Wainaina (Suing as the Administrator of the Estate of Ephantus Kamande Wainaina - Deceased) v Kiruthi (Civil Appeal 71 of 2023) [2024] KEHC 14955 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 71 OF 2023

TW OUYA, J

NOVEMBER 28, 2024

BETWEEN

GRACE MUTHONI WAINAINA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF EPHANTUS KAMANDE WAINAINA - DECEASED) ... APPELLANT

AND

MOSES RUORO KIRUTHI ..... RESPONDENT

(Being an appeal against the judgement and decree of the Hon. O.M. Wanyaga (SRM) delivered on 16th February, 2022 in Thika CMCC No. 870 OF 2017)

JUDGMENT

Background

1. This appeal emanates from the judgment delivered on 16.02.2022 by the lower Court in Thika CMCC No. 870 OF 2017 (hereinafter the lower Court suit). The lower Court suit was instituted via a plaint on 04.09.2017 by Grace Muthoni Wainina, the plaintiff in the lower court (hereinafter the Appellant), in her capacity as the legal representative of the estate of the late Ephantus Kamande Wainaina (hereinafter the Deceased) as against Moses Ruoro Kiruthi, the defendant in the lower court (hereinafter the Respondent). The Appellant's claim was for damages founded on negligence as a result of a road traffic accident that occurred on 20.04.2016.

2. It was averred that at all material times to the suit, the Respondent was the registered owner of all that motor vehicle registration number KCC 463Q (hereinafter suit motor vehicle) and that on the date question the Deceased was lawfully walking and or standing on the pavement along Thika-Garissa Road at Metro Area, when the Respondent, his authorized agent and or driver negligently drove the suit motor vehicle causing it to hit the Deceased occasioning him fatal injuries as a result of which special and general damages was claimed. The doctrine of Res Ipsa Loquitor was equally pleaded by the Appellant.

3. The Respondent filed a statement of defence denying the key averments in the plaint and liability. He went on to aver that without prejudice to the averments in the defence, if at all an accident occurred (which was denied) then the said accident was wholly caused or substantially contributed to by the negligence of the Deceased who was negligently conducted himself along the said road at the material time, thus occasioning the accident.

4. The suit proceeded to full hearing, during which only the Appellant called evidence in support of the averments in her pleadings. In its judgment, the trial Court found that the Appellant had failed to establish any liability or blame as against the driver of the suit motor vehicle and thus proceeded to dismiss the Appellant's suit with costs to the Respondent.

The Appeal

5. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in her memorandum of appeal as itemized hereunder: -

> " 1. That the trial Magistrate erred in law and in fact by failing to consider at all the submissions of the Plaintiff in arriving at the decision.
>
> 2. That the trial Magistrate erred in law and in fact by ignoring the evidence of PW2 (police officer) that confirmed the occurrence of the accident as a state neutral person and thereby applying the wrong principle or liability (beyond reasonable doubt).
>
> 3. That the trial Magistrate erred in law and in fact by finding that plaintiff had not proved her case while the defence had not called any witness to the stand.
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> 4. That the judgment delivered is devoid of any reference by the defence and as such the reliance of eye witnesses only cannot cause the case to fail. This is a miscarriage of justice.
>
> 5. That the trial Court erred in law and in fact by addressing the plaintiff failed to prove her case while: -
>
> a. There was a police abstract – state document produced by the police officer.
>
> b. Death certificate – proving death due to accident.
>
> c. The defence failing to call any witness.
>
> 6. That the trial Magistrate erred in law and in fact by failing to appropriate any award as required by law as regards quantum and as such a grave injustice.
>
> 7. That the trial Magistrate erred in law and in fact by ignoring the PW2 (police officer) testimony which was adduced through the police abstract indicating the Deceased was hit by suit motor vehicle KCC 463Q.
>
> 8. That the trial Magistrate erred in law and in fact by failing to consider the plaintiff's submissions in awards Kshs. 2,309.189/-
>
> 9. That in seeking appeal, we urge Court to consider that the Plaintiff lost her son aged 42 and in knowledge presented that the suit vehicle was insured and then proceed to dismiss then gross injustice continues to afflict the plaintiff.

10. That generally the trial Magistrate misapprehended the entire suit misapplied the law and consequently arrived at wrong decision to dismiss a fatal claim.

11. That the trial Magistrate based entirely on evidence of eye witness who is not a beneficiary to the estate of Deceased and Court disenfranchised the estate to a fact that was far-fetched. This was also in the disregard at least by the defence submission to the 50:50 proposals as submitted by defence." (sic)

6. In light of aforecaptioned itemized grounds of appeal, the Appellant seeks before this Court, orders to the effect that: -

"a) That the lower Court judgement delivered on 16.02.2022 be set aside and replaced with an award for Kshs. 2,309,189/- as prayed in the submissions.

b) The Appellant be awarded costs of this appeal and lower Court." (sic)

7. Directions were taken on disposal of the appeal by way of written submissions, of which the Court has duly considered.

Submissions

8. On the part of the Appellant, addressing the Court on liability, counsel localized four (4) cogent issues for this Court's consideration. Concerning whether the absence of an eye witness negates the fact that an accident occurred, counsel anchored his submission on the decision in Mercy Ben & Another v Mt. Kenya Distributors & Another [2022] eKLR to assert that lack of an eye witness is not a ground for absolute dismissal of s suit given that in the instant matter the Appellant presented strong circumstantial evidence to establish an accident occurred whereas the Appellant's evidence was not rebutted by the Respondent on accord of the latter's failure to call any evidence. Further citing, the decisions in Sally Kibii & Another v Francis Ogaro [2012] eKLR, Fred ben Okoth v Equator Bottles Ltd [2015] eKLR and Embu Public Road Services Ltd v Riimi (1968) EA 22 as cited with approval in Susan Kanini Mwangangi & Another Patrick Mbithi Kavita [2019] eKLR it was argued that the doctrine of Res Ipsa Loquitor was pleaded in the instant matter as such there was no need to bring in an eye witness to testify in order to flesh up the Appellant's case as the test set out in the doctrine was meet by the Appellant. Counsel posited that despite the importance of eye witness evidence, the same is not a requirement, as failure of the former does not infer that an accident did not happen or there was no fatality, a consequence of which there should be no liability imposed on anyone. That it is not in dispute that an accident occurred whereas despite the police abstract not apportion any blame, the Appellant led evidence consistent with the facts pleaded meanwhile the Respondent failed offer any rebuttal, as such he should be held 100% liable.

9. On whether there was merit to the Respondent's case and whether the Appellant proved its case on balance of probabilities, it was submitted that the accident was not denied meanwhile the Respondent failed to call any evidence in support his case whereas the Appellant tendered evidence supporting the pleaded averments as such the latter established a case as against the Respondent on a balance of probabilities. That evidence by the police officer rendered as per the police abstract concerning the date, time, place and parties involved in the accident was not controverted further augmenting the fact that the Appellant established his case on a balance of probabilities. The decisions in *Motex Knitwear Limited v Gopitex Knitwear Mills Limited (Nairobi) Milimani HCCC No. 834 of 2002* as cited in Linus Ng'ang'a Kiongo & 3 Others v The Town Council of Kikuyu, Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Shulter & Another [1979] eKLR, Hellen Wangari Wangechi v

Carumera Muthini Gathua [2005] eKLR as cited with approval in Standly Maira Kaguongo v Isaac Kibiru Kahuthia [2022] eKLR were relied on in the forestated regard.

10. Concerning apportionment of liability, counsel called to aid the decision in Motex Knitwear Limited (supra) to contended that the Respondent having failed to call evidence, he ought to be held 100% liable. In the alternative to the forestated, cited the decision in Mercy Ben & Another (supra) to submitted that if the Court is unconvinced on finding the Respondent 100% liable, in the instant matter it is undisputed that either one or both of the parties must have occasioned the accident therefore given the earlier submissions on the matter the Court ought to apportion liability at 80:20 in favour of the Appellant as against the Respondent. On quantum, this Court was summarily urged award under general damages; - on loss of dependency Kshs. 2,003,632/-, on loss of expectation of life Kshs. 170,000/-, pain & suffering Kshs. 100,000/-; on special damages 35,550/-; all totaling Kshs. 2,309,182/-. In conclusion, this Court was urged to allow the appeal as submitted with costs and interest.

11. On the part of the Respondent, counsel began by anchoring his submissions on the decision in Mursal & Another v Manese (suing as legal administrator of Dalphine Kanini Manesa) (Civil Appeal No E020 of 2021) [2022] KEHC 282 (KLR) and Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR concerning the principles this Court ought to adhere to as the first appellate Court. Responding to the Appellant's submissions on liability appertaining the relevance of an eye witness in the matter, counsel relied on the decision in Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR, Bukenya & Others v Uganda [17972] EA 549, Republic v George Onyango Anyang & Another [2016] eKLR, Hellen Sejer Hansen & 2 Others v Julius Kakungi Mukavi [2020] eKLR and the provisions of Section 107 & 109 of the *Evidence Act* to contend that the trial Court's finding on the question was proper as the Appellant failed to prove her case by failing to call an eye witness to the accident. It was further submitted that the Appellant failed to discharge her burden of proof whereas no credible evidence was adduced to attribute blame to the Respondent therefore the trial Court did not err in its finding.

12. Concerning the police officer's evidence, it was argued that his evidence had no import on the matter, on grounds that: - he was not an eye witness; never visited the scene; did not book the matter in the occurrence book (OB); was not the investigating officer whereas his evidence was only premised on the police abstract to the extent that the matter was still pending under investigation (PUI). The decisions in Multiple Hauliers v Patricia Anyango & 2 Others [2012] eKLR and Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR were cited in the above regard. In the alternative and without prejudice to the earlier submissions, counsel called to aid the decisions in Commercial Transporters Limited v Registered Trustee of the Catholic Archdiocese of Mombasa [2015] eKLR and Nelson Njihia Kimani v David Marwa & Another [2017] eKLR to argue that in the absence of any concrete evidence as to who was to blame for the accident, this Court ought to apportion liability equally between the parties.

13. On quantum of damages, submitting on the head under loss of dependency, counsel argued that dependency is an issue of fact and must be led with evidence. That the Appellant having failed to demonstrate the Deceased's alleged dependants, this Court ought to arrive at the conclusion that the Deceased had no dependants thus decline to award under the head. However, if this Court is unconvinced of the above, it ought to adopt the lumpsum approach and award Kshs. 600,000/- under the head. The decisions in Gilbert Kimatare Nairi & Another (suing as personal representatives of the estate of Lemayian Richard Kimatare (deceased) v Civiscope Limited [2021] eKLR, Mwanzia v Ngalali Mutua v Kenya Bus Ltd as quoted in Multiple Hauliers (EA) Limited & Another v William Abiero Ogeda (suing as the representative of Christine Arglera Obiero (deceased) & 2 Others [2016]

eKLR, Mary Kahesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR and Albert Odawa v Gichimu Gichenji [2007] eKLR were relied on.

14. With respect to loss of expectation of life the Court was summarily urged to award Kshs. 100,000/- on premise of the decision in Gilbert Kimatare Nairi (supra). On pain and suffering the Court was urged to award Kshs. 10,000/-. Counsel went on to cite the decision in Kemfro v A.M Lubia & Another [1982-1988] KAR 727 as quoted in Rose Adisa Odari v Wilberforce Egesa Magoba [2019] eKLR to posit that the in assessing damages under the *Law Reform Act* and Fatal Accident Act, this Court ought to deduct the latter from the former since a collective inclusion would amount to duplication of the award. On special damages, the Appellant conceded to the award of Kshs. 35,550/- as being the amount specifically pleaded and proved. In summation, this Court was urged to apply itself to the law and authorities submitted by the Respondent in opposition of the appeal.

Disposition And Determination

15. The Court has considered the record of appeal, the pleadings and original record of the proceedings. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate Court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123. Further, it is trite that an appellate Court will not ordinarily interfere with a finding of fact made by a trial Court unless such finding was based on no evidence, or it is demonstrated that the Court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. That said, a revisit of the memorandum of appeal and submissions by the respective parties before this Court it is evident that the appeal turns on the twin issue of liability and awardable damages.

16. Pertinent to the determination of issues before this Court are the pleadings, which formed the basis of the parties' respective cases before the trial Court. See;- Court of Appeal decision in Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91. This Court had earlier in its judgment outlined the gist of the respective parties' pleadings, as such it serves no purpose restating the same at this juncture. Further, having equally identified what the dispute before the trial Court twirled on, the key query for determination is whether the trial Court's findings on the issues falling for determination before it were well founded.

17. To contextualize the latter, it would be apposite to quote in extenso the relevant facets of the impugned judgment. The trial Court after restating the evidence tendered before it addressed itself on liability as follows; -

> ...."The Court has considered the evidence presented by the Plaintiff as well as submissions filed. This being a civil suit the plaintiff needs to prove her case on a balance of probabilities.
>
> Liability
>
> Police abstract confirms the accident happened.....No eye witness testified, this is despite a witness statement being filed by an alleged eye witness. The said person was not called to testify.....An accident is called accident as its never pre-planned. It is therefore not fair to insist on the availability of an eye witness. .....
>
> The law is clear, it is upon the Plaintiff to prove her case. In this case, no effort was made to call the alleged eye witness. The contents of either the police file or abstract were not presented before Court. All the Court has is evidence that an accident happened and deceased died. The mere occurrence of an accident does not automatically make the vehicle driver guilty/liable for the same. In this case, there in no evidence to suggest that the driver of motor vehicle registration number KCC 463Q was to blame for the accident. Plaintiff has failed to establish liability.

Having failed to establish blame on the vehicle driver, the Court sees no need to delve into the issues of damages payable.

The upshot of the foregoing is that Plaintiff's suit is dismissed with costs to the Defendant." (sic)

18. As rightly submitted by the Respondent, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. Whereas, it is well trodden that the same is on a balance of probabilities meaning that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. See Court of Appeal decision in Mumbi M'Nabea v David M. Wachira [2016] eKLR. Hence, the duty of proving the averments contained in the plaint lay squarely on the Appellant vice versa with respect to the averments contained in the Respondent's statement of defence. In Karugi & Another v Kabiya & 3 Others (1987) KLR 347 the Court of Appeal stated that: -

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

19. Further, this Court has continually observed that, (as rightly noted by the trial Court), the mere occurrence of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant [Emphasis mine]. The Court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing by stated that: -

> " There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

20. In Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
>
> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them.

> One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

21. Before the trial Court, the Appellant testified as PW1. She began by stating that the Deceased was her son meanwhile proceeded to adopt her witness statement as her evidence in chief and adduced into evidence the documents appearing in her list of documents as PExh.1, 2, 4, 5, 6, 7 8 & 9 save for the police abstract. On cross examination, it was her evidence that she did not witness the accident. In re-examination she confirmed that she did not witness the occurrence of the accident and that the Deceased lived in her home.

22. PC Charles Mwadime - No. 84389, testified as PW2. It was his evidence that he was attached to Thika Police Station and that in Court he had a police abstract dated 21.07.2016 relating to OB6/20/4/16. That the Deceased was fatally injured as a result of an accident that occurred at 11.00am involving the motor vehicle KCC 463Q Lorry. He went on to state that the accident was reported at Thika Police Station with the owner of the motor vehicle being the Respondent. It was his evidence; - that the investigating officer (IO) was one PC Jamal; that the Deceased was a pedestrian; and that the vehicle was insured by UAP Insurance. He adduced into evidence the police abstract as PExh.3. On cross examination he confirmed neither being the IO nor visiting the scene of the accident. He stated that the matter was captured as PUI with no one having been blamed for the accident as per the police abstract. That the results of the investigation would be in the police file since witness statements are not in Court. He further stated that he was not in a position to obtain the police file and could not tell if the Deceased was blamed for the accident since he had not seen evidence to the said effect. It was equally his evidence that PC Jamal was on transfer and he was not aware where he had been stationed. In re-examination, he stated normally after an accident parties are supplied with police abstract and that PUI means that as at the time of issuance of the abstract no party had been blamed for the accident. That if the Deceased was to blame, the same would be captured in the abstract and OB.

23. Evidently, from the totality of the aforecaptioned, PW1 was unequivocal that she did not witness the accident, that is the subject matter. Further, from her adopted witness statement she merely states that she was called by one of her sons, informing her that the Deceased had been involved in an accident. Therefore, it would not be in error to conclude that her evidence was not in any way or form instructive on the question of liability.

24. Similarly, it can be concluded that by PW2's evidence, he was not a witness to the accident. He equally confirmed neither being the investigating officer nor did he adduce the police file nevertheless appears to have merely read into evidence the contents of PExh.3, in respect of the accident in question. He did inveterate that matter was PUI, as at issuance of the police abstract whereas he was not in a position to obtain the police file and could not tell if the Deceased was blamed for the accident since he had not seen evidence to the said effect. It can thus be obstinately stated that his evidence was entirely garnered from the contents of the PExh.3, which is a document issued, admittedly after the fact.

25. The Appellant has made heavy weather of the fact that the trial Court was in error in arriving at the determination that "there in no evidence to suggest that the driver of motor vehicle registration number KCC 463Q was to blame for the accident" on the backdrop of her failure to call an eye witness to the accident. This Court concurs with the trial Court's observation that an accident is never pre-planned and thus insistence of an eye witness would not be fair if not an onerous task placed upon a claimant. However, it must be recollected that the corollary to the above reasoning, at all material times onus is on the claimant to prove his case on a balance of probabilities as against the defendant in respect of the particulars of negligence pleaded in the matter.

