REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 89 OF 2017

VIRGINIA NJERI

ROSEMARY WAMBUI MWANGI (Appealing as the

Legal Representatives of the Estate of

FRANCIS NDIRANGU MWANGI – DECEASED.....APPELLANTS

VS

JOSEPH NJENGA.....RESPONDENT

(Being an appeal against the judgment and decree of the Honourable L. Gicheha (SPM) delivered on 15/06/207)

JUDGMENT

1. On 08/08/2011, Francis Ndirangu Mwangi (Deceased) was a pedestrian along the Nakuru-Nairobi Highway at Barnabas when he was involved in a road traffic accident as a result of which he sustained fatal injuries. The accident involved motor vehicle registration number KYB 387 owned by the Respondent herein.

2. The Appellants, the Legal Representatives to the estate of the Deceased, filed suit at the Lower Court seeking special damages, general damages under both the Law Reform Act and the Fatal Accidents Act as well as costs of the suit and interests.

3. The suit was defended. The Respondent filed a Statement of Defence and the suit proceeded to hearing.

4. During the hearing, the Appellants called two witnesses. The first, a Policeman by the name Corporal Jackson Koome, testified as PW1. His testimony was remarkably short. He told the Court that he was not the Investigating Officer in the road traffic accident. Indeed, he did not know anything about the accident. He was there, merely to produce the Police abstract which was issued following the accident. He produced it without objection. The Police Abstract merely shows that there was an accident involving the Deceased as a pedestrian and the Subject Motor Vehicle. The witness did not know who was to blame for the accident. Neither is it recorded in the abstract.

5. There was no more evidence adduced on the question of liability.

6. PW2 was Rosemary Wambui Mwangi, the mother of the Deceased. She testified that the Deceased was married and had two children. She did not witness the accident but only got a call that her son had been involved in accident. By the time she got to the hospital, he was already deceased.

7. PW2 testified that the Deceased was 39 years old and used to earn Kshs. 700/- per day as a mason. She said that he used to spend most of his money on his wife, children and her. She also produced exhibits to show the monies she had spent for burial and other expenses following the death of the Deceased.

8. In a considered judgment, the Learned Trial Magistrate held that liability was shared equally in the circumstances of the case. She said:

> *I have considered the Plaintiff's evidence and I agree that all they have proven is that an accident did occur and the Deceased passed on because of the fatal injuries.*
>
> *However, in this case though, the Defendant did not call witnesses in his list of documents he did annexed (sic) the investigators*

report.

Guided by the principle that dismissing of a matter especially a fatal accident claim in which the only witness could have been the Deceased (sic). I believe the Court can rely on the evidence on record to come up with findings of liability. In the said report, two statements were written the driver (sic) and the turn boy. In the statements, the Deceased was crossing the road. The driver of the said lorry saw them start crossing and in his statement he saw the cause an obstruction to an oncoming bus…..From the sketch plan, the Deceased had almost completed crossing the road which confirms that the investigator found that the Defendant was driving at considerable high speed. I therefore find that both the Deceased and driver are to blame…..I apportion liability at 50:50.

9. After apportioning liability at 50:50, the Learned Magistrate proceeded to award the special damages as claimed and proved and then awarded general damages for pain and suffering at Kshs. 50,000/-; loss and expectation at Kshs. 120,000/-; loss of dependency calculated at Kshs. 839,000/-. After discounting for contributory negligence, the Learned Magistrate awarded the Appellants a total of Kshs. 544,040/-.

10. The Appellants are aggrieved by the decision and findings of the Learned Magistrate and have appealed to this Court. In keeping with the new insalubrious trend in appellate litigation, the Appellants' lawyers listed 11 grounds of appeal. In their submissions, they predictably condensed them to three. The 11 grounds in their prosaic glory are as follows:

1) That the learned trial magistrate erred in law and fact in apportioning liability for the subject accident at 50:50 despite overwhelming evidence adduces by the Appellants and complete lack of evidence on the part of the Respondent.

2) That the learned trial magistrate erred in law and fact by failing to find that the Appellant's case was not rebutted and therefore stood unchallenged and uncontroverted through failure/refusal by the Respondent to lead any evidence in defence.

3) That the learned trial magistrate erred in law and fact by failing to find that the Respondent and/or his agent was in control of a more lethal machine at the time of the subject accident thereby owed a greater duty of care than the Deceased and by failing to find that the Respondent and/or his agent breached that duty resulting in the subject accident and subsequent demise of the Deceased

4) That the learned trial magistrate erred in law and fact by completely failing to find that the Respondent through himself and/or his agent, having survived the accident unlike the Deceased, had utterly failed to discharge his duty of adducing evidence to explain the circumstances of the accident which duty was conferred upon him by the doctrine of res ipsa loquitor.

