REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 39 OF 2020

1. NETAH NJOKI KAMAU

2. MARTIN WANJUGI NJOROGE

***(Suing as the administrators of the estate of* Peter Njoroge Wanjugi Deceased).....APPELLANTS**

VERSUS

ELIUD MBURU MWANIKI.....RESPONDENT

(Appeal from the judgment and decree of the of the Senior Principal Magistrates Court

at Ruiru C.A. Otieno Omondi, SPM dated 25th February, 2020

in the Civil Suit No. 220 of 2019)

JUDGMENT

1. ***NATAH NJOKI KAMAU*** and ***MARTIN WANJUGI NJOROGE, (***the appellant) filed a suit before the Ruiru Magistrates court seeking damages for the fatal injuries of ***PETER NJOROGE WANJUGI (DECEASED).*** By that claim, the appellants alleged that the deceased was knocked down by vehicle registration Number KBP 012J. The appellants pleaded that the accident was caused by the negligence of ***ELIUD MBURU MWANIKI***, the respondent. The appellants set out in details the particulars of the respondent's negligence which included, amongst others, driving the vehicle without due regard to other road users; driving at excessive speed; and failing to stop, give way, slow down and/or swerve so as to avoid the accident. The appellants also pleaded that they would rely on the doctrine of *re ipsa loquitor.*

2. The respondent filed a defence to that claim. The respondent denied the allegations of negligence on his part but alleged in that defence that the accident was caused the deceased's negligence. The respondent particularised the deceased's alleged negligence, amongst others, as failing to use the designated pedestrian path; walking on the pathway of the subject motor vehicle; and dangerously exposing himself to danger. The respondent in that defence also relied on the doctrine of *volenti non fit injuria.*

3. At the trial, the 1st appellant adopted her written statement. The respondent did not adduce evidence. The appellants' claim was dismissed with costs by the trial court by its judgment dated 25th February, 2020. This appeal is against that dismissal.

4. This is a first appellate court. An appeal before this court is by way of retrial. The principles of such an appeal is that this Court must reconsider the evidence, evaluate it and draw its own conclusion. Those principles are applied with the caution that this Court did not see nor hear the witnesses as they testified: See the case ***SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123.***

5. The appellants filed twelve grounds of appeal. In those grounds the appellant stated that the trial court erred in its judgment when the appellants' evidence was uncontroverted; it erred in its finding that the appellants had not proved negligence against the respondent; it erred in that it failed to find that the respondent's defence was unsupported by evidence; and appellants contended that the trial court failed to apply the doctrine of *res ipsa liquitor*, as pleaded.

6. The trial court by its judgment made a finding that the appellants had failed to prove negligence of the respondent and this was in view of the denial in the defence.

ANALYSIS

7. The respondent filed a defence denying appellants' allegation of his negligence having been the cause of the accident. At the hearing, the respondent was required, as much as the appellants' were required, to adduce evidence to prove their pleadings. Pleadings are mere allegations. Pleading do not prove an allegation which can lead to the entry of judgment unless the allegation/the claim is undefended and is a claim for liquidated demand. In the case before the trial court, the claim was for damages due to alleged negligence of the respondent.

8. The respondent did not at all call evidence to prove the defence, he raised denying negligence on his part and instead lay the blame on the deceased. It follows that the respondent's defence remained mere allegation. There has, indeed been many decided cases in this vein. On such case is, ***NORTH END TRADIGN COMPANY LIMITED (Carrying on the Business Under the Registered Name of) KENYA REFUSE HANDLERS LIMITED VS. CITY COUNCIL OF NAIROBI (2019) eKLR*** thus:-

> ***"18. In EDWARD MURIGA THROUGH STANLEY MURIGA VS. NATHANIEL D. SCHULTER Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.***
>
> ***19. In the case of MOTEX KNITWEAR LIMITED VS. GOPITEX KNITWEAR MILLS LIMITED Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of AUTAR SINGH BAHRA AND ANOTHER VS. RAJU GOVINDJI, HCCC No.548 of 1998 appreciated that:-***
>
> > ***'Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.'"***

9. Similarly, the Court of Appeal in the case ***EDWARD MARIGA through STANLEY MOBISA MARIGA VS. NATHANIEL DAVID SHULTER & ANOTHER [1979] eKLR*** said:-

> ***"The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother."***

10. The trial court erred to have considered the respondent's defence when it indeed remained unproved. The respondent's defence was not available for consideration having not been proved by evidence. This is made further clear in the case ***CMC AVIATION LTD VS. CRUSAIR LTD (NO.1) (1987) KLR 103*** as follows:-

> ***"The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."*** *(Emphasis mine)*

11. The appellants, however had the onus of proving their case against the respondent whether or not the respondent adduced evidence. This is because appellant's case not being a liquidated claim ought to have been proved. Further this is because this was a defended claim and there was no interlocutory judgment entered against the respondent since the respondent had filed his memorandum of appearance and defence within the requisite period.

