**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 535 OF 2009**

**GNN.....1ST APPELLANT**

**EWN.....2ND APPELLANT**

VERSUS

**GEOFFREY GICHOHI NJERI.....RESPONDENT**

(Being an appeal from the judgement/decree of the Principal Magistrate's Court

at Nairobi Milimani Commercial Courts by Hon. Okato dated 10th September, 2009

in CMCC No. 5897 of 2005)

**JUDGEMENT**

1. The Appellants lodged fatal accident claim vide plaint dated 10/5/2005 claiming –

**(a) General and special damages.**

**(b) Costs**

**(c) Interest.**

2. The background of the case was that the deceased, the late RH was the husband to the 1st Appellants and a father to one minor namely; AMH.

3. The deceased who was lawfully travelling as a fare paying passenger was involved in a road accident along Thika-Nairobi road near Blue Post Hotel Area on the 13th day of December, 2003.

4. When the 1st Appellants learnt of the accident, she went to Thika General Hospital where she found that the deceased had passed on.

5. The 1st Appellants reported the matter to Thika Police Station and was issued with a police abstract which showed motor vehicle registration No. KAA 524R was involved in the accident where the deceased was a passenger.

6. The 1st and 2nd Appellants obtained Letters of Administration dated 24th September, 2004 to prosecute the claim on behalf of the estate.

7. The matter proceeded by way of formal proof on the 30th of June, 2009 since the Defendant never turned up to give his evidence despite entering appearance on 1st of April, 2008 and filing his statement of defence on 15th April, 2008.

8. Judgement was delivered on the 10th of September, 2009 dismissing the Appellants claim who being dissatisfied with the judgement filed their memorandum of appeal on 30th September 2009 against the whole of the judgement of Hon. S. A. Okato, Principal Magistrate (as he then was).

9. Being aggrieved by the trial magistrate verdict Appellants lodged the appeal and set out the following grounds –

**(1) That the learned magistrate erred in both law and fact by failing to consider the fact that the 's had already obtained interlocutory judgement against the defendant as submitted in their submission, the same having been entered on 28th January, 2008 hence arriving at the wrong conclusion.**

**(2) That the learned magistrate erred both in law and fact in finding that the Appellants had not traversed the evidence to support the particulars of negligence as averred to in their plaint yet there was already an interlocutory judgement on liability against the defendant/respondent thereby arriving at the wrong conclusion.**

**(3) The trial magistrate erred in law as well as in fact in failing to consider the Appellants' case on a balance of probability as required by the standard of proof in civil suits when the Appellants' evidence remained unchallenged at the close of the case, as the matter proceeded by way of formal proof and not a contested case.**

**(4) That the trial magistrate erred in law and fact in failing to evaluate and appreciate the Appellants' evidence (which was never controverted during the hearing) rightly and in the proper context thereby arriving at the wrong conclusion that was based on presumptions and extraneous matters that were not properly placed before the court.**

**(5) That the learned trial magistrate erred in both law and fact when he failed to address his mind to court record and the pleadings as filed thereby arriving at an erroneous decision.**

**(6) That the learned trial magistrate erred in both law and fact when he failed to assess the quantum of damages that the Appellants would have been entitled to had they been successful in their claim.**

**(7) That the learned trial magistrate misdirected himself and erred in law and in fact by addressing himself to issues which were not meant for determination by the court as there was already an interlocutory judgement in favour of the Appellants/applicants (delivered on 28th January, 2008) thereby arriving at the wrong conclusion.**

**(8) That the learned trial magistrate misdirected himself and erred in law and in fact by ordering that the Appellants/applicants' counsel herein do pay costs in a matter that was purely for a formal proof thereby arriving at the wrong conclusion.**

**(9) That the judgement of the trial court as written and delivered cannot therefore be supported in law and/or fact.**

10. The appeal was directed to be canvassed via submissions. Only Appellants filed the same.

**Appellants' Submissions:**

11. The Appellants submitted that they filed a request for judgement application dated 14th January 2008 and filed on 24th January 2008 indicating that despite the respondent herein having been served with summons to enter appearance and a copy of the plaint had either refused or neglected to file their defence within the prescribed period.

12. The matter was before the learned magistrate who entered an interlocutory judgment on 28th January 2008.

13. As per the plaint dated 10th May, 2005 and filed on 2nd June 2005, the particulars of special loss were set out at paragraph 5(c) totaling Kshs.112,020/= and the Appellants produced receipts in support thereof.

