IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & GATEMBU, JJ.A)

CIVIL APPEAL NO. 279 OF 2016

BETWEEN

JOYCE GATHONI WATHENA & ELIZABETH NJERI

(suing as personal representatives of the

estate of **SIMON KIARIE MBURU.....APPELLANTS**

AND

MBUGUA DAVID.....1ST RESPONDENT

DAVID KIARIE MBURU.....2ND RESPONDENT

(Being an appeal from the judgment and order of High Court of Kenya at Kajiado (Nyakundi J.) delivered on 28th September 2016

in

HC Civil Appeal No. 42 of 2015)

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JUDGMENT OF THE COURT

1. This is a second appeal arising from a suit filed by the appellants, **Joyce Gathoni Wathena and Elizabeth Njeri** in the Chief Magistrate's Court seeking general damages under the Law Reform Act and the fatal Accidents Act, special damages and costs of the suit, against the respondents, **Mbugua David** and **David Kiarie**.

2. The suit arose from a road traffic accident which occurred on 15th May 2012 at about 7.00 p.m. along the Oloitoktok- Emali Road. **Simon Kiarie Mburu** (the deceased) was riding motorcycle registration no KMCT 872B along the said road when he collided with motor vehicle trailer registration no KBP 493V/ZD 6740, suffered fatal injuries and died.

3. The motor vehicle was registered in the name of the 1st appellant but was owned by the 2nd respondent, **David Kiarie**. The appellants, who were the mother and wife of the deceased respectively, took out Letters of Administration and having done so, sued the respondents.

4. It was the appellants' case that the accident was occasioned by the negligence of the respondents or their agents who drove the motor vehicle carelessly and at an excessive speed causing it loose control and collide with the deceased's motorcycle resulting in his demise.

5. The 1st respondent did not enter an appearance. However, the 2nd respondent filed a defence in which he denied the appellants' claim and maintained that the accident was a result of the deceased's own negligence.

6. The trial court took the evidence of the appellants who admitted that they did not witness the accident but were called to the scene after the event. They maintained that at the time of his death the deceased was a businessman with an income of Kshs.40,000 and used to run a motorcycle business, sell foodstuff and financially support his mother, wife and two children. PW3, police constable **Charles Maina Mureithi** testified that when they arrived at the scene of the accident they only found the deceased and the motorcycle as the trailer had proceeded to the Police Station. They then took measurements of the scene, drew sketch marks and upon subsequent inspection of the motor vehicle and motorcycle, their findings were that the point of contact were at the frontal centre of the trailer, the wheels had not had an impact

on the body, the prime mover was moving from Emali towards Loitoktok, the body was lying just at the middle of the left lane facing Loitoktok direction, the deceased was not wearing a reflector jacket, that there were no skid marks and the motorcycle was moving from the left side to the right side to join Subeti direction. He concluded that the trailer had right of way and that the deceased was to blame for the accident as he did not wait for the trailer to pass to enable him join the road.

7. For the respondent, **ZephaniaWainaina**, (DW1) who was the driver of the trailer, testified that on the material day, he was driving from Emali when he noted two motorcyclists beside the road. The first cyclist rode towards the road and managed to crossed the road to the right. He hooted and flashed his lights in warning but the deceased suddenly followed the first rider and also attempted to cross the road. DW1 swerved to the right and braked to avoid the collision but hit the deceased while he was in the middle of the road with the frontal left side of the trailer. He denied over speeding and blamed the deceased for not wearing a reflective jacket, for not indicating and attempting to cross the road when it was unsafe to do so.

8. Upon consideration of the case in its entirety, the learned Resident Magistrate entered judgment in favour of the appellants and pronounced himself as follows;

> ***"Having considered the foregoing, perhaps if the driver of the of the trailer subject herein could have been at a lesser speed considering the weight of his motor vehicle, that could have been due care and he would have been in a position to apply emergency brakes more efficiently in the circumstance and avoid the subject accident.***
>
> ***I therefore blame the deceased herein 65% for the subject accident and the driver of the lorry subject herein 35% for the subject accident."***

9. Consequently, the trial court awarded the appellants the sum of Kshs. 10,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs 1,356,900/= for loss of dependency, Kshs. 20,000/= for funeral expenses. The same was subject to apportionment making the total award Kshs.520,415/=.

