Odhiambo & another (Suing as the administrators of the Estate of Denis Obiero Odhiambo) v Akello & another (Civil Appeal E016 of 2022) [2022] KEHC 16966 (KLR) (28 January 2022) (Judgment)

Neutral citation: [2022] KEHC 16966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E016 OF 2022

RE ABURILI, J

JANUARY 28, 2022

BETWEEN

EVERLINE ACHIENG ODHIAMBO ..... 1ST APPELLANT

JULIUS ODHIAMBO OBIERO ..... 2ND APPELLANT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF DENIS OBIERO ODHIAMBO

AND

NICKSON OMONDI AKELLO ..... 1ST RESPONDENT

LAMECK OYUCHO AMOLLO ..... 2ND RESPONDENT

(An appeal from the judgement and decree of the Honourable S.W. Mathenge in the Principal Magistrate's Court at Bondo delivered on the 6th April 2022 in Bondo PMCC No. 4 of 2022)

JUDGMENT

Introduction

1. This appeal arises from the judgment and decree of the learned resident magistrate Hon SW Mathenge in civil suit no 4 of 2022 delivered on April 6, 2022 in the principal magistrates court in Bondo. The appeal is against the whole judgement of the trial magistrate.

2. A brief background of the case is that the appellants sued the respondents for general damages under the *Law Reform Act* and the *Fatal Accidents Act*, special damages, costs of the suit and interest at court rates, for the fatal injury sustained by the deceased as a result of an accident that happened on the July 7, 2019 when the deceased who was a pedestrian was allegedly knocked down by a vehicle belonging to the respondents that was allegedly driven negligently, carelessly and recklessly. The appellants subsequently withdrew their case against the 3rd respondent.

3. The respondents who were defendants in the lower court filed their defence denying the plaintiff/ appellants' claim. They denied the occurrence of the accident and put the appellants to strict proof claiming that the accident was due to the negligence of the deceased.

4. The trial magistrate after hearing the case, found that the appellants had failed to prove the details of negligence as against the respondents as claimed and proceeded to dismiss the case.

5. The appellants being dissatisfied with the decision of the trial court filed a memorandum of appeal dated April 26, 2022, which memorandum raises the following grounds of appeal:

    i. The learned trial magistrate erred in both law and fact in arriving at a decision which was not only manifestly unjust but also against the weight of evidence on record.

    ii. The learned trial magistrate erred in both law and fact in failing to appreciate the fact that the appellant had a good case against the respondent.

    iii. The learned trial magistrate grossly misdirected herself in treating the evidence before her superficially and consequently coming to a wrong conclusion on the same.

    iv. The learned trial magistrate misapprehended the evidence on record to a material degree resulting in her arriving at a wrong conclusion.

6. The appellants seek orders that 'this appeal be allowed as prayed and the judgement of the trial magistrate be set aside and the same replaced by a suitable judgement by the appellate court.'

7. The appeal herein was canvassed by way of written submissions.

The appellants' submissions

8. The appellants submitted that they adduced evidence before the trial court which included a death certificate and a post mortem report that clearly indicated the cause of death. They further submitted that a police officer testified in court that indeed an accident occurred, that the accident was reported at Bondo Police Station and a police abstract issued, that the 2nd respondent was charged with causing death by dangerous driving.

9. The appellants submitted that although the police officer who testified on their behalf did not carry the traffic court files to court and although the said files did not form part of the documents they produced in support of their case, the police abstract presented by the police officer indicated the details and outcome of the traffic offence case.

10. It was submitted that it was not in dispute that the deceased was a pedestrian and that the driver of the motor vehicle owed a duty of care to the deceased as a pedestrian. The appellants submitted that they proved their case on a balance of probabilities as the respondents did not present any evidence before court to dispute liability.

The 1st & 2nd respondents' submissions

11. It was submitted that the decision arrived at by the learned magistrate was proper, fair and just as weighed against the weight of the evidence on record. The 1st and 2nd respondents submitted that both the appellant's witnesses were not at the scene of the accident and could not speak as to how it occurred and further that the abstract produced by PW2 was evidence of an accident report and not evidence of

negligence and could not be the basis of finding liability on the part of the respondents as was held in the case of *ZOS & CAO (Suing as the Legal Representatives in the Estate of SAO (Deceased)) v Amollo Stephen [2019] eKLR*.

12. The respondents submitted that the appellants had the duty of proving negligence on the respondents' part which burden they failed to discharge and further that they failed to plead the doctrine of Res Ipsa Loqitor as was held in the cases of *Tread Setter Tyres Ltd v John Wekesa Wepukhulu (2010) eKLR* and that of Nickson Muthoka Mutari v Kenya Agricultural Research Institute (2016) eKLR.

