REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 30 OF 2018

GACHANJA THAGANA.....APPELLANT

VERSUS

MWANGI WANJOHI.....RESPONDENT

(Appeal from the judgment and decree in Chief Magistrates Court Civil Case No. 181 of 2008 (Hon. W. Kagendo, Chief Magistrate) delivered on 18 May 2018)

JUDGMENT

By a plaint dated 18 April 2008, the appellant sued the respondent for special damages and also for general damages under the Law Reform Act, cap. 26 and the Fatal Accidents Act, Cap.32; the suit arose out of a road traffic accident which occurred along Nyeri-Kiganjo road and in which the appellant's wife (herein "the deceased") was alleged to have perished.

The accident is said to have occurred on 5 March 2007 and that it involved the respondent's motor vehicle registration number KAN 084Z in which the deceased is alleged to have been travelling as a fare paying passenger at the material time. It was the appellant's case that the accident was due to the respondent's or his agent's negligence in driving or otherwise managing the vehicle.

Besides setting forth the particulars of negligence, the appellant also pleaded the doctrine of res ipsa loquitur in support of his case.

The respondent denied the claim and filed a statement of defence in that respect. In particular, he denied being the owner of the motor vehicle registration number KAN 084Z and also that the deceased was travelling in the said vehicle on 5 March 2007 as a fare paying passenger as alleged or at all. He also denied negligence on his part or on the part of his agent and denied further that the deceased sustained fatal or any injuries as a result of the accident.

In the alternative, the respondent pleaded that if any accident occurred involving motor vehicle registration number KAN 084 Z on 5 March 2007, the same was inevitable. The respondent also denied that the appellant suffered any loss or damage or that he received any notice of intention to sue.

The record shows that only the appellant testified and after considering his evidence the learned magistrate dismissed his suit. He was aggrieved by the decision of the learned magistrate and it is for that reason that he has filed the present appeal.

In his memorandum of appeal dated 14 June 2018, he has impugned the decision of the subordinate court on three grounds. These are that the trial magistrate erred in law and in fact in failing to appreciate or in any way consider the doctrine of res ipsa loquitur; that he also erred in law and in fact in failing to appreciate that the burden was on the respondent to prove that the doctrine of res ipsa loquitur was not applicable to the appellant's case; and, finally, the learned magistrate's decision was against the weight of the evidence.

He urged this court to allow the appeal and also have his suit against the respondent allowed together with the costs and interest.

As earlier noted, only the evidence of the appellant was taken at the trial. He testified that the deceased was his wife. On the material day, she left home to visit her sister who was admitted at Nyeri Provincial General Hospital. However, he never heard of her until the following day when his brother told him that his wife had died in a road traffic accident. His brother also went to the police station to report the accident. He later went there himself to collect a police abstract which he exhibited in court as part of his evidence.

He testified further that his wife was aged 40 at the time of her death. She was a small-scale business woman who used to sell clothes. She used to earn about Kshs.600 shillings per month and that he relied on her for maintenance. She was also survived by children all of whom were adults at the time of her death.

He testified that he did not know who the vehicle owner was but that the report apparently of the accident was with the police.

In dismissing the appellant's claim, the learned magistrate held that the appellant had not proved liability as against the respondent; she dismissed his case on that note. But she further held that had the appellant proved his case, she would have awarded Kshs.858,200.00 in damages broken as follows; Kshs.720, 000.00 for loss of dependency; Kshs.20,000.00 for pain and suffering; Kshs.100,000/= for loss of expectation of life; and, Kshs.18,200.00 as special damages.

In his written submissions, Mr, Kingóri, the learned counsel for the appellant latched on to the issue of the doctrine of res ipsa loquitur and urged that the trial Court ought to have given it due consideration.

He added that the appellant produced sufficient evidence to demonstrate that the respondent was liable for the accident and also for damages as a result of the death of his wife. For instance, a police abstract showing that the respondent was the owner of the vehicle that was involved in the accident and that deceased was a passenger in the vehicle at the material time was not controverted.

With this evidence, so the appellant's counsel submitted, the burden shifted to the respondent to negate the inference of negligence on his part. And for this submission, counsel relied on **Obed Mutua Kinyili -versus- Wells Fargo & Another (2015) eKLR** and the English authority of **Barkway -versus- South Wales Transport Company Ltd (1950) 1ALL ER, 392.** In the absence of any evidence to the contrary, so counsel argued, the respondent should have been held solely responsible for the accident and the appurtenant consequences.

In response to the appellant’s counsel's submissions Ms. Mwai, the learned counsel for the respondent, urged that the appellant did not call any eye witness to explain whether indeed the deceased was a fare-paying passenger in motor vehicle registration No. KAN 084Z; or to prove that the said vehicle belonged to the respondent or that it was involved in a road traffic accident as alleged by the appellant. Counsel urged that without such evidence the doctrine of res ipsa loquitur wasn't applicable.

As rightly urged by counsel for the appellant, amongst the appellant's exhibits at the trial was an abstract from the police giving, as expected, salient facts of the accident as ascertained by the police. The abstract shows, inter alia, that the accident was reported at Nyeri police station on 5 March 2008 at 5:45 PM and was entered in the occurrence book as no.7/5/3008; that the accident occurred on the same date on Nyeri-Kiganjo Road; that it involved motor vehicle registration number KAN 084 Z; and, the vehicle was registered in the name of the respondent as its owner.

The abstract also shows that Mary Mukami Gachanja was not only a passenger in the vehicle but also that she died in the accident, apparently as a result of the injuries which she sustained.

The reference to 2008 is obviously an error because the abstract is dated 4 May 2007 and it stands to logic that it certainly cannot have been issued a year before the accident occurred. It was collected by the appellant's counsel on the same, date, the 4th day of March, 2007, a day after the accident and by which date, as the abstract itself shows, the case was still under investigation.

The abstract was produced and admitted in evidence without any objection from the respondent or his counsel. Neither was it challenged in any way. As a matter of fact, counsel for the respondent acknowledged that it is the only evidence which the appellant produced in proof of the fact of the accident but which, in her respectable view, was not sufficient.

With due respect to the learned counsel for the respondent and the learned trial magistrate, having been duly admitted in evidence and, in the absence of any evidence to the contrary, the representations made in the abstract were sufficient proof of the facts sought to be proved.

A perusal of the overleaf of the abstract is clear that the document is an abstract of the records of the police on the accident. It is also express that it is the record that gives the salient facts of the occurrence of an accident as ascertained by the police from their own observation.

It follows that, in the absence of any contrary evidence, the abstract was sufficient enough to prove, at least on a balance of probability, that indeed a road traffic accident involving motor vehicle registration number KAN 084 Z occurred along Nyeri-Kiganjo road as pleaded by the appellant. It was also enough to prove that the deceased was a passenger in the accident vehicle and that the respondent was its owner.

Talking of proof of ownership, it is true that a certificate of official search from the registrar of motor vehicles would be the best evidence and it is always conclusive proof of ownership of a particular vehicle; however, it has been held that where there is no contrary evidence, the person indicated in the abstract as the owner of the vehicle is presumed to be the owner.

In **Kisumu Civil Appeal No. 333 of 2003 Ibrahim Wandera versus P.N. Mashru Ltd**, the appellant had been awarded damages in the subordinate court but its judgment was overturned by the High Court on the ground that ownership of the accident vehicle had not been proved. This issue was taken up in the second appeal and the Court of Appeal overruled the High Court and held that the learned judge erred to have proceeded as if the plaintiff had not produced any evidence of ownership of the vehicle when a police abstract which was produced and admitted in evidence clearly showed the particulars of the vehicle and its owner. The court held further that since the admission of the abstract was not contested, the defendant was deemed to have been satisfied with the evidence as a sufficient proof of the facts it sought to establish.

