



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CIVIL APPEAL NO. 3 OF 2015**

*(Being an appeal from a Judgment of the CM'S Court Naivasha Civil Case No. 1112 of 2010) - S. Muchungi (RM)*

**M A (*Minor suing thro' next friend*)**

**and mother A N.....APPELLANT**

**-VERSUS-**

**WANJIRU MWANGI alias LUCY WANJIRU.....1<sup>ST</sup> RESPONDENT**

**HENRY SHIVACHI.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

1. This appeal challenges the dismissal of the Appellant's suit for damages before the lower court. The grounds in the Memorandum of Appeal state that:

**“1) THAT the learned Trial Magistrate erred in law and in fact in evaluating the evidence on record and arrived at a wrong conclusion that the Plaintiff did not prove her case to the required standard and hence dismissed it.**

**2) THAT the learned Trial Magistrate erred in law and in fact in not considering the doctrine of *Res Ipsa Loquitur*.**

**3) THAT the learned Trial Magistrate erred in law and in fact in not considering the Plaintiff/Applicant's evidence fully and putting a lot of weight on the Defendants' evidence which was misleading.**

**4) THAT the learned Trial Magistrate erred in law and in fact in not assessing or making adequate assessment of damages payable to the Appellant.**

**5) That the learned trial Magistrate erred in Law and fact in dismissing the Appellant's case when there was abundant evidence in support of it.”**

2. The suit in the lower court was based on negligence and was brought to recover damages in respect of injuries sustained by the minor Plaintiff following a road traffic accident along Maai-Mahiu/Naivasha road on 10/10/2010, while travelling in the 1<sup>st</sup> Respondent's vehicle **KBJ 098J**. The said vehicle allegedly lost control while being driven by the 2<sup>nd</sup> Respondent. Several allegations of negligence by the latter driver/agent/servant of the 1<sup>st</sup> Respondent are set out in the plaint.

3. By their amended defence, the Respondents denied all the key averments in the plaint and averred that the claim was fraudulent as particularised in the statement. Further, and in the alternative, the Respondents averred that the accident was inevitable and occurred pursuant to a tyre burst which could not have been anticipated and/or prevented by the Respondents. At the close of the hearing, the trial court found that negligence had not been proven and dismissed the Appellant's claim.

4. In arguing this appeal, the parties consented to file written submissions. The Appellant took issue with the finding of the lower court, based on the evidence of the police officer, that the accident vehicle was not speeding at the time of losing control. Restating the evidence of the Appellant at the trial, and the doctrine of *res ipsa loquitur*, counsel for the Appellant stated that the Respondents did not tender any explanation for the tyre burst, and subsequent accident in which one person died.

5. The Appellant submitted that the trial court misapprehended the reasoning employed to arrive at the decision in **Kenya Bus Services Limited -Vs- Kawira [2003] 2EA 519**. She relied on the Court of Appeal decision in **Embu Public Road Services Limited -Vs- Riimi**

[1968] EA 22 and contended that the driver of the accident vehicle failed to take any or preventive action and/or give an explanation at the trial. She prayed that the appeal be allowed.

6. For their part, the Respondents submitted as follows. The cause of the accident was not established by the Appellant and therefore negligence was not proved. That the evidence of the police officer supported the Respondents defence of inevitable accident; and that a tyre burst did not connote negligence. They cited two cases namely **Karanja Kago -Vs- Karoki Njenga & Edward James Mungai Nairobi [1979] eKLR** and **Joash Misikhu Vuranje -Vs- Wanjiru Mwangi & Another [2016] eKLR** in support of this position. The Respondent therefore urged the court to dismiss the appeal.

7. In **Selle -Vs- Associated Motor Boat Co. [1968] EA 123** the Court of Appeal for Eastern Africa laid out the principles guiding the exercise of the jurisdiction of the first appellate court in an appeal such as the one before this court. The court stated:-

**“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).”**

8. Through the next friend **A N N (PW1)** it was the Plaintiff’s evidence that the Plaintiff minor and her mother **PW1** were travelling in the Respondent’s motor vehicle **KBJ 098J** from Western Kenya to Nairobi. On reaching Maai Mahiu the vehicle, a bus, sustained a tyre burst; that the driver was unable to control the vehicle which proceeded to zig zag on its rim before a second tyre burst and it went off and ended up on the right hand side of the road facing Nairobi.

