurred on 11th June 2008. She and other passengers were travelling in motor vehicle registration number KBA 850B along Kisii – Chemosit road when the driver lost control of the vehicle and got into an accident. The respondent averred that the appellants, whom she claimed were the owners of the vehicle, were vicariously liable for the negligent acts of the driver who had caused the accident.

4. The respondent's suit was selected as a test suit by a ruling of the trial court dated 17th December 2009. Before the court, the respondent testified that they were on the left side heading towards Nakuru when the vehicle swerved and fell on the right side of the road. She testified that she had reported the matter and recorded her statement at the police station after leaving Nyamira District Hospital where she had been taken for treatment. She recalled that there had been no vehicle behind or in front of them when the accident occurred. She blamed the driver of the vehicle for the accident for failing to be careful. She also stated that she had been injured on her chest, back, on her left eye and 2 lower molar teeth had cracked.

5. The respondent also called CPL Adam Yane (PW 2) attached at Nyamira Police Station Traffic Department, to testify in support of her case. He stated that the two police officers who had issued the police abstract and investigated the matter had both been transferred. He told the court that a report was made on 11th June 2008 that an accident involving the subject vehicle had occurred. The driver of the vehicle had died and the passengers had been injured.

6. PW 2 stated that according to the witnesses, the rear tyre had burst and the vehicle had rolled. According to the motor vehicle inspection report, minor pre-accident defects had been noted but they would not have contributed to the accident. He told the court that no one had been blamed for the accident.

7. Lameck Karanja (PW 3) a clinical officer at Nyamira District Hospital confirmed that he had attended to the respondent and filled a P3 form in relation to the respondent whom he said was admitted from 11th June 2008 to 13 June 2008. He stated that she had sustained injuries on the spinal cord and had received some injections and an Xray done. During cross examination, PW 3 stated that he had no records to show that the respondent had been admitted in hospital. He stated that the treatment book had some erasures. That there was a name of another patient before the respondent's name was inserted.

8. The appellants denied the occurrence of the accident and in the alternative pleaded that the accident had occurred due to the burst of a tyre of the motor vehicle. They averred that the driver was unable to avert the accident despite his exercise of all reasonable care and skill.

9. Alex Kimani (DW 1) a motor vehicle inspector testified that he inspected the vehicle which had been involved in the accident on 12th June 2008. He stated that the speedometer could not be determined due to damages but the engine, axles, gearbox, suspension and transmission were intact. The steering was also okay. He noted that all the glass was broken and the outside body, the front window frames, the body roof, the foligate and dashboard as well as the window side were damaged. The foot brake could not be determined but the handbrake was okay and the exellator system was serviceable. The rear side seat was broken, the front reflectors were faded and one wheel was missing. DW 1 stated that the rear nut was damaged and the tyre had a burst. All other tyres were okay.

10. According to DW 1, the vehicle had minor pre accident defects which could not have contributed to the accident. He also stated that the damages to the vehicle had been caused by the accident.

11. Francis Ndungu (DW 2) who worked as a director at Rift Valley Fitment Centre recalled that the vehicle which belonged to the 2nd appellant had been fitted with speed governors on 5th November 2007. He stated that the speed governors had a guarantee of 1 year and the speed limit was 80km/hr. The vehicle was taken for a road test and the speed governor was found to be working well. He stated that the speed governor that had been fitted on the vehicle could not be tampered with by drivers.

12. Kinoti Stephen (DW 3) who worked at Kingsway Tyres Limited Nakuru branch as a sales representative recalled that on 18th January, 2008, the 1st appellant had been issued with a receipt after purchase of a tyre. He stated that the make of the tyre purchased by the 1st appellant was specifically for matatus. He stated that their tires normally took at least one year before being replaced and that the tyre was about 5 months old and in good condition at the time of the accident. During cross examination, he stated that the 1st appellant had only purchased one tyre and he could not tell which tyre had burst.

13. The 1st appellant, David D. Kabesa (DW 4) testified that he had purchased the vehicle at a price of Kshs. 1.5 million from one Isaac Towett on 15th November 2007. He testified that he was at his place of work when he was called and informed that the vehicle had rolled and people had been injured. When he went to the hospital, he found several people had been injured but the driver had died. He informed his insurance company and they proceeded to Nyamira Police Station where his vehicle was inspected. He testified that his vehicle had a speed governor. He stated that the vehicle had a tyre burst which was the cause of the accident.

14. The parties took directions to canvass this appeal by way of written submissions, which I have considered.

15. The appellants' position is that the accident was inevitable. The appellants argue that the tyre burst did not connote negligence on their part. They contend that the respondent was unable establish that the driver was negligent therefore the trial court's finding on liability should be set aside. The appellant also complains that the award made by the court should be set aside for being inordinately high and incomparable to similar cases.

16. Conversely, the respondent urged the court to disregard the claim that the tyre burst was the sole cause of the accident. It was argued that the argument was merely an attempt by the appellants to absolve themselves from liability and that the appellant had a duty to ensure that the vehicle was in good condition and fitted with good tyres before commencing with the journey. On quantum, it was submitted that the trial magistrate did not misdirect herself on the award made considering the time and pain the respondent underwent.

