



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 47 OF 2018

CORAM: D. S. MAJANJA J.

BETWEEN

BENJAMIN MWENDA MUKETHA .

suing as the legal representative of ..

MERCY NKIROTE APPELLANT

AND

ABDIKADIR SHEIK 1ST RESPONDENT

FRED MUNENE 2ND RESPONDENT

HENRY KINYUA KIRUNJA 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.S. Mungai, CM dated 8th May 2018 at the Chief Magistrate's Court at Isiolo in Civil Case No. 58 of 2015)

JUDGMENT

1. The appellant's case was that the deceased was travelling aboard motor vehicle registration number KAZ 966Z owned by the 1st respondent on 23th January 2013 along the Meru – Isiolo road. He alleged that the 2nd and 3rd defendants, while in the course of employment, negligently controlled the vehicle causing the deceased to fall off the vehicle while it was moving causing her to suffer fatal injuries. The appellant as the legal representative of the deceased's estate filed suit to claim damages under the ***Law Reform Act (Chapter 26 of the Laws of Kenya)*** and ***Fatal Accidents Act (Chapter 32 of the Laws of Kenya)***.

2. In their statement of defence, the respondent denied the allegations in the plaint but asserted that if the accident did take place, the same was caused wholly and or substantially due to the negligence of the deceased.

3. The trial magistrate dismissed the case thus precipitating this appeal. The appellant contests the finding on both liability and quantum. Although the court dismissed the suit, the trial magistrate held that he would have awarded the following damages:

Pain and suffering Kshs. 30,000.00

Loss of expectation of life Kshs. 100,000.00

Special damages Kshs. 71,590.00

Loss of dependency Kshs. 4,000,000.00

Total Kshs. 4,201,590.00

4. Since the court would have awarded the said amount, I dismiss the appellant's contention in the memorandum of appeal that the trial magistrate failed to award damages for loss of dependency despite proof. The award of damages was dependent on the finding on liability and the trial magistrate correctly assessed damages despite dismissing the claim. I also note that the respondents did not cross-appeal against

the finding on damages. I shall therefore limit this judgment to considering the issue of liability.

5. In resolving the issue of liability I am called upon to review the evidence. In this regard, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusions bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

6. The appellant called two witnesses. Benjamin Mwenda Muketha (PW 1) testified that the deceased was his daughter and that she was pushed out of the vehicle and that he only heard about her death from the radio. In cross-examination he told the court that he heard about her death 14 days after the incident. PC Lilian Wambui (PW 2) recalled that a member of the public reported an accident on 23rd January 2013 involving the 1st respondent's motor vehicle and the deceased who had jumped out of the vehicle. She stated that no witnesses came forward to record statement as to what took place.

7. In light of this evidence, the trial magistrate dismissed the claim on the basis that there was no evidence to show how the accident took place as PW 1 did not witness the incident while PW 2's evidence contradicted that of PW 1 as to what could have happened to the deceased.

8. Counsel for the appellant, Mr Mutunga, submitted that the trial magistrate was wrong because there was adequate evidence on which to find the respondents liable. He pointed out that PW 1's evidence that the deceased was pushed out of the vehicle was confirmed by the radio broadcast and was not controverted. He contended that the trial magistrate improperly found that the deceased jumped out of the vehicle, a fact not supported by the police abstract hence there was no evidence that the deceased jumped from the vehicle. He urged the court to consider the peculiar circumstances of the case where the members of the public who reported the accident to the police did not come forward to testify.

9. Was liability proved in these circumstances? **Sections 107, 108 and 109** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the appellant to prove liability on the balance of probabilities. This proof must, of course, be through admissible evidence. PW 1 did not witness the evidence and only heard about the accident through a radio broadcast. The evidence of how the deceased died in an accident was therefore hearsay testimony which could not be used to prove the truth of the assertions made by PW 1.

10. PW 2 also testified that she did not witness the accident and that the accident was reported by members of the public. She produced the police abstract which confirmed the fact of the accident, the date it occurred, the fact that the deceased was a passenger and that she died. It was produced without objection and was the only evidence of the fact that an accident took place (see *Joel Muna Opija v East African Sea Food Limited KSM CA Civil Appeal No. 309 of 2010 [2013] eKLR*). A police abstract is not evidence of how the accident took place.

11. The question then is whether the respondent established negligence by establishing the basic facts from which the court could infer negligence. In other words, could the appellant rely on the doctrine of *res ipsa loquitur* to make the case that the respondents were liable. In *Nandwa v Kenya Kazi Limited [1988] eKLR*, Court of Appeal (Gachuhi JA) cited, with approval, a portion *Barkway v South Wales Transport Company Limited [1956] 1 ALLER 392, 393 B* on the nature and application of the doctrine of *res ipsa loquitur* as follows:

The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.

12. As the Court of Appeal explained, once the plaintiff establishes a prima facie case, the defendant must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on the part. Apart from the fact that the accident took place, the testimony of PW 1 and PW 2 as to how the accident could have occurred was not direct testimony as required by **section 63** of the *Evidence Act (Chapter 80 of the Laws of Kenya)*. In other words it was hearsay evidence. It matters not that the deceased was pushed or jumped. In either case, the testimony of both witnesses on this issue was inadmissible and not based on any fact. Since, there was no evidence on how the accident occurred, I find and hold that the appellant failed to prove negligence against the respondents on the balance of probabilities. I would, like the trial magistrate, dismiss the suit for want of proof.

13. I dismiss the appeal. Since the respondents did not attend court despite being served with process, I make no order as to costs.

DATED and DELIVERED at MERU this 22nd day of October 2018.

D.S. MAJANJA

JUDGE

Mr Mutunga instructed Joan W. G. Ndongoro and Company Advocates for the appellant.