Obino & another (Suing as the legal representative of the Estate of Robin Obino Ongere) v Ngatia & another (Civil Appeal E455 of 2021) [2022] KEHC 15731 (KLR) (Civ) (24 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E455 OF 2021

JN MULWA, J

NOVEMBER 24, 2022

BETWEEN

TERESIAH WANGUI OBINO ..... 1ST APPELLANT

FRANCIS ONGERE OBINO ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ROBIN OBINO ONGERE

AND

ERIC KIAN NGATIA ..... 1ST RESPONDENT

ALICE MUMBI MBATIA ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court at Milimani Commercial Courts in CMCC No. 5497 of 2019 delivered by the Hon. Edgar Kagoni (PM) on 21st July 2021)

JUDGMENT

1. The deceased, Robin Obino Ongere, died in a road traffic accident which occurred on July 5, 2018 along Thika Road opposite Muthaiga Police Station. In the plaint dated July 24, 2019, the appellants pleaded that the deceased was lawfully crossing the road on the material day when the driver of motor vehicle registration number KBP 533V Isuzu mini bus, property of the respondents herein, negligently drove, managed and/or controlled the said motor vehicle causing it to hit the deceased. The deceased succumbed to the injuries sustained as a result of the accident and the appellants lodged the suit in the lower court seeking compensation against the respondents in the form of special damages, general damages under the *Fatal Accidents Act* and *Law Reform Act*, costs of the suit and interest.

2. The respondents denied the claim in entirety in their joint statement of defence and put the appellants to strict proof. Without prejudice and in the alternative, the respondents averred *inter alia* that if the accident occurred, then the same was wholly or substantially contributed to by the negligence of the deceased.

3. On December 16, 2013, the appellants filed a reply to defence joining issues with the respondents herein and reiterating the contents of the plaint while denying the contents of the defence.

4. Upon hearing the claim, the trial court dismissed the suit with costs to the respondents.

5. Being aggrieved by the said decision, the appellants lodged the instant appeal *vide* a memorandum of appeal dated July 29, 2021. They raised the following grounds:

    1. That the honourable magistrate erred both in law and in fact by finding that the appellants had not proved negligence on a balance of probabilities.

    2. That the said judgment and decree are manifestly unfair to the appellants.

    3. That the honourable magistrate erred both in law and in fact by finding that the doctrine of res ipsa loquitur must be pleaded.

    4. That the honourable magistrate erred both in law and in fact by failing to apply the doctrine of *res ipsa loquitur* and thereby arrived at an erroneous finding.

    5. That the honourable magistrate erred both in law and in fact by failing to consider that the respondents did not deny causing the death of the deceased.

    6. That the honourable magistrate erred both in failing to consider the appellants' submissions.

    7. That in all instances, the judgment and decree of the court is unsupported by law and fact.

6. The appellants therefore seek the following orders in their appeal: -

    a) The appeal is allowed.

    b) The judgment and decree delivered dismissing the appellants' claim be set aside, and substituted with a judgment on liability against the respondents at 100%.

    c) The honourable magistrate's proposed judgment on quantum be upheld.

    d) The appellants be awarded costs of this appeal.

7. This being a first appeal, this court is tasked with the duty of re - evaluating the entire evidence so as to come up with its own independent findings and conclusions. See the case of *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123.

8. PW1, No 88537 PC Jessy Mwotolo Kasyoka from Pangani Police Station - Traffic Department produced the abstract that was prepared in respect of the subject accident. He testified that the accident involved motor vehicle registration KBP 583V Isuzu minibus driven by one Stephen K. Kimani and a pedestrian one Robin Ongere, the deceased herein. PW1 stated that the investigating officer was PC Ombati and the matter was still pending investigations at the time the abstract was issued. Further, he stated that he was paid Kshs 5,000/- for court attendance. On cross-examined, PW1 stated that he did

not visit the accident scene. It was also his statement that there is a designated pedestrian crossing past the police station and that the accident happened opposite the police station.

9. PW2, Teresiah Wangui Obono, the 1st appellant herein adopted her statement dated July 24, 2019 as her evidence in chief and produced the plaintiffs' bundle of documents as her exhibits in support of their case. In her said statement she stated that she was the mother of the deceased. It was her testimony that the deceased succumbed to injuries sustained in the said accident. She blamed the driver of the respondents' motor vehicle for the accident. In cross examination, she admitted that she did not witness the accident as she was in Nyamira. Further, she told the court that the deceased was an employee of Media Max Limited working as a casual. The deceased was staying with his aunt in Nairobi at the time of the accident but was their breadwinner. Upon reexamination, she clarified that the deceased was a correspondent with Media Max and was paid on commission.