10. Aggrieved by the trial court's findings, the respondent lodged an appeal before the High Court and in a judgment dated 28th September, 2016 the court concluded that the evidence on record proved no negligence and that the deceased was fully responsible given that he did not adhere to the provisions of the Highway Code. It is that decision that has instigated this second appeal based on two main grounds by the appellants:-

> ***a) That the Learned Judge erred in law when he applied the wrong principles of law.***
>
> ***b) That the Learned Judge erred when he failed to appreciate that negligence is denied by the standard of care applied and the requisite standard of care was not applied by the respondent.***

11. In submissions filed on 8th November 2019, the appellants, in support of the first ground argued that the Learned Judge wrongly applied the law on burden of proof. In their view, the respondent did not show that he made satisfactory effort to avoid the accident nor did he prove the speed at which he drove his motor vehicle. Consequently, the Learned Judge ought to have drawn an inference of negligence.

12. On the second ground, counsel for the appellants argued that the standard of care employed by the trial court was unreasonable and ought to have found that once the respondent saw two motorcyclists trying to cross the road, he should have slowed down his vehicle and driven more carefully. The respondent did not exercise the expected duty of care and was therefore negligent. Relying on the case of **Lakhamishi vs. Attorney General (1971) EA** it was urged that in the event the court finds difficulty in apportioning blame the parties should share it equally.

13. This being a second appeal and by virtue of **Section 72(1)** of the **Civil Procedure Act** we are restricted to considering only matters of law, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See ***Kenya Breweries Ltd. vs. Odongo; Civil Appeal No. 127 of 2007***). In our view the main issue that arises for our determination is whether the High Court failed to properly carry out its duty as a first appellate Court by departing from the findings of the trial magistrate.

14. In carrying out its mandate, the first appellate court must reconsider the evidence before it, evaluate it and draw its own conclusions. This Court will only interfere where the finding is based on no evidence, a misapprehension of the evidence or if the trial court acted on wrong principles in reaching its finding. (See ***Ephantus Mwangi& Another vs. Wambugu (1983) 2 KCA 100***)

15. The record shows that upon re-evaluation of the evidence, the learned High Court Judge faulted the trial court for misapprehension of the evidence which led to a wrong conclusion. In the Court's view there was no basis for the trial court's apportionment of liability. The learned Judge stated in part as follows:

> ***"The deceased was on left side of the road where the appellant's driver was driving. These provisions are applicable to the deceased to observe before making a move to cross from left to right side of the road. The fact that there was a first motor cyclist who crossed safely was not a safety net for the deceased to drive a cross the road when it was not safe to do so. There is no evidence on record what occasioned the deceased not to give way to the oncoming traffic.***
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> ***When the totality of the evidence of PW1, PW2, PW3 and DW1 is scrutinized one wonders on how the learned trial magistrate arrived at apportionment of negligence as between parties. It appears to me that the events of 15th May 2012 on occurrence of the accident and in the manner it occurred is fairly articulated by appellants' defence witness. It is apparent that the deceased failed to take extra precautions to cross the road in front of the said lorry in contravention of the highway code.***

I note that there was no sufficient evidence from either the appellants or respondents to have persuaded the trial magistrate to exercise discretion and apportion liability."

16. It is not in dispute that both courts in determining the issue of liability took note that the appellants did not witness the accident and made a finding of fact, which we cannot interfere with, that: the deceased was on the left side of the road where the respondents' driver was driving and that the trailer had right of way given that the deceased's motorcycle approached it from the left while trying to cross over to the right side of the road from Olioitoktok. In ***John Onyango & another vs. Samson Luwayi [1986] eKLR*** the Court expressed itself as follows:-

"This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: Abdul v Rubia 1917/1918 7 EALR 73."

17. These concurrent findings clearly indicate that both courts were not faced with instances of conflicting evidence as to how the accident happened so as to apportion blame 50:50 as suggested by the appellants. In an action for negligence, the burden of proof lies upon the party alleging it. Thus it was for the appellants to show by evidence that the driver of the trailer was wholly responsible or contributed to the accident. Here is a case where the rider of the motorcycle was clearly responsible for the accident. The deceased tried to cross the road when it was unsafe, thereby causing the accident. The investigating officer who inspected the scene and examined the motor vehicle and motorcycle determined that the point of contact was at the frontal centre of the trailer and that the trailer was moving from Emali towards Loitoktok, while motorcycle was moving from the left side to the right side to join Subeti direction. From the point of impact, the driver of the trailer was not to blame for the accident and had the rider observed the correct traffic rules, he would have avoided the accident.

18. In the circumstances, we agree with the finding of the High Court that the trial court's apportionment of liability was based on no evidence and find no reason to depart from the conclusion of the Judge. We are similarly not persuaded that the Learned Judge considered irrelevant matters, or failed to consider relevant material placed before it. This appeal is devoid of merit and wwarsae dismiss it accordingly.

Dated and Delivered at Nairobi this 20th day of November, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR