REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO 148 OF 2019

BENTER ATIENO OBONYO (SUING AS THE LEGAL REPRESENTATIVE OF THE

ESTATE OF THE LATE JOSEPH MAGATI MWAGARI (DECEASED)..APPELLANT

VERSUS

ANNE NGANGA .....1ST RESPONDENT

EXON INVESTMENT LIMITED.....2ND RESPONDENT

JUDGEMENT

1. The deceased herein **JOSEPH MWAGARI** was a pillion passenger aboard motor cycle registration number KMDP 070G which was plying along Nakuru –Eldoret road on **24th February 2016** when at around DT Dobie area he was involved in an accident with motor vehicles registration numbers KTWA 536E tuktuk and KBP 224F owned by the 1st and 2nd respondents respectivly

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 a full trial where the court dismissed the same ostensibly because the appellant was unable to prove negligence against the respondents.

3. Dissatisfied with the said verdict the appellant filed this appeal citing several grounds the major one being that the trial courts finding that negligence was not proved against the respondent was not only wrong but was based on a wrong apprehension or misapprehension of the law.

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

5. Before looking at the same, it is also necessary to note that **Appeal Number Nakuru 181 of 2019 (ESNA KEMUNTO MOGAKA. VERSES. ANNE NGANGA AND EXON INVESTMENTS LTD)** is as a result of the same accident as they were conducted together. The only difference is that the deceased therein **POLYCARP MOGAKA** was the one riding the motor cycle on the fateful day. The said matter was equally dismissed on the same reason, namely that negligence was not proved against the respondents.

6. Consequently, the findings of this court herein shall apply *mutatis mutandis* on number 181 of 2019 stated above.

7. The appeal was canvassed by way of written submissions and it is necessary to summarise the same as hereunder.

APPELLANTS SUBMISSIONS.

8. The appellant submitted on one issue of whether the defendants/respondents were liable for the accident that occurred on 24th February 2016.

9. The appellant relied on **Section 78(2) of the Civil Procedure Act**, the case of **Peter Ngigi Kuria & Another (suing as the legal representative of the Estate of Joan Wambui Ngigi v Thomas Ondili Oduol & Another [2019] eklr** and submitted that this court has a duty to re-evaluate all the evidence availed in the lower court to reach its own conclusions.

10. 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 his decision to dismiss the appellant's case. The appellant relied on the case of **EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR** where the court cited the case of **Margaret**

Waithera Maina v Michael K. Kimaru [2017] eKLR and held as follows with regards to the doctrine of res Ipsa Loquitor:

> **"……the doctrine applies only in situations where an accident occurs and no other explanation can be attributed to it other than inference of negligence on the part of the defendant. This was not the situation in the above accident and the same was not pleaded. The doctrine is normally used to establish a tort of negligence in the absence of a proper explanation on how the accident occurred. The doctrine applies in situations where surrounding circumstances may permit an inference of a presumption of negligence on the part of the defendant if that defendant cannot offer an explanation in rebuttal."**

11. In the same case mentioned above, the court held that a case cannot collapse merely on the basis that there were no eye witnesses. The Court on the basis of circumstantial evidence or evidence adduced by the defendant that tends to prove his involvement in the alleged act may infer culpability on the part of the defendant. The appellant submitted that the Respondents did not call any witnesses to controvert the Appellant's testimony, which would therefore translate to mean that the Appellant proved her case on a balance of probabilities as is the expected standard of proof in civil cases.

12. The appellant submitted that PW1 testified that the deceased was her husband and that on 24th February 2016 she was in Migori when she was called by her cousin telling her that her husband had been involved in an accident. She also testified that the husband had passed on as a result of the said accident. PW1 produced the deceased's Death Certificate as Plaintiff Exhibit 8, which indicates that the deceased died on the 25th February, 2016 and the cause of death was multiple injuries upper, lower limbs/head due to blunt force trauma caused by motor vehicle accident.

