REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 18 OF 2013

MICHAEL K. KIMARU ……..……...........……………………..........APPELLANT

-VERSUS-

MARGARET WAITHERA MAINA ……………..…......…………RESPONDENT

JUDGMENT

MICHAEL K. KIMARU , the appellant herein has appealed to this court against the entire judgment delivered on 15th November 2011 by Honourable Ochoi Senior Resident Magistrate's Court civil suit NO. 69 of 2010. The appellant had been sued in the lower court by the respondent herein owing to a road traffic accident that occurred on 1st April 2010 along Kenol Sagana road involving appellant's motor vehicle registration KBK 301A which vehicle, the respondent was travelling in as a fare paying passenger. The trial court found the appellant 100% liable and awarded the respondent kshs 50,000/- as general damages and kshs 3700/- as special damages. The appellant feeling aggrieved filed this appeal on 13th December 2011 vide memorandum of appeal dated 9th December 2011.

The appellant cited eight grounds of appeal in his memorandum of appeal as follows:

> ***1. That the learned magistrate erred in law and fact in dismissing the entire defence witnesses on the basis that the witnesses were incredible due to contradicting evidence when only one witness had given contradictory evidence on an issue that he was not an eye witness whilst all the other three who testified on that issue were consistent and were eye witnesses to the particular fact.***
>
> ***2. That the learned magistrate erred in law and in fact in dismissing the testimony of the defendant's witnesses merely because they had not recorded statements with the police.***
>
> ***3. That the learned magistrate erred in fact and in law in making a finding that it was not clear how the accident occurred.***
>
> ***4. That in view of the foregoing the learned magistrate erred in law and fact in failing to find that the accident had occurred as narrated by DW1, DW2 and DW3.***
>
> ***5. That further and without prejudice to the foregoing the learned magistrate erred in law and in fact after ascertaining that the court could not ascertain how the accident had occurred and that the appellant was liable.***

6. That learned magistrate erred in making a finding that the doctrine of res ipsa loquitor was applicable.

7. That the learned magistrate erred in law and in fact in finding the defendant wholly liable merely because the defendant had failed to enjoin the 3rd party . In so doing the learned magistrate erred in law and in fact in failing to appreciate the law in Civil Appeal NO. 177 of 2002 SAMMY NGIGI MWAURA –VS- JOHN MBUGUA KAGAI & GOHIL SOAP FACTORY LTD.

8. That the learned magistrate erred in law and in fact in finding that the plaintiff had proved her case on a balance of probabilities in view of the fact that the plaintiff's case is based on negligence and the plaintiff ought to prove her claim against the defendant otherwise the defendant should be acquitted among other reasons given in the memorandum of appeal.

Let me mention from the onset that I find the drafting of the memorandum awful. The appellant is duly represented by a reputable firm of advocates who ought to be doing a lot better in the drafting of appeals to at least conform with the requirements under **Order 42 Rule 2** of the **Civil Procedure Rules.** A memorandum of appeal should as a matter of law and practice shall set forth concisely and under distinct heads**,** ground under which it is made without any argument or narrative attached to any ground. I am of course alive to the fact that at times advocates of this court are so busy that they leave the work of drafting of pleadings to either clerks or pupils but such should be under strict supervision to ensure the quality and adherence of law is adhered to. Having said this, it may not be in the interest of justice especially for the appellant if I was to make my decision based just on this technical ground. I will therefore go into the substance of this appeal.

The appellant herein through counsel filed his written submissions which unlike the memorandum of appeal I must say are well presented.

The appellant in his submissions has faulted the learned trial magistrate in disregarding his defence on account that the witnesses were incredible and that the witnesses called gave contradictory evidence. The appellant has contended that the element of negligence was not proved as against him. In his submissions he has stated that as a general principle, negligence must be proved and there should be no liability without fault. His further contention is that there was evidence adduced at the trial court which showed that the respondent was asleep at the material time of the accident and therefore could not have been in a position to tell how the motor vehicle she was travelling was being driven. The appellant has further submitted the respondent did not discharge her burden of proof as provided under **Section 107** of the **Evidence Act.** The counsel for the appellant has therefore submitted that the respondents claim against should not have been sustained in the trial court and has quoted the following authorities to buttress his position that where negligence is not proved to the required standard a suit on negligence must fail.

