REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 151 OF 2001

GILBERT MURIUNGI .....APPELLANT

VS

JOSPHAT MARETE .....1ST RESPONDENT

CO-OPERATIVE INSURANCE CO LTD .....2ND RESPONDENT

JUDGEMENT

The appellant herein brought this appeal against judgement of Hon A.O Muchelule Chief Magistrate as he then was delivered on 29th November 2001 in which although it was not in dispute that the 2 defendants vehicles collided and the plaintiff who was travelling as a fare paying was in defendants matatu and that he suffered injuries as per P3 (EXP3)

Medical Report (EX p7) the plaintiff was admitted at Chogoria mission Hospital where he regained consciousness after about one month. The accident happened on 7th September 1993 and the traction through the right lower limbs for connection of the pelvic which was removed on 17th September 1993. The plaintiff was gradually mobilised on crutches and finally discharged on 5th November 1993. The plaintiff who was a teacher was only able to resume his duties on 28th February 1996.

The trial magistrate found the plaintiff didn't need evidence to prove that the defendants and the 3rd party were guilty of negligence. It was said the fact that the 2nd defendant and 3rd party may be blaming each other for causing accident did not necessarily help the plaintiff in proving his case.

The trial magistrate didn't quantify possible damages in event he found the plaintiff had proved his case. He dismissed the plaintiffs case with costs.

In the memorandum of appeal the appellant contended that the trial magistrate erred in law and fact in failing to appreciate that the plaintiff proved negligence against defendants. For this ground it was submitted that sufficient evidence was laid down before the trial magistrate and there was no dispute acceded occurred and the plaintiff was injured.

That there was proof of medical expenses incurred as a result of the accident.

It was argued that plaintiff proved negligence because the 2nd defendant owed duty of care to the plaintiff as well as other road users.

That as a result of the defendants negligence, the plaintiff suffered injuries. The authority of **Domeghue**

vs Stephensa [1932] was relied upon.

It was also argued that the trial magistrate erred in ignoring authorities showing similar circumstances which were relied upon to prove plaintiffs case. It was submitted that the authorities ought to have guided the trial court in atleast apportioning liability between defendants and awarding damages for plaintiff. The authority of **Devna Pandit vs Kennedy Otieno Obara and Another CC No. 494 of 2011** was relied upon and appellant prayed that judgment of the trial court be set aside and appeal be allowed.

Having considered and re-evaluated and relooked the evidence on record for the trial court it is my considered opinion that the plaintiff did satisfy the 3 elements in the doctrine of resipsa logruitor which are:-

a) The harm ordinarily would not have happened unless someone was negligent.

b) The harm was caused by something that only the defendant controlled.

c) The plaintiff voluntarily actions did not contribute to the harm.

The plaintiff was a fare paying passenger and having entered ist defendants vehicle which was being driven by the 3rd party, the defendant owed a duty of care to him. I do find that the plaintiff having given circumstances under which he sustained his injuries the trial magistrate ought to have required of the defendants to come up with evidence to the contrary. In this case the defendants are blaming each other for the accident but the trial magistrate proceeded on the wrong principle to find that the plaintiff had not proved negligence. The plaintiff needed not provide direct evidence as this is type of negligence that falls within the scope of the defendant's duty of care to the plaintiff. The case of **Houwe vs Seven forty two** is instructive in the circumstances herein. Aside from the pure power of burden shifting and the presumption of negligence the doctrine of res Ipsa alleviates the need for the plaintiff to explain how the hard occurred: there does not have to be an eye witness nor need there be direct evidence of defendants conduct. There is no absolute requirement that the plaintiff explains how the accident happened, I do find that the appeal succeeds and the order dismissing suit is set aside.

Even if the trial court found that plaintiff had failed to prove his case on a balance of probability he had responsibility to assess possible general damages which he didn't do.

In the submissions in the lower court, appellants counsel had proposed an award of Kshs 470,000/- as general damages with a rider that he would have proposed more if it were not that the jurisdiction was capped limited. For special damages he said kshs 28,600/= had been proved.

It was submitted that defendants were solely liable. The authorities relied upon were **High Court C.C. No. 2002 of 1991 at Nairobi and No. 4621 of 1988 at Nairobi.**

Mr Mbogo advocate for the 1st defendant as the other had submitted that the 1st defendant was sued for the acts of 3rd party. It was argued that 3rd defendant was driving 1st defendants motor vehicle on his way to Nairobi when he was hit from the rear by the 2nd defendants motor vehicle and that 3rd party can't be blamed as he was not charged. It was argued that DW1 who claimed to have been in 2nd defendants motor vehicle at the time of the accident was not credible for reasons his name was not in the police abstract as a witness and the work ticket doesn't indicate he was the authorised officer and he didn't sign it. Mr Marube advocate for 2nd defendant also submitted that it is not disputed an accident occurred but dispute to be determined is the extent to which the 2nd defendant was involved and who is liable to compensate the plaintiff.

2nd defendants counsel submitted that 1st defendant should be held liable 100% as the 2nd defendants vehicle encroached on their side of the road and caused collision. The authorities of **Domeghue vs Stevenson** and **Rolise vs Syviries** and others [1973] ALL KR 903 were relied upon by 2nd defendants counsel in urging the court to dismiss the suit against them. It was submitted that in event that the court

finds that 2nd defendant was liable contribution should be 10%. On quantum it was submitted that Kshs 45,000/= would be sufficient. The accident occurred on 7th September 1993 and it was not until on 29th November 2001 that judgment was delivered. The plaintiff suffered serious injuries that kept him out of work for a considerable period of time and the proposal of Kshs 470,000/= by then is in my view quite minimal considering the period of time taken to have this appeal heard. I will however not change that figure being plaintiff's counsel proposed it relying on guided authorities. The 1st defendant didn't not object to the proposal and didn't give any other proposal. The proposal by 2nd defendant was not based on any authority but in the circumstances of injuries very minimal and cant compensate the plaintiff. I do award Kshs 470,000 to plaintiff as general damages. The defendants liability will be apportioned at 60% to 40% for the 1st and 2nd defendants respectively.

Judgment is therefore entered for the plaintiff for Kshs 470,000/= against defendants as per the contributory negligence apportioned. Interest on general damages to accrue from date of judgement in the lower court. Special damages proven of Kshs 28,600/= also to be apportioned at 60% to 40% and interest to accrue from date of filing suit.

Costs of appeal and suit in lower court to the appellant/plaintiff.

Ruling Signed, Delivered and Dated this 2nd Day of August 2017.

HON. A.ONG'INJO

JUDGE

In the presence of:

C/A: Penina

Appellant:-N/A for Wangwe Advocate

Respondent:- N/A

Order

Notice of judgment to issue.

HON. A.ONG'INJO

JUDGE