13. The respondents submitted that their failure to adduce any evidence in defence did not tilt the balance and burden of proof to them. Reliance was placed on the case of *Mary Wambui Kabugu v Kenya Bus Services Ltd (1997) eKLR*.

Analysis and determination

14. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusion but bear in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. In *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*, the court stated as follows-

> ' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.'

15. In this appeal, it is clear that the determination of this appeal revolves around the following two issues namely:

    a. Whether the appellants proved their case on the balance of probabilities on liability against the respondents; and if so,

    b. What quantum of damages should this court grant?

    c. Who should bear costs

16. That the burden of proof was on the appellants to prove their case is not in doubt. In *Evans Nyakwana v Cleophas Bwana Ongaro (2015) eKLR* it was held that:

> ' As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person. The appellant did not discharge that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.'

17. The question then is what amounts to proof on a balance of probabilities. Kimaru, J (as he then was) in *William Kabogo Gitau vs George Thuo & 2 Others [2010] 1 KLR 526* stated that:

> ' In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took

place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.'

18. Therefore, the appellant had the duty of proving the facts constituting negligence on the part of the respondent even if the appellant chose to remain silent. The exception to this rule however is where the doctrine of res ipsa loquitor applies. In *Embu Public Road Services Ltd. v Riimi [1968] EA 22*, the East African Court of Appeal held that:

> ' The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident. Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show 'that there was a probable cause of the accident which does not connote negligence' or 'that the explanation for the accident was consistent only with an absence of negligence.'

19. The Court of Appeal stated as follows in the case of *Joyce Mumbi Mugi v The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No 214 of 2004*:

> ' In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of res ipsa loquitor. If a 'matatu' is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle.'

20. However, in *Mary Ayo Wanyama & 2 Others vs Nairobi City Council Civil Appeal No 252 of 1998*, the same court held that:

> ' It is not right to describe res ipsa loquitor as a doctrine as it is no more than a common-sense approach not limited by technical rules, to the assessment of the effect of evidence in certain

circumstances. It is implicit in the proposition that the happening itself was prima facie evidence of negligence and the onus lay on the defendant to rebut that prima facie case. It means the plaintiff prima facie establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety, res ipsa loquitor applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made... The plaintiff must prove facts which give rise to what may be called the res ipsa loquitor situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence.'

21. In this case, it is true that there was no eye witness to the accident. That however is not necessarily fatal as long as there is credible evidence on which negligence can be inferred. Such inference may be made where the plaintiff was a passenger in the vehicle that got involved in an accident in which event res ipsa loquitor may be successfully invoked. (See *Esther Mukulu Matheka v Merania Nduta Nairobi HCCC No 3039 of 1995*). In fact, Lenaola, J (as he then was) in *Esther Nduta Mwangi & Another v Hussein Dairy Transporters Limited Machakos HCCC No 46 of 2007*, held that:

> ' Although the defendant denied the accident but pleaded in the alternative that the accident was as a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations.The plaintiff, on the other hand pleaded the doctrine of res ipsa loquitor and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of res ipsa loquitor was pleaded, the burden of proof was shifted to the defendant to disprove the particulars of negligence attributed to him.'

22. In *Public Trustee vs City Council of Nairobi [1965] EA 758*, it was held that:

> ' The maxim res ipsa loquitor applies only where the causes of the accident are unknown but the inference is very clear from the nature of the accident and the defendant is therefore liable if he does not produce the evidence to counteract the inference. If the causes are sufficiently known, the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred.'

23. In this case while regrettably the doctrine of res ipsa loquitor was not pleaded by the plaintiffs, the doctrine being a rule of evidence may be inferred by the court from the circumstances of the case. (See the case of *Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR).*

24. In *Mary Wambui Kabugu v Kenya Bus Services Ltd Civil Appeal No 195 of 1995* Bosire, JA expressed himself as hereunder:

> ' The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent's driver. She did not, however, adduce evidence

to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed.'

25. This position is in fact mirrored by the decisions relied upon by the respondents in this appeal. In Treadsetters Tyres Ltd (supra), wherein Ibrahim, J (as he then was) cited *Charlesworth & Percy on Negligence, 9th Edition at pg 387* wherein it was stated that:

> ' In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.'

26. Similarly, in Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J (as she then was) quoted Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 where it is stated that:

> ' The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established.'

27. In *Nandwa v Kenya Kazi Ltd (1988) KLR, 488* as cited by Koome, J (as she then was) in *Regina Wangechi v Eldoret Express Company Ltd (2008) eKLR* it was held that:

> ' In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference.'

28. The question that this court must therefore resolve is whether there were proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the respondents herein.

29. That there was an accident involving the deceased and the respondent's vehicle is not in doubt. It matters not that the appellants did not call evidence to prove who was driving the vehicle at the material time.