9. As a result, the minor Plaintiff sustained head injuries. **PW1** stated that the driver was driving fast and was to blame. **PC (W) Alice Mathenge** was **PW2**. She confirmed a tyre burst resulted in the bus losing control and veering off the road, leaving one person dead and others injured.

10. The Respondents did not call any evidence, relying instead on their cross-examination of the witnesses and submissions. I have considered the submissions made on this appeal alongside the evidence by the Plaintiff minor.

11. The Plaintiff was obligated under Section 107 (1) of the Evidence Act to prove her claim, and in particular, negligence on the part of the bus driver. Out of the set of eight particulars of negligence pleaded in the plaint, it seemed that the Plaintiffs evidence narrowed down towards the following particulars:-

**“a) Driving at an excessive speed in the circumstances.**

**b) Failing to slow down, stop, swerve or in any other manner applicable control motor vehicle registration number KBJ098J so as to avoid the subject accident.**

**c) Allowed or permitted himself to drive unroadworthy motor vehicle when he knew or ought to have known the risks involved.**

**d) .....**;

**e) .....**;

**f) Driving without due care and attention.**

**g) Having no regard at all to the safety of his passengers and particular the Plaintiff.**

**h) Res Ipsa Loquitur.”**

12. The fact of the tyre burst was specifically pleaded only by the Respondents in their amended defence as the cause of the “inevitable” accident. Although in her testimony **PW1** could not tell the actual speed at which the vehicle was moving, she maintained that it was speeding at the time the tyre burst happened. Thus the Plaintiff was relying both on speeding, the subsequent tyre burst and loss of control of the vehicle by the driver, in demonstrating his negligence.

13. In dismissing the Plaintiff’s evidence regarding speeding, the trial magistrate distinguished the instant case from the case of **Kenya Bus Services Limited -Vs- Kawira [2003] 2EA 519 interalia** by observing that:

**“Unlike in the quoted cases above, in this particular case, there is no concrete evidence to show that the vehicle may have**

been speeding and so contributed to the tyre burst. PW1 was not sure of the speed the vehicle was being driven at. At one point she said the vehicle was speeding but at some point she said she could not tell the speed the vehicle was being driven at.

The police officer who testified.....said that there was no evidence that the vehicle was at a high speed because of the distance it covered before stopping. Both witnesses stated that the tyres burst first before the vehicle went and hit a culvert.

Indeed if the vehicle moved only for about 8 metres before landing off the road it suggests that it was not at high speed. The police officer also said that the skid marks left on the road were an indication that the driver tried stopping the vehicle. He seems to have taken remedial measures to avoid the accident. I find nothing negligent in his actions.....” (sic)

14. Apparently accepting PW2’s evidence that the vehicles tyres were new, the court concluded that in the absence of an explanation for the possible cause of the tyre burst this was an inevitable accident.

15. The Appellant’s submissions take issue with the above reasoning by the trial court and while these submissions raise reasonable questions in that regard, they appear to overlook two critical points that are raised by the contents of the quoted passage. Firstly, that PW1 stated that she could not tell the actual speed at which the vehicle was moving is not necessarily inconsistent with her statement that the vehicle was speeding.

16. The definition part of Evidence Act defines evidence in the following terms:

**“evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved; and, without prejudice to the foregoing generality, includes statements by accused persons, admissions, and observation by the court in its judicial capacity;”**

Similarly, the definition of the term “fact” includes:

**“a) anything, state of things, or relation of things, capable of being perceived by the senses; and**

**b) .....**”

17. Section 3 (2) and 3 (3) of the Evidence Act provides that:

**“(2) A fact is proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.**

**(3) A fact is disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist.**

**(4) .....**”

18. PW1’s evidence as to the speed of the bus qualifies as direct evidence under Section 63 (2) of the Evidence Act which states that for purposes of direct oral evidence, direct evidence means *inter alia*:

**“(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;**

**(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;**

**(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;**

**(d) .....**”

19. The Respondents in their submissions have placed much reliance on this court’s decision in an appeal arising from the same accident herein – **Joash Misikhu** – where this court found *inter alia*, that speeding was not proven against the Respondent. It is necessary to observe that in that case, the Defendants had controverted the Plaintiff’s case at the trial. A proper reading of paragraphs 11 to 14 of this court’s judgment in the **Joash Misikhu** appeal explains why this court eventually reached the conclusion that **“it was unlikely that the vehicle was moving at an excessive speed.”**

20. In the present case however, no serious challenge of the Appellant’s evidence was raised either by cross-examination or through evidence by the Respondents during the trial. It matters not that the two appeals arose from the same facts. None of the appeals or trials served as a test case for the other, and in each case, the trial court had to make determinations based on the actual evidence tendered before it. Thus in the instant case, PW1’s evidence that the accident vehicle was speeding was not controverted by the evidence of PW2 as the trial court seemed to suggest. The Respondents in their submissions and the trial court also glossed over a second question.

21. And that matter forms the second observation on the trial court's reasoning, namely, that **PW2's** evidence regarding how the accident occurred ousted **PW1's** version thereof. **PW2's** evidence as to how the accident occurred consisted of pure hearsay. That is indisputable: **PW2** neither visited the scene of accident nor investigated the case, only relying, it would seem, on the police file and inspection report, none of which were produced as exhibits at the trial. Remarks by the witness as to the length of skid marks, or braking distance, inferences therefrom, and state of the bus tyres amount to hearsay: the sketch plans of the scene and vehicle inspection reports were not part of the documentary evidence tendered by the defence or any party. It would seem that **PW2's** evidence on this score was gleaned from unmarked documents which were shown to her during cross-examination.

22. In the circumstances, **PW2** was in no position to state the likely cause of the accident and or to dispute the version thereof as given by **PW1**. It is evident therefore that by relying on **PW2's** evidence to discredit and reject **PW1's** evidence, the trial court fell into error. The only solid and credible facts that could be drawn from **PW2's** evidence was the mere occurrence of the accident, the scene thereof and the vehicles and parties involved, as contained in the police abstract Exhibit 4 the only document she produced. The rest of **PW2's** evidence being inadmissible hearsay could not be acted upon.

23. On the evidence placed before the trial court through **PW1**, the trial court was entitled to find that hers was direct and uncontroverted evidence in respect of the manner in which the accident occurred. This is true regarding the occurrence of the tyre burst and what next happened. But as to whether the speeding occasioned the tyre burst, the connection may not be very clear.

24. What is clear though from **PW1's** evidence is that upon the tyre bursting, the driver of the bus lost control of the vehicle, which careened on 3 tyres from the left to the right side of the road and hit a culvert before it went off the road, where it stopped. This progression of events is to my mind confirmation of **PW1's** evidence that the vehicle was at a speed when the tyre burst occurred. Otherwise, the tyre burst alone ought not to have led to the driver losing control of the vehicle had the bus been doing a moderate speed. Indeed one passenger died on the spot.

25. The Respondents had pleaded inevitable accident, but no evidence was tendered to show what steps the vehicle owners and driver took before and after the tyre burst to ensure the safety of the bus passengers and other road users. See **Embu Public Road Service Limited -Vs- Riimi [1968] EA22**. Nor did the Respondents present any explanation why the tyre burst in the first place, and/or whether on account of their maintenance of the vehicle, this occurrence could not have been foreseen or prevented, as was done in the **Joash Misikhu** trial that gave raise to the earlier appeal before this court.

26. In the case of **Kago -Vs- Njenga [1979] eKLR** where a tyre burst was blamed for the accident the Court stated that:

**“The evidence of the Government vehicle examiner was that the tyre, although in good condition had burst. He could not say whether it had burst before or after the impact..... In my view it cannot be said.....that (the learned judges) inference that the accident was inevitable was unreasonable.”**

27. This court similarly presented with evidence of the motor vehicle inspector in **Joash Musikhu** (former appeal) found the accident inevitable.