5) That the learned trial magistrate erred in law by failing to hold that failure by the Respondent to discharge his obligation under the res ipsa loquitor doctrine amounted to an implied admission by the Respondent of 100% culpability.

6) That the learned trial magistrate erred in law by considering and allowing judgment on liability to be influenced by extraneous factors being the contents of documents not produced and/or admitted in evidence or at all and which did not form part of the record thereby completely ignoring the provisions of Orders Rule 3(2) of the Civil Procedure rules and the general law of the evidence.

7) That the learned trial magistrate erred in law and fact by making an award for damages for loss of dependency that is inordinately low and that ignores the overwhelming evidence adduced and circumstances of the case.

8) That the learned trial magistrate erred in law and fact by failing to make an award for damages for low of dependency that is reflective of the fact that the evidence of the Deceased's earning was tendered in the best possible way considering the informal work that the Deceased was engaged in and the general lack of documentation attendant thereto.

9) That the learned trial magistrate erred in law and fact by failing to find that the Respondent's failure to challenge and/or rebut, either through cross-examination or otherwise, the sworn evidence adduced on the earnings of the Deceased amounted to cogent proof of the same.

10) That the learned trial magistrate erred in fact by calculating damages for loss of dependency using a multiplier of 15 years notwithstanding uncontroverted evidence that the Deceased died at age 39 and was engaged in informal work and could therefore have quite comfortably worked beyond age 65 but for the subject accident.

11) That the learned trial magistrate erred in law and in fact by failing to hold that the Appellants proved their case against the Respondent on a balance of probabilities and even beyond that standard.

11. In their submissions, the Appellants condensed the grounds into four clusters which they argued together as follows:

1) *Whether the Trial Magistrate erred in apportioning liability for the subject accident at 50:50 despite the overwhelming and uncontroverted evidence adduced by the Appellants – covering grounds 1, 2 & 6 of the Memorandum of Appeal.*

2) *Whether the Trial Magistrate erred in failing to find that the Respondent and/or his agent had utterly failed to discharge his duty of adducing evidence to explain the circumstances of the accident which duty was conferred upon by the doctrine of res ipsa loquitor – covering Grounds 3, 4 & 5 of the Memorandum of Appeal.*

3) *Whether the Trial Magistrate erred in failing to make an award for damages for loss of dependency that was reflective of the overwhelming evidence adduced and circumstance of the case – covering Grounds 7, 8, 9 & 10 of the Memorandum of Appeal.*

4) *Whether the Trial Magistrate erred in failing to hold that the Appellants proved their case against the Respondent on a balance of probabilities and even beyond that standard – covering Ground 11 of the Memorandum of Appeal.*

12. The Appellants' attack on the Learned Magistrate's findings on liability -- covered under the condensed clusters (i); (ii) and (iv) - can be revealed in three steps. First, the Appellants argue that they relied on the doctrine of *res ipsa loquitur*. That doctrine, they argue, placed a burden on the Respondent to explain how the accident occurred and to show that it was not a result of his negligence.

13. Second, the Appellants argue that the Respondent failed to discharge that burden to explain that the accident occurred through no negligence of his own. He failed to do so, the Appellants argue, because he placed no evidence whatsoever before the Court. Having failed to place any evidence before the Court, the Appellants argue, the operation of the doctrine of *res ipsa loquitur* would have warranted a finding of 100% liability against the Respondent. In this regard, in the third place, the Appellants argue that it was in error for the Learned Trial Magistrate to consider materials which had been filed by the Respondent (such as the Investigation Report) but which were never produced in evidence. Had the Learned Trial Magistrate not relied on this material which was not properly before her, the Appellants argue, she would have had no basis for the equal attribution of the accident that she reached.

14. Is this logic by the Appellants unassailable? We can begin by correcting an obvious error the Learned Trial Magistrate committed: she relied on material which had not been tendered as evidence. A document which has not been properly tendered in evidence, even if it is available in the Court file, does not become part of the evidence and cannot be relied on by a fact finder in reaching her verdict. As the Court of Appeal held in ***Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR*:**

> *The mere marking of a document for identification does not dispense with the formal proof thereof. 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 become 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.*

15. It was, therefore, an error for the Learned Trial Magistrate to rely on the Investigations Report and other documents filed by the Respondent but which were not tendered in evidence. Unfortunately for the Appellants, however, this does not resolve the issue of liability in their favour. This is because the first two steps in their chain of logic described above does not hold true in the circumstances of this case. The doctrine of *res ipsa loquitur* does not apply axiomatically simply because a claimant says it does. Instead, the Plaintiff must demonstrate that the conditions for the application of the doctrine are present.

