REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 393 OF 2018

WASHINGTON ONYALO

JARED OJWANG

(suing as administrators at litemof the estate of **MELVIN ACHIENG** - Deceased)**.....APPELLANTS**

VERSUS

AMIT SURENDRA RUPARELIA.....1ST RESPONDENT

NIMROD AFRICA LTD.....2ND RESPONDENT

(Being an appeal from the Judgment delivered on 17th August, 2018 by Hon. M.W. Murage

(Resident Magistrate) Milimani Commercial Courts in CMCC No. 6000 of 2015)

JUDGMENT

1. The suit herein was instituted by way of the plaint dated 31st July, 2015. The claim was for damages arising following the death of the deceased in a road traffic accident involving motor vehicle registration No. KBB 999G on 31st July, 2015. It was pleaded that the deceased was a pedestrian walking along Mombasa Road near City Cabanas when she was hit by the said motor vehicle which was being driven by the 1st Respondent and owned by the 2nd Respondent. The accident was blamed on the negligent manner that the motor vehicle was allegedly being driven at the material time. The Appellant gave the particulars of negligence and further relied on the doctrine of *res ipsa loquitor*.

2. The claim was denied as per the Respondents statement of Defence dated 27th November, 2015.

3. During the hearing of the case, the Respondents did not attend court. The case proceeded *exparte*. The trial court found the Appellants' case not proved on a balance of probabilities and the same was dismissed with no orders as to costs.

4. The Appellants were aggrieved by the said judgment and filed this Appeal. Eight grounds of Appeal were raised. The same can be summarized as follows:

1. That the trial court erred in finding that there was no proof of ownership of motor vehicle registration No. KBB 999G.

2. That the judgment of the trial court is against the weight of the evidence.

3. That the trial court failed to consider the Appellant's submissions.

5. The Respondents did not participate in the Appeal. The Appellants filed written submissions which I have considered.

6. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:

> **"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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

7. PC Hussein Mohamed (PW1) testified herein. His evidence was that the accident was reported as a fatal hit and run accident and the entry was made in the OB. That the motor vehicle in question was assessed and it was established that the driver was the 1st Respondent, Amit Surendra Ruparelia and that the motor vehicle was damaged at the front bumper, left headlight and the left indicator. PW1 further produced the police abstract as an exhibit. The police abstract reflects the 1st Respondent was the owner of the motor vehicle. It is noted that the 1st Respondent is sued as the driver of the motor vehicle, not as the owner. There is therefore no evidence on record regarding the ownership of the motor vehicle or who the driver was. The OB referred to was not produced as an exhibit herein.

8. Although the Appellants' counsel in his submissions referred the court to the evidence tendered through the documents filed herein, the copy of Records from Kenya Revenue Authority though filed as part of the Appellant's documents was not produced as an exhibit nor any reference made of the same through the witnesses called to testify. The Appellants' case is therefore distinguishable from the authorities cited by the counsel for the Appellants.

9. Section 35 (2) of the Evidence Act which deals with the admissibility of documents is not of any assistance to the Appellants as the OB and other documents alluded to were not produced as exhibits herein. The police abstract produced reflects that the accident is still pending under investigations. The police abstract does not blame the accident on either of the parties. In any event, the police abstract failed to identify the 1st Respondent as the driver of the motor vehicle and failed to identify the 2nd Defendant as the owner thereof.

10. **The Court of Appeal in Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others (2015) eKLR** answered the question of documents not produced as exhibits as follows:

> **How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record… If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.**

11. The Appellants vide the application dated 15th August, 2019 sought to adduce additional evidence by calling the investigating officer and an eye witness. The said application was dismissed on 19th December, 2019.

12. Washington Onyango (PW2) testified on the question of damages. The Appellants have not complained about the quantum of damages that the trial court would have awarded if the case had succeeded.

13. Section 107 and 108 of the Evidence Act Cap 80 provides as follows:

Section 107 (1):

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"**

Section 108

The burden of prove in suit or proceedings lies on that person who would fail if no evidence at all were given on either sides.

The Appellant failed to adduce evidence in support of the particulars of negligence stated in the plaint.

14. 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… 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."**

15. In the case at hand, the accident is said to have occurred on the road. There is no credible evidence from which this court can infer negligence on the Respondents' side. The accident herein occurred on the road and it can be due to the negligence of either of the parties herein. This is not a case of where the doctrine *of res ipsa loquitor* is applicable. The accident herein does not speak for itself.

16. With the foregoing, I find no merits in the Appeal and the same is dismissed.

Dated, signed and delivered at Nairobi this 21st day of October, 2021

B. THURANIRA JADEN

JUDGE