



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CIVIL APPEAL NO.13 OF 2015**

TRANS EAST LIMITED.....1<sup>ST</sup> APPELLANT

AMIR ADEN MOHAMMED.....2<sup>ND</sup> APPELLANT

VERSUS

CHARLES OTIENO ADUL.....RESPONDENT

*(Appeal from the Judgment of the Resident Magistrate (E. M. Ayuka) in Kericho Chief*

*Magistrate Civil Suit No.110 of 2012 dated 9<sup>th</sup> March, 2015)*

**JUDGEMENT**

1. The appellants were the 3<sup>rd</sup> and 4<sup>th</sup> defendants in Kericho Chief Magistrate's Court (formerly Chief Magistrate's Civil Suit No.336 of 2004 and High Court Civil Suit No.11 of 2007) – **Charles Otieno Adul vs Alvi Auto Spares, Trans East Ltd, Amir Aden Mohamed and Esri Star (K) Ltd**. The respondent was the plaintiff in the case.

2. In his suit, the respondent sought damages for personal injuries sustained following a road traffic accident on 15<sup>th</sup> October, 2003 along the Nakuru-Kericho Road at the Londiani junction. The accident involved motor vehicle registration number KAM 499 D, a Nissan matatu in which the respondent was a passenger, Mercedes Benz Trailer registration number KAM 083 W/ZB 7008 which, according to the respondent, belonged to the 1<sup>st</sup> appellant and was driven by the 2<sup>nd</sup> appellant, and motor vehicle registration number KAP 078 M/ZB 9397 Mercedes Benz trailer belonging to the 1<sup>st</sup> defendant and driven by the 2<sup>nd</sup> defendant in the original suit.

3. The respondent alleged that on the date of the accident, the 2<sup>nd</sup> defendant so carelessly and or negligently drove the 1<sup>st</sup> defendant's motor vehicle registration number KAP 078 M/ZB 9397 that it collided with motor vehicle registration number KAM 083 W/ZB 7008 belonging to the 1<sup>st</sup> appellant and driven by the 2<sup>nd</sup> appellant which rammmed into KAM 499 D causing it to veer off the road and overturn. As a result, the respondent sustained a fracture of the left tibia, mid shaft, extensive bruises and lacerations on the right leg, and scattered lacerations and bruises on the hands, for which he claimed damages from the defendants. He also claimed special damages of kshs.3,000/- in respect of a medical report and kshs.1,100/= as treatment expenses.

4. In his judgment dated 9<sup>th</sup> March, 2015, Hon. E. M. Ayuka found that all the defendants, who had not called any evidence to controvert the plaintiff/respondent's evidence, were 100% liable for the accident. He proceeded to make an award to the plaintiff of kshs.350,000/- in general damages and kshs.4,520/- on

special damages, as well as costs and interest.

5. Dissatisfied with the decision of the court, the appellants have filed the present appeal. In their Memorandum of Appeal dated 27<sup>th</sup> March, 2015, the appellants rely on the following grounds:

*a) The learned magistrate erred in law and in fact in failing to give a concise statement of the case, the points of determination, the decision thereon and reasons for his judgment pronounced on the 9<sup>th</sup> March, 2015.*

*b) The learned magistrate erred in law and in fact in disregarding that the burden of proof lay on the plaintiff to prove negligence on the part of the appellants as well as the particulars pleaded in the plaint which the plaintiff failed to do.*

*c) The learned magistrate erred in law and in fact in ignoring and disregarding the appellants' submissions dated 7<sup>th</sup> November, 2014 and filed on 10<sup>th</sup> November, 2014 together with the authority annexed therewith.*

*d) The learned magistrate erred in law and in fact in disregarding the appellants' pleadings vide their defence.*

*e) The learned magistrate erred in law and in fact in failing to consider the testimony of respondent's witnesses vis –a-vis the appellants.*

*f) The learned magistrate erred in law and in fact in failing to find that the case was not proved to the required standard in law.*

