REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 16-21 OF 2020

CIVIL APPEAL NO. 16 OF 2020

JOSPHAT MUTHURI KINYUA

(Suing as the legal representative of Estate of

SUSAN KANANA Alias SUSAN KANANU – DECEASED.....APPELLANT

AND

CIVIL APPEAL NO. 17 OF 2020

GEOFFREY MURUNGI MITIRIKIA (Suing as the legal

representative of Estate of MARGARET SALOME MUKOMAUA Alias

SALOME MUKOMAUA – DECEASED.....APPELLANT

AND

CIVIL APPEAL NO. 18 OF 2020

TABITHA KARAUKI NKUNJA (Suing as the legal representative of Estate of

MARGARET NTUNDU M'KIRICHIA – DECEASED.....APPELLANT

AND

CIVIL APPEAL NO. 19 OF 2020

ISSAC KIMATHI M'CEBERE AND LUCY AKOU

(Suing as the legal representative of Estate of

SARAH GAKII NGORE – DECEASED.....APPELLANT

AND

CIVIL APPEAL NO. 20 OF 2020

HENRY MWITI NTOITI

(Suing as the legal representative of Estate of

JULIA KARAI NTOITI – DECEASED.....APPELLANT

AND

CIVIL APPEAL NO. 21 OF 2020

ISSAC KIMATHI M'CEBERE AND LUCY AKOU

(Suing as the legal representative of Estate of

EDWARD KARUTI M'CEBERE DECEASED.....APPELLANT

VERSUS

FABIANO KAMANGA M'ETIRIKIA.....RESPONDENT

(Being appeals from the Judgment of Hon. E. W. Ndegwa (SRM)

delivered on 5th February 2018 in Githongo

SRMCC No. 6, 7, 8, 9, 10 and 11 of 2018)

JUDGMENT

1. This is a consolidated Judgment on the appeals set out herein which although argued separately, arose from the same trial before an SRM Court at Githongo. The Appellants are the personal representatives of deceased persons who were lawful passengers in motor vehicle registration number KCC 835Q. The motor vehicle was being driven by the Respondent along MERU-NKUBU road when it veered off the road causing a fatal accident. The Appellants sued the Respondent for negligence. The Respondent failed to enter appearance and the Appellants obtained interlocutory judgement against him. However, upon full hearing, the trial Court set aside the interlocutory judgement and dismissed the Appellant's case. The trial Court found that the Appellants had not proved their claim for negligence against the Respondent.

2. The Appellants are dissatisfied with the Judgement of the trial Court and they filed a memorandum of appeal dated 12th February 2020 raising 7 grounds of appeal as follows: -

a. That the learned magistrate erred in fact and in law in apportioning 100% liability to the deceased who was only a passenger in the subject motor vehicle.

b. That the learned magistrate erred in law and fact by failure to appreciate the consequence of interlocutory judgement that the plaintiff had no more to prove on liability in respect of the subject accident.

c. That the learned magistrate erred in law and fact by raising the degree and bar of prove of civil matter to beyond balance of probabilities.

d. That the learned magistrate erred in law and fact by failure to observe that the failure by Defendant to file defence and deny liability as attributed to him by the Appellant in the plaint amounted to admission of the same.

e. That the learned magistrate erred in law and fact by holding that the traffic matter was still under investigation yet she was dealing with a total different matter with respective degree of prove and no such information or evidence of ongoing investigation was tendered in Court.

f. That the learned magistrate erred in law and fact by failure to appreciate accidents don't normally occur and/or apply the doctrine of res ipsa lioquitor.

g. That the learned magistrate erred in law and fact by assessing excessively low damages in the matter and ignoring evidence and submissions.

Appellant's Submissions

3. The Appeal was canvassed by way of written submissions. The Appellants filed submissions dated 30th July 2020. It is urged that the Court erred in law and in fact in apportioning 100% liability to the deceased who was only a passenger in the subject motor vehicle. Citing the case of *Ogol vs Murithi (1985) KLR 359*, it is urged that in a road traffic accident, in the absence of any explanation to show that a respondent was on the balance of probabilities not negligent, a finding of negligence is inevitable once it is shown that the doctrine of *res ipsa loquitor* applies. It is urged that a Defendant should at least show that he is not personally negligent even if the accident remained inexplicable.

