**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 25 OF 2016**

**ISHMAIL KIMUTAI TARUS.....1ST APPELLANT**

**MUGONGA MAIRURA.....2ND APPELLANT**

**-VERSUS-**

**MARK KIPYEGO.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. Cherere, Chief Magistrate, delivered on 8 February 2016 in Eldoret CMCC No. 191 of 2015)**

**JUDGMENT**

**[1]** This is an appeal arising from the Judgment and Decree of **Hon. Cherere, CM,** (as she then was) delivered in **Eldoret Chief Magistrate's Civil Case No. 191 of 2015: Mark Kipyego vs. Ishmail Kimutai Tarus, Mugonga Mairura and Muyela Jeney**. The Respondent's cause of action in that suit was that, on or about **30 July 2014,** while he was lawfully riding motor cycle **Registration No. KMDC 350K FOCIN** along the Eldoret-Ndalat Road, the said motor cycle violently collided with the Defendant's **Motor Vehicle Registration No. KAV 185G,** which was so recklessly driven that it lost control and veered off its lane.

**[2]** It was, thus, the contention of the Respondent before the lower court that the accident occurred solely on account of the negligence of the Defendants; and that as a result of the collision, his motorcycle was extensively damaged, thereby occasioning him loss and damage. The particulars of special damages and of material loss in respect of the motorcycle were set out in paragraph 5 of the Amended Plaint. Consequently, the Plaintiff prayed for **Kshs. 38,976/=** being the cost of repairs incurred in restoring the motorcycle to its pre-accident condition. He also prayed for loss of user as well as special damages, interest and costs of the suit.

**[3]** The Appellants denied the claim; and in particular the allegations of negligence set out in paragraph 5 of the Amended Plaint. In the alternative, the Defendants averred that, if an accident occurred as alleged, then the same was wholly occasioned by the negligence on the part of the Plaintiff while riding his motorcycle registration number **KMDL 350K**. They relied on the particulars set out at paragraph 6 of the Defence and the doctrine of *volenti non fit injuria*. Thus, the Defendants prayed that the Plaintiff's suit before the lower court be dismissed with costs.

**[4]** The original record of the lower court shows that the issue of liability was settled by consent on **30 November 2015** and a Consent Order recorded to that effect in the following terms:

> **"The issue of liability in this case to abide the outcome in CMCC 190/2015."**

**[5]** The matter thereafter proceeded for hearing for the purpose of assessment of damages; in which the Respondent testified as **PW2.** He also called **John Kiplagat Chesanga**, a Motor Vehicle Assessor based in Eldoret, as **PW1.** It was on that basis, and on the basis of the written submissions filed by Counsel for the parties that the Learned Trial Magistrate found the 2nd Defendant wholly liable to the Respondent for the loss and damage suffered in the accident; and proceeded to award him a total of **Kshs. 42,976**/= as damages together with interest thereon and costs of the suit. The court was of the view that no evidence had been tendered to show the nexus between the 1st and 3rd Defendants to **Motor Vehicle Registration No. KAV 185G.**

**[6]** The Appellant, being dissatisfied with the outcome of the suit, filed this appeal on **29 February 2016** challenging the lower court's findings on both liability and quantum on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and in fact in holding the 2nd Appellant 100% liable in negligence;
>
> **[b]** That the Learned Trial Magistrate erred in law and fact in failing to consider the evidence adduced by the 2nd Appellant's witness while making a determination on liability;
>
> **[c]** That the Learned Trial Magistrate erred in law and fact in holding that the evidence by the Respondent was uncontroverted thereby arriving at an erroneous decision;
>
> **[d]** That the Learned Trial Magistrate erred in law and fact in failing to properly consider, evaluate and determine the circumstances surrounding the accident;

**[e]** That the Learned Trial Magistrate erred in law and fact in holding that the Respondent had proved his case on a balance of probability;

**[f]** That the Learned Trial Magistrate erred in law and fact in failing to order and/or hold that in view of the judgment delivered, the case against the 1st Appellant stands dismissed with costs;

**[g]** That the Learned Trial Magistrate erred in law and fact in awarding repair costs of **Kshs. 38,976/=** when no evidence of the same was availed and/or produced.

**[7]** In the premises, it was the Appellant's prayer that the lower court's judgment be set aside and that an order be made dismissing the Respondent's suit with costs to the Appellants.