1. Nzoia Sugar Co. Ltd –vs- David Nalyanya (2008) e KLR.

2. Walter Onyango –vs- Foam Matresses Ltd (2009) e KLR.

3. Amalgamated Saw Mills Ltd –vs- Tabitha Wanjiku (2006) e KLR

4. John Mwenda Mbaabu –vs- Arcade Stationers Ltd (2005) e KLR

The respondent opposed this appeal through written submissions which were followed up with highlights made by Mr Kiama counsel for the respondent. The respondent contended that the evidence adduced in the trial court was sufficient and that the appellant did not rebut the evidence adduced by the plaintiff. The respondent particularly took issue with the appellant's failure to take out 3rd party proceedings if he was blaming the driver of motor vehicle registration KBA 917 Q which was also involved in the accident that saw the respondent sustaining some injuries. The respondent has submitted that failure to take out 3rd party proceedings left the trial court with no option but to hold him 100% liable to blame

for the accident.

Before I consider the main issue in this appeal which is whether or not the respondent established and proved the element of negligence and sufficiently attributed the same to the appellant, let me consider another important ground raised by the appellant in his 6th ground in the memorandum of appeal and that is the applicability of the doctrine of res ipsa loquitor in the respondents case in the lower court . With due respect, the respondent's plaint before the subordinate did not plead that the doctrine of res ipsa loquitor applies. I have also looked at the judgment and I find that the trial magistrate did mention that the doctrine applied in the case before him. I do find as a matter of fact that the evidence adduced in the trial court clearly explained how the accident occurred. The respondent (PW 3) gave evidence and gave the account on how the accident happened. The appellant's witness also gave their own account on how the accident occurred which is slightly different from the account given by the respondent. The respondent stated that the appellant's driver was trying to overtake when he collided with another vehicle later given as motor vehicle registration KBA 917 Q, Toyota Starlet. The appellant's version of events were that the appellants motor vehicle registration NO. KBK 391 A was being driven from Nairobi towards Nyeri when at around Kenol another motor vehicle registration KBA 917 Q Toyota Starlet crossed from the other side of the road and collided with appellant's oncoming motor vehicle registration NO. KBK 391A and thereby caused the accident. In situations where explanation exist on how the accident occurred even if there are two different versions, the doctrine of "res ipsa loquitor" does not apply. The doctrine applies only in situations where an accident occurs and no other explanation can be attributed to it other than an inference of negligence on the part of the defendant. This was not the situation in the above accident and the same was not pleaded. The doctrine is normally used to establish a tort of negligence in the absence of a proper explanation on how the accident occurred. The doctrine applies in situations where surrounding circumstances may permit an inference or a presumption of negligence on the part of the defendant if such defendant cannot offer an explanation in rebuttal. Black Law Dictionary describes the doctrine as follows:

> ***"It is merely a short way of saying that circumstances attendant on the accident are of such nature as to justify a jury in light of common sense and past experience in inferring that the accident was probably the result of defendant's negligence in the absence of explanation or other explanation which the Jury believes.***

In situations where a court knows or can tell from the facts on material presented before it the actual cause of the accident, the doctrine cannot apply. The trial in my view fell into error when it made a finding on the doctrine when it was not pleaded by the respondent and when the doctrine was inapplicable.

