REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 276 OF 2017

DORITH SHILWATSO JACOB (suing as an administrator/

legal representative of the estate of the late

ABSOLOM CHINGWA (DCD).....APPELLANT

VERSUS

BAJABER HAULIERS LIMITED.....RESPONDENT

(An appeal arising from the Judgment of the Hon. J. N. Nang'ea Chief

Magistrate delivered on the 24th November, 2017 in Mombasa Civil Suit No. 2207 of 2015)

CORAM: Hon. Justice R. Nyakundi

Abok Adhiambo Advocates for the Appellant

Kiarie Kariuki Advocates for the Respondent

JUDGMENT

The issue in this appeal revolves around the dismissal of the claim filed by the appellant in negligence seeking damages against the respondent.

In the Judgment of the court presided over **Hon. Nang'ea**, the appellant claim fell flat on his face for reason of not adducing evidence on causation and blame worthiness on the part of the respondent.

Being aggrieved with the dismissal order a Memorandum of Appeal set out the following grounds for consideration:

> ***(a). That the Learned Magistrate erred in Law and fact by dismissing the appellant's suit against the weight of evidence on record.***
>
> ***(b). That the Learned Magistrate erred in Law and fact by determining on that prima facie basis that there was no evidence to proof negligence.***
>
> ***(c). That the Learned Magistrate erred in fact and in Law in failing to award the requisite quantum awardable contrary to the weight of evidence on record.***

Appellant's submissions

It was the appellant counsel submissions that pursuant to the principles laid down in **Kirugi & another v Kabiya & 3 others {1987} KLR 347, Treadsetters Tyres Ltd v John Wekesa Wepukhulu Civil Appeal No. 57 of 2006 {2010} eKLR**

That the burden of proof which rests with the appellant established the elements of the claim on a balance of probabilities.

The appellant counsel further argued, the process of adjudication in a civil claim particularly traffic accident claims, there is a nexus between the accident and ultimate impact on the victim.

According to counsel, the dicta in the case of **Rosemary Mwasya v Steve Tito Mwasya & Another CA NO. 100 OF 2017 {2018} eKLR** informs the position of the appellant predicament. In this authority the Court of Appeal held interalia:

> ***"That even if the abstract would have indicated that investigations were complete and blame for the accident contributed either wholly or in part to any 3rd party, that alone would not have absolved the appellant from liability, in the absence of any successful third party proceedings being taken out against the owner, agents and or driver of KBH 358C, on one hand, and on the other hand, production of supportive evidence to exonerate herself from any blame for causation of the said accident."***

In reference to the application of the doctrine of *resipsaloquitor*, counsel for the appellant argued and submitted that there was clear manifestation of misdirection of its application as can be appreciated from the impugned Judgment.

In questioning the legality of the decision counsel relied on the decision of the Court of Appeal in **Nandwa Kenya Kazi Limited {1998} eKLR and Stapley Gypsum Mines Ltd (2) {1953} AC 663.**

Although the Learned trial Magistrate went ahead to assess and award damages, counsel for the appellant challenged the proportion of the quantum on the basis that certain (key principles) were ignored or misapprehended.

In that regard counsel contended that the proposed figure of assessment was inordinately low and unjust in the particular facts of the case. For this proposition counsel cited and relied on the following cases **Rose Adisa Odari v Wilberforce Egesa Magoba Civil Suit No. 87 of 2008 {2009} eKLR, Felistus Karithe Titus & Another v John Chuma & Another Civil Case No. 44 of 2014 eKLR** Counsel guided with the principles in the various cited authorities and the facts of the case at the trial pleaded that the appeal be allowed by lifting the dismissal order.

On the other hand, the respondent counsel as a rejoinder to the issues raised by appellant counsel also filed written submissions dated 16.8.2019.

The respondent counsel reasoning was to the effect that the burden of proof was never discharged as required in Law to warrant any claim to attach against the respondent. All what the appellant told the court was purely hearsay evidence as neither of the two witnesses was in a position to speak to the occurrence of the accident.

