REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CIVIL APPEAL NO. 37 OF 2015

(Being an appeal from the Judgment of the Chief Magistrate's Court

at Naivasha Civil Case No.622 of 2012, S. Mwinzi – Ag. SRM)

LOCHAB TRANSPORT LIMITED.....................APPELLANT

- VERSUS -

TERESIA WANGARI AND KEZIAH

MUKUHI MUIGAI (*Personal representatives of the Late*

ISAAC MACHARIA MUTUNGA..................RESPONDENTS

J U D G M E N T

1. This appeal emanates from the decision of **S. Mwinzi Ag. SRM** (as he then was), delivered on 25th March, 2015. In the suit before him the Plaintiffs had sued in their capacity as personal representatives of **Isaac Macharia Mutunga** who died in a road traffic accident on 2/1/2009, while travelling in a motor vehicle **CHS-ST-190-404 8254 YUASA** (Yuasa vehicle). The said vehicle collided with the Defendant's vehicle **KAV 265F/ZC 38822** along Naivasha/Maai Mahiu road. Negligence was alleged by the Plaintiffs against the Defendant's driver. The foregoing is a summary of the plaint field on 29/8/2012.

2. The Defendants denied all the key averments in the plaint, and in the alternative blamed the driver of the **YUASA** motor vehicle for the collision. Further, they applied for third party notices against the representatives of the estate of **Mawamburi Mugimba**, the deceased owner of the said motor vehicle, namely **Jane Wairimu Mungai** and **Caroline Nduta Mwamburi**. It does not appear that these notices were served upon the said parties.

3. On 15/10/2012 a preliminary objection was filed by the Defendant intimating that the Plaintiff's suit was time barred. In his judgment after the trial, the trial magistrate found for the Plaintiffs against the Defendants and awarded damages in the sum of Shs 2,080,500/= with costs and interest.

4. Aggrieved by the outcome the Defendants, now Appellants filed a memorandum of appeal containing six grounds of appeal as follows:

> **"1. The Learned Trial Magistrate erred both in law and fact by allowing a claim filed out of time without addressing the issue of limitation in the judgment.**

2. The Learned Trial Magistrate erred both in law and in fact by determining the issue of liability on the basis of written submissions and not the evidence on record.

3. The Learned Trial Magistrate erred by finding the Appellant for the accident subject matter without any evidence at all.

4. The Learned Trial Magistrate erred both in law and in fact by shifting the burden of proof to the Appellant contrary to the Law of evidence.

5. The Learned Trial Magistrate erred both in law and in fact by finding the Appellant liable just of the reason that it failed to join a third party and not on the basis of the evidence on record.

6. The Learned Trial Magistrate erred both in law and in fact by awarding the Respondent in the sum of Kshs 2080,500/= which was too excessive in the circumstances." (sic)

5. The parties agreed before this court to argue the appeal by way of written submissions. For their part, the Appellants consolidated their grounds of appeal into one, to the effect that:

"The learned trial magistrate erred both in law and in fact by finding the Appellant 100% liable for the accident……….without any evidence and shifted the burden of proof to the Appellant, contrary to the Law of Evidence."

The ground of appeal relating to quantum was withdrawn.

6. The gravamen of the Appellant's submissions is that the Respondents failed to prove negligence on the part of the driver of the Appellant's vehicle **KAV 265F/ZC 38822**. Emphasising that none of the Respondent's witnesses witnessed the accident, the Appellants relied on the provisions of Section 107 (1) and 108 (2) of the Evidence Act to argue that the court erred by finding the Appellant liable when there was no evidence of negligence.

7. Three authorities namely **Haji -Vs- Marair Freight Agencies Ltd [1984] KLR 142, Karugi & Another -Vs- Kabiya & 3 Others (1987) KLR 347** and **Nandwa -Vs- Kenya Kazi [1988] KLR 492** were cited in support of the Appellant's argued position.

8. Similarly it was pointed out that the Appellant's evidence regarding the manner in which the accident occurred was not controverted, and that the trial court erred, by purporting to shift the burden of proof to the Appellants, based on their non-joinder of the owner of the **YUASU** motor vehicle. They have urged this court to set aside the judgment of the lower court and substitute an order of dismissal of the suit.

9. The Respondents naturally support the decision of the trial court, in particular highlighting the reasons given for its decision. These include the failure by the Appellants to enjoin the Third Party, despite pleading the negligence of such party for the accident, and the finding that the Respondents had established their case to the required standard.

10. With regard to the first reason, the Respondents assert that in light of the provisions of Order 1 Rule 15 of the Civil Procedure Rules, the Appellants were estopped from blaming the Third Party for the accident because they failed to enjoin them. And that the Respondents' case was against the Appellants not the Third Party.

11. Thus the trial court could not make orders against a non-existent party – See **Harrison Wafula Khamala -Vs- Isaac Ndarwa Kiarie [2016] eKLR, Stella Muthoni -Vs- Japhet Mutegi [2016] eLKR**. In the result the abandonment of the third party proceedings by the Appellant left it exposed to liability – See **Kenya Bus Service Limited & Another -Vs- Githae Gatururu [2013] eKLR**.

12. As well as defending the court's finding that the Respondents established their case on a balance of

probabilities, the Respondents relied on the doctrine of *res ipsa loquitur* as restated in **Jackline A. Obundo -Vs- Kenya Bus Services & Another [2007] eKLR**, and observed that, having been a passenger in the **YUASU** motor vehicle, the deceased herein could not have contributed to the accident. Further, that the Appellant's evidence regarding the accident was not credible or sufficient to displace the presumption of fact raised by the Respondents' evidence. The Respondents therefore urged the court to dismiss the appeal.

13. This is a first appeal. The Court of Appeal for Eastern Africa laid out the confines of the duty of the first appellate court in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** in the following terms:-

> **"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally.**
>
> **An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."**

14. During, the trial the first Respondent **Teresia Wangari** testified as **PW1**. She adopted her witness statement and documents that had been filed simultaneously with the plaint on 29/8/2012. She also called a police officer **PC Alice Mathenge** (**PW2**). The gist of the Respondents' evidence was that the deceased died on 2/1/2009 following a road accident on Naivasha – Maai Mahiu, involving the **YUASA** vehicle and the vehicle **KAV 265F**. The first Respondents set out their consequent losses as a result of the death.

15. The Appellants' witness was **John Macharia Wambugu** (**DW1**) the driver of the vehicle **KAV 265F.** He stated that he was travelling from Kampala to Nairobi on the day of the accident. That it *"was dark in frost and it was drizzling."* Suddenly an oncoming vehicle appeared at 10 metres and despite him slowing down, the said vehicle rammed into his vehicle. Police visited the scene and afterwards allowed him to drive away. He said he has not been charged for traffic offence.

16. I have reviewed the pleadings, the evidence as well as submissions made on this appeal. The applicable law as to the burden of proof is found in Section 107 (1) of the Evidence Act which states that:

> **"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."**

17. Section 108 further provides that:

> **"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."**

In the case of **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that:-

> **"We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the**

parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

18. The authorities cited by both the Appellant and the Respondents resonate with the foregoing as well as reinforce the standard of proof in civil cases. And as stated by the Court of Appeal in **Nandwa -Vs- Kenya Kazi**:

> **"In an action for negligence, the burden is always on the Plaintiff to prove that the accident was caused by the negligence of the Defendant. However, in the course of the trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by negligence on the part of the Defendant, the issue will be decided in the Plaintiff's favour unless the Defendants' evidence provides some answer adequate to displace that inference."**

19. At paragraph 5 of their plaint the Respondents' averred that:

> **"5. The said accident was solely caused by the negligence of the Defendant's servant, agent, employee and or driver and as such the Defendant is therefore vicariously liable. (sic)**
>
> **<u>PARTICULARS OF NEGLIGENCE</u>**
>
> **a. Driving motor vehicle registration number KAV 265/ZC38822 without due care and attention at all.**
>
> **b. Driving at a speed which was excessive in the circumstances.**
>
> **c. Ramming into motor vehicle CHS-ST-190-4048254 YUASA.**
>
> **d. Failing to maintain a proper lookout or in any other way manage and/or control the said Motor vehicle so as to avoid the accident.**
>
> **e. Failing to stop, swerve, apply brakes or act in any other way control Motor Vehicle registration Number KAV 265F/ZC38822 to avoid the accident.**
>
> **f. Driving on the path of motor vehicle CHS-ST-190-4048254.**
>
> **g. Failing to have regard to safety of other road users." (sic)**

Further at paragraph 6 the Respondents averred their reliance on the doctrine of *res ipsa loquitur*.

20. The Appellant's defence statements contain denials of these and other key averments in the plaint. The duty of proving the allegations of negligence contained in the plaint lay squarely on the Respondents. This is true, whether such evidence of negligence was direct, or indirect therefore raising the presumption of negligence under the *res ipsa loquitir* doctrine (See Court of Appeal decision in **Embu Public Road Services Limited -Vs- Riimi [1968] EA 22**.

21. It is evident that neither **PW1** nor **PW2** witnessed the accident. While the occurrence of the accident in this case is not disputable, it is not enough that a collision happened. In **Kiema Mutuku -Vs- Kenya Cargo Handling Services Limited [1991] 2 KAR 258,** the Court of Appeal held that our law does not support liability without fault. Said the court:-

> **"There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."**

22. In his judgment, the trial magistrate grappled with the rival submissions made before him concerning the absence of Plaintiff eye witnesses to the accident. The Appellant had referred the court to a decision echoing the duty of the Plaintiff to call witnesses in proof of liability in a claim based on negligence.

