REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL APPEAL NO. 13 of 2015

FORMERLY NAKURU CIVIL APPEAL NO. 212 OF 2013

(Being an Appeal from the Judgment delivered by Hon. E. Riany (RM) Naivasha, SPMCC No. 1111 of 2010)

JOASH MUSIKHU VURANJE…….……..……. APPELLANT

-VERSUS-

WANJIRU MWANGI alias LUCY WANJIRU ……..…….....……1ST RESPONDENT

HENRY SHIVACHI ……..…….……....…… 2ND RESPONDENT

J U D G M E N T

1. The Appellant herein was the Plaintiff in the lower court. He had sued the Respondents as Defendants in the lower court seeking damages arising from injuries he sustained in a road traffic accident along Naivasha - Maai Mahiu road on 10/9/2010. The accident involved the vehicle KBJ 098J Nissan Bus owned by the 1st Respondent and driven by the 2nd Respondent her employee. The Appellant was a paying passenger.

2. It was Appellant's case through his pleadings and evidence in the lower court that the 2nd Respondent was speeding and that following a tyre burst, he lost control of the vehicle which went off the road and hit a culvert. He claimed to have sustained soft tissue injuries to the neck, head and right hand in the accident.

3. The Defendants denied liability in their pleadings and evidence, asserting that the accident was due to unavoidable circumstances occasioned by the tyre burst. In the court's judgment delivered on 24th October 2013 the court agreed with the Respondents and found that they had displaced the presumption of negligence arising from the tyre burst itself an act of God. The learned magistrate dismissed the suit with costs. .

4. Aggrieved by the decision the Appellant filed the present appeal. The memorandum of appeal cites five grounds as follows:-

"1) THAT the learned trial Magistrate erred in law and fact in evaluating the evidence on

record and arrived at a wrong conclusion that he Plaintiff did not prove his case to the required standard and hence dismissed it.

2) THAT the learned trial magistrate erred in law and fact in not considering the doctrine of Res Ipsa Loquitur.

3) THAT the learned trial magistrate erred in law and fact in not considering the plaintiff Appellant'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 fact in not assessing or making adequate assessment of damages payable to the Appellant.

5) THAT the trial Magistrate erred in law and fact in dismissing the Appellant's case when there was abundant evidence in support of it."

5. The Appellant filed written submission as agreed between both counsel for the parties. However, the Respondent's counsel did not make submissions and was not present in subsequent proceedings. The gist of the Appellant's submissions is two fold; firstly that the Appellant had established his claim to the required standard, and that the trial court erred by failing to apply the doctrine of *res ipsa loquitur* as pleaded in the plaint and advanced at the trial. The Appellant emphasised that the 2nd Respondent was speeding at the time of the accident adding that "**were it not for that he was over speeding the tyre burst alone could not have resulted in an accident ……..(and he) would have managed to control it**"

6. The duty of the appellate court stated in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123** as follows:-

> **"i) 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.**
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> > **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)."**

7. And in **Peters –Vs- Sunday Post [1958] EA 424 pg 429** the court stated:-

> **"It is a strong thing for an Appellate court to differ from the finding, on a question of fact, of a Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence……to determine whether the conclusion originally reached upon it should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."**

8. On my part I have reviewed the pleadings and proceedings as well as the judgment of the lower court in discharging the above mandate. In my view, this appeal really turns on the question whether

negligence was proved against the Defendants.

9. The Appellant gave evidence to the effect that the driver of the vehicle had been speeding some 20 minutes before the tyre burst. I will say more on this at a later stage. But first, I note that in her judgment the trial magistrate dismissed the Appellant's evidence on speeding primarily because a witness one Corporal Otuke (PW3) told the court that no such allegation of speed was made by any witness to police after the accident. Clearly, that statement consisted of hearsay evidence and the trial magistrate erred by considering it.

10. However, she was also for other reasons not convinced that the vehicle was speeding. Apparently, she did not believe the Appellant's evidence on this aspect. She highlighted the records produced by the defence indicating that the accident vehicle had been fitted with a speed governor that limited its speed. That was a relevant matter for consideration.

11. On my own I have reviewed the evidence of PW1. In his evidence-in- chief, he stated that the vehicle was being "driven fast" although he could not see the speedometer from the rear of the bus where he sat. He also stated that:

> **"The driver over sped and tried to avert the accident which he failed to do."**

He maintained this evidence during cross-examination but added that:

> **"Had not the tyre burst there would not have been an accident. The cause of the accident was the tyre burst."**

12. From this answer and earlier evidence-in-chief it is not clear whether indeed the vehicle was speeding as it seems that PW1 made a subjective conclusion without expressly estimating the speed. This was a critical matter because evidence adduced by the 1st Respondent (D. Exhibit 3-4) indicates that the vehicle was fitted with a speed governor as at 10/8/2010 when it was inspected by the relevant department.

13. The Vehicle inspection Report (D. Exhibit 4) indicates that the vehicle was inspected on 10/8/2010 and found to comply with the Traffic Act, apparently after the fitting of seat belts and a speed governor. The vehicle was allegedly going down an incline on the road at the time of the accident but there is no evidence to show that the speed may have been above the public service vehicle limit of the speed governor (80 Kilometres per hour as per PW3's evidence) or that whatever the speed the driver was negligent in view of other circumstances obtaining on the road.

14. It is noteworthy that although the vehicle stopped after a distance of 140 metres, it did not overturn. The trial magistrate correctly took this the braking distance into account in light of the size of the vehicle. PW3 pointed out on the sketch plan of the scene that the vehicle rested some 140 metres from the point of the tyre burst. This distance tends to contradict the Appellant's assertion of "over speeding", more so because even after going off the road and hitting the culvert, the vehicle did not overturn, per PW3. This is confirmed by the accident damage reflected on the Certificate of Examination Report (D. Exhibit 1). The damage was limited to the front and lower portions of the bus.

15. For these reasons, it is rather unlikely that the vehicle was moving at an excessive speed. He who alleges must prove. In my view, the Appellant's evidence on this score was doubtful and by itself could not sustain the claim of negligence.

16. Turning to the question of the burst tyre which is not disputed, the Appellant testified that he noted while at the police station that the vehicles tyres were worn out. D. Exhibit 1 indicates that the both the rear tyres were serviceable while the front tyres had burst and sustained damaged (o/s and n/s front tyres respectively). The report also shows that the front rims and tyre were damaged.

17. This same vehicle, according to the 1st Respondent (DW1) had passed a vehicle inspection test on 10/8/2010 vide D. Exhibit 4. Equally, a service card and receipts were produced (D. Exhibit 5) to prove

that 2 of the bus tyres were new. It was the evidence of DW1 that D. Exhibit 1 could not have been issued to clear the vehicle for use on the road, if it had worn tyres. This evidence tends to controvert the Appellant's evidence that the tyres were worn, or that somehow the vehicle was defective. At any rate he did not specify the affected tyres. After the accident, the motor vehicle examiner vide D. Exhibit 1 noted minor pre-accident defects, excluding the possibility that these could have caused the accident.

18. Connected to the above it has been argued by the Appellant that the trial court did not consider the doctrine of *res ipsa loquitur*. That is not correct, with respect. From page 23 line 15 to page 24 of the judgment, the trial magistrate grappled with the doctrine of *res ipsa loquitur*, even though she did not call it out as such. She was satisfied upon considering the vehicle reports before her that the vehicle was in good condition prior to the accident. She therefore found that the presumption of negligence raised by the fact of the undisputed tyre burst had been rebutted. That is the law. Once Appellant had established that indeed a tyre burst occurred, the presumption of negligence was raised against the Respondents.

19. However, such presumption is rebuttable, and in this case, the trial court was satisfied that the Respondents had discharged their burden. The trial magistrate clearly appreciated the doctrine and cited authorities provided by the defence to support her findings. The authorities clearly apply to the instant case. The facts in the case of **Unga Group Limited –Vs- Attorney General [2004] eKLR** for instance are comparable to those in the instant case. There, the accident vehicle sustained a tyre burst but the driver managed to keep control of the vehicle. The court outlined the duty of the Defendants upon the presumption of negligence being raised.

20. Similarly the case of **Kago –Vs- Njenga Civil Appeal No. 1 of 1979,** the accident was related to a tyre burst. The Court of Appeal found that no negligence had been proved after the tyre burst against the driver. The Appellant herein admitted the efforts of the 2nd Respondent to control the vehicle after the accident. The court held in the case of **Kago** that:-

> **"For the defence to rebut the presumption of negligence arising from "*res ipsa loquitur*", it was for the Defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident that did not connote negligence on their part, or that the accident was due to circumstances not within their control (See Msuri Muhhddin –Vs- Kassaby & Another [1960] EA 201).**

21. In **Nandwa –Vs- Kenya Kazi Limited [1988] eKLR** Court of Appeal (Gachuhi J. A. as he then was) cited a portion of the judgment in the English case of **Barkway –Vs- South Wales Transport Company Limited [19560] 1 ALLER 392 at Page 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."**

22. The duty of the Plaintiff is to establish the event, in this instance, the tyre burst. This he did. The burden then shifted to the defence, as stated in the authorities. The trial court in this case concluded upon evaluating the evidence that the tyre burst was an act of God. With respect, the amended defence did not plead an act of God, rather in paragraph 6 the defendants appear to plead unavoidable or inevitable accident.

23. On my own evaluation of the evidence I would agree that the tyre burst was the probable cause of accident and that accident was inevitable. For all the foregoing reasons, I have found no justifiable cause

for interfering with the findings of the lower court. I find no merit in this appeal and will dismiss it with costs.

Delivered and signed at Naivasha this 26th day of February, 2016

In the presence of:

N/A for Appellant

N/A for Respondents

Court Assistant Stephen

C. W. MEOLI

JUDGE