Kendi & another (suing as the legal representatives of the estate of Duncan Mwenda (deceased) v Japheth Iringo (Civil Appeal 28 of 2022) [2022] KEHC 12793 (KLR) (31 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12793 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL 28 OF 2022

EM MURIITHI, J

AUGUST 31, 2022

BETWEEN

DOREEN KENDI ..... 1ST APPELLANT

ZIPPORAH KAJUJU ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF DUNCAN MWENDA (DECEASED

AND

JAPHETH IRINGO ..... RESPONDENT

JUDGMENT

1. The deceased herein Duncan Mwenda was a pillion passenger aboard motor cycle registration number KMFM 474E which was plying along Ruiri-Isiolo Road on February 24, 2021 when at around Kwa Koome area he was involved in an accident with motor vehicle registration number KCN 632V Subaru Salon.

2. As a result of the said accident the deceased sustained fatal injuries and passed on. The appellant thereafter filed suit on her own behalf as well as the deceased estate. The matter went on full trial where the court dismissed the same because the appellant was unable to prove negligence against the respondent.

3. The appellant filed this appeal citing several grounds, the major one being that the trial court finding that negligence was not proved against the respondent was a total disregard of the available evidence on record and that she misdirected herself.

4. When matter came up for hearing the court ordered the parties to file their written submissions which they have complied.

5. The appellant submitted on three issues as follows:-

   a) Whether the learned trial magistrate erred in law and fact by failing to appreciate that the appellants had proven their case on balance of probabilities.

   b) Whether the learned trial magistrate erred in law and in fact by failing to give cognizance to the testimony of an expert witness in light of all other available evidence.

   c) Whether the learned trial magistrate erred in law and in fact by failing to assess the damages that would have been awarded t the appellants if their case had been successful.

6. The appellant relied on the case of *Selle v Associated Motor Boat Co* [1968] EA 123 and submitted that this court has a duty to re-evaluate all the evidence availed in the lower court to reach its own conclusions.

7. The appellant submitted that the doctrine of *res ipsa loquitor* applies in this case, but the trial magistrate however failed to consider this in arriving at her decision to dismiss the appellant's case.

8. The appellant submitted that PW1 a police officer produced a police abstract and PW 2 produced several exhibits contents of which showed that an accident occurred on April 24, 2021. The accident involved Duncan Mwenda (the deceased) as a pillion passenger on Motor Cycle Registration KMFM 474E and motor vehicle registration number KCN 632V Subaru Salon owned by the respondents and that the nature of injuries of the person injured were fatal.

9. The appellant relied on the cases of *William Kabogo Gitau v George Thuo & 2 others* [2010] eKLR and *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR where the appellant submission was that the evidence adduced proved liability on the part of the respondent based on the three principles of proving the tort of negligence which are: that the respondent owed the appellant a duty of care, that there was a breach of that duty and that the appellant suffered injuries as a result of that breach

10. The respondent on the other hand submitted that the appellant herein had not proved liability against the respondent. It submitted on two issues, namely; whether the trial court erred in finding that the appellant had not proved liability against the respondent and whether the trial court erred in not awarding damages. It relied on the case of *Mount Elgon Hardware v United Millers Ltd* [1996] eKLR, where the court opined that it is the duty of a party alleging negligence to prove the same and a party cannot be allowed to prove that which he has not pleaded.

11. It is trite that in civil cases the standard of prove is on a balance of probabilities which lies with the party who alleges. The law on burden of proof under sections 107, 108 and 109 of the *Evidence Act*, cap 80 laws of Kenya places the burden of proof as to any particular fact on the person who wishes the court to believe in its existence, unless it is provided by the law that the proof shall be on a particular person.

12. Section 107 sets a foundation upon which the foregoing is based. It categorically provides that,

> "whoever desires any court to give a judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts."

In short, the onus of proving is on the person alleging.

13. The respondent submitted that he who alleges must prove. That the trial court observed that the only evidence produced by the appellants in support of their claim was that the police abstract that was produced by PW1.

14. It is an undisputed fact that the accident indeed occurred and that the appellant's husband lost his life as a result of the accident. However, in negligence there is no liability without fault. This position was well laid in the case of *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] eKLR as cited in the case of *Eunice Wayua Munyao v Mutilu Beatrice & 3 others* [2017] eKLR where it was held 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."

15. In light of the foregoing, I have perused the entire record of appeal and considered the submissions by counsels for both parties and there are two issues for determination in this suit namely;

    a) whether the appellant proved her case on a balance of probabilities?

    b) whether the doctrine of *res ipsa loquitor* applies in the circumstances?

Whether The Appellant Proved Her Case On A Balance Of Probabilities

16. This being the first appeal, it is this court's duty under section 78 of the *Civil Procedure Act* to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co Ltd* [1968] EA 123 cited by the appellants where Sir Clement De Lestang (VP) stated that:

> "An appeal to this court from a trial by the High 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. In particular, this 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".

