



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), WARSAME & GATEMBU, JJA)

CIVIL APPEAL NO. 280 OF 2016

BETWEEN

MARGARET NDINDA WAMWENGA.....APPELLANT

AND

MBUGUA DAVID.....1ST RESPONDENT

DAVID KIARIE MBURU.....2ND RESPONDENT

(Being an appeal from the judgment of High Court of Kenya at Kajiado (Nyakundi J.)

delivered on 28th September, 2016 in HC Civil Appeal No. 41 of 2015)

JUDGMENT OF THE COURT

- Margaret Ndinda Wamwenga** (the appellant) brought this appeal against the judgment and order of the High Court (Nyakundi, J.) delivered on 28th September, 2016.
- Briefly, the background of the appeal is that the appellant was the registered owner of motorcycle registration no KMCT 872B, which collided with motor vehicle trailer registration no KBP 493V/ZD 6740 on 15th May, 2012 at about 7.00 p.m. along the Oloitoktok- Emali Road. As a result of the accident, **Simon Kiarie Mburu** (the deceased) who was the driver/servant of the appellant was fatally injured resulting in his demise and the motorcycle was completely damaged.
- The appellant commenced proceedings against the respondents; **Mbugua David and David Kiarie**, who were the registered and beneficial owner of the trailer respectively. The appellant alleged that the respondents negligently drove the trailer at an excessive speed and without due care. She claimed special damages in the sum of Kshs.75,000/= which was the purchase price of the motorcycle.
- The 1st respondent did not enter appearance. The 2nd respondent who entered appearance, denied liability alleging that it was the deceased who was negligent for crossing the road without due care and failing to adhere to the Highway Code occasioning the accident.
- At the hearing, the appellant produced the motorcycle logbook and a receipt from Makindu Motors as proof of ownership. She stated that she removed scrap metal from the motorcycle and sold it for Kshs.5,500/=.
- After evaluating the evidence and law applicable, the trial court held that both parties were to blame and apportioned liability at 65% against the deceased driver and 35% against the respondents. Consequently, the court made an award of 35% of the value of the motorcycle less the cost received for the scrap metal being Kshs.24,325/= against the respondents jointly and severally and costs of the suit.
- Aggrieved by the said decision, the respondents filed an appeal before the High Court. Again, the evidence was evaluated and the High Court determined that there was no basis for the apportionment of liability and that driver of the motorcycle was wholly and solely responsible for the accident, hence set aside the decision of the trial court with costs.
- Dissatisfied with this decision, the appellant is now before us on second appeal raising seven grounds of appeal in its memorandum of appeal which has been summarised into two main grounds:

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.

9. In submission filed on 8th November, 2019 the appellant argued that the Learned Judge wrongly applied the law on burden of proof and that the respondents did not show that they made an effort to avoid the accident. According to the appellant, the court should have drawn an inference of negligence under the circumstance given that the respondents were unable to prove the speed of their vehicle or that their driver/agent slowed down when he saw the two cyclist before him. We were urged to allow the appeal and set aside the High Court's decision.

10. This matter was heard together with **Civil Appeal No. 279 of 2016** where the estate of the deceased appealed the decision of the High Court to set aside the trial court's award on contributory negligence. In the said appeal, we upheld the decision of the superior court to set aside the trial court's decision and concurred that the trial court's apportionment of liability was based on no evidence and was a misapprehension of the evidence before it. Our findings in the aforementioned case shall apply *mutatis mutandis* in the instant case.

11. In the event, we hold the appellant did not prove any negligence against the respondents and that the appellant's driver was solely to blame for the collision. In the premises, we have no reason to address the issue of quantum. Consequently, we uphold the High Court's decision and dismiss this appeal with costs to the respondent.

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, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR