



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

CIVIL APPEAL NO. 19 OF 2015

BETWEEN

MARY AMBEVA KADIRI suing as the administrators of estate of

SALEH JUMA KADIRI (DECEASED).....APPELLANT

AND

COUNTRY MOTOR LIMITED.....RESPONDENT

(Being an appeal from the Judgment and Order of Hon.L. Gitari,

CM at the Chief Magistrates Court at Kisumu

in Civil Case No. 432 of 2006

dated 10th February 2015)

JUDGMENT

1. This the appellant's case against the respondent was dismissed because the appellant failed to prove her case precipitating this appeal.
2. The case against the respondent arose from a road traffic accident that occurred on 13th October 2005 along the Kisumu – Nakuru Road. It was alleged in the plaint that the deceased was working as a turn boy in the respondent's motor vehicle registration number KAH 445 when the driver of the said vehicle drove it negligently and caused to collide with motor vehicle KAH 455J also belonging to the respondent. The appellant brought this action for damages against the respondent on behalf of the estate and dependants of the deceased.
3. The respondent denied the accident and pleaded in the alternative that if the accident did take place then the deceased was wholly or substantially to blame. It alleged that the deceased was hanging outside the vehicle while it was in motion then jumping off. It further alleged that the deceased was behaving in an unruly manner thereby distracting the driver.
4. According to the memorandum of appeal dated 9th March 2015. Mr Anyul, learned counsel for the appellant, submitted that the deceased, who was a passenger, died after the two vehicles belonging to the respondent collided. Counsel contended that in the circumstances, there was an irresistible inference that

the appellant was to blame for the accident. He maintained that in accordance with the doctrine of *res ipsa liquitor*, the burden shifted to the respondent to disprove liability. Counsel pointed out that the police abstract, which the trial magistrate wrongly disregarded, proved that the accident took place and that the two motor vehicles which collided belonged to the respondent.

5. Counsel for the respondent, Ms Barasa, supported the conclusions of the trial magistrate and submitted that the respondent did not prove that an accident took place and without proof of negligence, the respondent could not be held liable. She contended that the police abstract did not establish that the vehicles were owned by the respondent or how the accident took place hence there was no evidence upon which the court could infer negligence. She further submitted that considering the circumstances, the doctrine of *res ipsa loquitur* was not applicable to this case.

6. This being a first appeal, this court is required in law to re-evaluate the evidence adduced before the trial magistrate before reaching its own independent determination whether or not to uphold the decision of the trial magistrate. The court should bear in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co. [1968] EA 123*** and ***Peters v Sunday Post Ltd [1958] E.A 424***).

7. Only the deceased's mother testified at the trial. She recalled that on 13th October 2005, the deceased left to go to work at Country Motors. At about 1 pm, her brother in law informed her that there had been an incident at work and that he had passed away when two vehicles belonging to his employee collided. She rushed there and found the deceased was already dead. At the time of his death, the deceased was 29 years old and was employed as a turnboy with the respondent where he was earning Kshs. 6,000/- with which he used to support her and their two children. After his death, she obtained a grant of letters of administration and a police abstract which she produced and which showed that the two vehicles which collided belonged to the respondent. The respondent did not call any witnesses.

8. The learned trial magistrate found as a fact that the appellant did not discharge the burden of proving negligence against the respondent. The trial magistrate further held that the allegations of negligence against the deceased were not denied hence they were deemed to be admitted hence the defendant could not be found liable.

9. I am now called upon to examine the evidence and determine whether the trial magistrate's findings are supported by the evidence. From the testimony of PW 1, it is clear that she did not witness the accident. She was told that her son had died at work and from the police abstract the accident involved collision of the respondents' vehicles while the deceased was a passenger.

10. The question for the court is whether the appellant established a prima facie case of negligence. In other words, could the appellant rely on the doctrine of *res ipsa liquitor* to make the case that the respondent was liable. The ***Black's Law Dictionary (8th Ed.)*** page 1336 defines *res ipsa loquitur* as, "the thing speaks for itself". It goes on to explain that, "The doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a prima facie case". 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.

11. As the Court of Appeal explained, once the plaintiff established 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. From the foregoing, it is my view that the appellant could

rely on the doctrine of *res ipsa loquitur* if she could establish a prima facie case showing that the accident took place at the respondent's involving the respondent's motor vehicles and that the case was not rebutted.

