REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 116 OF 2011

CORAM: D.S. MAJANJA J.

BETWEEN

HAZA TOURS..... 1ST APPELLANT

SOLOMON MWENDA.....2ND APPELLANT

AND

PETER MWORIA M'ARIMI

suing as the administrator of the estate of

IRENE GACIUKI (DECEASED).....1ST RESPONDENT

SIMON MWIRIGI.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.R.N.Kimingi, CM dated 26th August 2011 at the Chief Magistrates Court at Meru in Civil Case No. 53 of 2009)

JUDGMENT

1. The subject of this appeal is a road traffic accident that took place on 17th September 2007 along the Meru-Mikinduri road involving the 1st appellant's motor vehicle registration number KAS 254K ("the Minibus") driven by the 2nd appellant and the 2nd respondent's vehicle registration number KYC 282 ("the Pickup"). The deceased was a fare paying passenger in the Minibus and she died as a result of the accident. Following the accident, the deceased's personal representative and dependants claimed damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***. The trial court found the appellants fully liable and awarded the respondent the Kshs. 10,000/- for pain and suffering, Kshs. 800,000/- for loss of dependency and Kshs. 40,000/- for special damages.

2. Although the appellants contested the trial court's findings on liability and quantum in the memorandum of appeal dated 24th May 2018, at the hearing of the matter, Mr Muthamia, counsel for the appellant, informed the court that the appellant was only contesting the issue of liability.

3. The principle that governs the exercise of this court's exercise of appellate jurisdiction is that it is the duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). Further, an appellate will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles (see ***Ephantus Mwangi and Another v Duncan Mwangi Wambugu*** **[1982 – 88] 1 KAR 278**).

4. In the grounds of appeal, the appellants complain that the trial magistrate did not take into account the findings contained in Traffic Case No. 274 of 2008 and thus reached the wrong conclusion on liability. They further complain that the 2nd respondent was wholly and or substantially to blame for the accident as a metal rod/object escaped into the Minibus from the Pickup as they by passed each other and that there was no contact between the two vehicles. The appellant also attacked the judgment on the ground that the trial court did not consider the entirety of the evidence and submissions and thereby came to the wrong conclusion on the issue of liability.

5. Although the directions were taken in presence of the parties, the respondent neither filed submissions nor attended court for the hearing of

the appeal.

6. The evidence on the issue of liability before the trial court was as follows. Zakary Mbundi Mwithiu (PW 2) recalled that on the morning of the material day, as he was walking along the Meru-Mukinduri road towards Meru, he saw the Minibus coming from the Meru direction going downhill towards Mikinduri on the left side. The Pick-up was going uphill while the Minibus was travelling at a high speed moving in a zig zag manner. He testified that it moved to the side where the Pickup was and tilted as if it was going to overturn. The Minibus hit the Pickup at the body and tore off the angle line of the pickup. He further recalled that when the Minibus went as if to overtake, the driver of the Pickup tried to control it away from the Minibus but was unable to. The Minibus stopped about 100 metres away while the Pickup was left where it was hit. PW 2 went to check the Minibus and found the deceased had hit her chest against the seat. In cross-examination, PW 2 told the court that the angle line is the piece of metal on the body of the vehicle that makes the carrier and that the Minibus is the one that tore off the angle line.

7. Abdul Hassan (PW 3) testified about the investigation file. He confirmed that the accident took place involving the Minibus driven by the 1st appellant and Pickup. He testified that the conclusion of the investigation was that the Minibus was overtaking another vehicle and in the process moved from its lane to the other lane where it met the Pickup and as a result the accident took place. He confirmed that the driver of the Minibus was charged with causing death by dangerous driving but was acquitted. In cross-examination, he told the court that from the report, the minibus hit a stone when it left its lane.

8. The 2nd appellant, Solomon Mwenda Muriithi (DW 1), recalled that on the material day he was driving the Minibus going downhill towards Mikinduri from Meru when he met a Pickup going uphill. The road was dusty and he had put on the lights. He stated that he was not driving fast as he was at 50kph. The Pickup was about 15m and in the middle of the road. He stated that he tried to avoid the pick up by moving to the extreme left but the vehicle hit a stone and tilted to its right. He told the court that a piece of metal came into the vehicle through the window and pierced the deceased through her chest. The conductor in the Minibus, Peter Mutwiri (DW 2), recalled that the Pick-up was coming towards them and was in the middle of the road. He stated that the minibus tilted to the right and he heard sound and noted that one of the passengers was pierced by an iron bar.