In the **Kisumu Civil Appeal No. 309 of 2010 Joel Muga Opija versus East African Seafoods Ltd**, the same question of proof of ownership of a motor vehicle involved in a road traffic accident in which a claimant was injured arose. Here the subordinate court found for the claimant and awarded him both special and general damages but subject to contribution.

When the defendant appealed to the High Court, the learned judge overturned the subordinate court’s decision on, amongst other grounds, that the ownership of the accident vehicle was not proved since all that the plaintiff produced to prove this fact was a police abstract.

The court of appeal did not agree with the learned judge of the High Court and found the High Court decision in **Collins Ochung Ondiek versus Walter Ochieng Ogunde Civil Appeal No. 67 of 2008** persuasive on this point. The Court quoted Ali Ar oni, J., in that case in which she held:

> "***In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that the defence did not take the issue of ownership seriously"***

The court held the evidence by a police abstract that the defendant was the owner of the accident vehicle was "*not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence."*

While allowing the appeal, the court concluded that:

> "***We agree that the best way to prove ownership would be to produce to the court a document from the registrar of motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot later be denied."***

Again, in **Nakuru Civil Appeal No. 210 of 2006 and Lake Flowers Ltd versus Cila Fancklyn Onyango Ngonga & Ano.** the Court of Appeal sitting at Nakuru held that the evidence by the plaintiff of the ownership of the accident vehicle was not controverted because the defendant who is alleged to have been the owner of the vehicle did not call any evidence. The court held that without the defendant adducing evidence to counter the plaintiff's evidence of, inter alia, the police abstract showing the defendant to have been the owner of the vehicle, it could not deny that it owned the vehicle.

It is clear from all these decisions that a police abstract as evidence of ownership of an accident vehicle will suffice as proof of that fact if it is neither contested nor controverted.

As it was in these cases, the respondent in the present appeal did not call any alternative evidence or in any way controvert the appellant's evidence on the issue of ownership of the accident vehicle. Thus, there was every reason not only for the appellant to sue the respondent but also for the learned magistrate to proceed on the presumption that the respondent was the owner of the vehicle in question.

It has been noted that it was apparent from the police abstract that the appellant's wife was not only a passenger in the respondent's vehicle but that she also died in the accident involving that vehicle.

Proof of her death was found in a certificate of death produced by the appellant as one of the exhibits in support of his case. It is apparent from that certificate that the person alleged to have died is Mary Mukami Gachanja, aged 50 and that she died on 5 March 2007. The cause of death is indicated to be "*massive internal hemorrhage due to multiple organ damage in a road traffic accident"*.

The information in the certificate is, in every respect, consistent with the evidence in the police abstract on the identity of the deceased, when and how she died. The cause of her death, which must have been established upon a post-mortem examination, is consistent with the plaintiff's claim that the deceased succumbed to injuries in a road traffic accident.

Again this piece of evidence was never questioned or controverted.

It follows, therefore, that there can never be any doubt that the deceased died and that she died on a specific date and in a vehicle involved in a road traffic accident and in which she was travelling as a passenger; and, finally, she succumbed to the injuries she sustained in the accident.

Failure of the appellant's case was solely based on the learned magistrate's finding that liability was not proved; in her judgment, the learned magistrate held as follows:

> "***The plaintiff did not call any other witness. The evidence on record simply states the loss the plaintiff suffered, following the death of the deceased. There is no evidence on record that could assist the court in making a finding on liability. In the circumstances the court finds the plaintiff's case against the defendant on liability has not been proved to the required standards."***

The abstract which, as noted, was admitted in evidence did not list any person as having been a witness to this accident. On his part, the appellant testified that the deceased left him behind, at home, as she traveled to visit her sister in hospital. He certainly had no idea whom his wife may have been traveling with or, whether anybody witnessed the accident. If the information in the abstract is anything to go by, there may not have been any witness or, at least, none came forward to report what he or she may have witnessed. In the circumstances, it would have too much to ask of the appellant to produce a witness and, worse still, throw out his case for want of an eyewitness.

