



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 25 OF 2005

SILAS NTONJIRA.....APPELLANT

VERSUS

MUKIRI IKOTHA1ST RESPONDENT

ISAIAH MBARUA2ND RESPONDENT

J U D G M E N T

1. This is an appeal from the judgment and decree in the *Meru CMCC No. 747 of 2000* made on 7th August, 2004 by Hon. W. M. Muiruri (CM). The Appellant was the plaintiff in a plaint lodged in that court. He alleged that on 14th June, 1999, at about 8.00 p.m. while riding motorcycle registration number KUN 733 along Kautine – Maua road, he was hit by motor vehicle registration number KAB 274P belonging to the 1st Respondent which was at the time being driven by the 2nd Respondent. He set out in his plaint what he considered to be the particulars of negligence and blamed the Respondents for the accident.

2. The Respondents filed a joint defence in which the totally denied liability and blamed the Appellant for the accident. After trial, the Appellant was held liable for the accident and his suit was dismissed. It is against the said dismissal that the Appellant has set out seven grounds of appeal in his Memorandum of Appeal. The said grounds may be collapsed into three as follows; that the trial court had failed to consider the Appellant's evidence and its decision is against the weight of evidence; that the trial court had failed to apportion liability reasonably according to the evidence and circumstances of the case and that the trial court was unduly influenced by the alleged perjury thereby arriving at a wrong decision.

3. This is a first appeal. This Court is therefore duty bound to re-evaluate afresh the evidence tendered before the trial court and come to its own independent conclusion but at all times having in mind that it did not have the advantage of hearing the witnesses (See *Peter vs. Sunday Post [1958] E.A 429*).

4. It was the Appellant's case that on the material day at about 8.00 p.m., he was engaged by a one 'doctor' Kathee (D1W2) to repair his motorcycle which was emitting smoke; that after repairing the motorcycle, the Appellant went for a road test along Kautine – Maua road. That while riding on his correct side of the road, he saw two vehicles one overtaking the other. He was knocked down, fell unconscious and found himself in hospital where he was admitted for two days. He suffered soft tissue injuries on his cheek, chest, legs, back and hands. He admitted in cross-examination that he was charged and convicted for driving a motorcycle without a road licence and insurance.

5. PW1 was No. 50223 PC Ali Godana attached to Maua Police Station. He produced the investigations file for the accident together with the police abstract. Doctor John Macharia (PW3) produced the medical

report which showed the injuries that the Appellant had sustained as a result of the said accident.

6. On his part, the 1st Respondent told the court that on the material day, he was informed that his motor vehicle registration number KAB 274P had been involved in an accident. That he rushed to the scene and found the Appellant lying down with the motorcycle lying under his vehicle. The 2nd Respondent unloaded the *miraa* from his vehicle and took the Appellant to hospital aboard KAB 274P. That the Appellant was fully conscious when he found him at the scene of the accident.

7. D1W1 was Daniel Kasee, a nurse by profession. He testified that on the material day at about 8.00pm while inside his shop, he heard someone start and zoom off with his motorcycle registration number KUN 733. Shortly thereafter, he heard that it had been involved in an accident. The motorcycle did not have headlights at the time as he had removed them. He came to learn that it was the Appellant who had taken off with his motorcycle. He reported the incident to the police the following day.

8. D1W2 Emmanuel Odero Sillah, an officer from the Kenya Revenue Authority told the court that DEXh 4, a copy of the driving licence that had been produced by the Appellant was a forgery. D2, Isaiah Mbarua was the driver of KAB 274P at the material time. He told the court how on the material day and time, he saw a motorcycle having no head lights at about 300 meters away driving towards him. When the motorcycle neared his vehicle, the motorcyclist jumped off and fell on the side while the motorcycle slid towards his vehicle. The motorcycle was at the time being driven on his side of the road. He recognized the motorcyclist as the Appellant. Neither the cyclist nor the motorcycle came into contact with his vehicle. That

9. Both parties filed written submissions which they relied on. It was submitted on behalf of the Appellant that, on the basis of the doctrine of *res ipsa loquitur*, the Respondents were negligent. The cases of **Kisii HCCA No. 185 of 2007 Tombe Tea Factory Ltd vs. Samuel O. Oroka** and **Embu Public Road Service Ltd vs. Rimi [1968] EA 22** were relied in support of the Appellant's submissions. It was further submitted that the trial court did not evaluate the evidence properly and was unduly influenced by the alleged perjury to arrive at a wrong decision. It was further submitted that if the court found that the Appellant contributed to the accident, liability should be apportioned at 50:50 basis. The cases of **Nrb HCCC No. 858 of 1988 Lucy Muthoni Munene vs. Kenneth Muchunge & Anor** and **Lakhamshi vs. Attorney General [1971] E.A 118** were relied in support of that contention. The sum of Kshs. 600,000/= was submitted for as quantum.

10. For the Respondent, it was submitted that the appeal lacked merit as the trial court did evaluate the evidence on record; that the Appellant had not proved his case as required by law; that a case of perjury was proved against the Appellant before the trial court; that the trial court was entitled to reject the Appellant's testimony as he had come to court with unclean hands. It was further submitted that, since there was no evidence that there had been any collusion between the motorcycle and the Respondent's motor vehicle, the issue of contribution does not arise. The cases of **NRB CA No. 252 of 1998 Wanyama & 2 Others vs. Nairobi City Council and Simeon Ombisi vs. Kamau Nguji & Anor [2005] eKLR** were cited in support of the Respondents' submissions.

11. This court has carefully considered the record, the submissions of learned Counsel and the authorities relied on. The first ground is that the trial court had failed to consider the Appellant's evidence and its decision is against the weight of evidence. The accident occurred at 8.00pm at night. There were only three eye witnesses to the accident. The Appellant, the 2nd Respondent and a third person who was said to be dead as at the time the case came up for trial.

12. The Appellant's evidence was that at the material day and time, he was riding the subject motor cycle from Kwanjiru market towards Maua town when he collided with the 1st Respondent's vehicle which was at the time overtaking another vehicle. That he was at the time riding on the left hand side of the road while facing Maua town. That he was road testing the motorcycle having been allowed to do so by its owner (D1W2). That upon collision, he lost consciousness and only found himself in hospital where he was admitted for two days.

13. On his part, the 2nd Respondent testified that at the material day and time, he was driving the subject vehicle from Maua town to Garbatulla. That he was on the left side of the road as one comes from the Maua side. He saw the motorcycle riding towards him at about 300 meters ahead of him. It had no head lights. The motorcyclist jumped out of it and the motorcycle slid under his vehicle. He stopped the vehicle, came out and found that it was the Appellant. He took him to hospital. That the motorcycle did not come into contact with the vehicle.

14. The trial court found that its task was to determine which of the two versions it was to believe. PC Ali Godana (PW1) produced the Certificate of Examination and Test of Vehicle No. VT525839 in respect of KAB 274P as Dexh 7. It showed that there was no body damage that was noted on the vehicle; that the front and rear reflectors were broken and that the vehicle had minor pre-accident defects. DW1 Daniel Kasee, the owner of the motorcycle, told the court that immediately after the accident, he visited the scene. He found the motorcycle on the ground facing Maua town. It was on the right hand side of the road as one faces Maua town. The motorcycle had no headlights as he had removed them and placed them in the shop since the motorcycle was not in use at the time. Its front part had no damage. He denied having given the motorcycle to the Appellant in the presence of his wife as he was not married by then.

15. The testimonies of the 2nd Respondent and DW1, Daniel Kasee, remained unshaken. DW1's testimony corroborated that of the 2nd Respondent that the motorcycle had no headlights; that it was riding on and therefore fell on the right side of the road when facing Maua town. It should be recalled that the Appellant had told the court that he was given the motorcycle by DW1 in the presence of the latter's wife. It turned out that DW1 was not even married at the time. Although the motorcycle was not inspected, the testimony of DW1 that there was no damage on its front part corroborated the 2nd Respondent's testimony that there had been no collision between the motorcycle and the vehicle. Further, Dexh 7 showed that there was no body damage that was noted on motor vehicle KAB 274P.