**[8]** Pursuant to the directions given on **2 April 2019**, the appeal was canvassed by way of written submissions. In the Appellant's written submissions dated **22 May 2019**, it was conceded that the accident did happen as alleged involving the Appellant's motor vehicle and the Respondent's motorcycle. It was however contended that the mere occurrence of the accident is no proof of negligence on the part of the 2nd Appellant; and that a duty was placed in law on the Respondent to prove the particulars of negligence alleged by him against the Appellants. Counsel relied on **Treadsetters Tyres Limited vs. John Wekesa Wepukhulu [2010] eKLR** and **Miller vs. Minister of Pension [1947]** to support the submission that the burden of proof was not sufficiently discharged by the Respondent.

**[9]** On quantum, Counsel for the Appellants argued that the Assessment Report which the lower court relied on was but an estimate of the repair costs and not evidence of payment. He submitted, on the authority of **Tahir Sheikh Transporters Ltd & Awadh Ghalib vs. Joseph Gichuki Waweru [2015] eKLR** and **David Langat & Another vs. Muturi Gachira Thenje [2015] eKLR**, that material damage is a claim in the nature of special damages and therefore must be specifically pleaded and proved. Counsel conceded, however, that the sum of **Kshs. 4,000/=** Special Damages was correctly awarded as it was duly proved.

**[10]** On behalf of the Respondent, his Counsel defended the decision of the lower court, contending that no error was committed by the Learned Trial Magistrate in holding the 2nd Appellant 100% liable to the Respondent. Counsel submitted that the Learned Trial Magistrate considered all the evidence and the issues arising therefrom; and pointed out that the Appellants opted not to call any evidence before the lower court to controvert the Respondent's testimony on the issue of liability or prove the allegations of negligence levelled against the Respondent. Reliance was placed on **Kipkebe Limited vs. Dismas Nyangau Omaiyo [2011] eKLR** to support the argument that there was no basis upon which the Learned Trial Magistrate would have apportioned liability.

**[11]** On the impugned award of **Kshs. 38,976/=** as repair costs, Counsel for the Respondent submitted, on the authority of **Nkuene Dairy Farmers Sacco Ltd & Another vs. Ngacha Ndeiya [2010] eKLR**, that the Respondent was only required to show the extent of the damage and what it would cost to restore the damaged motorcycle, as near as possible, to the condition it was in before he accident. He further submitted that, since the evidence adduced by the Respondent in this regard was uncontroverted, it cannot be validly argued that the lower court fell into error in awarding that sum.

**[12]** I am mindful that, this being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court and come to its own conclusions thereon. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was enunciated thus:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

**[13]** Before the lower court, the Respondent's evidence was that his motorcycle **Registration No. KMDC 350K** was damaged in a road traffic accident that occurred on **30 July 2014**. He produced his logbook as the **Plaintiff's Exhibit 3** as well as a purchase receipt dated **22 July 2013** and a signed transfer form as the **Plaintiff's Exhibits 4 and 5** before the lower court. In addition to the foregoing documents, the Respondent produced an inspection report by the Police, insurance cover for the motorcycle and his driving licence as the **Plaintiff's Exhibits 6, 7 and 8** in support of his claim.

**[14]** On his part, **PW1** told the lower court that, as a Motor Vehicle Assessor, he was instructed by the Respondent on **15 January 2015** to inspect motorcycle **Registration No. KMDC 350K** which had been involved in an accident. He stated that he proceeded to carry out his inspection and assessed the repair cost to be **Kshs. 38,976/=.** He produced, as exhibits before the lower court, the Assessment Report and supporting photographs as the **Plaintiff's Exhibit 1(a),** and confirmed that he was paid **Kshs. 4,000/=** for his services. He produced the receipt he issued in that regard as the **Plaintiff's Exhibit 1(b)** before the lower court.

**[15]** The record of the lower court proceedings further shows that, although the parties had agreed to adopt the findings on liability in **Eldoret CMCC No. 190 of 2016**, the parties did not revisit the issue; such that, after the close of the Respondent's case, directions were made for the filing of submissions on the basis of which Judgment was pronounced. In the premises, the Appellants did not adduce any evidence to controvert or rebut the evidence of the Respondent. It was on the basis of that evidence that the Learned Trial Magistrate held that:

> **"Plaintiff's evidence that a collision occurred between his motor cycle KMDC 350K and defendant's M/V KAV 185G on 30.7.14 has not been controverted. The inspection report PEXH. 6 indeed confirms the said collision. Plaintiff blamed the driver of M/V KAV 185G for overtaking when it was not safe to do so thereby driving on the lawful lane of the motor cycle thereby causing the collision. He produced a certificate of insurance PEXH. 7 which confirms that the motor cycle was duly**