Counsel advanced the argument and relying on the case of **Fred Ben Okoth v Equator Bottlers Limited {2015} eKLR** which adopted a passage from **Clerk & Lindsell on torts, 20th Edition at Page 55**:

> ***"That the burden of proving causation rests with the claimant in almost all instances. The claimant must adduce evidence that is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains."***

The proposition by the respondent counsel was to the effect that *Resipsaloquitor* cannot be maintained without sufficient evidence from the plaintiff. According to counsel if that doctrine was well founded in this case, it would be an answer to the claim on negligence as filed by the appellant.

To further strengthen his arguments, on this same issue on liability counsel placed reliance on the following authorities: **Mary Ambeva Kadiri v County Motor Limited {2017} eKLR, Dika Hatache Gutu & Another v County Government of Marsabit {2018} eKLR**

In counsels view under the present rules of procedure and with the consequences attaching under our present Law, the evidence by the appellant would not give to an action for negligence. Counsel therefore urged the court to leave the rights lie where they belong without any interference with the decision of the trial court.

I have considered the evidence at the trial, Memorandum of Appeal, and submissions by both counsels. At the heart of this appeal is the question whether, reliance on the doctrine of *resipsaloquitor* without move is capable of discharging the burden of proof on liability in negligence.

Analysis and determination

This being a first appellate court, its power and jurisdiction is guided the principles in the cases of **Okeno v R {1957} EA, Peters v Sunday Post Ltd {1958} EA 424.** In both authorities the primer of the jurisdiction of an appellate court is illustrated as follows:

> ***"It is uncertain whether, their Lordships should have reached the same conclusion on the evidence, but it is important, seeking in the appellate court, they should be ever lawful of the advantage enjoyed if the trial Judge who saw, and heard the witnesses and was in comparably better position than the Court of Appeal to assess, the significance of what was said, how it was said and equally important what was not said (see Sotiros Shipping v Sauviel Sohold (the times March 16) 1983). It is a strong thing for an appellate court to differ from the finding, on acquisition of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witness, In overall the first appellate court has the duty to evaluate and scrutinize the evidence before the trial court and treat to a fresh scrutiny."***

The evidence at the trial on what transpired came from **PW1, Dorris Shilwatso**, the mother to the deceased **Absolom Ichingwa**. She indicated to have taken out grant of letters of administration on behalf of the Estate of the deceased. It was in her evidence that when the accident occurred she was far away from the scene. Further, she told the court that eventually steps were taken to inter the body of the deceased and finally file the claim for compensation against the respondents under the Law Reform and Fatal Accidents Act.

It was also her case through the testimony of **PC Bonface Eruso** of Port Police Station who alluded to the circumstances of the accident involving the pedestrian deceased and the respondent motor vehicle.

In cross examination PW2 confirmed to the court that he was neither the investigating officer nor did he have the police file which contains the materials touching on the accident. Counsel appearing for the respondent thought there was not much to cause alarm to persuade him to call evidence in rebuttal.

The starting point is to look at the pleadings on the particulars of the claim prosecuted by proxy in view of the death of the deceased. Out of the critical questions which the court was bound to answer specifically is whether, causation and blameworthy was to be shouldered by the respondent or by contributory negligence to be shared with the deceased.

There are various aspects of inquiries to be carried out by a trial court duly constituted under Article 50 (1) of the Constitution. The cause of action by the appellant was purely on negligence.

It was for the appellant to prove upon each element of negligence on a balance of probabilities as pleaded in the plaint. It is trite that causation and liability are fulcrums a claim rightly can be pursued against the wrongdoer.