4. It is urged that failure by the Respondent to file a defence is proof that the Respondent is in admission of the Plaint in its entirety. It is also urged that an interlocutory judgement is conclusive proof that the Plaintiff had no more to prove in liability with respect to the accident.

The case of *HCC NO. 158 of 2008 Adan Hussein Ali Rahima Dahirvs Geoffrey Ndiku Nutisya and A. H. Hameed Traders* is cited for the proposition that a plaintiff need not prove liability in instances where interlocutory judgement is entered since such judgment is considered final on the issue of liability and that the Plaintiff only needs to prove damages.

5. It is urged that the trial Court failed to appreciate that accidents don't normally occur and/or apply the doctrine of *res ipsa loquitor*. That the deceased boarded the Respondent's motor vehicle expecting to be ferried safely to her destination but that did not happen as the motor vehicle she was travelling in was involved in an accident occasioning her fatal injuries. It is urged that the Appellant's witness in the trial Court testified and tendered a police abstract proving the occurrence of the accident and also establishing that the deceased was a passenger in the motor vehicle. It is urged that the doctrine of *res ipsa loquitor* applies in cases where the deceased or the injured is a passenger in a motor vehicle involved in an accident. It is urged that it was only the driver who was driving the subject motor vehicle who could tell the cause of the accident as he was expected to be careful in view of the fact that he was in control and that a passenger cannot be attributed any negligence for an accident on a vehicle he is not in control of.

6. On loss of dependency, it is urged that the trial Court assessed excessively low damages. That evidence was tendered to the effect that the deceased died at a prime age of 31 years, married with 4 children who were of school going age and that she was a hotel attendant earning about Ksh 1,000 per day i.e about Ksh 30,000/= per month. Citing the case of *Alice O Alukwe vs Akamba Public Road Services & 3 Others (2013) eKLR,* it is urged that a multiplier of 30 years should be used and that a dependency ration of 2/3 would suffice bringing the total amount to Ksh 30,000*29*12*2/3=Ksh 6,960,000/=.

7. On pain and suffering, it is urged that the deceased died a painful death and that since there was no evidence that the deceased was alive for a while, they pray for Ksh 100,000/=. They cite the case of *Premier Dairy Limited vs Amarjit Singh Sagoo & Ano 2013 eKLR* where the Court awarded Ksh 75,000/=.

8. On loss of expectation of life, it is urged that the Defendant failed to controvert the Plaintiff's testimony that the deceased was in good health until the time of his untimely demise. Citing the case of *James Wambura Nyikal & Another vs Mumias Sugar Co. Ltd & Another* he urged that the Court should award Ksh 150,000/= under this head.

9. It urged that the trail Court erred in failing to award special damages despite the same being pleaded in the Plaint. The case of *Jacob Ayiga Maruja & Another vs Simeon Obayo (2005) eKLR* is cited. The Appellant prays for Ksh 155,500/= on account of obtaining limited grant for the estate of the deceased, funeral expenses and other costs.

10. It is urged that the Appellants appreciate the law that he who alleges must prove but that he further reiterates that he pleaded the doctrine of *res ipsa loquitor* and that the Court should have considered that the deceased was a fare paying passenger and that the Respondent could not escape blame after failing to call any evidence on defence. The Appellants cite the case of *Kericho Civil Case No. 88 of 2004, A. Obondo vs Kenya Buse Services & Another (2007) eKLR*.

Respondent's Submissions

11. The Respondent, filed submissions dated 25th August 2020. On liability, the Respondent urges that from the police abstract dated 12th September 2020, the accident involved motor vehicle registration numbers KCC 205Q Toyota Matatu and KCL 205P Isuzu Lorry. That the police abstract does not blame him for the accident and it would be prejudicial and unjust to blame him when the matter is still under investigation by the police. He cites the case of *Farida Kimotho vs Ernest Maina (2002) eKLR* for the proposition that a happening of an accident is not prima facie evidence of negligence but there ought to be affirmative evidence of negligence. He urges that the Appellants did not tender any evidence to link the Respondent to the said accident as required by Section 107 and 108 of the Evidence Act and as per the case of *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR* and the other case of *Kennedy Nyangoya vs Bash Hauliers (2016) eKLR.* He urges that PW1's testimony that the Respondent and/or his driver and/or his employee was negligent was hearsay. It is urged that this witness could not shed light on liability as he was not an eye witness and that the investigating officer was also not called to testify or to shed light on what transpired at the time of the accident.

12. He urges that the Court needs not delve into the issue of whether the documents produced in Court by the Appellant were receipts or invoices or whether they bore stamp duty as such an exercise will be of no value to the outcome of the appeal. He urges that on special damages, although pleaded, there was no receipts to prove that the money was actually expended and the prayer should fail. On the Ksh 155,500/= prayed for as expenses on obtaining limited grant, they urge that the same was not pleaded and the same should fail. On pain and suffering and loss of expectation of life, they urge that the Appellants prayed for damages under the Fatal Accident Act and not under the Law Reform Act and since damages for pain and suffering and loss of expectation of life are awarded under the Law Reform Act, the Appellants are not entitled to it because they did not plead the same. He urges that to make that award, the Court would be pronouncing itself on a claim not made by the parties. He cites the case of *Jospeh Mbuta Nziu vs Kenya Orient Insurance Company Ltd (2015) eKLR* and *Adetoun Oladeji (Nig) Ltd vs Nigeria Breweries PLC S.C. 91/2002.* He however urges that should the Court award damages for pain and suffering, as the deceased succumbed immediately, an award of Ksh 10,000/= will suffice as per *Kenya Railways Corporation vs Samwel Mugwe Gioche (2012) eKLR.* On loss of expectation of life, he urges that Ksh 60,000/= will suffice being the conventional global figure ordinarily awarded by Courts. He cites the case of *Joseph Kahiga Gathii & Paul Mathaiya Kahiga (Suing as the Administrators of the Estate of the late Lydia Wanjiku Kahiga and Elizabeth Murugi Kahiga both deceased) vs World Vision Kenya & 2 Others (2014) eKLR.*

13. On loss of dependency, he urges that the Appellants did not tender any evidence to confirm the deceased occupation and income. He cites the case of *Dainty vs Haji & Another (2005) 1 EA 43*. He urges that if one failed to prove what the deceased earned, it is prudent for the Court to give a global award for loss of dependency. He cites the case of *Mwanzia vs Ngalali Mutua vs Kenya Bus Services (Msa) Ltd & Another*. He urges that the Court adopts the reasoning of the trial magistrate bearing that it is the trial Court that had the advantage of viewing the demeanor of the witnesses.

Issues for Determination

14. The main issues for determination touch on the question of liability although this Court observes that parties have also submitted on quantum. The Court outlines the following three (3) issues for determination: -

i) Whether the failure by the Respondent to file a defence was an admission of liability;

ii) Whether the entry of the interlocutory judgment against the Respondent absolved the Appellants from the requirement of proving liability;

iii) Whether the doctrine of res ipsa loquitor applied to the Appellants' case.

iv) Whether there is reason to disturb the finding of the trial Court on quantum.

Whether the failure by the Respondent to file a defence was an admission of liability.

15. Despite proper service of the Plaint, the Respondent failed to file a defence. Interlocutory judgement was entered against him and the matter proceeded to formal proof hearing. The Appellants urge that failure by the Respondent to file a defence was an admission of liability. To this Court's mind, failure by the Respondent to file a defence does not necessarily mean that he admits the claim. In practice, there are instances when a party will file a defence and admit part of the claim therein. Admission in law requires a positive indicator, either express or by way of implication. This Court finds that the failure by the Respondent to file a defence only means that the matter will proceed for hearing as undefended or unopposed but it does not compel the Court to find in favour of the Plaintiff. To draw a distinction between failure to file a defence and admission, this Court finds that the former results in entry of interlocutory judgment and the latter results in entry of judgment on admission. This Court thus does not find that failure by the Respondent to file a defence amounted to an admission of the claim against him. It only permitted the Court to enter interlocutory judgment against the Respondent with respect to the claim for pecuniary damages as per the provisions of Order 10 Rule 6 of the Civil Procedure Rules.

Whether or not the entry of the interlocutory judgment against the Respondent absolved the Appellants from the requirement of proving liability.

16. According to the Appellant, interlocutory judgment is considered final and once this is entered, the only thing he needs to prove is quantum. The provisions of law with respect to judgments entered in default of appearance or in default of filing defence are found in Order 10 of the Civil Procedure Rules. From the onset, this Court has to make a distinction between judgments based on claims for liquidated sums and claims for pecuniary damages. The twin provisions on these items are Order 10 Rule 4 and Order 10 Rule 6 of the Civil Procedure Rules which provide as follows: -

Judgment upon a liquidated demand [Order 10 Rule 4]

(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail to so appear, the Court shall on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.

Interlocutory Judgment [Order 10 Rule 6]

Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

17. The above provisions notwithstanding, the Court also observes that the rules make provision for hearing upon failure by a Defendant to appear as follows: -

General rule where no appearance entered [Order 10, rule 9.]

Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.

18. The Appellant's claim in the trial Court was not only for pecuniary damages but also for negligence. This means that once interlocutory judgment was entered against the Respondent, the Court was still required to hear the Appellants on the aspect of liability for the claim on negligence. The provisions of Order 10 Rule 6 providing for assessment of damages once interlocutory judgment has been entered indicates that this is the case when the only claim in the matter is for pecuniary damages. Where there is another claim in addition to that of pecuniary damages, the matter will have to be heard for a determination on that other claim as anticipated by Order 10 Rule 9.

19. The Appellants have cited the case of *HCCC No. 158 of 2008 Adan Hussein Ali & Rahima Dahir vs Geoffrey Ndiku Nutisya and A. H. Hameed Traders* for the proposition that once interlocutory judgment has been entered, the Plaintiff doesn't need to prove liability but the Court goes straight to the question of damages. With respect, this Court does not accept that once interlocutory judgment has been entered, assessment of damages is the only thing left for the Court to do in cases of negligence claims. The Court is also not able to take advantage of this decision because the facts in relation to the case were not discussed in detail in the decision. In my view, Order 10 Rule 6 applies in cases of pecuniary damages only. It does not apply where there is a further claim, other than for detention of goods with or without pecuniary damages. When there is some other aspect of the claim besides the claim for pecuniary damages, as a claim for negligence, the Court will

have to consider such a claim on the merit and satisfy itself that the same has been proven through 'formal proof' proceedings before proceeding to assess damages. This is the course adopted in ***Mwatsahu vs Maro,*** Civil Case No. 74 of 1996 (1967) EA 42, a case of pecuniary damages for breach of warranty of title which the Court (Harris J) found the registrar could not enter judgment in default of the defence.

20. The Court does not therefore find that the entry of interlocutory judgement absolved the Appellants from proving liability by way of hearing in Court. This Court thus finds that despite omission by the Respondent to file a defence in the matter, the Court was still required to have the matter heard with respect to liability, in addition to the question of assessment of damages.

21. It is not in dispute that Counsel for the Appellants proceeded on the mistaken interpretation of the provisions of Order 10 Rule 6 that he was not required to call any evidence with respect to the aspect of liability for the claim of negligence. The Court also failed to point out to the Counsel of the need to have the matter heard on liability. The Court and the Appellant's Counsel made use of the term formal proof, which term this Court observes is not defined in the Civil Procedure Rules. The term formal proof has been considered by Emukule J in ***Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR*** and approved by Havelock J in ***Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR*** as follows: -

> ***In the present circumstances however, the Defence was struck out and thus the Defendant does not have the opportunity or privilege to present its evidence and argument. In light of the absence of a Defence on the file, it follows logically, that the matter would proceed to formal proof. What therefore is hearing by formal proof? In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, Emukule, J observed thus;***
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> ***"……. I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."***
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> ***8. Can hearing therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.***

I respectfully agree.

22. To reproduce the record, on 15th June 2018, the Court made the following directions: -

> ***The defendant having been duly served with summons to enter appearance together with suit papers and whereas the same defendant has neither entered appearance nor filed any defence within the stipulated time, interlocutory judgment be and is hereby entered as prayed by the plaintiff through his Advocates M/S Mutembei & Kimathi Advocate. Case to proceed for formal proof.***
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> 23. During hearing, the Appellants only led evidence on quantum of damages. This, with respect, is only assessment of damages rather than formal proof. In their written submissions in the trial Court, Counsel for the Appellants had the following to say concerning liability: -
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> ***You Honour, the defendants have not denied any facts stated in the plaint nor have they contradicted any testimony that has been made in Court. This is sufficient proof that the defendant is not disputing the facts herein. Thus, on the issue of liability, we humbly submit that the defendant is 100% liable.***

24. Clearly, the interpretation of the term formal proof by Counsel for the Appellants was mistaken to be restricted to assessment of damages. In the judgment of the trial Court, the trial magistrate outlined the issues for determination, one of which was liability. This Court observes that even with the interlocutory judgment, liability remained a pertinent issue for determination. Order 15 Rule 2 of the Civil Procedure Rules provides for the framing of issues for determination which this Court finds ought to be done early on in the proceedings before hearing and should not only be left for the Court to do at the point of writing Judgement. Had this been done early enough, the Appellants' Counsel would have taken note of the need to call evidence and to urge on the matter of liability. The requirement of Order 11 Rule (3) (1) of the Civil Procedure Rules *(then in force)* are clear as to the framing of contested and uncontested issues at the pretrial directions.