16. In a suit for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. If at the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the defendant, then the issue will be decided in the plaintiff's favor unless the defendant's evidence provides some adequate answer to displace that inference.

17. In the present case, there was no satisfactory evidence to show that motor vehicle KAB 274P was being driven at high speed or was overtaking any other vehicle, or that it came into contact with either the Appellant or the motorcycle he was riding. To the contrary, the evidence on record established that; the Appellant was riding the motorcycle without any valid licence; that the motorcycle had no headlights although it was at night; that the same was being ridden on the wrong side of the road and did not collide with motor vehicle KAB 274P.

18. In the circumstances, this court is satisfied that the Appellant did not prove his case to the required standard. That the trial court properly considered all the evidence on record, evaluated the same in accordance with the law and arrived at a correct decision. In the premises, the first ground fails.

19. The second ground was that the trial court failed to apportion liability on the basis of the evidence on record and the circumstances of the case. This court has already re-evaluated the evidence on record. The Appellant sought to rely on the doctrine of *res ipsa loquitur*. The question here is whether that doctrine is applicable in the circumstances of this case. In *Barkway vs. South Wales Transport Co. Ltd [1950] 1 ALL ER 392 at 393* it was held:-

“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 by itself evidence of negligence, depended on the absence of explanation of the accident, but, although it was the duty of the respondents to give an adequate explanation, if the facts were sufficiently known the question reached to be one where the facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be inferred”.

20. Closer home, in **Embu Road Services vs. Riimi (supra)**, the Court of Appeal for Eastern Africa held at page 24:-

“The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the person who caused the accident. The Plaintiff, in those circumstances, does not have to show any specific negligence, he merely shows that an accident of that nature should not have occurred, in those circumstances, which leads to the inference, the only reasonable inference, that the only reason for the accident must therefore be the negligence of the defendant”.

21. In the present case, the Appellant did not establish any facts to show that in the circumstances, the accident should not have happened. In this court’s view, the evidence of the Respondents displaced any inference whatsoever of any negligence on their part. The evidence tendered before the trial court explained how the accident occurred. The facts established that the Appellant was the author of his own misfortune. Accordingly, the doctrine of *res ipsa loquitur* was not applicable. Further, there was no evidence on record to warrant the court apportioning liability between the parties. That ground also fails.

22. The final ground was that the trial court was unduly influenced by alleged perjury. The record shows that on 17th August, 1999 in **Maua SRMC Traffic Case No. 435 of 1998 Republic vs. Silas Ntonjira**, the Appellant was charged and convicted of the offence of riding a motorcycle without a licence. In the present case, he testified before the trial court on 3rd March, 2003 before the matter was adjourned to 31st March, 2003 for further cross-examination. When the matter resumed and he was being re-examined on the said 31st March, 2003, the Appellant produced a photocopy of a driving licence as Pexh 12. That document was proved to be a forgery by D1W2 whose testimony was not displaced.

23. The Appellant testified that he was given the motorcycle by D1W1 in the presence of the latter’s wife. It turned out that D1W2 was not even married at the time the Appellant took the motorcycle. Further, the Appellant once again stated on oath that after the collision, he fell unconscious and only gained consciousness the following day at 6am. Apart from the firm testimonies of the Respondents that the Appellant was conscious and that they spoke to him at the scene of the accident, the P3 form the Appellant produced as PExh 4 showed that when he was attended at the hospital a few hours after the accident, he was in a ***‘good general condition’***.

24. I think what this court has endeavored to show from the foregoing is that, the Appellant was a perennial liar on oath whose evidence was difficult to believe. In the circumstances, the trial court cannot be faulted for disbelieving him. Clearly, he had lied before it. That ground also fails.

25. As regards quantum, there was no appeal against the trial court’s assessment of a sum of Kshs.180,000/= which sum this Court finds to be adequate and within the acceptable range on similar and comparable injuries.

26. In the circumstances, this Court comes to an inescapable conclusion that the appeal lacks merit and the same is hereby dismissed with costs to the Respondents.

DATED and DELIVERED at Meru this 21st day of September, 2017.

A. MABEYA

JUDGE