16. It is important to recall that the doctrine of *Res ipsa loquitur* is a legal rule that lets plaintiffs avoid proving specific negligence when they can show that the type of accident speaks of the defendant's negligence. It assesses liability in the absence of clear evidence of what went wrong. The Courts allow Plaintiffs this facility out of realization that some accidents are usually caused by negligence. Consequently, when the Plaintiff brings his case within the doctrine, the Court infers negligence from the accident's very occurrence.

17. However, for the doctrine to apply, two conditions must be satisfied. *First*, it must be shown that the accident is one that ordinarily would not occur in the absence of negligence. This is what allows the plausibility of the inference: if the inference is far-fetched, then the doctrine does not apply. *Second*, the doctrine does not apply unless it can be demonstrated that the Defendant was in exclusive control of the agency that caused the injury. This refers to the extent to which the Defendant participated at the scene of the accident. If the Defendant had exclusive agency that caused the accident, and the accident is one that ordinarily would not occur in the absence of negligence, then by operation of the doctrine of *res ipsa loquitur*, the Defendant would be liable for the accident unless he offered an explanation other than negligence.

18. The question here is whether the two conditions for the operation of the doctrine of *res ipsa loquitur* have been met. I think they have not. The only evidence the Appellants placed before the Court was that there was an accident involving a pedestrian (the Deceased) and a motor vehicle driven by an agent of the Respondent. Period. Indeed, despite the Appellants' counsel repeated overuse of "uncontroverted evidence" and "overwhelming evidence" throughout their submissions, there was no evidence that showed, as the submissions claim, that the Deceased was "walking on the side of the highway completely off it…." The only evidence adduced on how the accident occurred was that of Corporal Koome: and that only consisted of producing the Police Abstract. The Police Abstract only proved that the accident occurred and that it involved a pedestrian and a motor vehicle.

19. In the circumstances, therefore, the doctrine of *res ipsa loquitur* has no application. It was incumbent upon the Appellants to prove negligence. There is no inexorable rule that ordinarily pedestrians are not hit by vehicles absent the negligence of drivers. Pedestrians may, ordinarily, be as much at fault for accidents as drivers and the fact that a motor vehicle is a "lethal machine" does not, as the Appellants claim, automatically trigger the doctrine of *res ipsa loquitur* without a showing that the double conditions for its operation have been satisfied.

20. Was the Learned Magistrate, then, wrong in arriving at 50:50 apportionment of liability? In my view she reached the correct conclusion via the wrong route. The wrong route was, of course, to reference material which had not been properly put on record as evidence. However, the result would have been the same if the Learned Magistrate had used the correct principle that where it is proved that an accident occurred and there is no plausible explanation from either sides how it occurred, it is permissible to conclude that the parties were equally to blame for the accident. That should have been the outcome here.

21. Turning to the appeal against the award of damages for loss of dependency, the Appellants argue that it was an error for the Learned Trial Magistrate to use the minimum wage of Kshs. 6,999/-per month in the face of the evidence adduced which the Appellants counsel calls "overwhelming." In fact, what the Counsel calls overwhelming is the oral testimony of the Deceased's mother that the Deceased used to earn Kshs. 700 per day as a mason. The Appellants insist that the Learned Magistrate should have accepted that figure and faults her for insisting on documentary proof. With righteous indignation, they complain:

> ***….****[I]t is common knowledge and it has come to be accepted by Courts over time that payslips and receipts are not the only mode of proof of income as most Kenyans actually work in the formal sector where no documentation enumerating on (sic) earnings ensues*.

22. It is true that Courts no longer dogmatically insist on documentary proof of earning. However, Courts do still insist on credible proof of earnings. It is not enough for a representative of an estate to invoke a figure with a straight face and demand compensation at that level. At the end of the day, whatever level of earning is claimed, the Trial Court must subject it to analysis and consideration including the credibility and plausibility of the claim. Here, the Court was unconvinced that the quoted figure had much relationship to the reality. I am unable to fault the Learned Trial Magistrate on this score. The scarcity of details of the earnings, support and dependency were enough to pique incredulity. While the Deceased may not have had pay slips to prove earnings, since he did not live with his mother, it would have been possible, for example, to adduce Mpesa statements to show the level of support he used to give her. It might also have helped to contextualize how much he used to earn by either adducing evidence about how the mother came to the categorical figure of Kshs. 700/- per day or by calling as witnesses colleagues to provide more context. As things stood, in the circumstances of this case, it was perfectly permissible for the Learned Trial Magistrate to meet the purported evidence on earnings with incredulity.

23. **The upshot is that the appeal herein is without merit. It is hereby dismissed with costs to the Respondent**.

24. Orders accordingly.

Dated and delivered at Nakuru this 16th Day of December, 2020.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.