13. She also went ahead to produce a post-mortem report dated 8th March, 2016 as Plaintiff Exhibit 3a which indicated the cause of death as multiple injuries involving head, chest due to rib fractures and long bones due to blunt body trauma in keeping with motor vehicle accident.

14. PW2 a police officer by the name PC Joyce Chelagat produced a police abstract dated 12th April, 2016, as Plaintiff Exhibit 16 contents of which showed that an accident occurred on 24th February, 2016. The accident involved Joseph Magati Mwagari (the deceased) as a pillion passenger on Motor Cycle Registration Number KMDP 070G, Motor Vehicle Registration No. KTWA 536E and Motor Vehicle Registration No. KBP 224F owned by the Defendants/Respondents and that the nature of injuries of the person injured (now the deceased) were fatal.

15. The appellant relied on the case of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita (2019) eKLR** where there were no eye witnesses to the accident that resulted to the deceased therein sustaining fatal injuries.

16. The court on the issue of lack of eye witnesses held;

> **"That 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 involved**."

17. The appellant submitted that even though there were no eye witnesses to the accident that occurred on 24th February, 2016, the facts speak for themselves that an accident indeed occurred on 24th February, 2016 involving Joseph Magati Mwagari (the deceased) as a pillion passenger on Motor Cycle Registration Number KMDP 070G, Motor Vehicle Registration No. KTWA 536E and Motor Vehicle Registration No. KBP 224F owned by the Respondents and that the deceased succumbed to fatal injuries sustained in the said accident.

18. It is the appellant's submissions that the Appellant through the evidence adduced proved liability on the part of the Respondents based on the three principles of proving the tort of negligence which are: that the Respondents owed the Appellant a duty of care, that there was a breach of that duty, that the Appellant suffered injuries as a result of that breach. The appellant further submitted that the Respondents indeed owed the Deceased a duty of care since they were all using the same road, fact which is not disputed by the Respondents, that the Respondents breached the said duty of care owed to the Deceased and all other road users as provided for under **Section 49(1) of the Traffic Act** due to careless and negligent driving of their authorized drivers and as a result of the said breach, the deceased sustained fatal injuries, which he consequently succumbed to.

19. The appellant submitted that the authorized driver of the 1st Defendant/Respondent driving Motor Vehicle Registration No. KTWA 536E, without due care and attention overtook a static Motor Vehicle Nissan Matatu which had stopped to pick up a passenger, causing Motor Vehicle Registration No. KTWA 536E to knock down the deceased who was riding as a pillion passenger on Motor Cycle Registration Number KMDP 070G on the same road.

20. The appellant submitted that this was a miscalculated intention since the 1st respondents authorized driver ended up hitting the Motor Cycle Registration Number KMDP 070G that the deceased was on, and consequently the Deceased was run over and/or hit by the driver authorized by the 2nd respondent driving Motor Vehicle Registration No. KBP 224F thereby causing the said accident. The deceased sustained fatal injuries as a result of the said accident. The investigation report stated clearly that the tuk tuk driver was blamed for the occurrence of the said accident, a fact which was completely ignored by the trial magistrate despite there being no evidence to the contrary.

21. The appellant submitted that vicarious liability is a legal concept that assigns liability to an individual who did not actually cause the harm, but who has a specific superior legal relationship to the person who did cause the harm. Vicarious liability mostly comes into play when an employee has acted in a negligent manner for which the employer will be held responsible. On this limb the appellant relied on the case of **P.A Okello & M.M Nsereko T/A Kaburu Okello & Partners v Stella Karimi Kobia & 2 Others (2012) eKLR** where the Court of Appeal held that:

> **"Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or**

authority"

22. The appellant submitted that the drivers who were driving Motor Vehicle Registration Number KTWA 536E and Motor Vehicle Registration Number KBP 224F were employees of the 1st and 2nd Respondents respectively. Therefore, they were operating and/or controlling the said motor vehicles under express or implied instructions from the 1st and 2nd Respondents during the course of their employment. It is therefore safe to say that the 1st and 2nd Respondents are vicariously liable for the negligence acts of their drivers who were and/or are under their employment and in which their negligence caused the road traffic accident that occurred on 24 February 2016, as a result of which the deceased sustained fatal injuries.

