REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 41 OF 2015

MBUGU DAVID……..……..……...1ST APPELLANT

DAVID KIARIE MBURU…….2ND APPELLANT

-Versus-

MARGARET NDINDA WAMWENGA…….……..……RESPONDENT

(Being an appeal against the Judgement delivered in the Senior Principal Magistrate's Court on 7/5/2014 by Hon. E.A. Mbicha – RM)

JUDGEMENT

This is an appeal by **MBUGU DAVID** and **DAVID KIARIE MBURU** hereinafter referred as the appellants against **MARGARET NDINDA WAMWENGA** hereinafter referred as the respondent against liability and quantum from a judgement of the learned trial magistrate Hon. E.A. Mbicha, Resident Magistrate.

The facts premised of the case at the trial court were that the respondent sued the appellants for material damage of loss of a motorcycle valued at Ksh.75,000/=. The respondent who was the owner of motorcycle KMCT 872B was on 15/5/2012 having it being driven by her driver, servant one **SIMON NGIGE WATHENA** hereinafter referred as the deceased along Loitokitok – Emali road. That in the course of business the deceased colluded with motor vehicle KPB 493 V/ZD 6740 owned and registered in the name of the 1st appellant. As a result of the accident, the deceased suffered fatal injuries.

The claim against the appellant was based on negligent acts of the driver, agent, or servant of the 1st appellant. The trial court heard the evidence and reached a finding in favour of the respondent in the following terms:

(1) Liability apportioned at a ratio of 65%35% in favour of the respondent; and

(2) Material damage at Ksh.69,500/= less 65% contribution by the deceased (driver) giving rise to the net award of Ksh.24,325/= plus costs.

Being dissatisfied with the decision of the lower court, the appellants have appealed to this court on the following grounds:

(a) The learned trial magistrate erred in the way he weighed the evidence tendered before the court.

(b) The learned trial magistrate erred in law by giving a judgement on liability that went against weight of evidence.

(c) The learned trial magistrate erred in law and fact by failing to find the deceased was responsible for the accident that led to the case that was filed in court.

(d) The learned trial magistrate erred in law by making up and inordinate award on quantum.

The facts of this appeal and evidence adduced are similar with the ones in ***Civil Appeal No. 42 of 2015***. I appraised the evidence by the witnesses for the plaintiff and respondents in the said appeal. The appellants in ***Civil Appeal No. 42 of 2015*** are the same ones who lodged this appeal against the respondent. There was an omission on my part of not consolidating them during case management when directions were taken in the presence of both advocates.

I have had the opportunity to re-evaluate the evidence and materials placed before the trial court. While discharging this duty, I bear in mind as a first appellate court I neither saw nor heard the witnesses. I therefore must be cautions that as I draw my own conclusions, these principles should mirror through my decision. These principles are well settled in the case of ***Pandya v Republic [1957] EA 337***.

I went in depth to appraise the whole evidence in ***Civil Appeal No. 42 of 2015***. I reiterate that the facts, in this appeal are same in all respects. The respondent evidence at the trial constituted her own testimony on ownership of the motorcycle KMCT 872B. it was further her testimony that she had employed the deceased as a rider at the time when the subject accident occurred.

The respondent did not witness the accident but learnt of it from the police. The other witness relevant to the trial was PW2 whose testimony was in respect to the investigations conducted and recommendation. The peculiar aspect of his testimony is that he was neither the officer who visited the scene or recorded statement from witnesses.

On the ground in respect of liability, I interfered with the findings of the trial court because the appellant was able to demonstrate that:

(1) There was absence of negligence on the part of the appellant's driver or servant.

(2) That the accident was due to the circumstances in terms of causation and blameworth, appellant's driver would not be held liable.

My conclusion was therefore that the respondent failed to discharge the burden of proof on a balance of probabilities to establish negligence on the part of the appellant.

As to the issue of apportionment of liability, the same was set aside as an error of law and fact on the part of the learned trial magistrate. The findings on liability in ***Civil Appeal No. 42 of 2015*** shall abide in this ***Civil Appeal No. 41 of 2015***.

The next ground of appeal is on Quantum:

As to the issue of quantum, the learned trial magistrate awarded Ksh.69,500/= less contribution of 65% ratio on liability to be borne by the respondent. In reappraising the facts and evidence at the trial court, I am of the following conceded view:

The respondent was the registered owner of the motorcycle KMCT 872B. It is not disputed that on

15/5/2012 one **SIMON WATHINA** drove it along Loitokitok – Emali road. The driver colluded with motor vehicle KPB 493V/ZD 6740 where he sustained fatal injuries. In the same accident the motorcycle was damaged necessitating this claim.

From the evidence, the respondent purchased the subject motorcycle on 30/9/2011. It was involved in a road traffic accident on 15/5/2012. The value of the motorcycle was proved by way of a receipt issued at the time of purchase from Makindu Motors. There was no evidence from assessor's valuation report regarding the value as at 15/5/2012 on pre-accident and the salvage of what remained after the accident.

The holding of the Court of Appeal in the case of ***Nkuene Dairy Farmers Co-operative Society Ltd v Ngacha Ndeiya [2010] eKLR*** has a proposition in this issue:

> **"In our views, special damages in a material damage need not to be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Again each item he assigned a value. We think the particulars of the damage and the value of the repairs were given with some degree of certainty."**

Applying these principles to the case, we are not told of the value of the motorcycle as at the time of the accident. The extent of the damage and value of each item was not availed at the trial court by an assessor. The motorcycle was about eight months old since date of purchase. There was need to provide for depreciation of asset. The respondent had a duty to prove all these at the trial court before discretion could be exercised in her favour. What the respondent did was to throw the receipt on purchase price at the court and demanded to be compensated for the loss.

In the case of ***David Bagine v Martin Bandi CA No. 283 of 1996***, the Court of Appeal pronounced itself in the following passage:

> **"It is trite law that the plaintiff must understand that if they bring actions for damages, it is for them to prove damage. It is not enough to note down the particulars and to speak, throw them at the head of the court saying this is what I have lost. I ask you to give me these damages, they have to prove it."**

It is true the respondent pleaded specific claim of Ksh.75,000/= as value of loss of the damaged motorcycle. Besides particularizing the value, she had a duty to give an assessor's report on pre-accident value and value of salvage for the court to come up with actual loss suffered. The evidence in this respect fell short of the threshold to prove material damage. The basic principle as in assessment of damages has been spelt out in ***Winfield on Tort 17th Edition at Pg 791*** as:

> **"Where property is damaged the normal measure of damages is the amount by which its value has been diminished and in the case of ships and other chattels, this will usually be ascertained by reference to the cost of repair. It does not matter that the repairs have not been carried out at the date of the trial or even that they are never carried out at all."**

In applying these principles to the evidence adduced at the trial court on material damage of the motorcycle, it is clearly manifested that an error of law occurred. The learned trial magistrate duty was to compensate the respondent. He therefore needed to have been presented with evidence of the value of the motorcycle before the accident and cost of repair of the damage after the accident. That was not the case.

DECISION

The upshot of this, I allow the appeal on damages awarded to the respondent for Ksh.69,500/=. The judgement of the lower court dated 7/5/2014 on both liability and quantum is hereby set aside. The appellant is also awarded costs of this appeal.

Dated, signed and delivered this 28th day of September, 2016.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Kamau for Mutuku for Respondent present

Mr. Njuguna for Appellant Absent – to be notified

Mr. Mateli Court Assistant