12. In assessing the evidence, the trial magistrate held that the police abstract was not produced and that in any case the abstract was not sufficient to prove negligence without calling an eye witness to the accident or the police officer who issued the abstract. In this respect the trial magistrate fell into error as the police abstract was produced by PW 1 without opposition from the respondent. The production of the police abstract established the fact that the accident took place and it involved the two vehicles belonging to the respondent. In ***Joel Muna Opija v East African Sea Food Limited KSM CA Civil Appeal No. 309 of 2010 [2013] eKLR*** the Court of Appeal held that the best way to prove ownership of motor vehicle would be to produce a document from the registrar of motor vehicle showing the registered owner. However, if a police abstract is produced in court without any objection, its contents could not be denied.

13. The police abstract confirmed that both motor vehicles KAH 455J and KAL 013A belonged to the respondent and that the accident took place on 13th October 2005 when the two vehicles collided and the deceased, who was a passenger, died. There is further undisputed evidence that the deceased was an employee of the respondent. In these circumstances, that this evidence established a prima facie case of negligence which only the respondent as the owner of the two vehicles and the employer of the deceased could answer. Since no answer was forthcoming the court ought to have held respondent fully liable.

14. The trial magistrate further erred in holding that since the appellant did not file a reply to defence, the allegations against the deceased were admitted. In dealing with this issue I would do no better than quote the Court of Appeal in ***Joash M. Nyabicha v Kenya Tea Development Authority KSM CA No. 302 of 2010 [2013]eKLR*** where it held as follows;

A plain reading of Order VI rule 9 (1) shows that an allegation in a pleading may be traversed expressly by the opposing party or there may be a joinder of issue under rule 10 of the same Order which joinder operates as a denial of the issue or issues. Rule 10 (1) and (2) reads as follows:-

10(1) If there is no reply to a defence there is a joinder of issue on that defence (2) Subject to sub-rule (3) -

(a) there is at the close of pleadings a joinder of issue on the pleading last filed, and

(b) a party may in his pleading expressly join issue on the immediately preceding pleading.

Having failed to file a reply to defence there was a joinder of issue and not an admission which served to deny those allegations. Since the respondent did not call any evidence to support the allegations in the defence, they remained just that; allegations.

15. On the who therefore I am satisfied that there was prima facie evidence of negligence which called upon the respondent to rebut and since it failed to do so, I find the respondent fully liable.

16. I now turn to the issue of quantum. Although the trial magistrate dismissed the appellant's claim, she assessed damages and made the following award:

Pain and Suffering under the <i>Law Reform Act</i>	Kshs.	10,000.00
Loss of expectation of life under the <i>Law Reform Act</i>	Kshs.	100,000.00
Loss of dependency under the <i>Fatal Accidents Act</i>		
(6,000 X 12 X 18 X 2/3)	Kshs.	864,000.00

Special Damages	kshs.	10,000.00
Death Certificate	Kshs.	100.00
Total	Kshs.	984,100.00

17. Mr Anyul submitted that the award was too low based on the multiplier of 18 years given that the deceased was 29 years at the time of death. He suggested that a multiplier of 30 would have been more appropriate. Ms Barasa was of the view that award was reasonable.

18. The Court of Appeal in *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another* NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR held that the choice of multiplier is a matter of the courts discretion which must be exercised judiciously. In arriving at the multiplier, the court should consider the circumstances and conditions of life of the deceased could have lived, keeping in mind that the standard of life, the life expectancy in Kenya has reduced over the years and the period of expected dependancy.

19. In this case the trial magistrate was not only guided by decisions of the High Court in similar circumstances but also considered that the nature of the deceased's employment as turn boy placed him in the high-risk bracket hence a multiplier of 18 was reasonable. I do not find any error in the manner of assessment of the multiplier. I therefore affirm the award of damages.

20. In conclusion, the appeal is allowed and the judgment of the subordinate court is substituted with a judgment against the respondent for the sum of Kshs. 984,100.00 together with cost of the appeal and of the suit in the subordinate court.

21. When the court makes an award under the *Fatal Accidents Act*, it must, in accordance with **section 4(1)** apportion the amount awarded to each dependant and where children are involved approve a scheme of investment for the sums due to the children. I therefore direct that the appellant to file the necessary application for consideration before this court in due course before the decretal sum is released to them.

DATED and DELIVERED at KISUMU this 28th day of March 2017.

D.S. MAJANJA

JUDGE

Mr Anyul instructed by D.O.E Anyul and Company Advocates for the appellant.

Ms Barasa instructed by Peter M. Karanja and Company Advocates for the respondent.