23. The appellant submitted that the documents produced as evidence by the Plaintiff witnesses were admitted in the proceedings and the contents were not challenged by the defendants. The appellant relied on the case of **Shaneebal Limited V County Government of Machakos [2018] eklr** and submitted that her evidence was uncontroverted. The appellant further relied on the case of **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000 (cited in Peter Ngigi Kuria & another (Suing as the legal representatives of the Estate of Joan Wambui Ngigi) v Thomas Ondili Oduol & another [2019] eKLR),** where Mbaluto, J. held that, where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

24. The appellant submitted that since there was no rebuttal of the Appellant's evidence, the Appellant therefore proved that the Respondents were liable for the accident that occurred on 24th February, 2016 hence the Judgment/Decree of the Honourable Magistrate delivered on the 27th August 2019 in NAKURU C.M.C.C NO. 966 of 2016 should be set aside and/or reviewed and this Honourable Court be pleased to find the Respondents 100% liable for the said accident.

25. The appellant submitted that even though there were no testimonies from eye witnesses as to the occurrence of the accident that occurred on 24th February, 2016, the trial court erred in dismissing the suit since the evidence tendered by the Appellant's witnesses not only proved the Appellants case on a balance of probabilities, but also proves 100% liability against the Respondents. The appellant submitted that this Honourable Court should set aside the Judgment/Decree of the lower court delivered on the 27 August 2019 in NAKURU C.M.C.C NO. 966 of 2016 and allow this Appeal as prayed. In view of the foregoing, the appellant submitted that this Honourable Court should enter judgement in favour of the Appellant against the Respondents as follows:

26. Liability at 100% against the Respondents, Special Damages of Kshs. 93,590 as proved and General Damages. The appellant relied on the case of **Richard Macharia Nderitu (legal representative of the estate of Salome Muthoni Maina v Philemon Rotich Langas & 3 Others HCCC 86 OF 2012) (2013) eKLR and Alice O. Alukwe (suing on behalf Maureen Alukwe (Deceased) vs Akamba Public Road Services Ltd and 3 others (2013) eKLR** to submit that Kshs 100,000 would be reasonable compensation amount under the limb of pain and suffering considering the cost of inflation and time effluxion.

27. On the loss of expectation of life, the appellant relied on the celebrated case of **Jacob Mutahi Githaiga v Said K. Msellen HCC 98/1999** to submit that Kshs 200,000 would be reasonable compensation under this limb considering the cost of inflation and again time effluxion.

28. On the Loss of dependency, the appellant submitted that the deceased was 46 years old at the time he met his death. The deceased might have lived to the age of 60 years since at the age of 46 he was still a strong man who was working hard to fend for his family. Therefore, a multiplier of 14 years should be adopted. The deceased was a mechanic in Nakuru Town earning a monthly salary of Kshs. 200,000. The deceased had 6 children who were still dependent on him during his lifetime.

29. The deceased was spending a quarter of his salary to maintain his family. Thus loss of dependency should be computed as follows: 200,000 x 12 x 14x 1/4= 8,400,000. Thus an award of Kenya Shillings Eight Million, Seven Hundred and Ninety-Three Thousand, Five Hundred and Ninety (Kshs. 8, 793, 590), costs and interest would be appropriate in this case.

1st RESPONDENT'S WRITTEN SUBMISSIONS

30. The first respondent relied on the case of **Karugi & another v Kabiya & 3 others [1983] eKLR,** where the court opined that it is the duty of the Plaintiff to prove his case.

31. It is the 1st respondent's submissions that the Appellant was responsible for advancing her case. It is also important to note that through cross examination the Respondent was able to controvert the Appellant's case. It is trite law that hearsay evidence is not admissible. PC Joyce Chelagat, No. 89148, attached to Nakuru police station established that she was not the investigating officer. She could not confirm who was to blame for the accident as she was merely summoned to produce a police abstract. Her evidence was mere hearsay and therefore inadmissible in its entirety.

32. The 1st respondent submitted that nowhere in the judgment has the Learned Magistrate mentioned that the passenger was liable for the accident. The learned magistrate only made a finding that the Plaintiff, now the Appellant herein failed to prove liability and did not specifically hold anyone liable for the accident. For the avoidance of doubt, the Appellant during the hearing of her case clearly stated that she did not know who was to blame for the accident, and that she was at Migori when she received a call informing her that her husband had been involved in an accident. The Honourable Magistrate in dismissing the suit stated clearly that the Appellant had failed to prove her case. In this instance, the Appellant cannot allege that the court found a mere passenger liable for the accident. The deceased's dependants ought to have brought the suit against the rider's insurer since the motor cycle was insured as indicated in the police abstract.

33. 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.

34. **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.

35. The 1st respondent further placed reliance on the case of **Treadsetters Tyres Ltd v John Wekesa Wephukhulu [2010] eklr and the case of Evans Nyakwana v Cleophas Bwana Ongaro (2015) eklr** and submitted that the onus was on the appellant to prove the driver's negligence and further to prove a causal nexus between the driver's negligence and the accident that occurred. This was the position in **Statpack Industries vs, James Mbithi Munyao Nairobi HCCA No. 152 of 2003,** where Justice Visram (as he then was) stated;

> **"that a person making an allegation must prove a causal link between someone's negligence and his injury. He stated that a plaintiff must adduce evidence from which on a balance of probability a connection between the two may be drawn."**

36. In the case of **Ishmael Nyasimi & Another v David Onchangu Orioki suing as personal representative of Antony Nyabando Onchango (deceased) [2018] Eklr** at paragraph 14, the court pointed out that there was no evidence on how the accident could have occurred and in the absence of such evidence, the court found and held that the Respondent failed to prove negligence against the Appellant on the balance of probabilities, in the circumstances, therefore indicated it would dismiss the suit for want of proof.

37. The Appellant in this case bore the burden of proving the case on a balance of probabilities. It was up to the Respondent to test the accuracy and veracity of the Appellant's testimony in the trial court through cross examination. In this case, the Appellant failed to prove that the 1st Respondent was liable for the accident. More importantly the court should highlight the fact that the Appellant in cross examination stated that she did not know who was to blame for the accident. Further, the police file was taken to the Directorate of Criminal Investigations implying that an inquiry was to be made as to the cause of death in this case.

38. This implies that as at the time, no one was to blame for the accident. The 1st respondent submitted that the Appellant did not discharge the burden of proof to the standard she is by law called upon to do. The Appellant led no evidence whatsoever as proof that the first Respondent was responsible for the accident. The particulars of negligence must be proved before the court is called upon to find fault upon the Defendant.

39. 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 -Vs. Kenya Cargo Hauling Services Ltd 1991** 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."**

40. In light of the foregoing, the 1st respondent submitted that the Appellant herein failed to meet the threshold to establish negligence on the 1st Respondent. The Appellant only gave a sequence of events leading to the accident without establishing the blame worthiness and causation attributed to the 1st Respondent. Consequently, the 1st respondent relied on the case of **Alfred Kioko Muteti v Timothy Miheso & another 2015 eKLR**, where the Court dismissed the plaintiff's case as he did not prove his claim against any of the defendants. The 1st Respondent further submitted that the Trial Magistrate did indeed follow the principles of law.

41. In his Judgment all factual and legal issues that had been raised were addressed. Awards granted have to be supported by evidence. The trial court never acted on a wrong principle of law, neither did it take into consideration an irrelevant factor nor adopt a wrong approach. The Trial Magistrate looked at the evidence on record together with the precedents and made an award for special damages because the Plaintiff had justified the award as per the legal requirements on awarding special damages.

42. Further the court looked at factual evidence when awarding general damages and arrived at the amount he finally awarded. The 1st Respondent submitted that without prejudice to her submissions on liability, if this honourable court finds that the Learned Magistrate erred in not finding the Respondent liable, then it should adopt the assessment on quantum by the trial court. The 1st respondent submitted that there is no reason for interfering with the trial court's decision since the Respondent herein has proved that the appeal is unmerited and should be dismissed. Thus, the trial court's judgment in Nakuru CMCC No. 966 of 2016 should be upheld and consequently this Appeal be dismissed with costs.

ISSUES FOR DETERMINATION.

43. 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**; Whether the appellant proved her case on a balance of probabilities and Whether the doctrine of res ipsa loquitor applies in the circumstances.**

Whether the appellant proved her case on a balance of probabilities.

44. 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 (V.P) stated that:

45. **"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''.

46. First and foremost, there is no doubt that an accident occurred in which the appellant was injured. Hence, the only question is who caused the said accident? The appellant, PW1, on cross examination testified that she didn't know who was to blame for the accident as she was only called and informed that her husband had been involved in the accident. She did not witness the accident.

47. PW2 a police officer attached to Nakuru police station testified that she was not the investigating officer and produced a police abstract which indicated that the accident was pending under investigations. 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.

48. I place reliance on the case of **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."**

49. In this case there is no credible evidence on which negligence can be inferred on the part of the 1st Respondent or the 2nd respondent herein.

Whether the doctrine of res ipsa loquitor applies in the circumstances.

50. The appellant submitted that the trial court would have applied the doctrine of Res ipsa Loquitor to find liability on the part of the respondents.

51. The Court of Appeal, in the case of **Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR (WAKI, NAMBUYE & KIAGE, JJ. A)** 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."**
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> **The same sentiments were expressed by Hobhouse L.J. in the case of Ratcliffe v. Plymouth & Tobay HA 1998 PIQR 170:**
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> > **".....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 vs. 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:**
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> **"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."**

52. The Court of Appeal, differently constituted in the case of **Fred Ben Okoth V Equator Bottlers Limited [2015] eKLR (Musinga, Gatembu & Murgor, JJ. A)** held that:

> **"Proof of causation is crucial to the success of most of the actions in tort, except in instances where the doctrine of "res ipsa loquitur" is applicable."**

53. 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] E.A 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."**

54. In the instant case there was no eye witness to shade light on how the accident occurred. The police abstract on record showed that the accident was under investigation. The accident involved a motorcycle, a tuktuk and a motor-vehicle and from the evidence adduced, nothing attributes liability to any of the defendants. There cannot be an assumption of liability as the Plaintiff failed to prove facts which give rise to what may be called the res ipsa loquitor situation. In my humble opinion the doctrine does not apply in the circumstances.

55. As can be deduced from all the cited authorities the key issue is to prove. 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. As a matter of fact, the traffic police ought to have clarified how the accident may have happened by producing the sketch maps of the scene and any other relevant evidence.

56. It is unfortunate that the two cases must fail. The trial court acted judiciously and this court does not find any reason to fault on this question of negligence.

57. On the issue of quantum, I find the basis for the award by the trial court reasonable in the circumstances. The pain and suffering and the other heads taken into account by the trial court fitted well with the circumstances as well as the age of the deceased.

58. For the foregoing reasons, the appeal is hereby dismissed with no order as to costs. As intimated above this judgement applies mutatis mutandis with **Appeal no.181 of 2019**.

DATED SIGNED AND DELIVERED IN NAKURU VIA VIDEO LINK THIS 29TH DAY OF APRIL 2021

H. K. CHEMITEI.

JUDGE