The trial Magistrate had at his disposal this one issue on negligence to adjudicate and sufficiently render justice to the parties. It is well settled since 1932 in the case of **Donoghie v Seven Sea (Arc. 562)** that:

> ***"negligence is in Law, the lack of, or failure to exercise reasonable care in the conduct of one's activity which is as consequence result in the loss and or damage to another, which was reasonably foreseeable consequence of the said negligent exercise of that activity."***

The duty in similar version is cast upon the drivers of motor vehicles to drive with reasonable care is both statutory and Common Law as contained in the provisions of the Traffic Act. This statutory duty of care is expressly provided for in Section 46 on causing death by driving or obstruction, Section 47 on reckless driving and Section 49 driving without due care and attention. These provisions ought to mirror when a court moves to exercise discretion to establish causation and vicarious liability.

This legal proposition was stated in the case of **Cecil Brown v Judith Green and Ideal Car Rental Claim No 2006 HCV** the court in Jamaica held:

> ***"It is clear that there is, indeed a common law duty as well as statutory duty for motorists to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid the accident."***

The court should be slow to dismiss a case pleaded in negligence unless its so hopeless that various approaches to the question of liability would not yield any cause or blame to the driver of the motor vehicle. The principle in this area of Law was clearly stated in **Leyland Shipping Co. Ltd v Norwich Vaccum Fire Insurance Society Ltd {1918} AC 350** where the court stated:

> ***"Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but if this meta physical topic has to be referred to , it is not wholly so, the chain of causation is a hardly expression, but the figure (s) inadequate causation is not a chain, but a net. At each point inferences, forces, events, precedent and simultaneous, meet, and the radiation from each points extends infinitely. At the point where these various influences meet it is for the Judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause."***

Whenever a person dies as a result of authors of breach of duty care and before his or her death there was a legitimate expectation to live a full life, therefore the question of negligence must be dealt with judiciously and meticulously to inspire confidence to the justice system.

It must be borne in mind that the right to life is protected under Article 26 of our constitution. Nobody is allowed to prematurely terminate the life of another human being except to the extent authorized by this same constitution or any other written Law.

The first question in the hands of the trial Magistrate in this case was to determine clearly and with cogent reasons whether the appellant did establish liability against the respondent. To assert therefore customarily that *res ipsa loquitor* did not proof liability in negligence without corroboration evidence was plainly wrong.

The doctrine of *res ipsa loquitor* or in ordinary language ***"the thing speaks for itself is a species of circumstantial evidence"*** **developed at Common Law to help a plaintiff prove negligence."**

See **Professor Paul A. Lebel and Stuart** on:

> ***"the negligence case: Res Ipsa Loquitor Cal. L. Rev 183 {1949}*** In the English case of **Byrne v Boadle 159 Eng Rep 299**)

> ***"The court found the defendant negligence under the principle of res ipsa loquitor even though the plaintiff could not prove affirmatively that negligence conduct caused the barrel to fall"***

Our own Evidence Act under Section 119 expressly provides as follows:

> ***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case. This was an action under the tort of negligence arising from an alleged act of vicarious liability of the respondents motor vehicle in which the appellant was fatally injured. The compensation sought under the Law Reform Act and the Fatal Accidents Act was intended to put the estate of the deceased to some remedial position before occurrence of the accident."***

From the testimony of PW1 and PW2, it was shown that the vehicle in question was under the management of the respondent, or, its servant, employee or agent at the date and time of the accident.

The important thing for the Magistrate was to recognize as such and that presumptions did exist and his duty was to discover the reasons for their existence and effect, instead of dismissing the entire claim as a mere alien interlopers into the Law of evidence and as such unworthy of serious considerations.

I agree to a large extent that the fact of the accident was open to further evidence besides the embraced doctrine of *res Ipsa loquitor* but the sole ultimate and issuable fact which as must be followed was on the investigations carried out by the police.

