



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 99 OF 2014

SOLOMON LEMAIYAN NKENYUA.....APPELLANT

VERSUS

JOSEPH SABOO.....1<sup>ST</sup> RESPONDENT

OBARA SABOO.....2<sup>ND</sup> RESPONDENT

*(An appeal arising from judgment and decree of Hon. B.O. Ochieng – Senior Principal Magistrate in Kilgoris P.M.C.C 18 of 2013 and delivered on 12.08.2014)*

**JUDGMENT**

1. This appeal arises out of the decision of Hon. B.O. Ochieng SPM, dated 12<sup>th</sup> August 2014. In the said decision, the trial magistrate allowed the Appellant's claim to the extent that the Respondents were 50% liable. The other 50% liability was attributed to an Act of God. The trial magistrate awarded general damages of Kshs 150,000/- and special damages of Kshs 6,500/-.
2. The appellant's claim against the respondents arose out of a road traffic accident that occurred on 27<sup>th</sup> November 2011 along the Kisii-Kilgoris road, at a bridge near Nyumba Tano area. In his plaint dated 4<sup>th</sup> February 2013, the appellant alleges that he was travelling as a passenger in motor vehicle Registration Number KBK 317Z when the Respondents' driver or agent negligently drove the said motor vehicle permitting it to submerge and or fall into a river. As a result the appellant drowned sustaining severe bodily injuries.
3. In their statement of defence dated 2<sup>nd</sup> July 2013, the respondents denied that they were the registered proprietors of motor vehicle KBK 317Z and denied the occurrence of the accident on 27<sup>th</sup> November 2011 as alleged by the Appellant. In the alternative, the Respondents averred that if any accident occurred then it was contributed to by negligence of the plaintiff and an act of God.
4. After hearing the respective cases of the parties, the trial magistrate reached the conclusion that there was an accident occurred on 27<sup>th</sup> November 2011 and found that the driver of the motor vehicle to be 50% liable. The other 50% liability was attributed to an act of God.
5. Aggrieved by the decision of the trial court, the appellant has filed the present appeal in which he raises the following grounds in his Memorandum of Appeal dated 18<sup>th</sup> June 2018:

- 1) *That the trial magistrate erred in law and in fact in holding the Act of God 50% liable contrary to the evidence tendered by the witness.*
- 2) *That the learned magistrate erred in law and in fact in failing to hold the Respondent 100% liable for the accident.*
- 3) *That the learned trial magistrate erred in laws and in fact in making an award in general damages that was inordinately low as to amount an erroneous estimate of loss and damage suffered by the appellant, considering the injury was sustained by the appellant.*
- 4) *That the learned trial magistrate erred in-law and fact by failing to evaluate the injuries sustained as shown in the treatment card and the medical report availed by the appellant noting that the respondents did not tender any evidence to contradict the injuries sustained by the appellant.*
- 5) *That the learned trial magistrate failed to consider the appellant's submissions and legal authorities relied upon in support thereof.*
- 6) *That the learned trial magistrate's decision albeit, discretionary one was plainly wrong.*

6. As this is a first appeal, I am under a duty to evaluate the evidence before the trial court and reach my own conclusion- **Selle vs Associated Boat Co. Ltd [1969] EA 123**. In doing so, I must bear in mind that I have neither seen nor heard the witnesses.

7. The parties by consent preferred to adopt evidence of Pw2, Pw3, Dw1 and Dw2 in **CC 124/2014** as evidence before the trial court. Solomon Lemayian Nkeiyua (**Pw1**) recalled that on 27<sup>th</sup> November 2011 he boarded Nissan KBK 317Z so as to travel back to Nyanguso. He testified that it had rained earlier. Before arriving at his destination, a passenger alighted at Nyumba Tano. He recalled that a few meters before the bridge, he heard children warning the driver of swollen river at the bridge, he also heard some women in the front seat telling the driver to stop but the driver proceeded. The vehicle was swept down the bridge. That the driver jumped off from the vehicle. He managed to get out through a window. He sustained injuries on the head, he was cut by an object, and his ears were full of water. His chest was hit by a log and his elbow cut. His abdomen too was injured. He was treated at Transmara District hospital.

8. Sgt Jacob Mwaadi (**Pw3**) gave evidence that he is a base commander based at Kilgoris Police Station. He testified that there was an accident reported on 27<sup>th</sup> November 2011 involving motor vehicle KBK 317Z Toyota Matatu. He conducted the investigations and recorded statements from the surviving witnesses. On the date of the accident it had rained heavily and there was raging water passing over the bridge. Some passengers told the driver to stop driving as they approached the bridge but he continued driving. That when the vehicle was swept into the swollen river, the driver jumped off leaving the vehicle unattended. Some of the passengers died.

9. John Obat Mose (**Dw1**) recalled that on 27<sup>th</sup> November 2011 he was at work driving a lorry KBK 317Z. It was raining, upon arriving at a Nyumba Tano, there was a bridge ahead. There was a Station Wagon right ahead of him. He heard a loud bang followed by water suddenly rushing over the bridge. The water dragged the vehicle and effort to control it were futile as there was a lot of water over the bridge. Joseph Leparakuo Kaleke (**Dw2**) recalled that on 27<sup>th</sup> November 2011 at 5:00 p.m. he was driving a Station Wagon KAR 026D along Kilgoris Nyaguso road. He overtook a Nissan Matatu and proceeded to cross the bridge without any hindrances. He later learnt that there was an accident.

10. When the appeal came up for hearing parties agreed that it should proceed by way of written submissions. The Appellants submitted that the evidence before the trial court shows that there was heavy downpour with an overflow of water at the bridge when the motor vehicle approached it. They submitted that any reasonable person would have foreseen that it was not safe to cross the bridge and relied on **Ryde v Bushell & Another (1967) EACA**. It was his case that the driver was aware of the raging waters but decided to take his chances. It was his submissions that the award of Kshs. 150,000/- on general damages too low.

11. The Respondent submitted that the appellants did not tender any convincing reasons to warrant blame on the respondent. It was their case that the accident was solely caused by an act of God. It was their case that since treatment notes from Transmara District Hospital were not produced, the treatment card captured only soft tissue injuries and an award of Kshs. 50,000/- would be sufficient.

12. It was not in dispute that the accident took place on the stated date, time and place. It is trite law that he who alleges the existence of a fact must prove it. Thus the burden of proof was on the appellant to prove that the accident occurred due to negligence on the part of the respondent. The appellant in his plaint relied on the doctrine of *res ipsa loquitur* to establish the respondents' negligence. In **Winfield and Jolowicz on Tort (11<sup>th</sup> Edition, S & M, 1979) at page 99** the doctrine of *res ipsa loquitur* has been explained as follows;

***In order to discharge the burden of proof placed upon him, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which qualify as negligent conduct. Sometimes, however, the circumstances are such that the court will be prepared to draw an inference of negligence against the defendant without hearing detailed evidence of what he did or did not do.***

13. The Respondents' defence was that the accident was inevitable as it was occasioned by the sudden rush of water flowing across the bridge. In **Kago -Vs- Njenga Civil Appeal No. 1 of 1979**, the Court of Appeal held that

***“For the defence to rebut the presumption of negligence arising from “res ipsa loquitur”, it was for the Defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident that did not connote negligence on their part, or that the accident was due to circumstances not within their control (See Msuri Muhhddin -Vs- Kassaby & Another [1960] EA 201).” Emphasis added.***

14. In **Ryde V Bushell & Another (1967) EA 817** the East African Court of Appeal held as follows:-

***“(i) The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;***

***(ii) Nothing can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence.”***

15. Dw2 on cross examination gave evidence that there was water flowing above the bridge at the level of half a tire. He also recalled that there were stationery vehicles on the other side of the bridge. Pw1 also gave evidence that there was a woman in the vehicle who asked Dw1 not to drive across the bridge but he did not heed to her advice. The evidence points to the fact that the driver failed to pay due care and attention while driving as he allowed the vehicle on to a bridge that had water overflowing across it.

16. After evaluating the evidence, I am satisfied that there is sufficient evidence on record which this court draws the inference that the accident was caused by the negligent actions of the driver. He was warned by his passengers and even persons he passed on the road, he saw

what was ahead and should have taken all precaution not to approach the bridge. The driver subjected the lives of his passengers to danger and drove straight to the place he was warned not to. The finding of Act of God was inappropriate in this case. Floods do occur when it rains however, it is expected that a prudent driver must take all the necessary precaution whilst approaching a flooded area to take the next possible available route to reach his destination, or wait and not to approach raging water and expect to sail through without an incident. The appellants has thus proved his case on the balance of probabilities while the respondents have failed to discharge their burden which is to show that the accident was caused by no negligence on their part or circumstances not within their control.

17. The second issue for determination is whether damages awarded by the trial court warrants interference. Counsel for the appellants submitted that the award of Kshs. 150,000/- was inordinately low and that the amount of Kshs 500,000/- would sufficiently compensate the appellants for the injuries sustained. The general principle upon which this Court, as an appellate court, will interfere with an award of damages was stated in **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5** as follows;

*An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low ....*

18. In his plaint the appellants pleaded that he suffered a contusion on the head leading to hearing loss on both ears, contusion on the anterior abdomen, blunt trauma to the chest, dislocation of the left elbow and cut wound on the left elbow, he confirmed the same in his evidence in court. The appellants presented a medical report done by Dr. Ogando Zoga whom upon examination of the appellants found that he was in fair condition, had some hearing loss especially on the left ear, the abdomen and the elbow was also tender. He came to the conclusion that the appellants needed a follow up by an ENT surgeon as the injury on ear may be a permanent disability, meanwhile all other injuries were in the process of healing. There was no evidence adduced of a follow up with an ENT surgeon.

19. The Appellants relied on the case of **David Kombo Tsuma HCCC. No. 204 of 1987** where Plaintiff suffered a fracture of the skull resulting to total loss of hearing on both ears and was awarded Kshs. 400,000/-. The Respondent relied on the case of **David Okoka Odera v Kilindini Tea Warehouse Ltd (2008) eKLR** where the Plaintiff sustained soft tissue injuries on the Lumbar Sacral Spine and was awarded Kshs 40,000/-.

20. In awarding damages of Kshs. 150,000/- the trial magistrate found that appellants had suffered multiple soft tissue injuries, the most serious being dislocation of left elbow and loss of hearing. In **Autosol K. Limited & another v Martin Gitau Kinyanjui [2019] eKLR** the plaintiff lost consciousness for 3 hours, had multiple cuts on the right cheek which was bleeding and his right shoulder was dislocated. The trial court awarded Kshs 500,000/-, on appeal the court awarded Kshs 300,000/-.

21. In the circumstance, the appeal is found to have merit and is hereby allowed. I find the Respondent 100% liable, the award given by the trial court is also inordinately low and warrants interference. The judgment of the trial court on quantum is hereby set aside and substituted with an award for general damages in the sum of Kshs.250, 000/-. I grant the appellants interest on the sum from 12<sup>th</sup> August 2014, the date of the original decree.

22. I award costs of the appeal to the appellants.

**Dated, Signed and Delivered at KISII this 28<sup>th</sup> day of February 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Otara                      For the Appellant**

**Miss Angasa                For the Respondent**

**Rael                            Court clerk**