25. Although parties did not urge it, the Court finds that there was an element of defectiveness in the trial to the extent that the Court overlooked the need to frame issues early on and that the Court failed to identify the contested and uncontested issues and frame the issues for determination in accordance with Order 11 Rule 3 and Order 15 Rule 2 of the Civil Procedure Rules. The Court did not also point out to Counsel for the Appellants the need to call evidence on liability. In the strict adversarial system, this could be taken to be a mistake on the part of Counsel, which as is apparent even in the arguments made on appeal, has not come to his attention. The Court, however, considers that the mistakes of Counsel ought not be visited upon innocent litigants, especially in serious cases such as the instant one involving fatal accident claims. The hearing before the magistrate courts was defective.

26. By analogy to the criminal trial process, a retrial is ordered to correct defects in a trial. This was discussed by the Court of Appeal in ***Opicho vs R, Criminal Appeal No. 208 of 2008 (2009) KLR, 369*** where P. K Tunoi *(as he then was)* P. N Waki & A. Visram JJ A held as follows: -

> ***"As we stated earlier, we have no intention of analyzing the evidence on record and will not therefore discuss the submission by Mr. Githui whether the evidence of the child was corroborated. We must first discuss whether, in view of the transgression of procedure evident in the trial, the appellant ought to be retried before another court. If so, any analysis of evidence on record may well prejudice that retrial. Should we order one?***
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> ***"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or of the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."***
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> ***That was stated in Fatenhali Manji vs The Republic (1966) EA 343. In many other decisions of this Court, it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See Muiruri v Republic (2003) KLR 552, Mwangi v Republic (1983) KLR 522, and Bernard Lolimo Ekimat v Republic, Criminal Appeal No. 151 of 2004 (UR).***

For procedural defects of the hearing in the civil proceedings before the trial Court hearing, this Court will consider whether to order a retrial.

27. In the not too dissimilar case of personal injury arising out of motor cycle accident, the Supreme Court of Canada in the case of ***Clements v. Clements, 2012 SCC 32, [2012] 2 S.C.R. 181*** ordered for a retrial in a case where the trial had proceeded based on the wrong interpretation of the law on the tort of negligence. In the said case, despite finding that the 'but for' test had not been met, in that it was not established that the cause of the accident was attributed to the omission by the Defendant in his duty of care to the Plaintiff, the trial Court went ahead and found that the Defendant was negligent. In a majority decision of McLachlin C.J. (Deschamps, Fish, Abella, Cromwell, Moldaver and Karakatsanis JJ. concurring) the Court held as follows: -

> ***[52] Having rejected the defendant's expert evidence that the accident would have happened regardless of the excess speed and excess weight, the judge was left with the fact that while there was no scientific proof one way or the other, "[o]rdinary common sense" supported the causal relationship between the injury and the excessive speed and weight (paras. 63-64). He noted, at para. 64, that the motorcycle's manual itself stated that "[h]igh speed increases the influence of any other condition affecting stability and possibility of loss of control", and that the defendant agreed the speed at which he was travelling and the load he was carrying were factors that contributed to the accident (para. 33). Finally, the trial judge used language tantamount to finding actual "but for" causation, stating (at para. 67):***
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> ***I conclude on all of the evidence that the defendant's breaches of duty materially contributed to the injuries suffered by the plaintiff as a result of the accident. In short, her injuries were the result of her husband driving too fast with too heavy a load when his rear tire unexpectedly deflated. Causation is therefore established within the parameters discussed by the Supreme Court of Canada in Athey and Resurfice. [Emphasis added.]***
>
> ***[53] We cannot be certain what the trial judge would have concluded had he not made the errors I earlier described. All that can be said is that the parties did not receive a trial based on correct legal principles. In my view, the appropriate remedy in these circumstances is an order for a new trial.***
>
> ***[54] I would allow the appeal and order a new trial. The appellant will have her costs in this Court. The orders for costs below are set aside.***

28. In the present case, this Court finds that the hearing at the trial Court proceeded, based on a mistaken view, now corrected by this Court, that it was not necessary to call evidence on liability. Despite knowing that this was required, the trial Court failed to bring this to the Appellants' Counsel attention. The mistake in failing to call evidence, was primarily one of Counsel in his misinterpretation of the provisions of Order 10 Rule 6 on entry of interlocutory judgment and his failure to take note of the provisions of Order 10 Rule 9 requiring hearing in all other undefended claims.

