



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 374 OF 2019**

**AGNES WANGARI WAINAINA AND PAULKIARIE GICHANA (Suing as the legal  
representatives of the estate of**

**JOHN WAINAINA WANGARI (deceased)..... APPELLANT**

**VERSUS**

**DAUDI SHIKHOMELA..... 1<sup>ST</sup> RESPONDENT**

**MULTIPLE HAULIERS (EA) LIMITED.....2<sup>ND</sup> RESPONDENT**

***(An appeal from the judgment of the Chief Magistrate's Court Nairobi CMCC No. 49911 of 2016 Hoh. Magistrate M. Obura delivered on 31<sup>st</sup> day of May 2019 at Nairobi)***

**JUDGMENT**

1) John Wainaina Wangari, deceased, was involved in a road traffic accident along the southern by-pass road in Nairobi on 3<sup>rd</sup> July 2015 and was fatally injured. The deceased's motor cycle registration no. KMDB 687P is said to have collided with motor vehicle registration no. KBM 768V/ZD 4927 owned by Multiple Hauliers (EA) Ltd, the 2<sup>nd</sup> respondent and driven by Daudi Shikhomela, the 1<sup>st</sup> respondent.

2) Agnes Wangari Wainaina and Paul Kiarie Gichana, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively filed a compensatory suit against the respondents before the Chief Magistrate's court in their capacities as the administrators of the estate of the deceased. The suit was defended. Hon. A. M. Obura, learned Senior Principal Magistrate heard the suit and had it dismissed on 31<sup>st</sup> May 2019.

3) The appellants being dissatisfied, filed this appeal and put forward the following grounds of appeal.

***i. THAT the learned trial magistrate erred in law and facts by apportioning full liability on the appellant.***

***ii. THAT the learned trial magistrate's judgment was against the weight of evidence before her and this amounted to miscarriage of justice.***

***iii. THAT the learned trial magistrate erred in law and fact by entering judgment in favour of the respondents while there was so much inconsistencies in evidence by the respondents in their pleadings.***

***iv. THAT the trial magistrate erred in law and in fact in failing to take into consideration the submissions and case-law authorities availed by the appellant.***

***v. The learned trial judge erred in law and facts in her judgment by relying on a police abstract that clearly indicated that the accident was still under investigation.***

***vi. The learned trial judge erred in law and facts by failing to apportion negligence of the part of the respondent.***

4) When the appeal came up for hearing this court gave direction to have the same disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions and the authorities cited by both sides.

5) It is the submission of the appellants that the trial court erred when it dismissed their suit. This court was urged to infer negligence on the part of the respondent by applying the doctrine of **Res Ipsa Loquitur**. The appellant pointed out that the respondent's, witness statement and evidence adduced at the trial contradicted part of his evidence thus necessitating the need to apply the doctrine of Res Ipsa Loquitur.

6) It was pointed out that the trial court took the testimony of the respondent as the gospel truth thereby absolving him of any liability. It is also argued that the police abstract contained a statement blaming the deceased for the accident for no reason at all.

7) It is the submission of the respondent that the 1<sup>st</sup> respondent did not contribute to the accident in any way and therefore liability cannot be apportioned as alluded by the appellant. The respondent stated that it is clear from evidence that the deceased emerged from a rough road and should have slowed down and check before joining the main road.

8) The record shows that the trial Senior Principal Magistrate in her judgment stated in part as follows:

**“There can be no liability without fault. In the present case, the evidence before court tilts towards blaming the deceased alone for the unfortunate accident. DW 1's testimony has not been rebutted. I am inclined to accept his version of events which is backed by police findings. I find that the plaintiff failed to prove negligence on the defendants part on a balance of probability. I find the defendants not liable in the circumstances.”**

9) After a careful re-evaluation of the evidence tendered by the DW1, it is clear that DW 1 produced the OB record which indicated that the accident occurred when the rider who was coming from an earth road, joined the main road and in the process of joining, the rider rammed into the front axle of the trailer.

10) The OB further stated that the impact threw the rider to hit a pedestrian and caused death to the rider and some injuries to the pedestrian. It is also stated that the trailer driver (1<sup>st</sup> respondent) was intercepted along the by-pass and taken to Karen Police Station and later to Lang'ata.

11) The 1<sup>st</sup> respondent stated that he was driving the trailer along the Southern bypass when he heard noise at the rear side of his vehicle. He said he stopped, checked and saw a cyclist lying under the vehicle. He said he proceeded to Karen Police Station where he obtained a police abstract which blamed the rider. It is evident that the evidence of the 1<sup>st</sup> respondent does not tally with what is recorded in the OB. In OB, it is stated that the 1<sup>st</sup> respondent was intercepted along the Bypass and taken to Karen police Station contrary to what the 1<sup>st</sup> respondent had stated.

12) The 1<sup>st</sup> respondent claimed that he heard noise at the rear of the trailer and that upon stopping he realized that a motor cycle was under the vehicle. It is clear that the 1<sup>st</sup> respondent's evidence is not reliable because the same is contradictory and could not therefore be used to establish blame as against the deceased as the sole cause of the accident.

13) I am convinced that the learned Senior Principal Magistrate fell into error when she relied on contradictory evidence to solely blame the deceased for the accident. There is no dispute that the appellant's witness did not witness the accident. In other words the only eye witness is the 1<sup>st</sup> respondent, who gave contradictory evidence. There was need to tender independent evidence to corroborate the 1<sup>st</sup> respondent's evidence. What remains undisputed is the fact that the accident occurred involving a motor cycle and a trailer.

14) It is also not disputed that as a result of the accident, the rider of motor cycle registration no. KMDB 687P, one John Wainaina Wangari passed on. In the circumstances of this case there is no clear evidence as to who is to blame. In such a case the doctrine of **Res Ipsa Loquitur** kicks in. In the case of **Barkaway vs South Wales Transport Co. Ltd (1950) 1 ALL WE 392 at page 393 B** it was held inter alia that:

**“The application of the doctrine of Res Ipsa Loquitur, which is no more than a rule of evidence affecting onus of proof of which the essence was that an event, which in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence, depended on the absence of explanation of an accident, but although it was the duty of the respondents to give an adequate explanation if the facts spoke for themselves and the solution must be found by determining whether or not he established facts negligence was to be inferred.”**

15) I am satisfied that the evidence tendered lead to conclusion that the deceased and the 1<sup>st</sup> respondent are equally to blame for the accident.

16) In the end, I find the appeal as against liability to be successful. Consequently, the order dismissing the suit is set aside and is substituted which an order apportioning liability between the deceased and the 1<sup>st</sup> respondent in the ratio of 50:50.

17) There is no appeal as against quantum assessed by the trial magistrate therefore I will not interfere with the same save that the ratio of liability shall apply.

18) For the avoidance of doubt, the appeal is allowed thus giving rise to issuance of the following orders;

**i. The order dismissing the suit is set aside and is substituted with an order apportioning liability in the ratio of 50:50.**

**ii. The following awards**

**a. Pain and suffering ksh.50,000/=**

**b. Loss of expectation of life ksh.150,000/=**

**c. Loss of dependency ksh.9,600,000/=**

**d. Special damages ksh.120,000/=**

**Total ksh.9,920,000/=**

**Less 50% contribution ksh.4,960,000/=**

**Net award ksh.4,960,000/=**

**iii. Special damages to attract interest at court rates from the date of filing suit until the date of full payment.**

**iv. General damages to attract interest at court rates from the date of judgment until the date of full payment.**

**v. The appellants to be paid costs of both the suit and the appeal.**

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 26<sup>th</sup> day of August, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent