REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D.K. Kemei – J

CIVIL APPEAL NO. 154 OF 2016

DANIEL MUTISO KAVOI.....APPELLANT

-VERSUS-

GACHERU PETER.....1ST RESPONDENT

GIDEON NZYUKO.....2ND RESPONDENT

MICHAEL SEMERA.....3RD RESPONDENT

ANTHONY MUINDE.....4TH RESPONDENT

(Being an appeal against the judgement of Hon L. Simiyu SRM

delivered on 22.11.2016 in Machakos CMCC 924 of 2014)

BETWEEN

DANIEL MUTISO KAVOI.....PLAINTIFF

-VERSUS-

GACHERU PETER.....1ST DEFENDANT

GIDEON NZYUKO.....2ND DEFENDANT

MICHAEL SEMERA.....3RD DEFENDANT

ANTHONY MUINDE.....4TH DEFENDANT

JUDGEMENT

1. Vide a plaint filed in the trial court on 26.11.2014**,** by the appellant, the appellant on 2.3.2014 was a passenger in a Motor Vehicle registration number KAS 247S being driven/controlled along Machakos- Kitui Road by the 1st and 2nd respondents and registered in the names of the 2nd respondent, when the same collided with motor vehicle registration KAS 492C that was being driven and controlled by the 3rd and 4th respondents fell off and the appellant sustained injuries as particularized in paragraph 8 of the plaint. The appellant pleaded negligence as particularized in Paragraph 7 of the Plaint and sought special damages, general damages and interest and costs of the suit. The appellant pleaded the doctrine of vicarious liability and res ipsa loquitor

2. In his defence, the 2nd respondent denied that there was a cause of action against him; denied the accident; denied ownership of the suit vehicle, denied negligence and denied that the appellant was a passenger. They denied the injuries and loss and pleaded that the accident was caused solely and or contributed to by the negligence of the appellant and or the driver of motor vehicle KAS 492C and prayed that the suit be dismissed with costs.

3. In his defence, the 4th respondent pleaded that the suit was fatal and incompetent. The 4th respondent denied the accident; denied ownership of the suit vehicle, denied negligence and denied that the appellant was a passenger. They denied the injuries and loss and pleaded that the accident was caused solely and or contributed to by the negligence of the appellant and or the driver of motor vehicle KAS 247S and prayed that the suit be dismissed with costs.

4. There is no indication of a defence filed by the 1st and 3rd defendants and the appellant applied for interlocutory judgement to be entered against them.

5. After hearing the matter, judgment was delivered 22.11.2016 in favour of the Respondents against the Appellant, wherein the trial magistrate did not find the evidence of the appellant clear and convincing as to how the accident happened and found that liability was not proven and hence dismissed the suit for want of proof. The court found that an award of Kshs 150,000/- would be sufficient for the appellant had the case been proven. The Appellant was dissatisfied with the decision and filed the instant appeal wherein counsel took issue with the dismissal of the case against the respondents; the failure to rely on the doctrine of res ipsa loquitor and the failure to enter judgement when the respondents never called any witnesses. Counsel prayed that the judgement of the lower court be set aside and that the appellant be awarded general and special damages and also that the appellant be awarded costs.

6. The appeal was canvassed vide written submissions and it is only the appellant's submissions on record. Learned counsel for the appellant submitted on the issue of liability and quantum. According to counsel, it was undisputed that an accident occurred between the suit vehicles and that as a result of the accident the appellant sustained injuries. Counsel placed reliance on the case of ***Susan Kanini Mwangangi & Another v Patrick Mbithi Kavita (2019) eKLR*** **as well as** ***Joel Mugo Apila v East African Sea Food Ltd (2013) eKLR*** **in support of the argument that the respondents did not call any witnesses or rebut the appellant's evidence and therefore the appellant had proved his case on a balance of probabilities. Counsel urged the court to grant the appellant compensation.**

7. Learned counsel for the respondents filed no submissions**.**

8. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**.

