REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 30 OF 2009

FRANCIS WACHIURI MURAGE

PWANI UNITED BUILDERS.....APPELLANTS

VERSUS

PAULINE MUTHONI GITAU (legal representative of the estate of)

PETER MUTHUI HUHO.....RESPONDENT

(An appeal from the judgment and decree of the Hon. Murigi (S.R.M.) in Murang'a CMCC No. 402 of 2004 delivered on 17th December, 2008)

JUDGMENT

1. The Appellants herein were sued in Murang'a CMCC No. 402 of 2004 for recovery of damages. The damages were alleged to have arisen from a road traffic accident on 11th September, 2001. It was the Respondent's claim that she was on that particular day travelling aboard motor vehicle registration number KAK 344F along Kenol-Sagana road. That the 1st Appellant negligently drove the 2nd Appellant's motor vehicle registration number KAH 441U as a result of which it collided with the Respondent's Motor vehicle KAK 344F. She claimed that as a consequence thereof, she sustained cut wounds on the head and abrasion wounds on the face, fractures of right radius and ulna-middle third, pelvic fractures involving left iiliac bone and left superior pubic ramii and chest injuries with fractures of 4th, 5th, 6th, 7th and 8th ribs right posterior aspect. The Respondent attributed the occurrence of the accident to the 1st Appellant's negligence. It was particularly pleaded that he drove at an excessive speed in the circumstances, failed to keep proper look out or to have regard to other motorists, failed to give any adequate warning of his approach, failed to stop, slow down, swerve or in any way manage KAH 441U to avoid collision and that failed to obey highway code.

2. The Appellants filed a defence in which they denied the claim. They pleaded that the Respondent allowed an unlicenced driver to drive KAK 344F; that KAK 344F was driven at an excessive speed, that the driver of KAK 344F attempted to overtake without ascertaining the safety of so doing and failing to heed the lawful presence of other vehicles on the road particularly KAH 441U.

3. It was the Respondent's testimony that KAK 344F was heading towards Kagumo. As the vehicle was going down-hill at Kambiti area a vehicle from Nyeri direction tried to overtake others in the process, KAH 441U hit KAK 334F at the door behind the driver. She stated that KAH 441U was being driven at a high speed and blamed its driver for the accident. It came out in her evidence that there was no vehicle in front of KAK 334F but there were on coming vehicles. She stated that the driver of KAK 334F was charged at Kagumo Law Courts with a traffic case but was acquitted. To so prove she produced

proceedings therein (P. Exhibit 9 and 10). The Appellant stated that after the occurrence of the accident, she received treatment at Makuyu (MNCO) Mission Hospital on the date of the accident then transferred to Avenue Nursing Home. She produced a discharge summary (P. Exhibit 3). She also produced medical reports (P. Exhibit 4, 5 and 6) and lamented that she had not fully recovered since she could not stand or walk for long and that she was still on medication.

4. The Appellants closed their case without calling evidence. The trial court found the Appellants wholly liable for failure to rebut the Respondent's evidence and failure to prove negligence against a third party whom they had enjoined in the proceedings. Judgment was entered against the Appellants jointly and severally for KShs. 750,000/=.

5. Aggrieved by the said decision, the Appellants have filed this appeal on grounds that:-

i. *That the learned trial magistrate erred in law and in fact in finding the Appellants 100% liable for causing the accident and in failing to apportion liability between the Appellants and the third party.*
ii. *That the learned trial magistrate erred in law and in fact in assessing general damages at KShs. 700,000/= and KShs. 50,000/= for future medical expenses for the Respondent considering the injuries pleaded and proved the same was manifestly excessive in the circumstances.*
iii. *That the learned trial magistrate erred in law and in fact in failing to consider or have sufficient regard to the submissions filed on the Appellant's behalf.*

6. The Appellants' submissions on liability was that liability should wholly attach to the 3rd party. They relied on **Wainaina Nganga Gakuu v. Jael Oduor & 3 Others (2008) eKLR** where the court held the view that the trial court erred in failing to consider the evidence contained in the police file which they say was established on a balance of probabilities that the 4th Respondent/3rd party was guilty of causation of the accident. They further relied on **Baker v. Market Harborough Industrial Co-op Society Ltd (1953)** to advance their argument that the trial magistrate should have considered apportioning liability at 50:50 ratio between them and the 3rd party.

7. The Appellants did not adduce any evidence to controvert the Respondent's case or prove negligence on the part of the 3rd party. It was expected of the 1st Appellant to present evidence in court to explain what measure he took to avoid the accident. It is a presumption in the law of evidence that a party who has in his possession evidence which he fails to call, that evidence is presumed to have been adverse to him. The consequence of failure to furnish evidence in rebuttal was discussed in **Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988** Makhandia J held:-

"The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

8. In **Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007**, Ali-Aroni J, held:-

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

9. In the absence of evidence in rebuttal from the Appellants, it follows that the Respondent proved her case on a balance of probability against the Appellants. In the circumstances, I find that the trial court was right in finding the Appellants 100% liable jointly and severally. They never tendered any evidence to shift the blame from them to the 3rd party. The authority of **Baker** (supra) relied on by the Appellants, in

my view, is irrelevant to this case since in this case it is possible to decide who was liable for the accident.

10. On quantum, the Appellants did not express any dissatisfaction on the assessment of damages. They only had an issue stating that there was a typographical error since the trial court assessed general damages at KShs.300,000/= and future medical expenses KShs. 50,000/= but at the end of it erred in calculation and stated that the final award was KShs. 750,000/=. It is trite that assessment of damages is a matter of a trial court's discretion and ought not be interfered with unless the trial court acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. See the case of **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where the Court held as follows:-

"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga – vs- Musila (1984) KLR 257.)

11. I have looked at the original record of the trial court. It reveals that in the trial court's original signed judgment, the court awarded Kshs. 700,000/= as general damages for pain and suffering and Kshs. 50,000/= being future medical expenses. It is the typed judgment that shows a sum of Kshs.300,000/- instead of Kshs.700,000/= general damages. Section 99 of the Civil Procedure Act provides:-

"Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

I am therefore inclined to correct that error.

12. Accordingly, the appeal is without merit and it is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 22nd day of May, 2015

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A. MABEYA

JUDGE