**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 230 OF 2017**

**SIDI KAZUNGU KARISA [Legal representative of the estate of**

**PHILIP KAHINDI KAZUNGU- Deceased].....APPELLANT**

**-VERSUS-**

**KHATIBU MWINYIHAJI.....1ST RESPONDENT**

**KHATIBU KHATIBU.....2ND RESPONDENT**

**KANGA MARK MARIKO.....3RD RESPONDENT**

**(Being an Appeal for the whole Judgment of the Chief Magistrate's Court at Mombasa by Hon. J. M Nang'ea delivered on 19th September 2017 in Mombasa CMCC No. 228 of 2016)**

**Coram: Hon. Justice Reuben Nyakundi**

**Kanyi & Co Advocates for the Appellant**

**Kairu & McCourt Advocates**

**JUDGEMENT**

1. This appeal principally relates to the dismissal of the Appellant's claim in **Mombasa CMCC No. 228 of 2016** for want of liability on the part of the Respondents' herein by a judgement delivered on 19th September 2017.

2. By Plaint dated 4th May 2015, the Appellant filed suit on behalf of the estate of **Philip Kahindi Kazungu- deceased** who was her son. She prayed for general and special damages, the costs of the suit and interest. It was her averment that the deceased was driving a 'tuk tuk' registration number KTWA 503E in Mombasa town when careless and negligent driving on the part of the driver of a matatu motor vehicle KBL 813H, the 3rd Respondent herein, caused a collision between the two vehicles. The 2nd Respondent was averred to being the registered owner of the vehicle driven by the 3rd Respondent in the course of his employment. The Appellant had further testified that it was her younger son that gave her the information about the occurrence of the accident after which she had proceeded to Coast General Hospital where she identified the deceased's body. The Appellant testified that her son was unmarried and had no children but would assist her financially. It was averred that the institution of the suit at trial on behalf of the deceased had been enabled by the Appellant obtaining Grant of Letters of Administration ad Litem at a cost of Ksh. 10,000/- in legal fees.

**3. Police Constable Sylvester Wabwire** of Port Police station testified on behalf of the Appellant. He produced the police abstract, confirming he was not the investigating officer and that the investigating officer had proceeded on transfer.

4. The Respondents' had filed a joint defence, denying all the Appellant's claims and putting her to strict proof thereof. According to them, if any accident occurred, it was caused purely by the deceased's failure to apply brakes and causing his vehicle to veer off its lane. The Respondents urged the trial court to dismiss the suit with costs. At trial, the defence did not call any witnesses.

5. Upon consideration of the submissions and the evidence, the learned trial magistrate found on a balance of probability that the accident had indeed occurred and was the cause of the deceased's death. This conclusion was reached even in the absence of an eye witness to the accident as the trial magistrate placed reliance on a police abstract that corroborated the Appellant's case as to the fact of the occurrence of

the collision. The trial magistrate also noted the post mortem report and certificate of death both produced in evidence showed the death followed a road traffic accident.

6. Based on the records from KRA, the learned trial magistrate concluded that the 2nd Respondent was the registered owner of the motor vehicle registration number KBL 813H and that the there was no evidence linking the 1st Respondent to the said vehicle's ownership.

7. The learned trial magistrate then went on to find that the Appellant had failed to prove the 3rd Respondent's negligence on a balance of probability. In arriving at this conclusion, it was noted that no eye witness testified, the investigating officer in the accident did not appear in court and neither was the investigation file showing the 3rd Respondent's culpability availed. Further, it was noted that as the Appellant did not plead the doctrine of *"Res ipsa loquitor"*, she could not avail herself to its benefit.

8. It is the foregoing decision that has provoked the instant appeal, brought by memorandum dated 3rd October 2017 an on the following grounds:

**a. THAT the learned magistrate erred in law and in fact by misapprehending the evidence presented before him.**

**b. THAT the learned magistrate erred In law and In fact in failing to find the Respondents culpable in negligence.**

**c. THAT the learned magistrate erred in law and in fact by misapprehending or ignoring the evidence adduced by the parties.**

**d. THAT the learned erred In law by misapprehending and/or misconstruing the legal principle of "Res Ipsa Loquitor".**

**e. THAT the learned magistrate erred in law and fact in dismissing the Appellant's suit**

**f. THAT the learned magistrate erred in law and in fact in failing to award the Appellant costs.**

9. The orders sought on appeal are:

**a. THAT the judgement made on the 19th September, 2017 be set aside.**

**b. THAT this case be heard afresh before a different magistrate;**

**c. THAT in the alternative, this Honourable Court does take up the submission of the parties, and/or reassess the evidence and issue a judgement thereon.**

**d. THAT the costs of this appeal be paid to the Appellant by the Respondents.**

**Submissions on Appeal**

10. The Appellant's counsel filed submissions dated 30th May 2018 while the Respondents' submissions are dated 3rd September 2019.