23. The foregoing notwithstanding the trial magistrate reached a conclusion to the following effect:

> **"To distinguish the circumstances of this case from the above case, it's on record that the Plaintiffs…….called a Police Officer to testify. Granted, the officer said the matter is pending directions from the police headquarters.**
>
> **Further, the issue of liability as between the Defendant and the third party could only be determined through third party proceedings, which the Defendant never followed through. On these two grounds, I find I would properly directed to hold the Defendant 100% liable for the accident"**

24. On my part, having reviewed the Plaintiffs' evidence at the trial, I do agree with the Appellants that there was no evidence whatsoever from the Plaintiffs regarding the manner in which the accident occurred; much less to prove negligence by the Appellant's driver. Moreover, the Defendant's version of the accident heaped the blame on the driver of the **YUASA** vehicle in which the deceased was travelling. Authorities upon which the Respondents have placed reliance, do not exclude the duty of a Plaintiff to prove negligence.

25. What they state is that the Defendant who wishes the court to apportion proven liability against a third party must enjoin the party both at the trial and on appeal or else bear the liability alone. In other words, the court will not make orders against a party not before it. However, the duty to prove negligence does not shift from the Plaintiff to the Defendant merely because the latter has alluded to a third party's contribution, partial or whole, to the occurrence of an accident.

26. I might add here that the Respondents themselves inexplicably failed to enjoin the owner of the vehicle in which the deceased was travelling at the time of the accident. In all the cases cited by the Respondents on this score, there was evidence adduced by the Plaintiff as regards the negligent actions of the Defendant driver.

27. For instance, in the case of **Stella Muthoni**, the court, before reviewing the Plaintiff's evidence on negligence stated that:

> **"Under Sections 107 and 108 of the Evidence Act…….. it is the party who alleges the existence of a fact that must prove it ….(to) a balance of probability. The Appellant in her plaint pleaded various particulars of negligent against the Defendant."**

After reviewing the evidence by the Plaintiff and the Defendant the court concluded that:

> **"To my mind she (Plaintiff) had discharged her burden and the evidentiary burden had shifted to the Respondent….."**

28. While it is true that the Defendant who claims relief or contribution ordinarily has the duty of enjoining the third party, or else be found 100% liable, that does not mean that any default in enjoining such third party absolves the Plaintiff from making a case in negligence against the Defendant. The trial court's reasoning in this case verges on such a position; which is erroneous.

29. The rationale of the decision in **Benson Charles Ochieng** and the other authorities cited by the Respondents is that the court cannot apportion liability between a Defendant and person not party to a suit. However no liability can attach against either the Defendant, or the third party, even if enjoined until the claimant proves negligence.

30. In the instant case the Respondents woefully failed to discharge their duty to prove negligence against

the Appellants and it was a serious misdirection for the trial court to hold otherwise. These conclusions stand, whether the Respondents relied on the doctrine of *res ipsa loquitur* or not.

31. As stated in the **Nandwa case** the doctrine will only come into play where a set of facts proved by the Plaintiff raise a *prima facie* inference of negligence on the part of the Defendant, and who does not provide an answer. In this case, only the collision and death of the deceased was established by the Respondents. There is no material upon which a court could properly make a *prima facie* inference of negligence. Indeed **DW1's** evidence is that the driver of the **YUASA** vehicle caused the collision. That the accident occurred on a dark and frosty night.

32. The Respondents needed to prove more facts, beyond the mere occurrence of a collision to establish a *prima facie* inference that the accident was caused by the negligence of the Defendant driver. (See also **Kiema Mutuku's** case). Even so **DW1's** evidence fully exonerated the Appellant's driver from liability. In conclusion, the findings on liability by the trial magistrate were based on no evidence.

33. The Court of Appeal stated in **Ephantus Mwangi & Another -Vs- Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278**, **Hancox J.A.** (as he then was) stated succinctly that:-

> **"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did"**

The first holding in the case was that:-

> **"The court of appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if**
>
> **(a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of evidence or**
>
> **(b) ……………..."**

34. I am satisfied that the lower court finding on liability was primarily based on no evidence, and/or a misapprehension of the same as well as misapplication of the principles regarding joinder of 3rd parties. Consequently the entire judgment cannot stand. I hereby set it aside and substitute therefor an order for the dismissal with costs of the lower court suit. The costs of this appeal are awarded to the Appellants.

Delivered and signed at Naivasha this 22nd day of September, 2017.

In the presence of:-

N/A for Appellant

Mr. Karanja for Respondents

Court Assistant - Barasa

C. MEOLI

JUDGE