9. The 2nd respondent, Simon Mwirigi (DW 3), testified that he was driving the Pickup going uphill. He was driving at a speed of about 40 to 50 kph as the road was rough. He saw the Minibus as it was 15 metres ahead coming towards him with another vehicle, a Nissan. Suddenly the Minibus came to his side as it tried to overtake the Nissan. The Nissan stopped to give way to the Minibus so that it could complete overtaking. The Minibus squeezed between the Nissan and Pickup and tried to get back on its side. While it did so, it hit some stones and got off the road on the side where the Pickup was causing it to lay on the Pickup on the right side. By that time DW 3 stated he had slowed down completely. He recalled that the Minibus pulled off the angle line welded on the upper part of the pick-up.

10. Peter Thuranira (DW 4) was a passenger in DW 3's vehicle on the material day. He recalled that he saw a Nissan and the Minibus coming towards them and the Minibus overtaking the Nissan and in doing so the Minibus hit the Pickup and in the course ripping off the angle line.

11. Having reviewed the evidence, I find as follows. It is not in dispute that the 2nd appellant was charged with the offence of causing death by dangerous driving and acquitted. In its first ground of appeal, the appellant contended that the trial magistrate failed to take into account the evidence, judgment and proceedings in the traffic case. While a conviction is binding on the trial court and connotes negligence, the converse is true for an acquittal (see ***Robinson v Oluoch*** **[1971] EA 376** and ***Michael Hubert Kloss and Another v David Seroney and 5 Others*** **ELD CA Civil Appeal No. 285 of 2005 [2009]eKLR**). The acquittal only means that the prosecution failed to prove its case beyond reasonable doubt. The trial court was not bound by the judgment of the criminal court. The court trying the civil case was not bound by the judgment of the criminal court. It was duty bound to evaluate the evidence of the witnesses including the proceedings of the traffic case before it before coming to a decision whether the plaintiff proved its case on a balance of the probabilities. This was explained by Nambuye J., (as she then was) in ***Kenya Power and Lighting Co., Ltd v Zakayo Saitoti Naingola and Another*** **NRB HCCA No. 522 of 2004 [2008]eKLR** as follows;

> *The legal effect and or bearing of the acquittal of the 4th defendant in the traffic proceedings, to this proceedings, is that the acquittal did not give the 4th defendant clean bill of unblameworthiness. This is so because the traffic court, was exercising criminal jurisdiction whose standard of proof was different from the one applicable to civil proceeding. The one in the traffic proceedings was one beyond reasonable doubt. Whereas the one in civil proceedings is one of a balance of probability. Further this court has judicial notice of the fact that since the two courts were exercising different jurisdictions the court seized of the civil proceedings was not to be bound by the decision of the court exercising criminal jurisdiction. It was duty bound as it did, to re-evaluate the evidence on the record and arrive at its own conclusion. Likewise, this court, as an appellate court, is not bound by the findings of the lower court. It has a duty to re-evaluate the evidence on the record and then arrive at its own conclusion on the matter.*

12. The second ground of appeal was that the 2nd appellant substantially contributed to the accident as a metal/rod object escaped from the Pickup into the Minibus as they bypassed each other and as there was no contact between the two vehicles. DW 1, in his evidence, stated that, *"At the time out vehicles collided the pickup was on the road in motion and not stationary."* Furthermore, according to the police officer who investigated the accident and went to the scene, Joshua Mwangangi, stated that the driver of the Minibus had lost control and hit the Pickup after hitting a rock that was protruding on the road surface. I therefore reject the appellants' suggestion that there was no collision between the Minibus and the Pickup particularly in light of DW 1's own admission.

13. The next question is whether the cause of the deceased's death was solely caused by a metal object from the Pickup. PW 1, who witnessed the accident, did not see the Pickup carry a metal object or rod but saw the Minibus rip of the angle line affixed to the Pickup. Nothing emerged from the evidence of PW 3 or the investigating officer in the criminal proceedings to suggest otherwise. The totality of the evidence is that the 2nd appellant was speeding on what was admitted to be a rough and dusty road. As he tried to overtake another vehicle. he went on the lane where the Pickup was, hit a stone which was protruding, lost control and brushed the body of the Pickup thus ripping off the anhle line and causing it to go through the window of the Minibus and pierce the deceased. I find and hold that the metal road or angle line did not fly to the Minibus by itself but rather was dislodged as a result of the collision with the Minibus. The 2 nd appellant was negligent

in that he was driving too fast in conditions where the road was dusty and he was unable to control the vehicle to the extent that it collided with the Pickup. I have no reason to depart from the findings of the trial magistrate.

14. The appeal is dismissed. Since the respondents did not file written submission as directed by the court or attend the hearing, I make no order as to costs.

DATED and **DELIVERED** at **MERU** this **5th day of June 2018.**

D.S. MAJANJA

JUDGE

Mr Muthamia instructed by Gikunda Anampiu and Company Advocates for the appellant.

Maitai Rimita and Company Advocates for the 1st respondent.

Kiogora Arithi and Company Advocates for the 2nd respondent.