REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 476 OF 2001

NDUNGU KIMANI .....……..…….....…APPELLANT

VERSUS

PAUL NJENGA GATHERU……..... RESPONDENT

J U D G M E N T

The Appellant herein Ndung'u Kimani filed this appeal against Paul Njenga Gathuru following a judgment and decree in CMCC No. 2972 of 1998 (Milimani Commercial Courts) delivered on the 1st day of August, 2001 by Hon. R.E. Ougo.

On the 28th day of April, 1998, the Appellant as a personal representative of the estate of Martin Ndungu "deceased" filed suit seeking special damages at Kshs.47,450/- general damages under the Law Reform Act Cap 26 Laws of Kenya. He also prayed for costs and interest.

The suit was informed by the fact that on or about the 6th day of March, 1997 along the new Naivasha-Limuru road while the deceased was lawfully walking along the said road, the Respondent, his servant, agent and/or his driver so negligently drove/managed and/or controlled motor vehicle registration number KYV 019 that he caused the same to veer off the road and collided with the deceased inflicting upon him instant fatal injuries. The estate of the deceased attributed the accident wholly to the negligence of the Respondent's aforesaid motor vehicle. The particulars of negligence are set out in paragraph 5 of the Plaint as follows:-

i. Driving the motor vehicle without care and regard to other road users particularly the deceased.
ii. Driving the said motor vehicle so carelessly without diligence on the road and sides.
iii. Driving the said motor vehicle on the road when the same was defective or unroadworthy.
iv. Failing to apply the brakes of the said motor vehicle or in any other way possible to avoid the accident.
v. Failing to veer off the said motor vehicle against colliding with the deceased and manage, control or in any other way avoid the accident.
vi. Having no care or regard to the safety of the deceased while lawfully being a pedestrian on the road.
vii. Causing the accident.

The Respondent in his statement of defence filed on the 29th day of June, 1998 denied negligence and the

particulars thereof attributed to him. In the alternative he pleaded that the accident if at all, was caused solely and or substantially contributed to by negligence on the part of the deceased and he proceeded to give the particulars of negligence he attributed to the deceased.

When the matter came up for hearing before the lower court the Appellant testified as PW1 and he did not call any witness. In his evidence he told the court that the deceased was his son who was aged 27 years at the time of the accident that caused his death. He told the court how he obtained the various documents following the accident which included the death certificate, letters of administration and the police Abstract. It is worth noting that the police Abstract was not produced as exhibit but it was marked for identification following an objection that was raised by the Respondent on the ground that the Appellant was not the maker of the same.

In addition to the above documents, the Appellant also produced receipts for burial expenses which included a receipt for the coffin, mortuary fees and transport. In total he produced receipts amounting to Kshs.44,300/-. He told the court that his son was doing business of buying farm produce from the farms and bringing them to Ukulima market and out of this business his profit would be about 32,000/- in a month net expenses. He was not married and his parents and siblings used to depend on him. He however did not produce any evidence in support of the earnings from the said business.

The Respondent did not call any witness and after hearing the case, the learned Magistrate dismissed it with costs and the judgment is what triggered this appeal.

The appellant has based his Appeal on the following grounds:-

1. The learned principal Magistrate erred and misdirected herself on the issue of evidence to be adduced on how the fatal accident happened.
2. The learned Principal Magistrate misdirected herself and erred in law and in fact by finding and holding that an eye witness or the investigating officer should have been called to adduce evidence on how the accident happened when the Respondent did not contest the fact that the accident happened.
3. The learned Magistrate erred in law and in fact in dismissing the Appellant's suit particularly so when no evidence at all was adduced by the defendant to support his defence.
4. The learned Principal Magistrate erred in law and in fact in finding that the Plaintiff did not prove that the defendant was negligent whereas no evidence was adduced by the defendant to prove the averments of negligence on the deceased.
5. The learned Principal Magistrate erred in law and in fact in failing to appreciate the exhibits produced by the Plaintiff to prove his case.
6. The learned Principal Magistrate erred in law and misdirected herself by failing to consider the evidence of the plaintiff in its totality and in support of his plaint, particularly so when no evidence was adduced at all and/or any witness called to support the averments in the defendant's case.
7. The learned Principal Magistrate erred in law and in fact in failing to consider the averments of the Plaintiff in the Plaint which averments were not rebutted by the defendant as the defendant did not adduce any evidence.
8. The learned Principal Magistrate erred in law and in fact by dismissing the Plaintiff's suit with costs whereas no evidence was adduced by the defendant.

When the appeal came before me on the 8th February, 2016, for plenary hearing, the learned counsels for the parties highlighted the submissions that they had filed earlier on.

Mr. Machira advocate for the Appellant relied on his written submissions and argued that when a collision occurs, the law is very clear that the driver of the motor vehicle being the one driving a dangerous machine owes the road users a duty of care and it's upon such a driver to explain how he knocked down a pedestrian. According to him, when an accident occurs and a motor vehicle veers off the road and knocks a pedestrian, the burden of proof shifts to the defendant to explain how he was unable to control the dangerous machine and what exactly happened.