29. The Court was, however, fully aware of the correct procedure as seen in the judgment where one of the issues identified for determination was on liability. It is this Court's view that the interests of justice demand a retrial. Section 78 (1) (e) of the Civil Procedure Act provides for the powers of the Court sitting on appeal as follows: -

> ***78. Powers of appellate court***
>
> ***(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—***
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> ***a) to determine a case finally;***

b) to remand a case;

c) to frame issues and refer them for trial;

d) to take additional evidence or to require the evidence to be taken;

e) <u>to order a new trial.</u>

30. The Court will, therefore, order a retrial in the matter on the ground in the language of ***Clements vs Clements*** that ***"the parties did not receive a trial based on correct legal principles."***

Whether the doctrine of res ipsa loquitor applied to the Appellants' case.

31. The Appellant faulted the trial Court for failing to apply the doctrine of *res ipsa loquitor* in the matter. The doctrine of *res ipsa loquitor* does not have a blanket application to all negligence claims. The first appellate Court would ordinarily have a duty to scrutinize the matter and determine whether the doctrine is applicable based on the particular set of facts presented before it.

32. However, this Court will refrain from making a determination on this issue on whether the doctrine applied in the Appellants' case in view of the order for retrial already made, and in order to avoid embarrassing the trial Court that will hear the retrial.

Whether there is reason to disturb the finding of the trial Court on quantum.

33. Parties submitted at length on the issue of quantum. This Court will again refrain from making any findings on quantum in view of the order for retrial.

Conclusion

34. The deceased persons represented by the Appellants were involved in a fatal accident involving motor vehicle registration number KCC 835Q which was owned by the Respondent. They brought a claim for negligence and damages against the Respondent in the trial Court. The Respondent failed to file a defence in the matter and interlocutory judgement was entered against him. The Appellants proceeded with the matter on assessment of damages under the mistaken belief that they were not required to call any evidence on liability for the claim of negligence.

35. This Court finds that the failure by the Respondent to file a defence did not amount to an admission of the negligence claim in the Plaint. It only meant that the matter could proceed to formal proof as undefended cause. This Court further finds that the provision of assessment of damages pursuant to entry of interlocutory judgment with respect to a claim for pecuniary damages under Order 10 Rule 6 of the Civil Procedure Rules did not absolve the Appellants from their duty to prove liability. A reading of Order 10 Rule 9 reveals that a Plaintiff is required to set down his matter for hearing with respect to all other claims even when the Defendant has failed to file a defence or to enter appearance. The claim by the Appellants was twofold. The first part was on liability for negligence and the second part was on quantum of damages. The claim on liability qualifies in the category of *'all other claims'* required to have been set down for hearing as per Order 10 Rule 9 of the Civil Procedure Rules.

36. The mistake of failure to call evidence on liability is attributed primarily to the Counsel for the Appellants within the context of the adversarial system in Kenya. The trial Court had a duty to hold a pretrial conference under Order 11 and identify and frame the issues pursuant to Order 15 Rule 2 of the Civil Procedure Rules and bring to the Appellants' attention the need to prove liability. This Court finds that the circumstances of the case of the motor vehicle accidents where six passengers died and the interests of justice require the Court to order for a retrial pursuant to Section 78 (1) (e) of the Civil Procedure Act.

Orders

37. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. The Appellants' appeal is allowed to the extent that the Judgement of the trial Court is set aside.

ii. There shall be a retrial of the Appellants' case before the Senior Resident Magistrate's Court at Githongo, differently constituted.

iii. The trial Court files shall be returned to the trial Court and the parties are directed to appear before the Court on 7th October 2021 for directions on the retrial.

iv. There shall be no order as to costs.

DATED AND DELIVERED ON THIS 30TH DAY OF SEPTEMBER, 2021.

EDWARD M. MURIITHI

<u>JUDGE</u>

Appearances

M/S Mutembei & Kimathi Advocates for the Appellants

M/S Kinyanjui Njuguna & Co. Advocates for the Respondent