11. Submitting on the ground that the learned magistrate erred in law and in fact by misapprehending the evidence presented before him, it is argued that the Appellant presented a police abstract from Port Police Station dated 26th August, 2015, Though the Appellant failed to secure the attendances of the investigating officers, **P.C. Wario** and **P.C. Muli** who were on transfers, the abstract itself carried serious claims of culpability against the Respondents. It is submitted that despite concluding that an accident occurred, the trial magistrate failed to consider the abstract setting a prima facie case against the respondents. Reliance is placed on **Rahab Micere Murage[suing as a Representative of the Estate of Wakiini Murage] vs. Attorney General & 2 Others [2015] eKLR.**

12. It was argued that the trial magistrate overlooked the fact that the 3rd Respondent was found culpable for the accident by the investigating officers.

13. Relying on the definition of a prima facie case recognised in **Mrao Ltd vs First American Bank of Kenya & 2 others,** it was submitted the exhibits produced in court create a prima facie case against the Respondents who chose not to respond. That per **Section 112 of the evidence Act Cap, 80,** the exhibits implicating the Respondents shifted the burden of proof to then.

14. Citing **Nandwa vs Kenya Kazi Ltd CA 91/1987 Mombasa,** it was submitted that the learned trial magistrate misapprehended the application of doctrine of res ipsa loquitor where the Plaintiff had not pleaded it.

15. Advocate for the Respondents' submits that none of the two (2) witnesses called by the Appellant adduced any evidence whatsoever on liability for the accident as neither was present at the scene of the accident so none of them could purport to testify on the issue occurrence, circumstances and/or liability for the accident.

16. It is further submitted that the Appellant failed to discharge the burden of proof placed upon her by law and as such, failed to prove negligence and/or fault on the part of the driver of the subject motor vehicle. The learned trial magistrate therefore rightly dismissed the case entirely with costs to the Respondent.

17. Counsel submits that the onus to prove any assertion lays on he who alleges. PW2 indicated to Court that he was not the Investigating Officer and that he was not at the scene of the accident. He was merely relaying what was in the OB. He could not establish whether investigations were completed' to determine who was liable.

18. The Respondents' Advocate submitted that the burden of proof lay with the Appellant to show who the cause of the accident was and this burden did not shift at any time. Reference is made to Sections 107, 108 and 109 of the Evidence Act. This position is buttressed with a litany of case law not least among them: **East Produce (K) Limited vs. Christopher Astiado Osiro Civil Appeal No. 43 of 2001; Evans Otieno Nyakwana vs. Cleophas Bwana Ongaro [201] eKLR; Mary Wambui Kabugu vs. Kenya Bus Services Limited, Civil Appeal No. 195 of 1995; V.O.W vs Private Safari (EA) Limited [2010] eKLR; Eunice Wayua Munyao vs. Mutilu Beatrice & 3 Others [2017] eKLR; Mombasa Maize Millers Limited vs. Peter Wekhoba Ouma [2019] eKLR; Isaac Michael Okenye vs. Lacheka Lubricants Limited & Another [2017] eKLR; Jamal Ramadhan Yusuf & Another vs. Ruth Achieng Onditi & Another [2010] eKLR** and **Treadsetters Tyres Limited vs. John Wekesa Wepukhulu [2010] eKLR**

19. It is further submitted that the standard of proof in civil cases is proof on a balance of probabilities. For a definition of what exactly amounts to a balance of probabilities reference is made to **Ignatius Makau Mutisya vs. Reuben Musyoki Muli (2015) eKLR and Grace Kanini Muthini vs. KBS & Another Nyeri H.C. Miscl Appl. No. 270 of 2000.**

**Analysis and Determinations**

20. This being a first appeal, I am duty bound to follow the principles in **Peters vs Sunday Post Limited [1958] EA 424**. This duty is outlined in **Michael Murage v Dorcas Atieno Ndwala [2019] Civil Appeal 390 of 2017 eKLR** in the following manner:

> **'a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
>
> **b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**
>
> **c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.'**

21. I have re-evaluated the evidence on the record at the onset of this judgment. The issue for determination is whether the Honourable trial magistrate erred in failing to find the Defendants/Respondents liable and hence dismissing the suit.