Going by the evidence on record, in all probability, the accident must have been a self-involved sort of accident in the sense that no other vehicle of any sort is indicated to have been involved in the same accident. Neither was there any suggestion that the accident was caused or contributed to by some other person to whom liability could be attributed in any degree.

In any event, the appellant, as noted, pleaded the doctrine of res ipsa loquitur in his plaint and to that extent he need not to have called any witness to explain how the accident may have occurred; instead, once the appellant invoked this doctrine, the burden was on the respondent to explain that he was not negligent and regardless of whatever he did to avoid the accident, it did happen all the same. At the very least, the appellant was entitled to some explanation why the learned magistrate thought this doctrine was not applicable to his case. I suppose that had

the learned magistrate accorded this rule of evidence the attention it deserved, she probably might have come to the conclusion that there was some merit in the appellant's case.

In **Barkway versus South Wales Transport Co. Ltd (1950) 1ALL ER** a tyre burst of an omnibus caused it to veer off the road and fall over an embankment as a result of which a passenger died. Several hypotheses were put forth but none of them was attributable to the tyre burst with any measure of certainty. It could not be explained in categorical terms how the defendant company, the omnibus owner, may have been negligent. The claimant pleaded res ipsa loquitur because, so it was her case, *'omnibuses which are properly serviced do not burst their tyres without cause nor do they leave the road along which they are being driven.'*

The case escalated to the House of Lords. In leading judgment, Lord Porter cited Erle CJ in **Scott versus London Dock Co (3H&C 601)** where he said of this doctrine as follows:

> ***"... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care***"

The learned judge went further to explain that "*the doctrine is dependent on the absence of explanation and although it is the duty of the defendants if they decide to protect themselves to give an adequate explanation of the cause of the accident yet if the facts are sufficiently known the question ceases to be one where the facts speak for themselves and the solution is to be found by determining whether on the facts as established negligence is to be inferred or not."*

On his part, Lord Normand spoke of the doctrine as follows:

> ***"The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maximum res ipsa loquitur is of little moment. The question then comes to be whether the owner has performed the duty of care incumbent on him, or whether he is by reason of his negligence responsible for the injury. <u>The maxim is no more than a rule of evidence affecting onus. It is based on commonsense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant</u>***." (Emphasis added).

In all probability, the accident in the present case was self-involved and the moment the appellant pleaded this doctrine, he was not required to call evidence on how the accident happened in order to find the respondent culpable; if he did, the invocation of the doctrine of res ipsa loquitur would, in the words of Lord Normand, be of little moment. The burden was on the respondent to prove that the accident occurred other than as alleged by the appellant and, in any event, it was not as a result of negligence on his part. He did not call any evidence and therefore did not discharge this burden.

For all I have said, I would find the respondent negligent and solely responsible for the accident in which the appellant's wife perished.

The final question I would have determined in this appeal is the manner of assessment damages by the learned magistrate. There are one or two things I would have said about how the learned magistrate went about it but I am well advised to avoid that course since both parties appear to be content with the award; I suppose they were more preoccupied with the dispute over liability for the accident than with anything else. The little I can say is that that the learned magistrate did well, as she was required to, and assessed the damages, in the event her decision dismissing the appellant’s suit is overturned.

In the ultimate, I allow the appellant's appeal with costs. The judgement of the lower court is set aside. It is substituted with the order that the plaintiff's suit is allowed and he is awarded the sum of Kshs. 858,200/= for loss of dependency; pain and suffering; loss of expectation of life; and, special damages as awarded by the learned magistrate.

The appellant shall also have costs in the lower court and interest calculated at court rates from the date of the judgment of the lower court. It is so ordered.

Signed, dated and delivered in open court this 22nd day of May 2020

Ngaah Jairus

<u>JUDGE</u>