14. The honourable court further entered judgement on liability, against the defendant and therefore the issue of liability was settled long before the matter proceeded for formal proof.

15. The honourable court is invited to note that the interlocutory judgement that was entered on liability and special damages has not been reviewed, set aside or appealed against by the respondent.

16. The learned magistrate held the following position regarding liabilities which was at cross variance with the interlocutory judgment:

***"Accordingly, I find that the defendant is not liable to the in negligence."***

17. It was submitted that the trial magistrate in total disregard of the interlocutory judgment erred in revisiting the issue of liability which was already settled.

18. It is the Appellants' contention that the trial magistrate failed to consider their case on a balance of probability as required by the standard of proof in civil suits.

19. The trial magistrate chose to concentrate on the issue of whether the 1st Appellants was a witness to the accident.

20. The above decision was made in total disregard of the fact that the respondent herein did not attend court during the hearing and therefore his averments remain uncontroverted more so where the police records i.e. the police abstract confirmed that the deceased was a lawful passenger in the respondent's motor vehicle.

21. They submit that the trial magistrate did not properly apply the standard of proof in civil suits since whether the 1st Appellants witnessed the accident or not, does not *ipso* fact indicate that there was no accident especially in the face of the Appellants' uncontroverted evidence produced in court.

22. The 1st Appellants produced before the trial court evidence that remains unchanged due to want of attendant by the respondent herein during the trial.

23. There was no conflicting evidence produced during the trial and therefore the trial court ought to have considered the same.

24. They submit that this was a serious error on the part of the learned trial magistrate.

25. The trial magistrate held the following view of which the Appellants are aggrieved.

> **"In the police abstract (exhibit 4) the defendant is listed as the first witness. This being the case, the ought to have sought to rely on the doctrine of res ipso liquitor and lift the burden of proving that the accident did not occur because of the defendant's negligence.**
>
> **Had the pleaded res ipso liquitor and given the fact that the defendant did not testify, the would have carried the day in court. Accordingly I find that the defendant is not liable to the in negligence."**

26. The trial magistrate stated that the Appellants ought to have pleaded this. In the case of ***Margaret Waithera Maina vS Michael K. Kimaru Civil Appeal No. 16 of 2015,*** the court held the following view:-

> **"The same sentiments were expressed by Hon. L. J. in the case of Ratcliffe v Plymouth & Tobay HA 1998 p1qr:**
>
> **".....the expression res ipso liquitor should be dropped from the litigators vocabulary and replaced by the phase "a prima facie case. Res Ipso Liquitor is not a principle of law it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case has been made out."**

27. Secondly, the said principle it does not have to be pleaded as erroneously held by the lower court in this case. This court so stated in the case of ***Nandwa vs Kenya Kazi Ltd, Civil Appeal No. 91 of 1987*** for the reason that evidence is not to be pleaded. Also see ***Bennet vs Chemical Construction (GB) Ltd 3 ALL ER 822*** where the court emphasized that:-

> ***"It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable."***

28. They submit that the Appellants produced the police abstract dated 20th January 2004 which indicated that the name and address of the owner of the vehicle registration number KAA 524R was the respondent, Geoffrey Gichohi Njeru which proved the fat that an accident occurred on 13th December, 2003.

29. The Appellants further proceeded in court the deceased's death certificate which indicated that the deceased died on 13th December, 2003 and the cause of death was entered as, "h*ead chest and musculoskeletal injuries due to motor vehicle accident."*

30. In addition, the Appellants produced the most crucial evidence being a copy or record from the Commissioner of Motor Vehicles dated 15th April, 2005. That indicates that the owner of motor vehicle registration No. KAA 524R, a Toyota Corolla was owned by the respondent Geoffrey G. Njeru.

31. They submit that the learned magistrate erred in making the doctrine of res ipso liquitor a requirement that must be pleaded and hence arriving at the wrong conclusion and decision.

32. After the interlocutory judgement that was entered on liability and special damages, these two issues were foregone and what was left was the assessment of damages.

33. They submit that it was not in order to have judgment on liability entered and then reversed to impugn such judgement and they pray that this honourable court assess the quantum in favour of the Appellants which the trial magistrate failed to do.

34. That had the learned trial magistrate been alive to the fact that there was an interlocutory judgement on liability and special damages, he would have assessed the quantum as required by law which would have rendered the claim successful and the costs would have followed the event and be granted to the Appellants.

**EVIDENCE ADDUCED:**

35. PW1 testified that the deceased was her husband and that on 13th December 2003 he was involved in a road traffic accident near Blue Post Hotel along Nairobi Thika road. When she learnt of the accident she went to Thika General Hospital where she found that the deceased had died.