28. In making comparisons between the facts in **Embu Public Road Services Limited -Vs- Rimii** and **Kago -Vs- Njenga** the Court of Appeal stated that:

**“A somewhat similar case is that of Embu Public Road Services –Vs- Riimi [1968] EA 22. That was also a case of burst tyre after which the bus overturned, causing injuries to the respondent who successfully sued for damages. The appeal was dismissed because it was held that the bus should not have overturned, although the tyre had burst, had the driver taken that amount of corrective action which should be expected of a competent driver. The driver had been guilty of negligence after the tyre burst.” (Emphasis added)**

29. Similarly, in the present case, the driver was shown to have been negligent before the tyre burst by driving at a high speed due to which, it must be that, following the tyre burst, he was completely unable to take adequate corrective action to avoid losing control. The Plaintiff minor in this case therefore succeeded to prove direct negligence arising from speeding. As regards the occurrence of the tyre burst, it can be said here, as stated in **Kenya Bus Services Limited -Vs- Kawira [2003] 2EA 519** that:

**“Buses when properly maintained, properly serviced and driven, do not just run over bridges.....New tyres do not just burst.....”**

30. In **Kenya Kazi Limited -Vs- Nandwa [1988] eKLR** the Court of Appeal cited the case of **Henderson -Vs- Henry E. Jenkins & Sons [1970] AC 282 page 301** as hereunder:-

**“In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.**

**But if 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 defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential of proof resting on the defendants...”**

And at page 30 letter **H Lord Pearson** made a finding that:

**“From these facts it seems to me clear, as a prima facie inference, that the accident must have been due to default of the defendants in respect of inspection or maintenance or both. Unless they had a satisfactory answer, sufficient to displace the inference, they should have been held liable.”**

31. Despite the Appellant’s evidence, the Respondents herein did not tender any evidence to explain that the tyre burst in this case had no probable cause or that the bus driver took appropriate corrective measures, to no avail, and hence the accident was inevitable. For the purposes of the instant case, the court agrees with the Appellant’s assertion that it was erroneous for the trial court to conclude that liability had not been proved.

32. On quantum, the Plaintiff’s injuries pleaded in the plaint consisted of blunt injuries to the head. These were supported at the trial by medical evidence in the form of a treatment chit dated 10/9/2010, the P3 form completed on 27/9/010 and the medical report prepared by **Dr. Omuyoma (PW3)** on 3/11/2010. The injuries were relatively minor, consisting mainly of a swelling which had subsided by the latter date of examination. No permanent damage or other sequela is indicated in the medical report.

33. In her submissions before the trial court, the Appellant had urged an award of Shs 150,000/= in general damages, relying on the case of **Kithoka Youth Polytechnic -Vs- Lucy Kithima Riungu [2008] eKLR**. It does not appear that the Respondents made any submissions on quantum or at all. The injuries sustained by the Plaintiff in **Kithaka** seem to be a little more extensive and severe than those proven in this case. The trial court had stated that, had liability been proven general damages amounting to Shs 80,000/= would have sufficed.

34. The principles governing the appellate court’s exercise of jurisdiction is so far as awards in general damages are concerned, were stated in **Kemfro Africa Limited t/a Meru Express Service & Ano. -Vs- A. M. Lubia & Another (1982 – 1985) 1 KLR 727:-**

**“The principle to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”**

35. It is my view, in light of the injuries sustained by the Plaintiff minor herein that an award of Shs 80,000/= as assessed by the trial court was appropriate compensation. Special damages claimed and proved amount to Shs 3,000/= in respect of the medical report.

36. In the circumstances, the judgment of the trial court is set aside and substituted with an order that that judgment be and is hereby entered for the Appellant against the Respondents jointly and severally in the sum of Shs 83,000/= [Eighty Three Thousand] with costs and interest. The Appellant is also awarded the costs of this appeal.

**Delivered and signed at Naivasha this 22<sup>nd</sup> day of September, 2017.**

In the presence of:

N/A for Appellant

N/A for Respondents

Court Assistant - Barasa

**C. MEOLI**

**JUDGE**