REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 119 OF 2013

MOMBASA MAIZE MILLERS (KSM) LTD.....1ST APPELLANT

JOHN MUHONDO WASWA…….....2ND APPELLANT

VERSUS

OLIPHA SARANGE ABUGA…….....RESPONDENT

(Being an Appeal from the Judgment and Decree by Hon. M.C.Nyingei (RM)

in Maseno PMCC NO.160 OF 2011delivered on 20th November 2013)

JUDGMENT

Olipha Sarange Abuga sued ***(hereinafter referred to as respondent)*** sued **Mombasa Maize Millers (KSM) Ltd and John Muhondo Waswa** ***(hereinafter referred to as appellants)*** in the lower court claiming damages for loss she suffered on 26th November 2009 when her motor KAV 383F collided with 1st appellant's vehicle KAY 681 A which was negligently driven by the 2nd appellant.

The defendants/appellants filed a statement of Defence and denied the claim and urged the court to dismiss it with costs.

In a judgment delivered on **20th November 2013,** the learned trial Magistrate found the appellants liable at 100 % and awarded the respondent Kshs. 373,175/- .

The Appeal

The Appellants being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 16th December 2013 which set out 7 grounds to wit:-

1) The Learned Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same

2) The Learned Magistrate grossly erred in finding the defendant liable at 100%

3) The Learned Magistrate misdirected himself in ignoring the written submissions presented and filed by the appellant in their entirety

4) The Learned Magistrate erred in law and in fact in awarding damages in respect of loss of user when the same had not been proved and/or adequately proved to the required standard

5) The Learned Magistrate proceeded on wrong principles when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable

6) The Learned Magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it presented an entirely erroneously estimate *vis-a-vis* the respondent's claim

7) The Learned Magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law

SUBMISSIONS BY THE PARTIES

When the appeal came up for mention on 21.3.17; the parties' advocates had agreed to canvass it by way of written submission which they dutifully filed.

Appellants' submissions

It was submitted for the appellants that the respondent was not an eye witnesses to the accident complained of and did not therefore know how it occurred. It was further submitted that the respondent did not produce receipts in support of repairs and that the sum of Kshs. 284,000/- in respect thereof was therefore not proved. It was finally submitted for the appellant that loss of user was also not proved.

Respondent's submissions

It was submitted for the respondent that the appellants did not call evidence to controvert her case.

The evidence

Plaintiff conceded that she was not present when the accident occurred and that her driver one David informed her that motor vehicle KAY 681 A was being driven carelessly and at high speed when the accident occurred. She produced a police abstract which confirms the occurrence of the accident and the fact that the 2nd appellant was charged in Vihiga Law Courts, convicted and fined Kshs. 3000/- in default 1 month imprisonment for careless driving. The assessment report shows that the repair costs were assessed at Kshs. 275,175/- but the respondent stated that she did not have receipts in support thereof. The respondent also conceded that she did not have evidence in support of her claim for loss of user.

Analysis and Determination

This being a first appeal, this court is mandated to evaluate the evidence before the trial court while bearing in mind that it never saw or heard the witnesses and therefore make due allowance for that. The principles governing the consideration and evaluation and findings of an appeal court have well been established particularly in the case of ***Kiruga Vs Kiruga & Another [1988] KLR page 348*** where the Court of Appeal held

> ***"An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."***

I have perused the entire record of appeal and considered the submissions by counsels for both parties.

While it is true that the respondent was not at the scene of the accident, the evidence from the police abstract confirms a collision between respondent's motor vehicle KAV 383F and 1st appellant's vehicle KAY 681 A. It is not disputed the 2nd appellant was charged, convicted and fined Kshs. 3000/- in default

of 1 month imprisonment for carelessly driving 1st appellant's motor vehicle KAY 681 A, thereby causing the accident.

Section 47A of the Evidence Act Chapter 80 Laws of Kenya states as follows**:**

> ***A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged***.

On liability, the learned trial magistrate rightfully found that the 2nd appellant had been charged with careless driving in Vihiga Law Courts and had been convicted and fined Kshs. 3,000/-. The appellants did not tender any evidence and I therefore find that the learned trial magistrate rightfully rendered herself that the appellants were jointly and severally liable at 100%.

I have considered ***Nandwa v Kenya Nazi Ltd[1988] eKLR*** cited by the appellant in which the court of appeal held:-

> ***"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.***

I have also considered the case of ***P I v Zena Roses Ltd & another [2015] eKLR*** which cited **Nandwa – Vs- Kenya Kazi Ltd** (supra) with approval.

The police abstract speaks for itself and compensates for failure by the respondent to call an eye witness. To my mind, the trial magistrate judicially considered the evidence placed before her. The respondent proved a set of facts which raise *primafacie* inference that the accident was caused by the negligence of the second respondent and I therefore find no reason to interfere with her finding on liability.

On quantum, the respondent did not produce any receipts or records in support of repairs and loss of user. The assessment report produced as an exhibit, however, shows that respondent's vehicle was inspected and each of the items required to be replaced in the vehicle was documented. The assessment report shows that the spare parts costs, the panel beating costs and other incidental were taken from the open market value. The items to be replaced or repaired are itemized to include the labour and VAT costs. The cost is no doubt the consequence of the action complained of.

It is trite law that special damages have to be specifically pleaded and strictly proved. This has been reinstated in ***Francis Mchee Nthiga v Davis N. Waweru (2014) eKLR, William Kiplagat Maritim & Another v Benson Omwanga, Charles Sande v KCC Ltd CA154/92,*** and ***Zacharia Waweru Thumbi v Samuel Njoroge Thuku [2006] eKLR*** .

The plaint shows that the respondent's claim was for Kshs. 284,000/-being repair costs. The issue for determination is whether the respondent's claim can only be proved by way of receipts. If so, does it therefore mean, that an injured party such as the respondent, who for one reason or another is unable to produce receipts has no recourse in law? I do not think so. In my considered view, the just, purposive and meaningful reading of the term "***specifically pleaded and proved"*** does not have the aim of driving litigants such as the respondent from the seat of justice. (See ***Wells Fargo Limited v Peter Owour Nyabondo [2017] eKLR)***. The learned trial magistrate's finding that the respondent had proved repair costs in the sum of Kshs. 275,175/- cannot therefore be faulted.

Loss of user was pleaded but was not particularized. No material was placed before the trial court to support the trial court's award of Kshs. 98,000/- under this heading. The trial court's decision was not

based on evidence and I therefore find that the learned trial magistrate acted on wrong principles in reaching her conclusion on this issue.

In the result, the appeal is allowed to the extent that the award of repair costs in the sum of Kshs. 275,175/- is upheld while the award of Kshs. 98,000/- for loss of user is set aside. Since the appellants have partially succeeded, it is hereby ordered that each party bears its own costs of this appeal.

DATED AND DELIVERED THIS *24th* DAY OF *August* 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellants - Mrs. Onyango h/b for Mr. Oduor

Respondent - N/A