



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 100 OF 2014

**TERESIA BARONGO OGATA (suing as legal representative of the estate of**

**Geoffrey Machuka Ongayo (Deceased).....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 23 of 2012 and delivered on 12.08.2014)**

**JUDGMENT**

1. The appellant's case in the subordinate court was that on 27<sup>th</sup> November 2011 along the Kisii-Kilgoris road, at a bridge near Nyumba Tano area, the deceased was a fare paying passenger in motor vehicle registration mark KBK 317Z ('matatu') when the driver or agent of the respondents recklessly drove the matatu and caused the same to submerge and or fall into the river. The deceased sustained fatal injuries. As a result of his death, the appellant claimed for lost dependency, loss and damages.

2. In their statement of defence dated 22<sup>nd</sup> August 2012, 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. It also averred that the appellant's suit was bad in law and incurably defective.

3. The matter was set down for hearing on 10<sup>th</sup> July 2013. After hearing the respective cases of the parties, the trial magistrate reached the conclusion that an accident occurred on 27<sup>th</sup> November 2011 and found that the driver of the matatu was 50% liable. The other 50% liability was attributed to an Act of God. The trial magistrate awarded general damages of Kshs 600,000/- and special damages of Kshs 42,780/-.

4. 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 10<sup>th</sup> September 2014:

*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 witnesses.*

*2) That the trial magistrate erred in law and fact in failing to hold the Respondent 100% liable for the accident.*

*3) That the learned magistrate erred in law and fact in failing to consider the appellant's evidence and submissions in his judgment.*

*4) That the learned trial magistrate's decision on liability albeit, is discretionary one was plainly wrong.*

5. 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.

6. Pw1, Teresa Barongo Ogata testified that the deceased was her husband. On 27<sup>th</sup> November 2011 the deceased went to his place of work in Kilgoris and did not return. She got news of an accident, they proceeded to search for the body of the deceased and only found it the following day. She has been issued with letters of administration in regard to his estate. She gave evidence that her husband was a driver. She produced into evidence police abstract and receipt from registration of motor vehicle showing the matatu was owned by the respondents. Pw2, Abel Ongayo, gave evidence that the deceased was his son. He spent Kshs. 40,000/- to hire both seats and vehicle and produced their

respective receipts.

7. By consent the parties adopted evidence of Pw2 and Pw3 in Kilgoris **PM CC No. 24 of 2012**. In **PM CC No. 24 of 2012** Solomon Lemayian Nkeiyua was Pw2 and Sgt Jacob Mwaadi Pw3, I shall herein after refer to them as Pw3 and Pw4 respectively.

8. **Pw3** recalled that on 27<sup>th</sup> November 2011 he boarded Nissan KBK 317Z so as to travel back to Nyanguso. 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. The driver jumped off from the vehicle. He managed to get out through a window.

9. Sgt Jacob Mwaadi (**Pw4**) 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. He gave evidence that. The vehicle was swept into the swollen river. The driver jumped off leaving the vehicle unattended. Ten passengers died.

10. When the matter came up for the Defence hearing they adopted evidence of Dw1 and Dw2 in Kilgoris PM CC No. 24 of 2012.

11. 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 Nyanguso road. He overtook a Nissan Matatu and proceeded to cross the bridge without any hindrances. He later learnt that there was an accident.

12. When the appeal came up for hearing parties agreed that it should proceed by way of written submissions. The appellant in its submission consolidated the grounds of the appeal into that of liability. The Appellants submitted that on the material day as the matatu approached the bridge there were children who warned the driver of the swollen river, similarly the passengers in the front seat of the matatu told him not to cross the bridge. They argued that any reasonable person and more so an experienced driver in would have foreseen that it was not safe crossing the bridge under the circumstances. He relied on the case of **Nakuru HCCA No. 159 of 2008 Timsales (K) Limited v Grace Bosibori**. It was their case that the respondent was 100% liable for causing the accident.

13. The Respondents submitted that the accident was solely caused by an Act of God after water from the river suddenly flooded the bridge causing the driver to lose control of the matatu. The respondent relied on the case of **Ryde vs. Bushell & Another (1967)**. It was also their submissions that the trial magistrate clearly considered both parties' written submissions and legal authorities relied upon.

14. The appeal before this court is purely on liability. 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. The appellant had the burden to prove that the accident was due to negligence of the respondent. In his plaint, the appellant 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.***

15. The Respondents' defence was that the accident was inevitable as it was occasioned by the water suddenly rushing 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 Muhddin –Vs- Kassaby & Another [1960] EA 201).” Emphasis added.***

16. 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.”***

17. Dw2 on cross examination gave evidence that there was water flowing across the bridge at the level of half a tire. He also recalled that there were stationary 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.

18. 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 it 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 appellant 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.

19. One other issue that one would not ignore in these proceedings is the fact that the appellant claimed damages from the respondent under the Law Reform Act (Chapter 26 of the Laws of Kenya) and Fatal Accidents Act (Chapter 32 of the Laws of Kenya). I note that the trial court failed to make an award on loss of expectation of life. 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...*

20. The Plaintiff in its submissions before the trial court proposed an award of Kshs 150,000/- for loss of dependency which was awarded to the plaintiff in the case of **Alice Mboga v Samuel Kiburi Njoroge Nakuru HCCC No. 357 of 1999**. The Respondents in their submissions proposed an award of Kshs 70,000/- guided by the case of **Joseph Wachira Maina & Anor vs Mohammed Hassan Nakuru HCCA No. 43 of 2003**. I find an award of Kshs 100,000/- to be sufficient for loss of expectation of life in the circumstance.

21. In conclusion the appeal is found to have merit and is hereby allowed on the following terms:

a) I find the Respondent 100% liable.

b) I hereby set aside the judgment of the Learned Trial Magistrate by entering judgment in favor of the appellants against the respondents for the sum of Kshs 1,391,700/- made up as follows:

Pain and Suffering	Kshs. 10,000/-
Loss of expectation of life	Kshs.100, 000/-
Loss of Dependency	Kshs.1,200,000/-(5,000 x 12 x30 x 2/3)
Special damages	Kshs. 81,700/-
<b>Total</b>	<b>Kshs. 1,391,700/-</b>

c) I grant the appellant interest on the sum from the date of judgment and award costs of the appeal to the appellant.

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**