6. The parties to this appeal filed written submissions which they asked the court to rely on in rendering its decision.

#### **The Appellants' Submissions:**

7. In their submissions dated 19<sup>th</sup> April, 2016, the appellants, after setting out the representation in the case before the lower court, observe that it is only their counsel and counsel for the respondent who participated in the proceedings. They submit further that the thrust of their appeal is whether the respondent proved his case before the trial court, the burden of proof being on him as was held in the Case of **Kirugi & Another vs Kabiya and 3 Others [1987] KLR 347**, to prove his case on a balance of probabilities. The appellants submit that neither the respondent nor his witnesses gave evidence on how the accident occurred, nor did they show the trial court how the appellants were responsible for the occurrence of the accident. Their submission is therefore that the trial magistrate erred in finding that the respondent had discharged the burden of proving his case on a balance of probabilities. The appellants further cite the provisions of section 107 (i), 109 and 112 of the Evidence Act in support of their argument that the respondent failed to adduce evidence of their negligence and that the trial court erred in finding in his favour.

8. The appellants further challenge the conclusion reached by the trial court that the two trailers hit one another and one of them hit the matatu in which the respondent was travelling from the rear. In the appellants' view, the conclusion by the trial court was contrary to the requirements of Order 21 rule 4 of the Civil Procedure Code. They rely for this proposition on the decision of Mabeya J in **Saj Ceramics Limited vs Robinson Manyare Nrb HCCC No.597 of 2008**. They ask the court to allow their appeal, set aside the judgment and decree of the lower court, and make an order for costs in their favour.

9. The appellants did not, in their submissions, address themselves to the grounds of appeal contained in grounds (c), (d) and (e) of their Memorandum of Appeal.

#### **The Respondent's Submissions:**

10. In submissions dated 18<sup>th</sup> May, 2016, the respondent opposes the appeal and urges the court to dismiss the appeal with costs.

11. The respondent submits that his version of events that, the matatu registration number KAM 499 D was hit from the rear by trailers registration numbers KAM 083 W/ZB 7008 and KAP 078 M/ZB 9397 was uncontroverted as the appellants did not produce any evidence to prove the contrary. His submission is that he sought to rely on the doctrine of *res ipsa loquitor* that from the evidence tendered, the accident was caused by the negligence of the two trailers, and that the evidence he had adduced afforded him the application of the doctrine of *res ipsa loquitor*. He relies on the decision in **Embu Public Road Services Ltd vs Riimi [1968] EALR 22** and **Nandwa vs Kenya Kazi Ltd [1988] KLR 485** as quoted in **Benson Kamau Gichimu vs Ngata Water Engineering Ltd [2007] eKLR** to support his argument that this court should upheld the finding of the trial court with respect to the negligence of the appellants.

12. The respondent also asks the court to uphold the award of damages by the trial court, noting that it was not so inordinately high as to warrant interference by this court.

### **Analysis and Determination:**

13. I have read and considered the submissions and authorities filed by the parties in this matter. I have also read and considered the pleadings and the record of proceedings before the trial court, and its decision on the matter.

14. In his plaint dated 18<sup>th</sup> May, 2004, (amended on 18<sup>th</sup> June, 2004) the plaintiff/respondent alleged negligence on the part of the defendants, including the appellants in this matter, who were the 3<sup>rd</sup> and 4<sup>th</sup> defendants in the suit. He sets out the particulars of negligence of the defendants and invokes the doctrine of *res ipsa loquitor*. The defendants all filed defences to the respondent/plaintiff's claim.

15. With respect to the present appellants, a defence dated 23<sup>rd</sup> June, 2004 was filed by the firm of Jones & Jones Advocates in which they denied, *inter alia*, that the plaintiff was a passenger in motor vehicle registration number KAM 499 D; that the 2<sup>nd</sup> appellant was careless or negligent, or that the 1<sup>st</sup> appellant was vicariously liable for his actions, or that the doctrines of *res ipsa loquitor* applies to the facts of the case. While they did not deny the occurrence of the accident, they attributed it to the negligence of the driver of motor vehicle registration number KAP 078 M/ZB 9397.