26. At the risk of repetition, the Appellant's suit as against the Respondent was premised on negligence. The Appellant at paragraph five (5) of her plaint itemized various particulars of negligence as against the Respondent, authorized agent and or driver of the suit motor vehicle. Particulars of which in the Court's view could only be attested to by an eye witness or an inference drawn premised on the results of investigation into the accident as per the police file by the investigating officer. Here, neither was an eye witness or the investigating officer called to shed light on the itemized particulars of negligence. Equally, excerpts of the police file were similarly not adduced into evidence by PW2.

27. Further, this Court has often held that a police abstract, in the context of the instant matter, serves the purpose of representing the occurrence of an accident and confirming that the same was actually reported. Invariably, the accounts by both PW1 and PW2 did not contain admissible and credible evidence as to how the accident had occurred, from which negligence could be attributed against the driver of the Respondent's motor vehicle. To wit the Court must reiterate the dicta in Karugi (supra) were it was reasonably observed that "before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant"

28. As regards the application of the doctrine of res ipsa loquitur, the Court of Appeal in Keziah & another (Personal Representatives of the late Isaac Macharia Mutunga) v Lochab Transport Limited [2022] KECA 477 (KLR), discussed in brief, its application. It observed in part that; -

> " The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? The mere fact that an accident involving the two vehicles occurred does not per se translate into the respondent's driver being culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

29. The Court proceeded to conclude that: -

> " As already stated, there was no eyewitness to the accident as would have shed light as to how it occurred. The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable. There cannot be an assumption of liability as the appellant failed to prove facts which give rise to what may be called the res ipsa loquitur situation or moment. In our view, the doctrine was inapplicable in the circumstances of the case and the High Court was right in so holding."

30. Similarly, in this case, beyond proof of the occurrence of the accident, the Respondent failed to prove facts which could give rise to or justify the invocation of the doctrine and or its application in order to attribute negligence as against the driver of the suit motor vehicle. The Court of Appeal decision in David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo [2019] eKLR while discussing the applicability of the foregoing principles stated that;

> " Ordinarily, in a road traffic accident, a claimant must lead evidence to prove not only the occurrence of the accident but how it happened."

31. The same court equally stated that;-

> ".....in a cause of action founded on negligence, there are two elements in the assessment of liability, namely causation and blameworthiness. See (Baker v Willoughby [1970] AC 467). "....

32. The trial Court while making a finding on liability correctly acknowledged that there is no evidence to suggest that the driver of the suit motor vehicle was to blame for the accident. The Appellant's subtle attempt at shifting the burden of proof upon the Respondent on accord of having failed to call any evidence must be seen as a serious affront and misapprehension of law, on he who alleges must prove.

33. To the foregoing end, notwithstanding the Appellant's reliance on the decision in Sally Kibii & Another v Francis Ogaro [2012] eKLR and Susan Kanini Mwangangi & Another Patrick Mbithi Kavita [2019] eKLR which are non-binding on this Court whereas the latter decision is not on all fours with the instant appeal given the fact that there was evidence from some witnesses who arrived at the scene that may have drawn an inference as to how the accident occurred whereas the facts in the decision Fred Ben Okoth v Equator Bottles Ltd [2015] eKLR differ to the instant appeal in totality. That's said, what this Court gathers from the Court of Appeal decisions earlier captured herein and authorities cited by the Appellant is that the application of the doctrine is best applicable in situations where the occurrence of the accident cannot be explained without inference of negligence on the part of the defendant such as in cases where the deceased and or claimant is a passenger in a motor vehicle. Lastly, the Appellant's contestation that failure on the part of Respondent's to call evidence rendered her evidence uncontroverted, correspondingly cannot sustain in light of the dicta in Karugi & Another (supra).

34. In conclusion, the Appellant failed to establish on a balance of probabilities that the Respondent was blameworthy and liable for the accident and this Court cannot fault the trial Court for arriving at the decision it did on liability. Under Section 107 of the *Evidence Act*, the burden of proof lay with the Appellant and if his evidence did not support the facts pleaded, she failed as the party with the burden of proof. See the case of Wareham t/a A.F. Wareham (supra). It would therefore be inconsequential to consider the question of awardable damages in light to the forestated finding. Consequently, the appeal herein lacks merit and ought to be dismissed with costs.

Determination

i. This Appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant.....wangui

For Respondent.....na

Court Assistant.....martin