17. The respondent also opposed the grounds of appeal set out in paragraph 7 and 8 of the appeal as follows;

> *7. The learned magistrate erred in law and in fact in dismissing the Appellants application to amend their defence to plead fraud on the basis that it had been brought in at a very late stage during the trial.*
>
> *8. The learned magistrate erred in law and in fact in failing to appreciate the fact that one is allowed by law to make an application at any stage of the trial before the closing of the defence case.*

18. The respondent contended that the application for amendment of the defence had been disallowed by the trial court for introducing a new matter 2 years after the respondent had testified. The respondent rightly argued that no appeal had been preferred against the ruling of the trial court within the stipulated time and the grounds of appeal were merely an afterthought.

19. The appellant appears to have abandoned these grounds of appeal in its submissions. I will therefore deal with the two main issues brought up in the written arguments which relate to liability and quantum.

20. The fact that the accident occurred or that the ill fated vehicle registration number KBA 850B belonged to the appellants is not disputed. The 2nd appellant testified that he had purchased the vehicle but was not issued with the log book as he had not finished payments for the vehicle. The respondent also produced a copy of records demonstrating that the 2nd appellant was the registered owner of the vehicle.

21. The respondent's case was that the accident had been caused by a tyre burst. This claim was not denied by the appellant. According to PW 1 there were no other vehicles involved in the accident. PW 2 also testified that according to the investigations of the police at Nyamira Police Station, the accident occurred as a result of a tyre burst.

22. The testimony of DW 2 lessened the chances that the accident had taken place due to over speeding. He stated that the vehicle had been fitted with a speed governor which had been tested and could not be tampered with by drivers.

23. The motor vehicle inspector, DW 1, testified that he had inspected the vehicle after the accident and had found that other than a few pre accident defects which could not have contributed to the accident, all other damages had been caused by the accident. He also confirmed that the vehicle had had a tyre burst.

24. The appellants also called DW 3 who had sold a new tyre to the 1st appellant. He stated that the tyre they had sold to the 1st appellant was well suited to the vehicle and was still in good condition at the time of the accident. Crucially, DW 3 could not tell whether the tyre that burst was the one that he had sold to the 1st appellant.

25. The case of ***Joash Musikhu Vuranje v Wanjiru Mwangi & Another [2016]eKLR*** which was referred to by the appellants can be contrasted from the present case since in that case, there was evidence that the vehicle had passed a vehicle inspection test a month prior to the accident. The vehicle inspection report was also produced as evidence in the court. In this case DW 1 only conducted the inspection after the accident.

26. I agree with the trial court's finding that as a passenger, the respondent could not contribute to the accident. The appellants did prove that the accident had been caused by a tyre burst but could not absolve themselves from liability since they were not able to prove that the tyre that had burst was the one that had been purchased from and vouched for by DW 3. I therefore uphold the trial court's finding on liability.

27. Turning to the appeal on quantum, the appellants contend that the award made by the trial court was inordinately high and should be set aside. PW 1 testified that as a result of the accident she had sustained injuries on her chest, back and on her left eye which had to be stitched and 2 of her lower molar teeth had cracked.

28. The respondent produced the police abstract and P 3 form showing that she was one of the victims of the road traffic accident. Although PW 3 stated that the respondent's treatment card had been altered I am satisfied that she sustained injuries as a result of the accident. PW 3 stated that the respondent had also been treated at Nakuru and the respondent produced a treatment note and receipts from Rift Valley Provincial General Hospital dated 16th June 2008.

29. The appellants proposed an award of Kshs. 50,000/= for the injuries suffered. They referred to the case of ***Mbogo Ndegwa (a minor) v Patrick Oloo Wangira & Another Nairobi HCC No. 525 of 1991*** where the court awarded Kshs. 50,000/=. They also relied on the case of ***Salim S. Zein t/a Eastern Bus Service & Another v Rose Mulee Mutua Nairobi CA No. 147 of 1994*** where the Court of Appeal reduced an award made by the trial court to Kshs. 50,000/= for injuries to the head, back, right upper limb and chest. The injuries had healed and there were no significant scars by the time plaintiff was examined.

30. The respondent proposed an award of Kshs. 600,000/=. They relied on the case of ***Rodgers Ayuya Ogonda v Njuguna Builders & Drainage Contractors HCCC No. 1807 of 1988*** where the plaintiff had suffered an injury on the spinal cord.

31. The appellant also relied on the case of ***George Mugo & Another v AKM (Minor suing through next friend and mother of AMK [2018]eKLR*** where the plaintiff who had sustained blunt injuries on the left shoulder, chest and left arm and bruises on the left wrist, was awarded Kshs. 90,000/=.

32. As a principle an appellate court is not justified in substituting a figure of its own for that awarded in the trial court simply because it would have awarded a different figure if it had tried the case at the first instance. It must be shown that the magistrate proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. (See ***Ali vs. Nyambu T/A Sisera Stores [1990] KLR 534 and Butt vs. Khan[1982-88] KAR 5***)

33. This court also has a duty to maintain a similar level of award for similar injuries while ensuring the claimant is fairly compensated. (See ***Stanley Maore vs Geoffrey Mwenda Civil Appeal No. 147 of 2002 [2004]eKLR***)

34. I note that the authorities cited by the appellants before the trial court were not recent and the injuries less severe than those suffered by the respondent. The injuries in the authority cited by the respondent were more severe than those she suffered. In my view, the award made by the trial court was fair compensation for the injuries suffered by the respondent and I uphold it.

35. The upshot of the foregoing is that this appeal is found to be lacking merit and is dismissed with costs to the respondent.

Dated and Delivered at Kisii this 26th day of February 2020.

A. K NDUNG'U

JUDGE