10. The respondents closed their case without calling any witnesses or tendering any evidence.

Analysis and Determination

11. The appeal was canvassed by way of written submissions which this court has given due consideration. The issues that arise for determination are whether the learned trial magistrate erred in finding that the appellants had not proved liability; and whether the appellants are entitled to an award of damages.

Whether the learned trial magistrate erred in its finding that the appellants had not proved liability.

12. In their submissions, the appellants faulted the trial court for dismissing their case on account of lack of an eye witness. They submitted that no evidence was tendered by the respondents to controvert the fact that the respondents' motor vehicle was involved in the accident, subject of this case. Further, the appellants' took issue with the trial magistrate's finding that the doctrine of *res ipsa loquitur* must be pleaded for it to be applicable. They contended that the trial magistrate fell into error by refusing to apply the doctrine yet they had established a prima facie case that an accident occurred involving the respondents' motor vehicle and the deceased.

13. In support of their submissions, they relied on the case of *Margaret Waithera Maina v Michael K. Kimaru* [2017] eKLR, where the Court of Appeal highlighted the application of the doctrine. Reliance was also placed on *Bennet v Chemical Construction (GB) Ltd* 3 All ER 822 to support the proposition that it is not necessary to plead the doctrine. Further, the appellants cited the case of *Mary Ambeva Kadiri suing as the administrators of estate of Saleh Juma Kadiri (deceased) v Country Motor Limited* [2017] eKLR, to support their submission that the plaintiff can rely on the doctrine of *res ipsa loquitur* if a *prima facie* case can be established that an accident took place involving the respondent's motor vehicle and that the case was not rebutted.

14. On the other hand, the respondents submitted that the appellants did not call any eye witness to the accident or the investigating officer to prove how the accident occurred and whether the respondents negligence caused the death of the deceased. They relied on the case of *Eunice Wayua Munyao v Mutilu Beatrice & 3 others* (2017| eKLR where it was held that a plaintiff must prove some negligence against the defendant where the claim is based on negligence. Further, the respondents submitted that the appellants introducing of the doctrine of *res ipsa loquitur* in their submissions without pleading it in their plaint yet the circumstances of the case did not warrant the adoption of the said doctrine. They relied on the case of *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR where the court stated that for *res ipsa loquitur* to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant.

15. Lastly, the respondents contended in the circumstances of this case, the doctrine of *res ipsa loquitur* can only be applied against the deceased in view of PW1's testimony that the deceased was crossing the road a few meters away from a designated pedestrian crossing.

16. In the plaint filed in the trial court, it is evident that the appellants did not plead *res ipsa loquitur*. They relied on this doctrine in their submissions filed in support of their case. In the judgment of the trial court, the learned magistrate held that the plaintiffs,and the appellants could not invoke the doctrine at the submission stage if it was not pleaded in the plaint.

17. The first issue for consideration by this court therefore is whether the doctrine of *res ipsa loquitur* must be pleaded to succeed? There are several authorities from both within and outside our jurisdiction in which courts have held that res ipsa loquitur does not have to be pleaded. This was the holding in the case of *Margaret Waithera Maina v Michael K. Kimaru* (supra). Further, in the case of *Nandwa v Kenya Kazi Ltd* [1988] eKLR, the Court of Appeal held that the doctrine was no more than a rule of evidence affecting onus of proof and evidence is not to be pleaded. Additionally, in the case of *Bennet v Chemical Construction (GB) Ltd* (supra) the English Court emphasized that:-

> "It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable"

18. Under what circumstances is res ipsa loquitur applicable? The Court of Appeal in the case of *Mary Ayo Wanyama & 2 others v Nairobi City Council* civil appeal No 252 of 1998 explained the doctrine of *res ipsa loquitur* as follows:

> "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."

19. In *Virginia Njeri & another v Joseph Njenga* [2020] eKLR, Justice Joel Ngugi pronounced himself as follows:

> "It is important to recall that the doctrine of res ipsa loquitur is a legal rule that lets plaintiffs avoid proving specific negligence when they can show that the type of accident speaks of the defendant's negligence. It assesses liability in the absence of clear evidence of what went wrong. The courts allow plaintiffs this facility out of realization that some accidents are

usually caused by negligence. Consequently, when the plaintiff brings his case within the doctrine, the court infers negligence from the accident's very occurrence.