30. PW2, the base commander Bondo Police Station testified and produced in evidence a police abstract showing that charges of causing death by dangerous driving were intended to be preferred against the 2nd respondent.

31. The evidence of PW1 was that when she arrived at the scene, she found the police placing the deceased's body in a police land cruiser. She stated that she did not know where the deceased was heading but stated that he hawked sweets and simsim.

32. In *Hallwell v Venables [1930] 99 LJKB 353*, it was held that:

> ' A driver of motor vehicle is held to have sufficient control over his vehicle and its surrounding circumstances to attract the operation of the principle in a suitable case. It is part of the experience of mankind that if a driver is exercising reasonable care, it is not usual for vehicles to overturn. In this case the vehicle overturned and therefore res ipso loquitor applies.'

33. In *Isabella Wanjiru Karangu v Washington Malele Civil Appeal No 50 of 1981 [1983] KLR 142*, it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. There is no reason for a pedestrian's complete failure to see a motorist and vice versa.

34. In my view, the evidence of the driver of the vehicle might have thrown more light with respect to the circumstances under which the accident occurred but, in this case, the respondents did not adduce any evidence to back up the allegations contained in their defence.

35. Having considered this appeal and taking into consideration the authorities cited above, and as there was no eye witness to the accident, although lack of an eye witness cannot invalidate a suit, I find that it is appropriate to apportion liability between the deceased and the respondents in the ratio of 50:50. I am fortified by the following holding in the case of *Baker vs Harburough Industrial Co-operative Society Limited (1953) 1 WLR 1472*where Lord Denning observed that:

> ' Every day, proof of collision is held to be sufficient to call on the defendant to answer. Never do they both escape liability. One or the other is held to blame and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitantly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame'

36. In this case, there was no eye witness and the driver of the offending vehicle did not die but opted not to testify, I find no difficulty in finding that both the driver and the deceased contributed to the occurrence of the accident in equal measure.

37. Accordingly, the appeal on liability succeeds. I therefore set aside that decision of the trial court on liability and in its place, I substitute the judgment dismissing the appellants' suit with an order apportioning liability between the respondents and the deceased equally. Each side bears 50%. The respondents are liable jointly and severally.

38. On what quantum of damages the appellants were entitled to, having found and apportioned liability, the trial magistrate in her judgement stated that had she found the appellants to have proved their case, she would have awarded them a global sum grand total of Kshs 1,010,000 as general damages for pain and suffering, loss of expectation of life and loss of dependency.

39. The Court of Appeal in *Catholic Diocese of Kisumu v Sophia Achieng Tete Civil Appeal No 284 of 2001 [2004] 2 KLR 55* set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> ' It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.'

40. In this case the court merely gave a proposal as to what it might have granted had the appellants proved their case against the respondents. I will thus proceed to quantify the damages payable as there was no evidence set out before the trial court of the abilities and future prospects of the deceased. This is because the court must apply certain principles in arriving at the respective awards under each head.

41. In *Chen Wembo & 2 Others vs IKK & Another (suing as the legal representatives and administrators of the estate of CRK (deceased) (2017) eKLR,* the judge made a global award of Kshs 600,000/- for loss of dependency for a deceased aged 12 years.

42. In *Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR,* the deceased was aged 17 years old and the court made an award of Kshs 1,500,000 for loss of dependency.

43. The deceased according to the death certificate produced in evidence, was aged 18 years. Based on the aforementioned case of Francis Odhiambo Nynja, it is my view that an award of Kshs 1,500,000 would be sufficient under the heading loss of dependency under the *Fatal Accidents Act*.

44. As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.

45. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. In the case of *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) 2019 eKLR* it was observed that:

> ' The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/= while for pain and suffering the award range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.'

46. The evidence laid out before this court is that the deceased died on the spot. I thus award Kshs 10,000 for pain and suffering and Kshs 100,000 for loss of expectation of life appropriate.

47. The special damages that were proven via receipts before the trial court is Kshs 2,400.

48. In the end, I find that the appeal successful. I hereby set aside the decision of the trial court dismissing the appellants' suit and substitute it with an order entering judgment for the plaintiff/appellant against the defendant/ respondent herein as follows:

    Liability: 50:50

    Pain and Suffering Kshs 10,000

    Loss of expectation of life Kshs 100,000

    Loss of dependency Kshs 1,500,000.

    TOTAL Kshs 1,610,000

    Less contribution of 50% Kshs 805,000

    Add Special Damages Kshs 2,400

    Total Damages payable: Kshs 807,400

49. The general damages will earn interest at court rates from date of judgment in the lower court until payment in full. Special damages earn interest at court rates from date of filing suit until payment in full. Costs of the suit in the lower court shall be to the appellants at 50%

50. I order that each party bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 28TH DAY OF DECEMBER, 2022

RE ABURILI

JUDGE