12. The appellants as correctly stated by the trial court in its judgment failed to meet the standard of proof with regard to evidential burden. The appellants were required in order to succeed in their claim, to discharge an evidential burden in relation to the fact in the issue. The fact in issue was which of the two parties, the deceased or the respondent was negligent resulting in fatal accident. Lord Nichol of the House of Lords in the case ***RE H AND OTHERS (MINORS) (SEXUAL ABUSE: STANDARD OF PROOF) (1969)*** stated the Civil standard of proof to be:-

> ***"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."***

13. In the case ***MILLER V. MINISTER OF PENSION (1947) ALL ER 373*** the civil standard of proof was also said to be:-

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

14. The 1st appellant at the trial adopted her written witness statement. That witness statement was in following terms:-

> ***"I am a co-administrator of the estate of the deceased. I recall it was on the 23rd September, 2018, I was at home at around 11.57 pm. I was contacted by a police man who asked me whether I knew*** *Peter Njoroge Wanjugi* ***and I confirmed that I was his wife. He then asked me to go the following day to Thika Level 5 (sic) because my husband was involved in a road traffic accident. We went to Thika Level 5 (sic) the same day together with our family members but we did not find him. We then went to the mortuary where we positively identified him. We were then given the contact of the police officer who had brought him to the mortuary.***
>
> ***We contacted the police man who explained to us how the accident happened. We later proceeded to Juja Police Station the same night and were shown the vehicle which had knocked down the deceased. The vehicle was a Toyota Premio of registration number KBP 012J.***
>
> ***The following day we went back to Juja Police Station where we were escorted to the scene of the accident.***
>
> ***We then started burial preparations and buried the deceased on 2nd October, 2018. We spent around Kshs.150,000/= for the same.***
>
> ***I pray that the court awards the estate of the deceased damages under the Law Reforms Act and fatal Accidents Act as stated in the plaint. That is all I wish to state for now."***

15. The above was the only evidence adduced on behalf of the appellants.

16. A similar case to this appeal was decided by the Court of Appeal and the holding of the Court of Appeal in that case is applicable to this case. That case is ***MARY WAMBUI KABGUO VS. KENYA BUS SERVICES LIMITED (1997) eKLR***. The Court of Appeal stated:-

> ***"The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. "***

17. The appellants did not state, as can be seen in the witness statement reproduced above, that the accident which resulted in the death of the deceased was caused by negligence of the respondent. Even the police abstract which the appellant produced in evidence indicated that the police were yet to conclude their investigation. The police, it would also seem, did not blame the respondent for the accident.

18. The appellants faulted the trial court for dismissing their claim in the light of the respondent not calling any evidence. What the appellant did in laying the failure of their case on the trial court was that they failed to appreciate that they bore the burden of proof to prove the allegations in their pleadings. The Court of Appeal in the case ***CHARTERHOUSE BANK LIMITED (UNDER STATUTORY MANAGEMENT VS. FRANK N. KAMAU (2016) eKLR*** had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-

> ***"We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."***

19. Appellants sought to rely on the doctrine of *re ipsa loquitor*. The appellants, in the evidence adduced that the trial court did not in any way show that the causal of the accident was in any way attributable to the respondent's actions. There was no evidence to the effect whether the accident occurred in or outside the road. The operation of the doctrine of *rep ipsa loquitor* depends on reasonable evidence of negligence being adduced by the claimant, here the appellants'. In other words the doctrine did not shift the burden of proving negligence from the appellants. The Canadian case, which is persuasive to this Court, ***FONTAINE VS. BRITISH COLUMBIA (OFFICIAL ADMINSITRATOR) 1998 CanLII 814 (SCC) (1998) ISCR 424*** considered *res ipsa loquitor* and stated:-

> ***"19 For*** *res ipsa loquitur* ***to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the factual circumstances of the case. As described in*** *Canadian Tort Law (5th ed. 1993), by Allen M. Linden, at p. 233,* ***"[t]here are situations where the facts merely whisper negligence, but there are other circumstances where they shout it aloud."***

21 Where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone. *K. M. Stanton in The Modern Law of Tort (1994),* ***stated at p. 76:-***

> "*Res ipsa loquitur* ***only operates to provide evidence of negligence in the absence of an explanation of the cause of the accident. If the facts are known, the inference is impermissible and it is the task of the court to review the facts and to decide whether they amount to the plaintiff having satisfied the burden of proof which is upon him." …***
>
> ***'Since various attempts to apply*** *res ipsa loquitur* ***have been more confusing than helpful, the law is better served if the maxim is treated as expired and no longer a separate component in negligence actions. Its use had been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. The circumstantial evidence that the maxim attempted to deal with is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. If such a case is established, the plaintiff will succeed unless the defendant presents evidence negating that of the plaintiff.'"***

20. For the appellants to successfully rely on the doctrine of *res ipsa loquitor* they should have established on a balance of probability a prima facie case of negligence against the respondent.

21. The appellants at trial fell in the same error as did the respondents. The appellants did not give evidence to support the allegations of negligence in their plaint and those allegations in their plaint therefore remained unproved.

DISPOSITION

22. It is in view of the above that I find the appellants' appeal is without merit. It is dismissed with costs.

JUDGMENT, SIGNED DATED AND DELIVERED AT KIAMBU THIS 28TH DAY OF OCTOBER, 2021.

MARY KASANGO

JUDGE

CORAM:

COURT ASSISTANT: NDEGE

FOR APPELLANT : MR. MACHARIA

FOR RESPONDENTS: MR. GITARI H/B MR. MBIGI

COURT

JUDGMENT DELIVERED VIRTUALLY.

MARY KASANGO

JUDGE