Here it may well could have drawn the attention of the trial Magistrate to summon the lead investigating officer stated by PW2 to be on transfer. Thus the scope of his exercise of discretion to receive and admit hear say evidence from PW2 was immensely enlarged by forbidding a traverse of the averment in the pleading necessary to imply correctly the doctrine of *res ipsa loquitor.*

In Kenya the superior courts have spoken on this doctrine of *res ipsa loquitor*. The purposeful approach is exemplified by the Court of Appeal in **Embu Public Road Services Ltd v Riimi 1968 EA 22** the court held that:

> ***"where an accident occurs and no explanation is given by the defendants which could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa loquitor and hold the defendant liable in negligence."***

In this country, given our history, values and nature of business transaction, courts have to interpret the Law in a manner that is less riskier so as to occasion an injustice to a litigant to the claim. Without laying down a hard rule. Certain facts an accidents claims have probative force to justify a broader interpretation of the *res ipsa loquitor* doctrine.

The incidences of occurrence in motor vehicle/cycle accidents accounts, on negligence is presumably attributable to the defendant, agent or employee by virtue of being in exclusive control and direction of the vehicle or chattel.

In most cases, the victim of the accident has not voluntarily contributed to the accident causing event. The wrong doer should not be therefore be left scot-free by the narrow interpretation of the doctrine on *res ipsa loquitor*. In my opinion the necessity of relaxing the stringency of proof in the plea of the doctrine of *res ipsa loquitor* does not shift the burden of proof but it allows the defendant to put forth evidence to counter the presumption.

In the instant case the Learned trial Magistrate opted for a *res ipsa loquitor* accompanied with some independent evidence to proof and infer negligence.

This trajectory does not mirror the jurisprudence of this country on the subject as stated by the Court of Appeal in the **Embu case (supra)**. This is an act of human conduct of a driver of the offending motor vehicle/cycle which was being put to question under the banner of breach of duty of care and attention. What actually took place was in away a travesty of justice based on an irregularity in the exercise of discretion by the Learned trial Magistrate on liability for failure to summon circumstantial evidence from the investigating officer who visited the scene and drew the sketch plan.

It is not lost that this accident claimed the victim of his right to life prematurely. It was incumbent upon the trial Magistrate in his adjudicatory role to inquire into the question by way of evidence: whether the deceased contributed to the accident. Secondly, in the defendant driving his motorcycle was he in breach of the particulars of negligence alluded in the plaint. Instead, the Learned trial Magistrate chose a less travelled road and stated as follows:

> ***"It is clear the cited superior courts decisions are inconsistent. I therefore make the liberty of choosing the case Law to be guided by I think it is not enough to just rely on the doctrine of res ipsa loquitor…."***

This is in part due to his failure to distinguish between proof by sufficiency evidence of the facts and persuasion of the doctrine of *res ipsa loquitor* to infer negligence and shift the burden of proof to the defendant under Section 111 of the Evidence Act.

If this court was to allow the strict interpretation and construction of the doctrine of res ipsa loquitor on liability it would be difficult for accidents victims, particularly, pedestrians knocked at night by moving vehicles/cycles without a remedy or compensation that there was no eye witness to the collision.

That is why I advocate for the common sense presumptions approach under Section 119 of the Evident Act to underpin the doctrine of *res ipsa loquitor* doctrine. For the above reason the court must interfere with the dismissal order for being in excess of jurisdiction and failure by the trial court to take into account relevant matter and unfortunately arriving at an erroneous decision.

Looking back at the plaint and the defence; it can be seen that the issue of liability was not adequately dealt with by the trial court. It is important the substance of negligence be dealt with fairly in accordance to the rules of natural justice, due process and evidence.

I confine myself to the specific issue to the trier of fact:

> ***"Whether, the respondent/defendant was liable in negligence for the occurrence of the accident. If so whether any contributory negligence can be attributable to the deceased."***

It therefore calls for the appeal to be allowed. The impugned Judgment of the trial court to be set aside in its entirety. A retrial be commenced on a priority basis before another Magistrate beside **Hon. Nang'ea (CM).** That this order be served upon the Chief Magistrate Mombasa to allocate the case to another Magistrate, bearing in mind, the period already, parties have spent in the previous litigation.

The costs of this appeal to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MARCH, 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Kapore for the respondent