He faulted the learned magistrate for dismissing the case even after the defendant failed to call evidence in the lower court. He also took issue with the learned magistrate's refusal to the Plaintiff to produce the police Abstract on the ground that he was not the maker. He submitted that the court ought to have considered the police Abstract and that the magistrate's refusal to allow production of the same was an error. On her part, the counsel for the Respondent relied on her written submissions and submitted that the burden of proof did not shift to the defendant because the plaintiff never adduced any evidence on liability and that the plaintiff never alluded anything about the accident. According to her, the Plaintiff did not bother to explain how the accident occurred and that the police Abstract needed to be produced by the maker because the plaintiff never laid down the basis for production of the same and that if the Plaintiff had been allowed to produce it, the defendant would not have been in a position to cross-examine on it.

Counsel for the Respondent further submitted that the Appellant had the option after the court refused him to produce the police abstract in that he could have appealed against the order for refusal or call the maker but he did not do so. She submitted that the defendant denied the occurrence of the accident but without prejudice pleaded that if it occurred, the deceased was to blame and this did not mean that the burden shifted. The police Abstract was never produced in court but it was just marked for identification.

I have carefully considered the submissions made by the learned Counsels and have also perused the record of the trial court. The duty of the court on a first appeal was articulated by the Court of Appeal in the well known and often cited case of **Selle vs Associated Motor Boat Company (1968) E.A 123** where the court stated that:-

> ***"An appeal to this court from the lower court 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect."***

The appellant's claim is based on the tort of negligence. In his plaint he has attributed negligence to Defendant and has particularized the same. It is not enough for a party to plead negligence without proving the same. It is trite law that whoever alleges must proof. As rightly submitted by the Counsel for the Respondent, the appellant in his evidence before the trial court never alluded to anything about the accident. He only told the court that his son died on the 6th day of March, 1997. He did not bother to explain how he died and what caused the death. In fact he did not even identify the motor vehicle that caused the death of his son at all.

According to the Appellant, the burden shifted to the Respondent and therefore he needed not prove any negligence on his part and the fact that the Respondent did not call evidence in the trial court, the learned magistrate ought to have found the Respondent fully liable.

I wish to note that the Appellant did not file a reply to the Respondent's defence even after the Respondent attributed negligence to deceased. Failure to file the same implied that the appellant did not deny the particulars of negligence attributed to the deceased by the Respondent.

The counsel for the appellant relied on the doctrine of ***res ipsa loquitor*** in his submissions. The said doctrine is explained in Black Law Dictionary as follows:-

> ***"The phrase 'res ipsa loquitor' is a symbol for the rules that the fact of the occurrence of an injury, taken with the surrounding circumstances may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and part experience, in inferring that the accident was probably the result of the defendant's negligence in the absence of explanation or other evidence which the jury believes."***

In the above explanation and for the doctrine of res ipsa loquitor to apply the circumstances surrounding the accident have to be known to permit an inference or raise a presumption of negligence or make out a prima facie case and present a question of fact for the defendant to meet with an explanation. The Appellant herein did not explain the circumstances under which the accident occurred on the basis of which the learned magistrate would have inferred negligence on the part of the Respondent. In fact nowhere in his evidence did he mention any accident involving the deceased and the respondent's motor vehicle registration number KYV 019.

Again, the deceased was a pedestrian as opposed to a passenger in the motor vehicle. In my view, the principle of Res ipsa loquitor would be more applicable in a case where an accident involves a passenger and not a pedestrian. It is a well known fact in law that a pedestrian can contribute to the occurrence of an accident in the manner he walks or crosses the road in the face of oncoming motorists or other road users. The Respondent having attributed negligence to the deceased, it would have been necessary for the Appellant to explain the circumstances under which the accident occurred and especially considering that he did not file a reply to defence denying the particulars of negligence attributed to the deceased. I therefore find that the doctrine is not applicable in this case because the circumstances in this case are different and distinguishable from those of the case of **Donoghue vs Stevenson (1932) All ERI** relied on by the Appellant.

The Appellant has also raised the issue of the police abstract. The proceedings in the trial court shows that the police abstract was not produced as an exhibit though it was marked for identification. The Respondent objected to its production on the ground that the Appellant was not the maker of the same. In the circumstances, the Appellant ought to have called the maker or appeal against the decision by the learned Magistrate to disallow its production. The Appellant did not take any of the options above. The refusal by the Magistrate to have the same produced meant that the document was not part of the exhibits produced and therefore its contents could not be relied on by the court in arriving at the decision that it did. The learned magistrate was therefore right in failing to consider the same.

The Appellant has heavily relied on the fact that the Respondent did not call any evidence in the trial and that the accident is admitted in the defence. I have looked at the defence, and the admission of the accident, is "***in the alternative and without prejudice***" and therefore, this in my view is not an admission that is plain and obvious that could have given the Appellant a blank cheque on the issue of negligence. The Appellant could not therefore rely on such an admission to escape the duty placed on him by the law to prove negligence and the burden of proof never shifted to the Respondent.

I hereby dismiss this Appeal and uphold the Judgment of the learned magistrate. Costs of the Appeal shall be borne by the Appellant.

DATED, SIGNED and DELIVERED at Nairobi this 17th day of March, 2016

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L NJUGUNA

JUDGE

In the presence

..... *for the appellant*

.....*for the respondent*