REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 114 OF 2011

(Being an appeal from judgment delivered by Hon. W. Juma, Chief Magistrate on 10th June, 2011 in CMCC No. 929 of 2008)

WAYNE KIPTANUI.....1ST APPELLANT

DAVID KIMAIYO.....2ND APPELLANT

VERSUS

VERONICAH NJOKI.....RESPONDENT

JUDGMENT

The Appellants were sued by the Respondent for damages under the Law Reform *(Chapter 26, Laws of Kenya)* and Fatal Accidents Act *(Chapter 32, Laws of Kenya).*The Respondent also sought special damages costs and interest. In a judgment delivered on 10th June 2011, the learned trial magistrate found the Appellants 100% liable for the accident, and awarded the Respondent damages in the sum of Ksh 1,206,000/= and as there was no evidence in support, no special damages were awarded.

Aggrieved with the said Judgment, the Appellants came to this court on appeal and cited nine grounds of appeal in their Memorandum of Appeal dated and filed on 8th April 2013. The grounds are -

1. *The learned trial magistrate erred in law and in fact in failing to appreciate the evidence of the defence that it was the plaintiff who authored his misfortune.*

2. *The learned trial magistrate erred in law in shifting the burden of proof to the defendant.*

3. *The learned trial magistrate erred in law and in fact in disregarding the defendant's evidence in the face of clear circumstances of the occurrence of the accident.*

4. *The learned trial magistrate erred in law and in fact in basing her judgment on hearsay evidence on the part of the plaintiff, regarding the manner of occurrence of the accident.*

5. *The learned trial magistrate erred in law in failing to appreciate the doctrine of res ipsa loquitur regard being had to the circumstances of the case.*

6. *The learned trial magistrate erred in law and fact in failing to make a finding that the plaintiff greatly contributed to the accident, thereby failing to apportion liability, in light of the evidence before the court.*

7. *The learned trial magistrate erred in law and in fact in assessing damages basing her decision on wrong principles and inadequate evidence.*

9. *The learned trial magistrate erred in law and in fact in awarding excessive damages in light of the evidence before the court.*
9. *The learned trial magistrate was biased in the trial and judgment.*

Counsel for the Appellants and the Respondents filed written submissions to assist the court in determining the appeal.The appeal in my opinion raises two issues, whether the Appellants were 100% liable for the accident.The second issue, was the consequential damages.

On the question of liability the Respondent could only testify as to her marital status with her deceased husband and the children she was blessed to have with him. She could not testify as to what caused the fatal accident in which her husband died. She did not witness the accident. PW3 a Police Officer who testified on the report of the accident acknowledged that there was no independent witness who saw the accident happen.They had recommended an inquest be carried out. When cross-examined by counsel for the Appellants PW3 testified that the deceased was a mechanic of a motor vehicle driven by another person, the repairs to be carried out were on the braking system, and that the motor vehicle was parked on a steep place, and then the mechanic went to take a phone call, and he could not tell what steps he had taken to ensure that with defective brakes on the motor vehicle it was safely parked.

That evidence tallies materially with the evidence of DW1, the First Appellant, and no doubt an Interested Party. His evidence is however quite straightforward matter of fact way and it is entirely credible. He was the driver of motor vehicle KAQ 067S which he said had a braking problem. He had taken it to his mechanic – Sammy Maina – *(the deceased),* who showed him where to park and he parked it in *"a starting position."*

As soon as he parked the vehicle, *"the mechanic moved in and started repairing it, he received a telephone call and moved away to talk on phone ahead of the motor vehicle, 3 – 4 metres away as he talked.I was inside the motor vehicle as he had been telling me to apply the brakes as he repaired."*

This witness testified that all of a sudden the vehicle started moving, "I shouted to him and called out to him, he did not heed, the brakes were loose, the motor vehicle run over him and it moved on and hit another motor vehicle with its mechanic who was injured slightly. It hit a culvert and stopped.

This witness admitted in cross-examination that he was on the driver's seat as the mechanic had been instructing him to step on the brakes, and that when the deceased went to take his telephone call, he remained in the vehicle, he tried to apply the brakes to no avail. An officer who came by recommended that he be charged, but he was not.

With that evidence, it is difficult to arrive at the conclusion that the 1st Appellant was 100% to blame and thereby liable. The Appellants invoked the doctrine of *"res ipsa loquitur" - (the thing speaks for itself), Res ipsa loquitor* is a rule of evidence in actions of injury where the mere fact of an accident occurring raises the inference of the defendant's negligence, so that a prima facie case may be said to exist.

However from the evidence of the only eye witness, even if he was not an independent witness, it is quite clear to me that the cause of the accident cannot be entirely attributed to the 1st Appellant and vicariously upon the 2nd Appellant, the owner of the brakeless vehicle. The first Appellant had as a driver thereof, noticed that the vehicle had braking problems.He had taken it to Sammy Maina, his regular mechanic. The mechanic had received and had instructed him to park the vehicle and he did so. The mechanic started working on the brakes, and instructed the driver the First Appellant to sit in the driver's seat, and step on the brakes from time to time as instructed by the mechanic to test whether they were holding.

In the course of that exercise, the mechanic receives a telephone call, he walks away from the

vehicle and moves 3-4 metres away, walking slowly and speaking on the telephone. Then suddenly without warning the vehicle starts rolling towards the path of the mechanic, and not giving the mechanic time to jump off its path it hit and run over him. He suffered serious injuries, and despite being rushed to the local Mercy Hospital he died a few hours later following the accident.

There is no evidence that the engine of the car was running. But even if it were running, it was in the course of the repairs, which had been temporarily interrupted by the telephone call. The evidence of the driver was that the vehicle was parked in a *"starting position"* by which I understand that it could roll or, be pushed, to aid its starting. The parking was upon the instructions of the deceased. There was no evidence how the vehicle was secured to stop it from jerking and rolling away in the event the engine was ignited, and the brakes failed, as they already had problems.The garage was that of the deceased. It was also his duty to ensure that vehicles under his repair are secured usually with stones, tyres or large stumps or logs of wood. In that regard therefore, the deceased too contributed to the accident in no small measure. I would put his contribution to 40% of the cause of the accident.

I will not interfere with the multiplicand used by the court, but I would reduce the amount awarded by 40%.The deceased was 34 years of age, bearing the vicissitudes of life he may have lived for another 26 to 60 years of age. His net earnings being shs 7,000/= per month for 26 years and contribution to family of $^{2}/_{3}$ the sum due would be Ksh 884,400/= computed as follows -

7,000 x 12 x 26 x $^{2}/_{3}$ = 1,206,000/=

less 40% contributory negligence = shs 321,600/=

shs 884,400/=

Save as aforesaid, I confirm the other awards made by the lower court. As the Appellants are partially successful, I direct that each party bears its own costs of appeal.

It is so ordered.

Dated, signed and delivered at Nakuru this 28th day of February, 2014

M.J. ANYARA EMUKULE

JUDGE