16. The plaintiff gave evidence in support of his claim. His evidence was that on 15<sup>th</sup> October, 2003, he was a passenger in Nissan matatu registration number KAM 499 D heading to Kisumu from Nairobi. The vehicle did not reach Kisumu as it had an accident at Londiani when it was hit from behind by two trailers that came from behind. He further stated that the two trailers hit each other then one of them hit the vehicle he was travelling in. He also gave details of the injuries he sustained and produced documents in support. In cross-examination, he stated that he could not remember which trailer hit their vehicle and that he could not tell clearly how the accident happened. He did not see the accident happening as he was facing ahead. It appears from the record that the police abstract on the accident was produced by consent of the parties to this appeal on 17<sup>th</sup> October, 2014, and the plaintiff then closed his case. The appellants did not call any witnesses in support of their case and they also closed their case on the same day.

17. However, it appears from the record that later that day, again by consent, the plaintiff's second witness testified following the re-opening of the plaintiff's case. This witness, P. C. Galgalo Abdi (No.73028) produced the police abstract on the accident in which the respondent and another were seriously injured. His evidence was that the case was still pending under investigation. On cross-examination, he stated that the police file was from Londiani Traffic base, which had been closed, and that the files from the base were '**heaped up**' at the Kericho office. He did not have the police file, and his testimony was that without the police file, the court cannot know who was charged or blamed for the accident, or the recommendations made.

18. As the first appellant court, I am not bound by the findings of fact made by the trial court. I am

entitled to re-evaluate the evidence and reach my own conclusion – See **Selle vs Associated Boat Co. Ltd [1969] EA 123**. In analyzing the evidence, I bear in mind that I am doing so to determine the sole issue that arises in this appeal: whether the trial court erred in finding that the respondent had proved his case on a balance of probabilities. I say this while noting that the appellants did not challenge the award of damages made in favour of the respondent.

19. Before addressing this issue, however, I observe that the appellants in their grounds of appeal also challenge the judgment of the trial court on the basis that it did not comply with the requirements of Order 21 rule 4 of the Civil Procedure Rules. This rule requires that a judgment on a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision.

20. In his decision, the trial the plaintiff/respondent magistrate sets out the evidence adduced by He then analyses two issues, the issue of liability and the quantum of damages to be awarded to the plaintiff. With respect to liability, after analysing the plaintiff's evidence, he notes that none of the defendants called any evidence, nor the evidence of the plaintiff was uncontroverted. He also noted that the two trailers hit one another and one of them hit the matatu in which the plaintiff was travelling from the rear. He proceeded to determine this issue in favour of the plaintiff/respondent whom he noted was a mere passenger in the matatu and cannot bear any liability for the accident.

21. It is my finding therefore that the trial court did render a judgment that was in conformity with the civil procedure rules with regard to judgments.

22. On the core issue that this appeal raises, whether the trial magistrate misdirected itself in finding that the respondent had proved his case on a balance of probabilities, an analysis of the evidence before the court leads to the conclusion that he did not.

23. I agree with submissions made on behalf of the respondent that the evidence before the court showed that the accident was occasioned by the negligence of the drivers of the two trailers. As the appellants conceded in their defence, an accident did occur in which the respondent, a passenger in a matatu that was hit by one of the trailers from the rear, was injured. The respondent relied on the doctrine of *res ipsa loquitur*. The appellants called no evidence to displace the evidence by the respondent of negligence on the part of the drivers of the trailers. In the circumstances, I find no misdirection on the part of the court in arriving at the conclusion that the accident was caused by the negligence of the drivers of the trailers. As the court (Sir Charles Newbold, P) stated in **Embu Public Road Services Ltd vs Riimi (supra)**:

***“...where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show ...”that there was a probable cause of the accident which does not connote negligence” or ...”that the explanation for the accident was consistent only with an absence of negligence.”***

24. In this case, the appellants chose not to give any explanation at all with respect to the occurrence of the accident. The Court therefore has no evidence, other than that of the plaintiff, who alleged negligence on the part of the defendants, to explain the occurrence of the accident. The plaintiff/respondent's evidence was unchallenged, and the trial court, in my view, properly accepted his evidence and ruled in his favour.

25. In the circumstances, I find no merit in this appeal, and it is hereby dismissed with costs to the respondent.

**Dated, Delivered and Signed at Kericho this 28<sup>th</sup> day of October 2016.**

**MUMBI NGUGI**

**JUDGE**