REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 12 OF 2016

SIMON KYUNGUTI.....APPELANT

=VERSUS=

KRUSHALI ENTERPRISES LTD..... RESPONDENT

(Being an Appeal from the Judgment delivered by the Honourable T.A. Odera, PM in Mavoko PMCC No. 544 of 2012 on 6th January, 2016)

=IN=

SIMON KYUNGUTI.....PLAINTIFF

=VERSUS=

KRUSHALI ENTERPRISES LTD.....DEFENDANT

JUDGEMENT

1. By a plaint dated 22nd October, 2012, the Appellant herein instituted a suit against the Respondent herein claiming General Damages for pain, suffering and future medical expenses, Special Damages in the sum of Kshs 226,920/-, Costs and interests.

2. According to the appellant, he was at all material times employed by the Respondent as a turnboy in the defendant's lorry reg no. KBP 825K. However, on or about the 21st September, 2011, while the Appellant was working in the said vehicle, the same, which had mechanical problems, was carelessly managed, handled and driven and as it was being parked, the same lost control and ran over the appellant who was off the road, causing him serious injuries.

3. It was the appellant's case that the said accident was caused by the Respondent's servants, particulars of which he outlines. He also particularise the injuries and special damages suffered by him.

4. According to the appellant, he used to work for the Respondents as a turnboy in the Respondent's said vehicle. On 21st September, 2011, at around midnight while he was in the course of his duties of dumping soil at Mlolongo, vehicle stalled and the driver of the said vehicle asked him to check the pipes between the cabin and the trailer while the driver remained seated in the cabin of the said vehicle. However, since the vehicle was parked on the hill, it suddenly started reversing and hit the appellant on his left shoulder as a result of which the appellant fell down and the vehicle ran over both his legs. Consequently, the appellant lost consciousness and regained the same in hospital. He was treated at Kenyatta National Hospital and Machakos General Hospital and had metals inserted in his left leg and was left on crutches. At the time of filing of the suit he had not fully healed and was still going for check ups.

5. He testified that he reported the accident to the police station where he was issued with a police abstract and a p3 form. He produced copies of the said documents as well as treatment chits and medical reports as exhibits. According to him, he was admitted for six weeks after the surgery and returned to work 2 years after the accident. He was however unable to return to his former job as he was nolonger able to carry out the same. He testified that he incurred medical expenses in the sum of Kshs 225,920/= and produced a bundle of receipts in support thereof.

6. It was his evidence that between December, 2011 and August, 2012 he travelled 8 times by taxi from Mutual to Kenyatta Hospital and

produced receipts for the same.

7. In the appellant's view, the accident was caused by the driver of the said lorry who did not apply the brakes. However after the accident the owner of the lorry denied having known him despite having worked for him for three years. He however averred that out of the total sum accrued the Respondent paid Kshs 9,000/- being the admission fees while the balance was settled by his father.

8. However the appellant admitted that he had no document showing that he was working for the defendant. However referred to the records of the subject vehicle, he admitted that the same did not indicate the defendant as the owner. According to him, the vehicle stopped after the accident and he could not tell whether the driver applied hand brake. While conceding that he was not a mechanic, the appellant stated that it was the driver who asked him to check the pipes. In further cross-examination he admitted that that he caused the accident since he was not a mechanic yet he did that job. He therefore state in answer to cross-examination that the defendant was not to blame for the accident.

9. The appellant also called PC Constable **Elvis Nakure** who confirmed that from the records held by their office the said accident occurred and the as a result the appellant was injured. At the time of his testimony the matter was still pending under investigation. He therefore produced the police abstract as exhibit despite not having been at the scene.

10. At the end of the appellant's case the Respondent did not adduce any rebuttal evidence.

11. After considering the evidence before him, the Learned Trial magistrate found that though the accident did occur; that the Appellant was working for the Respondent at the time; that the vehicle in question was beneficially owned by the Respondent; that the accident was caused by the reversing of the stalled vehicle; that the Respondent had the duty to keep the vehicle in a good mechanical state to avoid its stalling. However the court proceeded to find that the appellant was to blame for the accident, since he ought not to have gone under the vehicle to check the same. He therefore proceeded to dismiss the suit.

12. In this appeal, the appellant has identified the following as the grounds of appeal:

> **1. The learned magistrate erred in law and in fact in dismissing the appellant's case when the appellant had proven his case on a balance of probabilities and had discharged the burden of proof placed upon him.**
>
> **2. The learned magistrate erred in law and in fact in finding that the respondent was not 100% liable for the accident while all the evidence tendered by the appellant proved otherwise.**
>
> **3. The learned magistrate erred in law and in fact in failing to appreciate the evidence of the appellant with regards to liability of the accident which clearly blamed the respondent.**
>
> **4. The learned magistrate erred in law and in fact in failing to appreciate the evidence before her and submissions on behalf of the appellant.**
>
> **5. The learned magistrate erred in law and in fact in reaching a conclusion that was contrary to the evidence placed before her.**
>
> **6. The learned magistrate erred in law and in fact in awarding a figure that was too low if the judgment had been in favor of the appellant.**

Determination

13. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

14. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

15. However in **Peters vs. Sunday Post Limited [1958] EA 424,** it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a**

tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

16. However in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

17. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved her case. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

18. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

19. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

20. It follows that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but the same may shift to the defendants, the respondents in this case depending on the circumstances of the case. This issue was dealt with in **Daniel Kaluu Kieti vs. Mutuvi Ali Nyalo & another [2016] eKLR** where the court expressed itself as hereunder:

"There must be some explanation as to why a vehicle which is well driven and which is well serviced must refuse to go forward and instead reverse on its own as per the driver's own testimony. Section 112 of the Evidence Act is clear that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him. In this case, the 1st respondent claimed that the motor vehicle (bus) was well serviced and therefore it had no defects. But they did not produce any inspection report to prove that the motor vehicle was mechanically sound and or defective as contended by the appellant that it had worn out tires and that the exhaust pipe was even tied with a rope. The mechanical condition of the motor vehicle was a matter within the knowledge of the 1st respondent. The appellant having alleged that the vehicle was faulty, it therefore follows that the burden of proving that the vehicle was not faulty lay with the 1st respondent who was in possession and use of the motor vehicle. He did not discharge that burden. Accordingly, I find that the appellant proved on a balance of probabilities that the bus was faulty and it is that mechanical fault that could have caused the mishap of reversing on the hill on its own since the driver stated that he engaged the No. 1 gear but the vehicle was unable to go uphill . Instead, it went back and rested on a tree on the side of the road.

In Kenya Bus Services Ltd vs/ Dina Kawira Humphrey CA 295/2000 the Court of Appeal, per Tunoi, Omollo and Githinji

JJA observed quite correctly that:

> **"Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."**

The above decision was also cited with approval in Nyeri Court of Appeal Civil Appeal No. 22 of 2005. Similarly in Nairobi CA 179 of 2003 Rahab Micere Murage estate of Esther Wakiini Murage V Attorney General & 2 others [2015] e KLR the Court of Appeal reiterated that:

> **"Well driven motor vehicles do not just get involved in accidents….."**

21. From the evidence of the appellant, which evidence was not controverted, it is clear that he was acting under the instructions of the Respondent's driver. In his evidence, the vehicle reversed hit him and he fell down after which the vehicle ran over him. There was no evidence that the reversal of the vehicle was as a result of the appellant's action since no evidence was adduced by the Respondent. Whereas the accident may have been contributed to by the appellant, there is no evidence that the reversal of the lorry was caused by his said action. According to the statement which was adopted on behalf of the appellant, the vehicle in question lost control veered off the road and rolled severally. The plaintiff relied on the doctrine of *res ipsa loquitor*. In **Embu Public Road Services Ltd. vs. Riimi [1968] EA 22**, the East African Court of Appeal held that:

> **"The doctrine of *res ipsa loquitor* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident… Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."**

22. Dealing with the said doctrine, the Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** expressed itself as hereunder:

> **"In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of *res ipsa loquitor*…If a "*matatu*" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle."**

23. However, in **Mary Ayo Wanyama & 2 Others vs. Nairobi City Council Civil Appeal No. 252 of 1998**, the same Court held that:

> **"It is not right to describe *res ipsa loquitor* as a doctrine as it is no more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was *prima facie* evidence of negligence and the onus lay on the defendant to rebut that *prima facie* case. It means the plaintiff *prima facie* establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety…*Res ipsa loquitor* applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made…The plaintiff must prove facts which give rise to what may be called the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence."**

24. It is therefore my view that since the Respondent's driver was the one in control of the vehicle, which vehicle was stationary, the Respondent ought to have explained the circumstances under which the vehicle, which had already shown signs of mechanical breakdown rolled downhill if its gears were working properly. Drivers when driving carefully do not ordinarily lose control of the vehicles they are charged with. However, there may be circumstances that may lead to such loss of control without any negligence being attributed to the driver. It is however upon the driver to explain what led him to lose control of the vehicle and where no such evidence is forthcoming it must be presumed that the driver was negligent.

25. In this case the Learned Trial Magistrate does not seem to have addressed her mind to the applicability of *res ipsa loquitor* to the case. In the said **Daniel Kaluu Kieti vs. Mutuvi Ali Nyalo & another [2016] eKLR** the Court held that:

> **"I find that the trial magistrate failed to appreciate the weight or bearing of circumstances admitted and proved hence, this court is entitled to interfere with that finding as to the negligence of the 1st defendant ((see Peters Vs Sunday Post Ltd [1958] EA 424.) I do not see how the driver of the motor vehicle would have found it to be unsalable to ask his passengers to alight before attempting to go up the slope. In my view, going up when the vehicle was overloaded and the road muddy and slippery was an act of recklessness or carelessness on the part of the driver."**

26. It is therefore my view and I find that the Learned Trial Magistrate failed to take account of particular circumstances or probabilities material to an estimate of the evidence and arrived at an erroneous conclusion. That justifies this Court in interfering with her decision. There is no basis upon which the trial court dismissed the appellant's case since the Respondent failed to satisfy the burden which was statutorily shifted to it under the provisions of the ***Evidence Act***.

27. In the premises this appeal succeeds, the decision dismissing the appellant's suit is hereby set aside and is hereby substituted with a judgement in favour of the appellant against the 1st Respondent on liability at 100%. As regards the quantum, I agree with the sentiments of the Learned Trial Court and find no reason to interfere with the proposed quantum of damages.

28. Consequently, the appellant is awarded Kshs 450,000/- being general damages for pain and suffering, Kshs 150,000/= being the general damages for cost of future medical expenses. I further award the appellant Kshs 226,920/- being special damages. That comes to Kshs 826,920/- While the general damages will accrue interest at court rates from the date of judgement till the date of full payment, the special damages will accrue interests at the same rate from the date of filing suit till payment in full.

29. The appellant will have the costs of this appeal and those of the trial court.

30. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 25th day of February, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Muia for Mr Mutua Makau for the Appellant

CA Josephine