REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL APPEAL NO. 1 OF 2017

(Being an appeal from judgment and decree in Kitale Chief Magistrate's Court Civil Suit No. 108 of 2014 delivered by C.C. Kipkorir Resident Magistrate on 14/12/2016)

EMMANUEL K. LOKWEI.....APPELLANT

VERSUS

ISAIAH K. KWARIKWARI.....1ST RESPONDENT

DAYAH EXPRESS LTD..... 2ND RESPONDENT

J U D G M E N T

1. The appellant was a passenger in motor vehicle registration No. KBJ 265Y Matatu which got involved in a road traffic accident on 14/11/2013 pursuant to a collision with motor vehicle Registration No. KBM 181 V Bus belonging to the Respondent and drive specifically by the 1st Respondent. This accident occurred along Gilgil – Nakuru road.

2. The appellant then sustained injuries as enumerated in the amended plaint. He filed suit against the respondent citing several grounds of negligence.

3. The respondent did file their defence in which they attributed liability and negligence on the owner and or driver of motor vehicle KBJ 265Y.

4. The matter proceeded to full trial where the appellant called his witness. The respondent on their part did not call any and they closed their case.

5. The trial court found that the appellant was unable to prove liability as he did not know how the accident occurred. Neither of his witnesses who included a traffic police officer were able to establish how the accident occurred. Relying on the legal maximum res ipsa loquitor, the trial court attributed liability of 50% on the appellant and awarded him general damages of Kshs 1 Million together with proven damages.

6. The appellant was thus dissatisfied with the same hence this appeal. The gist of the appellants grounds of appeal is that the trial court erred in law and fact in arriving at a wrong decision on liability despite the overwhelming evidence on record.

7. The parties agreed to dispose this matter by way of written submissions. I have perused the same extensively together with the cited authorities.

8. What is not disputed herein is that an accident did occur and the the appellant who was a passenger in the Nissan Matatu was involved and he sustained injuries. What is not disputed from the evidence as presented by the appellant is that he could not remember how the accident occurred but he simply found himself at the hospital. Infact he narrated that what he was telling the court was hearsay, as was told by the police.

9. The police officer from the traffic department did not help things either as he was not the investigating officer neither did he produce the sketch map of the scene.

10. The trial court consequently found that it was appropriate to apportion liability at 50%. Was this erroneous? According to the appellant, yes.

11. In such a scenario, the most probable thing to have been done is for the appellant to have sued the owner and driver of the Matatu he was in as well as the respondent. This would have forced the Matatu driver to at least shed some light on how the accident occurred. The other alternative was to call the driver of the said matatu as a witness.

12. The 2nd option was for the respondent to have brought 3rd party proceeding against the matatu driver. They apparently chose not to.

13. Both drivers of the two vehicles at least should have helped the court explain how the accident occurred. In any case the appellant was a mere passenger and was not in control of the motor vehicle.

14. The doctrine of res ipsa loquitor relied on by the trial court is explained by Black Law Dictionary 10th Edition, as,

> ***" The thing speaks of itself."***
>
> ***The doctrine providing that, in some circumstances, the mere fact of an accident occurrences raised an inference of negligence that establishes a prima facie case;, the doctrine whereby when something that has caused injury or damage is shown to be under the management of the party charged with negligence, and the accident is such that in the ordinary course of things it would not happen if those who have the management use proper case, the very occurrence of the accident affords reasonable evidence, in the absence of the explanation by the parities charged, that it arose form the want of proper care. The principle does not normally apply unless (1) the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care; (2) the instrumentalities were under the management and control of the defendant and (3) the defendant possessed superior knowledge or means of information about the cause of occurrence."***

15. In light of the fact that there were 2 motor vehicles involved and the appellant had no control of either of them, and in the absence of any witness to explain how the accident occurred, I find that it was prudent for the trial court to attribute, so to speak, a 50:50 basis negligence on both motor vehicles. Based on the above definition, I think it is too onerous to demand as submitted by the respondent that the appellant did not prove negligence on the part of the respondent.

16. It is even further alleged that the respondent driver was found, at least from the police abstract, to be blame worthy. Whether he was charged and convicted of a traffic offence was not explained by either of the parities.

17. In my view there fore I do not see any other thing the trial court would have done given the circumstances. The 3rd party proceedings should have been taken out by the respondent if I understand clearly their defence.

18. In the premises I do not find any merit in this appeal. The appellant should be satisfied with what the trial court gave him. If he had brought in the owner or driver of the matatu he was travelling in, then

perhaps the rest of the 50% negligence would have been shouldered by him. This is so because the appellant was never at any one point in control of the vehicle.

19. The appeal is hereby dismissed with no orders as to costs.

Delivered, signed and dated at Kitale on 26th day of November, 2018.

H.K. CHEMITEI

JUDGE

26/11/18

In the presence of:

Parties – Absent

Court Assistant – Kirong

Judgment read in open court.