22. On liability, the trial magistrate expressed himself thus:

> **"As already observed no eye witness to the accident testified. Notwithstanding, the police abstract report admitted in evidence corroborates the plaintiff's case as in the fact of occurrence of the collision. The deceased's post mortem report and certificate of death produced in evidence also indicates that the death followed a road traffic accident.**
>
> **I find, on a balance of probability that the subject accident occurred and was the cause of the deceased's death. Regarding the ownership of the accident vehicle registration KBL 813H, both the records from KRA and the abstract report show the owner as the 2nd defendant. The latter has not given evidence in rebuttal. It is found on a balance of probability that he was the owner of the on the date of the accident There is no evidence that the 1st defendant also owned the vehicle in any capacity.**
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> **Concerning the claim of the 3rd defendant's negligence, no eye witness testified and the investigating officer didn't also appear in court. Plaintiff Witness 2 told the court that a decision was made to charge the 3rd defendant for causing the death by careless driving. The basis for the decision is not however given as the investigation file or other evidence gathered to show the 3rd defendant's culpability was not tendered. The court further notes that the plaintiff didn't plead the doctrine of 'Res ipsa loquitur' to avail herself to its benefit. Whereas the defendants failed to offer evidence, the onus was on the plaintiff to first prove 'prima facie' negligence on their part before they offer evidence in rebuttal.**
>
> **I accordingly find that the plaintiff fail to prove the 3rd defendant's negligence on a balance of probability. It is so held. Consequently, none of the defendants is found liable herein…"**

23. When the question of determination of liability in a road traffic accident arose in **Michael Hubert Kloss & another v David Seroney & 5 others [2009] eKLR,** the Court of Appeal opined:

> **"The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681** as follows:
>
> > **"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it……"The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have**

**happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.""**

24. The doctrine of *res ipsa loquitur* is discussed at length in **Embu Public Road Services Ltd. v Riimi [1968] EA 22** where the Court of Appeal held:

> **"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant…The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."**

25. I agree with the interpretation of the above doctrine in **Jackson Kimani Ngugi (Suing as the legal representative of the estate of Josephat Mburu Gitau-Deceased) v Jackton Ayieko Aruko & another [2020] eKLR** that a mere reliance on the (*res ipsa loquitor)* doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

26. In **Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392 at 393 B** the Court opines:

> **"The application of the doctrine of res ipsa loquitur, which was 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 of negligence, 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 were sufficiently known the question reached to be one where the facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be inferred."**

27. Applying the authorities recited above to the facts of the instant case, the learned trial magistrate found, rightly so in my view, that an accident had indeed occurred which accident caused the death of the deceased. Sound too is the finding on the ownership of the motor vehicle registration number KBL 813H where the learned trial magistrate found the 2nd Respondent to be the registered owner of the motor vehicle involved in the accident.

28. However, on liability, the trial magistrate bases his finding on the lack of an eye witness placing the 3rd Respondent at the scene and the fact that the doctrine of *res ipsa loquitor* is not pleaded. This respectfully, is a misapprehension of the law and it is on this limb that the learned trial magistrate fell into error. Once the trial court had found merit in the Plaintiff's assertion that on the basis on the evidence adduced, an accident had occurred, it fell upon it to consider the Defendants explanation for the accident. In order to avoid liability at this point, the Respondents ought to have showed either that there was no negligence on their part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of their part; or that the accident was due to the circumstances beyond their control. In my view, no such explanation was forthcoming from the Defendants and hence they ought to have been found liable.

29 Having determined as much, the logical conclusion is that this Court finds it necessary to disturb the trial Court's exercise of discretion on its finding on liability.

30. In the upshot, this Court allows the appeal filed by memorandum dated 3rd October 2017 in the following terms:

**a. The judgment dated 19th September 2017 in Mombasa CMCC No. 228 of 2016 is hereby set aside.**

**b. Mombasa CMCC No. 228 of 2016 reinstated and shall be heard under a new magistrate.**

**c. Costs of the Appeal to the Appellant**

31. It is so ordered.

**DATED,SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MARCH 2020.**

**…….**

**R. NYAKUNDI**

**JUDGE**

**In the presence of**

1. Mr. Maugu for the appellant