36. She produced his death certificate as exhibit P1. She had one child with the deceased namely; AMH and produced his birth certificate as exhibit P2.

37. She obtained Letters of Administration dated 24th September 2004 as exhibit P3. She reported the matter to Thika police station and was issued with a police abstract from which showed motor vehicle registration No. KAA 524R was involved in the accident. She produced the abstract as exhibit P4. The deceased was a businessman who used to earn Kshs.15,000/= a month and used to apply the money for the upkeep of the family. She also produced a copy of records and a receipt for Kshs. 500/= as exhibits P5 and P6 respectively and which confirmed that the defendant owns the vehicle. She incurred funeral and burial expenses in the sum of Kshs.41,000/= and produced a bundle of receipts as exhibit P7.

38. Counsel for the filed written submissions on liability and quantum.

39. The told the court that she was informed about the death of the deceased and that she went to Thika General Hospital where she confirmed that indeed the deceased had died. In fact she was informed about the accident a day after the incident.

**ISSUES:**

40. After going through the evidence on record. Pleadings and the submissions filed, I find the issues are ; ***Whether the trial court errored in dismissing suit regardless of interlocutory judgement on liability and liquidated claim ? Did Appellants prove its case on balance of probabilities?***

**ANALYSIS AND DETERMINATION:**

41. In the case of ***Samson S. Maitai & Anor v African Safari Club Ltd & Anor [2010] eKLR, Emukule, J*** observed thus;

> ***"……. I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."***
>
> ***Can hearing therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits."***

42. In the instant matter Appellants needed to adduce sufficient evidence to raise a presumption that what is claimed is true, then the burden pass to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.

43. PW1 testified that the deceased was her husband and that on 13th December 2003 he was involved in a road traffic accident near Blue Post Hotel along Nairobi Thika road. When she learnt of the accident she went to Thika General Hospital where she found that the deceased had died.

44. She reported the matter to Thika police station and was issued with a police abstract from which showed motor vehicle registration No. KAA 524R was involved in the accident. She produced the abstract as exhibit P4.

45. It had been pleaded that, the deceased was lawfully travelling as a fare paying passenger when he was involved in a road accident along Thika-Nairobi road near Blue Post Hotel Area on the 13th day of December, 2003.

46. The trial court made a finding, that ***"In the police abstract (exhibit 4) the defendant is listed as the first witness."*** However it proceeded to say, this being the case, the Appellants ought to have sought to rely on the doctrine of res *ipso liquitor* and lift the burden of proving that the accident did not occur because of the defendant's negligence.

47. Further it held, "***Had the appellants pleaded res ipso liquitor and given the fact that the defendant did not testify, they would have carried the day in court. Accordingly I find that the defendant is not liable to the in negligence."***

48. In the case of ***Nandwa vs Kenya Kazi Ltd, Civil Appeal No. 91 of 1987*** for the reason that evidence is not to be pleaded. Also see ***Bennet vs Chemical Construction (Gb) Ltd 3 ALL ER 822*** where the court emphasized that:-

> ***"It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable."***

49. The Appellants produced the police abstract dated 20th January 2004 which indicated that the name and address of the owner of the vehicle registration number KAA 524R was the respondent, Geoffrey Gichohi Njeru which proved the fat that an accident occurred on 13th

December, 2003.

50. The Appellants further proceeded in court the deceased's death certificate which indicated that the deceased died on 13th December, 2003 and the cause of death was entered as, *"head chest and musculoskeletal injuries due to motor vehicle accident."*

51. In addition, the Appellants produced documentary evidence being a copy or record from the Commissioner of Motor Vehicles dated 15th April, 2005 which indicated that the owner of motor vehicle registration No. KAA 524R, a Toyota Corolla was the respondent Geoffrey G. Njeru.

52. Thus the learned magistrate erred in holding that the doctrine of res ipso liquitor must be pleaded and hence arriving at the wrong conclusion and decision.

53. After the interlocutory judgement that was entered on liability and special damages, these two issues were foregone and what was left was the assessment of damages.

54. The trial was also supposed to have indicated the possible awards it would have awarded in event the suit succeeded. Thus this court makes the following orders;

***i. The appeal is allowed.***

***ii. The matter is referred back to the lower court for the formal prove.***

***iii. No orders as to costs as appeal was unopposed.***

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.**

**C. KARIUKI**

**JUDGE**