17. There is no doubt that an accident occurred in which the appellant husband was injured and passed away. Hence, the only question is who caused the said accident? The appellant, PW1 a police officer attached at Subuiga Police Station testified that she was not the investigating officer and produced a police abstract which indicated that the accident was pending under investigation. The investigating officer was not called to testify and give the court a clear picture of how the accident occurred and who was to blame for the accident. No police file and /or sketch map was produced to explain to the court how the accident occurred. Clearly, the appellant failed to prove her case on liability on a balance of probability as was held by the trial court.

18. In *Sally Kibii & another v Francis Ogaro* [2012] eKLR where the court in upholding the lower court's decision dismissing the appellant's case stated that:

> "In the Kenital case (above) I held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. The plaintiff simply did not adduce any evidence before the trial court on liability. They could have called eye witnesses and/or the investigating police officer. Proof of negligence was material in this case and the burden of proof was upon the plaintiff. She did not discharge the burden and the appellant's counsel Submission before me that 'someone, has to explain how the accident

took place, is telling. That 'someone' is the plaintiff who alleges negligence on the part of the defendant."

19. In this case there is no credible evidence on which negligence that can be inferred on the part of the respondent.

Whether The Doctrine Of Res Ipsa Loquitor Applies In The Circumstances

20. The appellant submitted that the trial court would have applied the doctrine of *res ipsa loquitor* to find liability on the part of the respondent.

21. The Court of Appeal, in the case of *Margaret Waithera Maina v Michael K Kimaru* [2015] eKLR) the court held as follows on res ipsa loquitur:

> " Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that "the thing speaks for itself". It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charlesworth & Percy on Negligence, 12th edition, appears this passage:
>
> > Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine:
>
> I think that it is no more than an exotic although convenient; phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.
>
> The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."

22. The same sentiments were expressed by Hobhouse, LJ in the case of *Ratcliffe v Plymouth & Tobay* HA [1998] PIQR 170:

> ".....the expression res ipsa loquitur should be dropped from the litigator's vocabulary and replaced by the phase 'a *prima facie* case'. Res ipsa loquitur is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a *prima facie* case has been made out."
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> Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of Nandwa v Kenya Kazi Ltd, Civil Appeal No. 91/1987 for the reason that evidence is not to be pleaded. Also see Bennet v Chemical Construction (GB) Ltd 3 All ER 822 where the Court emphasized that:
>
> It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable"

> Whether it be referred to as a maxim, doctrine, principle or merely a rule of evidence affecting the onus of proof, it is our conclusion, in view of the learning cited above, that it was unnecessary to apply it in this matter since the negligence of the respondent's driver was proved on a balance of probability."

23. Similarly, in the case of *Sally Kibii & another v Francis Ogaro* [2012] eKLR Ibrahim, J (as he then was) pronounced himself as follows: -

> " To my understanding, "res ipsa loquitor" would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence. See Bikwatirizo v Railway Corporation [1971] EA 82. To successfully apply this doctrine, there must be prove of facts that are consistent with negligence on the part of the defendant as against any other cause. This is a case of two cars colliding. What facts have been proved by the Plaintiff to presume negligence on the part of the defendant as against the other vehicle? Can I safely presume that the mere fact that the two cars being KAK 746 J and KAG 331 K collided, negligence was on the part of the defendant's case and not the other? The plaintiff must prove facts which give rise to what may be called the res ipsa loquitor situation. There cannot simply be an assumption in the Plaintiff's case in this case. If the deceased was in a self-involving accident as against a collision, then perhaps, such a presumption can be made against the owner of the car.
>
> With respect, I disagree with the appellant's counsel that the burden of proof of occurrence of an accident shifted to the other side. I hold the view, that the defendant is only enjoined to rebut the presumption of res ipsa loquitor after the plaintiff has established a prima facie case by relying on the facts of an accident. It is after this that the court is called upon to evaluate the evidence and find if the inference of negligence should be drawn against the defendant."

24. In the instant case there was no eye witness to shed light on how the accident occurred. The police abstract on record showed that the accident was under investigation. The accident involved a motor cycle and a motor vehicle and from the evidence nothing attributes liability to the respondent. There cannot be an assumption of liability as the plaintiff failed to prove facts which give rise to what may be called res ipsa loquitor situation. This court agrees with the trial court that the evidence adduced by the plaintiff was scanty and no explanation were made as to why the motor cycle rider was not called to shed light on what had transpired on the night the accident took place.

25. As can be deduced from all the cited authorities the key issue is for the plaintiff to prove his case. It is not enough to allege as done by the appellant herein and expect the court to agree with you. As expected under section 107 and 108 of the *Evidence Act*, the burden squarely is upon the appellant. The traffic police officer PW1 ought to have clarified how the accident may have happened by producing the sketch maps of the scene and any other relevant evidence.

26. It is very unfortunate that this case must fail, and the appellant has this court's sympathy. However, the trial court acted judiciously and this court does not find any reason to fault the trial court findings on this question of negligence.

ORDERS

27. Accordingly, for the reasons set out above, the appellant's appeal herein is declined.

28. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF AUGUST 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S. Hiram Kirimi & CO. Advocates for the Appellant.

M/S. Mithega & Kariuki Advocates for the Respondent.