9. The Evidence in the trial court was thus; Pw1 was Dr. Judith Kimuyu, a medical officer at Machakos Level 5 Hospital and West End Medical solutions. She testified that she examined the appellant on 6.7.2014 who was noted to have sustained bruises on his face, left knee, right thigh and upper chest, blunt injury to the left shoulder region with joint dislocation. She testified that the appellant was treated as an outpatient and given painkillers as well as underwent physiotherapy but however complained of pain in the left shoulder and tenderness on the left anterior chest. The P3 form, treatment card and treatment notes were produced by consent with no cross examination from counsel for the 2nd and 4th respondents. On record is an indication that there was a consent that judgement on liability do apply to the case **CMCC 923 of 2014.**

10. Pw2 was the appellant who testified that he was a passenger aboard vehicle KAS 247S minibus on 2.3.2014 when the same collided with vehicle KAS 492C Toyota corolla that was joining the tarmac from a feeder road on the left. He testified that the minibus was speeding and the corolla failed to give way while joining the road. He told the court that he was injured as a result of the accident and was treated at Mwala Hospital as well as Machakos Level 5 Hospital. However, he maintained that he still had pain at the clavicle joint. He tendered in court evidence of search conducted in respect of both suit vehicles; that KAS 247S was owned by the 1st respondent and KAS 492C was owned by the 3rd defendant as of the 2.3.2014. He tendered in court the abstract that was issued in respect of the accident as well as receipts totaling Kshs 2,860/- in support of special damages. On cross examination, he testified that the accident occurred during the day and the impact was on the left lane but that the minibus could not brake because it was over speeding. On reexamination, he testified that the accident could not be avoided because the Corolla refused to give way and the minibus driver was overspeeding.

11. Pw3 was John Kanyogo, a police officer attached to Machakos Police station who testified on the subject accident that occurred on 2.3.2014 and that the minibus KAS 247A hit KAS 492C, corolla that had made an abrupt turn in the middle of the road. He testified that the appellant was among the persons injured and produced the abstract as evidence. On cross examination, he testified that the driver of the Toyota Saloon was to blame for the accident. After the appellant closed his case the respondents' were put to their defence but however they closed their case without calling any witnesses.

12. In these premises having considered the pleadings and the evidence on record, the following issues are to be determined.

a) ***Whether the court can infer negligence on the part of the respondents.***

b) ***Whether the respondents are liable for damage and loss the appellant claims to have suffered and at what percentage.***

c) ***Whether the court may interfere with the finding of quantum of damages by the trial court.***

13. The answer to any of the above issues will depend and depends on the amount of evidence adduced by a party having the legal burden to do so. See s**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80** of the Laws of Kenya that place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author ***WVH Rodgers,*** **Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** as well as case law stated that the elements of negligence remain thus:

(A) there is a duty of care owed by a person -

(i) the person would foresee the reasonable possibility of his conduct injuring another and causing him loss**;** **Overseas**

Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd or Wagon Mound (No. 1) (1961) 1 All ER 404 and

(ii) the person would take reasonable steps to guard against such occurrence; and

(b) the person failed to take such steps.

In assessing whether a person took reasonable steps, the

court will consider:

(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences if the risk of harm

materializes;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm. See **Overseas**

Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The

"Wagon Mound" (No 2)) [1967] 1 AC 617

(B) the appellant breached the duty

(C) there was damage or injury

(D) the injury was caused by the breach

14. It is undisputed that the respondents owed a duty of care to the passengers of the suit vehicle as well as to other road users. In the case of **P N M & another (the legal personal Representative of estate of *L M M v Telkom Kenya Limited & 2 others [2015] eKLR*** it was stated that the driver was under a common law duty and obligation to exercise a high degree of care towards other road users and passengers and that had he exercised such care and caution, the accident would have been avoided. The evidence on record points to the fact that the vehicle KAS 492C made an abrupt turn on the road and the minibus could not avoid hitting the same as the driver was overspeeding hence the collision resulted. From the evidence I am satisfied that there was breach of duty of care owed by the respondents and because the respondents failed to rebut the appellant's version of the accident, it means that on a balance of probabilities, the appellant's version is true. I will also place reliance on the provisions of section 3(4) of the Evidence Act that states a fact is not proved when it is neither proved nor disproved meaning that the respondents in failing to call evidence have failed to prove that the appellant caused or contributed to the accident or that they were not negligent. In any event parties had agreed by consent that judgement on liability in Cmcc No. 924 of 2014 was to apply to this case in the lower court. The appellants opted not to tender evidence and hence the appellant's evidence was uncontroverted in all respects. The appellant was a passenger and thus had no control in the manner in which the vehicles were managed and or controlled. It was the responsibility of the drivers to observe the Highway Code. As they did not manage to control the vehicles then they together with their employers/principals/masters should be held liable in negligence. The fact that there was a collision is clear proof that the drivers were negligent and thus they should be held liable together with their masters in damages to the appellant. The learned trial magistrate misapprehended the evidence and thus went into error. The appellant discharged his burden of proof on balance of probabilities and ought to have come out as believable in view of the available oral and documentary evidence.

15. With the evidence on record, the court can infer negligence on the part of the 2nd and 4th respondents for the actions of their drivers as it was pleaded that the appellant would rely on the doctrine of res ipsa loquitor and vicarious liability. The proof of the accident by the abstract that was tendered in evidence as well as the testimony of the appellant meant the doctrine of *res ipsa loquitur ought to have been relied upon to infer negligence. In the case of* ***Board of Governors Kangubiri Girls High School v Jane Wanjiku Muriithi & another [2014] eKLR*** it was held that when a car is proved to have caused damage by negligence, a presumption arises that the owner is responsible for the driver's liability. I therefore have no hesitation in finding that the 2nd and 4th respondents are responsible for their drivers' failure to exercise care on the road and that all must be held liable in damages to the appellant. It was erroneous for the trial court to disbelieve the investigating officer who gave the version of events and it was then up to the respondents to rebut the evidence from the side of the appellant but they did not do so and hence the trial court ought to have ruled in favour of the appellant. It seems the trial court placed the appellant on a high burden of proof than the usual balance of probabilities. This was erroneous.

16. The resultant injuries are undisputedly a result of the accident as was testified by Pw1. They are in the nature of soft tissue injuries and the respondents are jointly and severally liable for the same. In **Republic v PS in charge of Internal Security Exparte Joshua Mutua Paul (2013) eKLR** Justice Odunga J in distinguishing between joint liability and joint and several liability cited the case of Dubai Electronics v Total (K) Ltd & 2 Others HCC NRB CC 870/98 and stated:

> "*Clearly, therefore, where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and /or several, the plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the tortfeasor according to their individual liability."*

Either way, he cannot recover more than the total sum decreed. However, the defendants are entitled to reimbursement from the co-defendants in the event that the plaintiff only opts to recover from one of them".

17. On the issue of general damages, counsel submitted that the evidence is to the effect that the appellant suffered bruises on his face, left knee, right thigh and upper chest, blunt injury to the left shoulder region with joint dislocation. It was the court's finding that an award of **Kshs. 150,000/=** in general damages be awarded to compensate the Appellant. The award is similar to comparable awards. In **Maimuna Kilungya v Motrex Transporters Ltd [2019] eKLR,** an amount of Kshs 125,000/- was awarded for soft tissue injuries and I see no reason to disturb the findings of the trial court.

18. Special damages that were proved were Kshs 4,760/-. However, I shall award what was pleaded 4,360/-. The same shall attract interest from the date of the accident.

19. In these premises I am commended to find that the trial court erred in its finding on liability and as such find merit in the appeal. I allow the appeal, set aside the judgement of the lower court and substitute therefor with an order that judgement be and is hereby entered in favour of the appellant against the respondents who are wholly jointly and severally liable for negligence at 100% and in the sum of Kshs 150,000/- general damages, special damages of Kshs 4,360/- with interest at court rates. The interest on the special damages shall be from the date of filing suit while those on general damages will be from the date of judgement. The Appellant is awarded costs of the appeal and in the lower court.

Orders accordingly.

Dated and delivered at Machakos this 29th day of May, 2020.

D. K. Kemei

Judge