But perhaps the most important ground to determine the direction this appeal takes is the issue of whether the respondent established negligence and sufficiently attributed it to the appellant at the trial court. Going by the pleadings filed before the subordinate court, the respondent herein pleaded that she was travelling as a fare paying passenger in motor vehicle registration NO. KBK 301A when the appellant's lawful driver so carelessly and recklessly drove the vehicle that he collided with motor vehicle registration NO. KBA 917 Q causing the respondent to suffer injuries. The respondent then goes ahead to give the particulars of negligence she attributed to the driver of KBK 301A as follows:

> " ***(a) Driving at an excessively high speed under the circumstances.***
>
> ***(b) Attempting to overtake a 3rd party vehicle when it was not safe to do so.***
>
> ***(c) Unlawfully encroaching on the lane of travel of motor vehicle registration NO. KBA 917 Q.***
>
> ***(d) Failing to slow down brake, swerve and or in any other way manage the said motor vehicle to avoid the accident".***

The appellant in his defence denied the same and put the respondent to strict proof. In her evidence before the trial court the respondent was emphatic on who was to blame for the accident.

"I blame the driver of the motor vehicle for trying to overtake when it was not safe".

I have looked at the evidence tendered by the respondent and particularly the evidence of PW2, A traffic police officer who testified and said that investigations as to who was to blame were still going on. When asked under cross –examination whether statements from eye witnesses had been taken she said that only one statement, that of the respondent herein taken but she was reported to have been asleep at the time. I find that the respondent confirmed this fact under cross examination.

It is on the basis of the above that the appellant urged me to find that the particulars of negligence attributed to the appellant , who as I have stated above was not the driver, was not proved to the required standard to justify the learned trial magistrate finding that the appellant was 100% to blame.

I have evaluated the pleadings and the evidence adduced. The appellant denied that the driver was negligent. Ownership is also denied. The respondent therefore had to establish and prove that the accident was caused by the negligence of the driver. She also had to establish the issue of ownership in order to tie in the appellant on vicarious liability. **Section 8** of the **Traffic Act Cap 403** provides that prima facie evidence of ownership is the person whose name appears on the log book unless the contrary is proved.The respondent had the burden to establish ownership by production of official search from the Registrar of Motor vehicle but did not. The police officer who testified never investigated the accident. Her role was just to produce a police abstract which merely demonstrated that an accident had occurred. It does not show whether the appellant's driver was to blame for the accident. The abstract (P exhibit 2(a)) produced does not show the results of the investigation that were carried out by any traffic officer if at all. The driver was not charged for any traffic offence and merely finding the appellant liable for not taking out third party proceedings for me is a misdirection. The issue of negligence has to be established. The appellant's responsibility in the accident cannot be assumed. It has to be specifically pleaded and proved.

The trial court from the judgment faulted the appellant for not enjoining the driver and not the 'owner' of motor vehicle registration NO. KBA 917 Q in the suit before him to be able to attribute negligence on the said driver. Well to some extent, the trial court was correct that a defendant who blames another party must take out 3rd party proceedings to enjoin tortfeasor. However to a large extent, the trial court misdirected himself on this score. For 3rd party proceedings to be triggered negligence must be established and proved against the defendant who can then claim either contribution or indemnity from the 3rd party. I agree with the appellant's submissions that **Section 108** of the **Evidence Act** places the burden of proof on a plaintiff in a given suit and that the burden is such that the suit would fail even if the defendant was to offer no evidence at all. So failure to take out 3rd party proceedings should not have been used to hold the appellant liable when no material supporting the finding was placed before the trial court.

In view of the above I do find that the learned trial magistrate erred to find that the respondent had proved her case to the required standard. There was no negligence proved on the part of the appellant's driver for which the appellant could be held vicariously liable. The evidence adduced did not establish that he was tortfeasor and there was no basis to find him 100% liable.

On the issue of quantum, I find it to be an exercise in futility since the issue of liability has been ascertained. The result is that I find merit in this appeal. I allow it and set aside the judgment entered against the appellant on 15th November 2011. I make no order as to costs.

R.K.LIMO

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17TH DAY OF MARCH 2015 in the presence of

Mr Kairu MC Court counsel for the appellant

Mr Kiama counsel for the respondent

Willy Court Clerk