**insured.**

**Defendants did not tender any evidence. Plaintiff's evidence that defendant, his servant and/or his driver drove negligently has not been controverted. Consequently, I find 2nd defendant liable at 100%."**

**[16]** Upon a re-evaluation of the material placed before the lower court, I am satisfied that the conclusion reached by the Learned Trial Magistrate was founded on sound evidence. The Appellants had denied negligence and attributed fault to the Respondent, particulars whereof were supplied at paragraph 6 of the Defence. Having failed to adduce evidence in proof of those particulars, it cannot be said that the Appellants sufficiently rebutted the Respondent's contention that they were to blame for the occurrence. I would accordingly, find no basis for interfering with the Learned Trial Magistrate's finding on liability as against the 2nd Appellant. As for the 1st Appellant, the lower court was explicit enough at pages 1 and 2 of the Judgment (at pages 58 and 59 of the Record of Appeal) that no case had been made out by the Respondent against either the 1st or 3rd Defendants. Consequently, the case against them stood dismissed; and if an order is necessary to give that decision effect, it is hereby so ordered.

**[17]** On quantum, the Appellant's conceded to the Special Damages component of **Kshs. 4,000/=,** which was pleaded and proved as the cost of **PW1's** services for inspecting the damaged motorcycle and preparing the Assessment Report. What the Appellants disputed is the sum of **Kshs. 38,976/=** claimed by the Respondent in respect of the spare parts, painting and miscellaneous charges expended to restore the motorcycle as near as possible to its pre-accident state. Particulars thereof were stated in paragraph 5 of the Amended Plaint thus:

| **Item** | **Auto parts** | **Quantity** | **Amount (Kshs.)** |
|---|---|---|---|
| **1.** | Front wheel rim | 1 | 2,000 |
| **2.** | Front tyre Tube | 2 | 1,000 |
| **3.** | Knee cap stainless steel guard | 1 | 4,500 |
| **4.** | Battery | 1 | 3,000 |
| **5.** | L&R Front shock absorbers | 2 | 9,000 |
| **6.** | Front mudguard | 1 | 1,750 |
| **7.** | Steering steel pipe | 1 | 1,200 |
| **8.** | Cyclist leg pedal | 1 | 3,500 |
| **9.** | Battery cover | 1 | 600 |
| **10.** | Lower chain box | 1 | 450 |
| **11.** | L&R Driving mirrors | 1 | 800 |
| **12.** | Tool kit | 1 | 300 |
| **Total** | | | **Kshs. 28,100/=** |

**[18]** In addition to the foregoing, the Plaintiff claimed **Kshs. 4,000/=** being labour charges, **Kshs. 1,000/=** for painting, **Kshs. 500/=** for miscellaneous charges and **Kshs. 5,376/=** being VAT at 16%; thus bringing the total sum to **Kshs. 38,976/=.** Having given consideration to the documents presented before the court by **PW1** and **PW2**, the Learned Trial Magistrate held, and rightly so in my view, that the sum of **Kshs. 38,976** was well proved. Thus, the argument by Counsel for the Appellants that an Assessment Report does not amount to strict proof that the sums in question were indeed spent by the Respondent is clearly untenable. I find succour in **Nkuene Dairy Farmers Co-op Society Ltd & Another vs. Ngacha Ndeiya [2010] eKLR** wherein the Court of Appeal took the position that:

**"Motor vehicle parts are sold in shops. An assessor, we think would be in a position to know their cost. The prices may vary from one shop to another but the prices are nonetheless ascertainable even without purchasing the item and fixing it on the damaged vehicle. Motor vehicle parts are common items and any price which the assessor might have given could be counterchecked and either accepted or disproved. The Appellants having not questioned those prices must be taken to have accepted the report as representing the correct market prices of the various parts which were shown on the Assessor's report. The experience of the Assessor was not challenged…The Respondent, to our mind, particularized his claim in the plaint and called acceptable evidence to prove the same and we have no basis for faulting both the trial and first appellate courts in the concurrent decision they came to. Indeed the decision of David Bagine vs. Martin Bundi Civil Appeal No. 283 of**

> **1996 which Mr. Kaburu cited to us, does state that a motor vehicle Assessor's report would provide acceptable evidence to prove the value of material damage to a motor vehicle…We agree with Mr. Charles Kariuki that the Assessor's report was sufficient proof and the failure to produce receipts for any repairs done was not fatal to the respondent's claim…"**

**[19]** In the premises, I find no merit in the appeal and would dismiss the same with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF SEPTEMBER 2019**

**OLGA SEWE**

**JUDGE**