Ikovo (Suing as Administrator of the Late James Ikovo) v Ngure & another (Civil Appeal 27 of 2020) [2022] KEHC 3096 (KLR) (20 May 2022) (Judgment)

Neutral citation: [2022] KEHC 3096 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 27 OF 2020

GV ODUNGA, J

MAY 20, 2022

BETWEEN

JOSEPHINE MUNANYIE IKOVO .... APPELLANT

SUING AS ADMINISTRATOR OF THE LATE JAMES IKOVO

AND

GEORGE GITAHI NGURE .... 1ST RESPONDENT

NICODAE KATIVA NDONGO .... 2ND RESPONDENT

JUDGMENT

1. The appellant in this appeal was the plaintiff in the lower court. She brought the suit against the in their capacity as the Administrator of the estate of the late James Ikovo, the deceased herein for compensation for general damages under the *Fatal Accidents Act* and the *Law Reform Act* following a fatal road traffic accident which occurred on the 5th January, 2017 involving Motor Vehicle Number KWZ 356 Registered in the names of the respondent.

2. It was pleaded that on 23/10/2017 the deceased was a passenger aboard motor cycle Registration Number KWZ 356 along Matuu - Mwingi road whereof the Respondent's Motor Vehicle Number KWZ 356 was so negligently driven, managed and/or controlled by the appellant, its servant and/or agent that it was allowed to veer off the road and as a result of which the deceased sustained fatal injuries.

3. The matter proceeded for hearing whereby the appellant called one witness while the defence did not call any witness. Parties agreed by consent that the documents were to be produced without calling their makers. The trial court delivered a judgement 26th February, 2020 in favour of the respondent while the appellant being dissatisfied with the said judgement filed this appeal.

4. PW1, Josephine Munanie, adopted her witness statement in which it was stated that on 5th January, 2017 at around 9.00am she received a call from her son, Joseph Kimnzi Ikovo, who informed her that

he had been called by police officers from Matuu Police Station and was informed that his father, the deceased had been involved in an accident. According to the statement, the deceased was travelling from Nairobi to Mwingi with his boss, Nicodemus Katiba, when they got involved in the accident along Nairobi- Mwingi Road near Kathyoko after Matuu while travelling in motor vehicle reg. no. KWZ 356.

5. Upon rushing to the scene at around 4.00 pm, PW1 met her said son, Joseph Kimnzi Ikovo, who was coming from Nairobi and found the accident had already occurred and the vehicle had already been removed to Matuu Police Station. They then proceeded to Matuu Police Station where the witness was informed that her husband, the deceased, died on the spot and was taken to Matuu Mortuary while the deceased's boss, who was driving sustained serious injuries and was taken to the Hospital. From there they proceeded to the mortuary where the deceased's body had been taken.

6. According to PW1, they had seven children and the deceased was the sole breadwinner of the family hence his death was a big loss to her and the family mentally, emotionally and financially. Prior to his death, it was stated, the deceased was working as a mason in Nairobi.

7. The witness was granted letters of administration ad litem in respect of the Estate of the deceased.

8. It was PW1's case that the driver of the said motor vehicle reg. no. KWZ 356 was to blame for the accident and this was borne out by the findings of the police as stated in the police abstract where the driver was blamed for negligence and was charged with the offence of causing death by dangerous driving.

9. In his oral evidence the witness also adopted the list of documents dated 15/11/18 which she exhibited and payed for damages and costs.

10. In cross-examination, PW1 disclosed that she was a farmer aged 34 years and insisted that her family depended on her deceased husband. She however admitted that she was not at the scene of accident but reiterated that her deceased husband was a mason but she had no have about evidence to this. She stated that most of the children are minors with only 3 are adults. She however did not have any documentary proof of earnings but averred that the deceased was being paid on a weekly basis as a mason. It was her evidence that according to motor vehicle search the 2nd defendant was the owner of the motor vehicle.

11. In his judgement, the learned trial magistrate found that the Appellant had not discharged her burden of proof with regard to negligence on the part of the defendant at all let alone on a balance of probabilities. He proceeded to dismiss the suit.

12. As is the practice in such findings, he proceeded to assess the damages he would have awarded had he found the Respondents liability in the sum of Kshs for pain and suffering, Kshs 100,000.00 for loss of expectation of life and Kshs 500,000.00 for loss of dependency.

13. Aggrieved by the said decision the Appellant appeals to this Court setting out the following grounds:

    a. The trial Magistrate erred in law and in fact by dismissing the Appellant's claim on issue of liability.

    b. The learned Magistrate erred in law and in fact by holding that the Appellant did not call an eye witness to account on what transpired at the time of the accident.

    c. The learned trial Magistrate erred in law and in fact there is no shred of evidence on how the Respondent caused the accident.

    d. The learned trial Magistrate erred in law and in fact by holding that the Appellant did not discharge the burden of proof with regards to negligence on the part of the Respondent.

e. The trial Magistrate erred in law and in fact by misconstruing the uncontroverted evidence by the Appellant before the Court.

f. The trial Magistrate erred in law and in fact in failing to award special damages which were not disputed by the Respondent.

g. The trial Magistrate erred in law and in fact by failing to consider the Appellant's submission on quantum.