17. However, for the doctrine to apply, two conditions must be satisfied. First, it must be shown that the accident is one that ordinarily would not occur in the absence of negligence. This is what allows the plausibility of the inference: if the inference is far-fetched, then the doctrine does not apply. Second, the doctrine does not apply unless it can be demonstrated that the defendant was in exclusive control of the agency that caused the injury. This refers to the extent to which the defendant participated at the scene of the accident. If the defendant had exclusive agency that caused the accident, and the accident is one that ordinarily would not occur in the absence of negligence, then by operation of the doctrine of res ipsa loquitur, the defendant would be liable for the accident unless he offered an explanation other than negligence."(Emphasis mine)

20. The court has carefully interrogated the evidence adduced by the appellant before the trial court that showed that there was an accident involving a pedestrian who was the deceased herein and the respondent's motor vehicle driven by their agent. The police abstract produced by PW1 only proved that the subject accident occurred. The respondents did not call any evidence to absolve their driver from blame. That being the case, it is the court's considered view, that indeed the trial magistrate erred by letting the respondents off the hook without any blame yet the evidence before her clearly showed that the accident occurred. In *Virginia Njeri & another v Joseph Njenga* (supra) whose circumstances were similar to the instant case, Justice Joel Ngugi held that:

> "...where it is proved that an accident occurred and there is no plausible explanation from either sides how it occurred, it is permissible to conclude that the parties were equally to blame for the accident. That should have been the outcome here."

21. Justice G. V. Odunga also held the same view in *Beatrice Kavindu Musembi (suing as the legal representatives of the Estate of Peter Muteti Musembi - deceased) v Patrick Mbithi Kavita* [2019] eKLR where he cited the case of *Isabella Wanjiru Karangu v Washington Malele* civil appeal No 50 of 1981 [1983] KLR 142. The learned judge noted that in the cited case, 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.

22. In view of the authorities above, among others, the court finds that liability ought to be apportioned between the appellants and the respondents at the rate of 50:50.

Whether the appellants are entitled to an award of damages.

23. Having found as above, it follows that the appellants are indeed entitled to damages but subject to 50% contribution. The appellants submitted that the assessment by the trial magistrate was correct and urged this court to uphold the same on appeal. The respondents did not tender any submissions in this regard.

24. I have considered the trial court's assessment of the damages it would have awarded. In *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] eKLR, the Court of Appeal held:

> "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."

25. Whereas there is no reason placed before the court to depart from the awards made in respect of special and general damages under the *Law Reforms Act*, this court finds that the learned magistrate misdirected herself on the award for loss of dependency under the *Fatal Accidents Act*. The learned magistrate applied the multiplier approach in making an award of Kshs 10,560,000/- on loss of dependency. The said court adopted a multiplicand of Kshs 80,000/- on the basis that the respondents' herein did not controvert PW2's evidence that the deceased worked at Media Max Limited and earned the said amount monthly. From the record, it is evident that PW2 did not produce anything to prove that the deceased worked at the said place and made the alleged monthly earnings. Under the provisions of section 107 to 109 of the *Evidence Act*, cap 80 Laws of Kenya, the legal burden of proof always lies upon the party who invokes the aid of the law. The appellants were not exempted from this despite the fact that the respondents did not controvert the evidence.

26. The law is that where one does not tender evidence of employment to prove monthly earnings, the court may use the minimum wage specified under the Regulation of Wages (General) (Amendment) Order.The deceased died in July 2018 and PW2 testified that he worked as a casual at Media Max Limited. The applicable minimum wage is as per the Regulation of wages (General) (Amendment) Order, 2018 which came into force on May 1, 2018. Under the Order, a general labourer in Nairobi earned Kshs 13,572.90 which is the amount proposed as the multiplicand in this case. However there shall be no departure from the multiplier of 22 years and dependency ratio of 1/3 adopted by the trial court. The award for loss of dependency shall therefore be calculated as follows: 13,572.90 x 12 x 22 x 1/3 = 1,182,471.05/-.

27. Additionally, this court finds that the learned magistrate erred by finding that the award of loss of expectation of life should be subtracted from the award of loss of dependency to avoid double compensation. The Court of Appeal in *Silverstone Quarry Limited & another v Beatrice Mukulu Kang'uta & another (suing as Administrators of the Estate of Philip Musyoka Muthoka* [2020] eKLR held that the issue of the issue of double compensation does not arise because the two statutes independently provide for award of damages.

Conclusion

28. Consequently, the appeal herein has merit and is hereby allowed as follows:

    1. Liability is apportioned equally between the appellants and the respondents in the ratio of 50:50.

    2. Damages are awarded as hereunder:

        i. Pain and suffering Kshs 20,000/-.

        ii. Loss of expectation of life Kshs 120,000/-.

        iii. Loss of dependency Kshs 1,182,471.05/-.

        iv. Special damages Kshs 54,050/-.

        Sub total Kshs 1,376,521.05/-.

(Reduction by 50% contribution)

Total Kshs 688,260.53/-

3. The general damages under the *Fatal Accidents Act* and the *Law Reform Act* shall accrue interest at court rates from the date of this judgment until payment in full, while special damages accrues interest from the date of filing of the suit until payment in full.

4. Each party shall bear own costs of the appeal.

5. The appellants shall have costs of the suit in the trial court.

Orders accordingly.

Delivered, Dated and Signed this 24th Day of November 2022.

J. N. MULWA

JUDGE