Determination

14. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in S*elle vs. Associated Motor Boat Co*. [1968] EA 123 that:

> "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

15. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

16. However, in *Peters v Sunday Post Limited* [1958] EA 424, it was held that:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The

appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

17. It was therefore held by the Court of Appeal in *Ephantus Mwangi and another v Duncan Mwangi* Civil Appeal No 77 of 1982 [1982-1988] 1KAR 278 that:

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

18. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellant proved her case on the balance of probabilities. 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."

19. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v 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."

20. In *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another (*2015) eKLR, the judges of Appeal held that:

> “Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-
>
> “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

21. In *Mary Wambui Kabugu vs. 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.”

22. This position is in fact mirrored by the decisions relied upon by the Appellant in this appeal. In *Treadsetters Tyres Ltd v John Wekesa Wepukhulu (*2010) eKLR, Ibrahim, J (as he then was) cited *Charlesworth & Percy on Negligence,* 9th Edition at pg 387 inn which it is 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.”

23. Similarly, in *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* (2016) eKLR, Nyamweya, J 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."

24. In *Nandwa vs. Kenya Kazi Ltd* (1988) KLR, 488 as cited by Koome, J 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."

25. 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 Riim*i [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."

26. Dealing with the said doctrine, the Court of Appeal in *Joyce Mumbi Mugi v The Co-Operative Bank of Kenya Limited & 2 others C*ivil Appeal No 214 of 2004 expressed itself as hereunder:

> "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."

27. However, in *Mary Ayo Wanyama & 2 others v 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."

28. In this case it is true 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 vs. 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."

29. In *Public Trustee v 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."

30. In this case, the doctrine of res ipsa loquitor was expressly pleaded by the plaintiffs.

31. The question that this Court must therefore deal with 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. That there was an accident involving the deceased and the Respondents' vehicle is not in doubt.

32. According to the police abstract report that was produced without any objection, the accident I question was self-involved.

33. In *Regina Nalukwago v Dr. Phillip Byaruhanga & 2 others Kampala* HCCS No. 211 of 1990 the Court cited with approval the decision in *Hallwell vs. Venables* [1930] 99 LJKB 353, where 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."

34. Having considered this appeal, I agree with the view formed by the learned trial magistrate that the matter was handled rather casually, particularly by the plaintiff's counsel. Such a serious matter where a person lost life ought not to have been treated in such a light manner. Had the Respondents adduced evidence as to how the accident occurred, the decision of the trial court would have been unassailable. However, in this case, the evidence adduced was that the deceased was a mere passenger in the vehicle. Vehicles do not by themselves overturn unless some reason is given which reason may either be that the driver was negligent, or some other third party was negligence or that it was due to some cause which could not be attributed to the driver which might be the state of the vehicle or an unavoidable third force. However, where an accident occurs and the deceased was a mere passenger, the case ought not to be dismissed merely because there was no eye witness. If that was the position, it would mean that where two people are in a vehicle one being the driver and the other one being a passenger both of whom lose their lives in the accident, then the innocent passenger would not be compensated.

35. The Court of Appeal in *Kenya Bus Services Limited vs. Humphrey* [2003] KLR 665; [2003] 2 EA 519 held that Buses when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without explanation and therefore where the defendant does not offer evidence *res ipsa loquitor* applies. The same Court in *Shaukatali Chaudry vs. Merwin Buckle* Civil Appeal No. 33 of 1963 similarly held that the overturning of a vehicle in good weather and visibility and in the absence of other traffic raises a *prima facie* case of negligence on the part of the driver. That *prima facie* case of negligence can be rebutted by showing, on the balance of probabilities that the skid and the consequent overturning is caused by the deceptively dangerous condition of the road.

36. Having considered the circumstances of this case where the deceased was a passenger in the said vehicle and the accident, according to the police abstract, was self-involving, I find that the learned trial magistrate erred in dismissing the suit. There is no indication that the learned trial magistrate took into account the fact that this was a self-involving accident hence the need for the defendant to have explained the circumstances under which a vehicle, which, if properly driven on the road, does not cause accidents, was involved in an accident in which the deceased lost his life. T say that is not to shift the burden of proof but is just a sensible deduction arising from the experience of mankind.

37. In the premises, I allow the appeal as regards liability, set aside the learned trial magistrate's decision thereon and substitute therefore a finding of liability against the Respondents/Defendants at 100%.

38. As regards the assessment of damages, save for the special damages of Kshs 48,300.00 and the lumpsum award which I would assess in the sum of Kshs 1,000,000.00 based on the decision in *Mary Njeri Murigi vs. Peter Macharia & Another [2016] KLR*, as well as the age of the deceased, I have no reason to interfere with the rest of the award.

39. Accordingly, I set aside the judgement of the trial magistrate and enter judgement for the Appellant against the Respondents as hereunder:

    a. Pain and Suffering Kshs 15,000.00

    b. Loss of Expectation of Life – Kshs 100,000.00

    c. Loss of Dependency - Kshs 1000,000.00

    d. Special Damages - Kshs 48,300.00

    e. Costs before the trial court.

40. As the appeal was not opposed there will be no order as to the costs of the appeal. The special damages will accrue interest at court rates from the date of filing suit till payment in full while the general damages will accrue interest at the same rate from the date of the judgement in the lower court till payment in full.

41. Judgement accordingly.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF MAY, 2022

G V ODUNGA

JUDGE

Delivered the presence of:

Mrs Wambua for Mr Maingi Musyimi for the Appellant.

CA Susan

CA Susan