IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 48 OF 1999

OBED MUTUA KINYILI …….....PLAINTIFF

-V E R SU S-

WELLS FARGO …….....DEFENDANT

CHRISTIAN CLAUS MICHAEL WALTERS ……..……. THIRD PARTY

JUDGMENT

1. This case was filed as far back as 1999. It was part heard on 14th October 1999 by Justice M. Ibrahim (**as he then was**) when Plaintiff closed his case. The matter was thereafter handled by several Judges when for one reason or the other it did not proceed for hearing. The matter was fixed before me on 8th October 2013 the Defendant informed the Court it was not intending to call any evidence. The Third Party long ago ceased to take part in the proceedings even though he was served. The duty of writing the Judgment of this part heard case has now fallen on my shoulders.

2. Plaintiff was the brother of Muteti Kinyili (**Deceased**) who died on 30th May 1997. According to Plaintiff's evidence the Deceased was employed by Wells Fargo, the Defendant, as a Security Guard. On 30th May 1997 Deceased was a passenger in the Defendant's vehicle which was being driven by Defendant's employee. The accident occurred on Mombasa-Malindi Road at night. The Defendant's vehicle collided with another vehicle. Plaintiff stated Deceased was taken to Pandya Memorial Hospital Mortuary after that accident. Deceased family paid Kshs. 11,000/- to that mortuary. Deceased was earning Kshs. 4,092/- net. Out of that amount he spent Kshs. 2,000/- on his mother and his siblings.

3. On liability for the accident Plaintiff stated-

   "I blame the Defendant for the accident. My brother (Deceased) was a passenger."

He was cross examined when he stated-

"I blame the other vehicle. It contributed to the accident."

4. That is the evidence before Court since the Defendant and Third Party did not offer any evidence.

5. The Plaintiff's claim is based on the Law Reform Act and Fatal Accident Act.

PLAINTIFF'S SUBMISSIONS

6. Learned Counsel for Plaintiff in written submissions submitted that the Plaintiff had proved that Defendant's driver was negligent on a balance of probability. That the circumstances of the accident indicated that he was wholly to blame. That since Defendant did not offer any evidence in its Defence, it did not prove any liability against the 3rd Party.

7. On quantum Plaintiff submitted that the Court should award on the heading of pain and suffering Kshs. 20,000/-. On loss of expectation of life Plaintiff proposed an award of Kshs. 150,000/-. Loss of dependency Plaintiff sought Kshs. 1,520,640/-.

DEFENDANT'S SUBMISSIONS

8. Defendant sought dismissal of Plaintiff's suit on two grounds.

9. Firstly that the Plaintiff had failed to prove that the subject motor vehicle belonged to the Defendant. Defendant submitted that since it had denied ownership of the subject motor vehicle in its defence the Plaintiff was obligated to prove such ownership. It was Defendant's stand that Plaintiff could not rely on the Police Abstract to prove ownership. Defendant relied on the case **THURANIRA KARAURI –Vs- AGNES NCHECHE [1997]eKLR** where Court of Appeal held thus-

> **"The Plaintiff did not prove that the vehicle which was involved in the accident was owned by the Defendant. As the Defendant denied ownership, it was incumbent on the Plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicle showing the registered owner of the lorry. Mr. Kimathi, for the Plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."**

What is important to note is that the Plaintiff in this present case produced the police abstract and the Defendant which was represented by Counsel and which Counsel cross examined the Plaintiff did not cross examine on the content of that police abstract. That being so I am of the view that the police abstract sufficiently proved that the subject motor vehicle belonged to the Defendant. My finding is supported by the conclusion reached in the case **SUPERFOAM LTD & ANOTHER –Vs- GLADYS NCHORORO MBERO [2014]eKLR** where it was stated-

> **"I also on this point refer to the case of WELLINGTON NGANGA MUTHIORA V AKAMBA PUBLIC ROAD SERVICES LTD & ANOTHER CA NO. 260 OF 2004 (Kisumu) (2010)eKLR Court of Appeal sitting at Kisumu held:**
>
> **'Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary."**

Perhaps more importantly in this case is that the Defendant did not adduce evidence before Court and that being so the pleadings in its Defence remain allegation because they were not proved. The Plaintiff on the other hand by evidence before Court stated that the Deceased was a passenger in Defendant's motor vehicle. That evidence under oath was not subjected to cross examination and was not challenged by any other evidence. My understanding is that once a Defendant just as

much as a Plaintiff fails to give evidence their pleading cannot be relied upon because they remain unproved.

10. The second ground which the Defendant sought Plaintiff's suit to be

dismissed is that the Plaintiff had failed to prove negligence. Defendant relied on the case **JAMAL RAMADHAN YUSUF & ANOTHER –Vs- RUTH ACHIENG ONDITI & ANOTHER [2010]eKLR** where the Court stated-

> **"… it is always necessary that the Plaintiff proves negligence with cogent and credible evidence since the mere fact that an accident occurs does not follow that a particular person has driven negligently."**

What needs to be stated is that in that case **JAMAL** (supra) unlike this present case the Defendant offered evidence. As stated before the defence filed by the Defendant here was unproved. Further it is important to note that Plaintiff the brother of the Deceased was not in the fateful car and could not give direct evidence of how the accident occurred. Indeed from the police abstract produced in Court it is clear that the driver and the Deceased, who seem to have been the only two people in the subject car both died from their injuries in that accident. In Law the Court can infer negligence from the circumstances of the case in which the accident occurred. This is by invoking the principle of *res ipsa loquitor*. In the book by Winfield & Jolowicz on Tort 17th Edition the learned author wrote-

> **"This has traditionally been described by the phrase res ipsa loquitur – the thing speaks for itself. …. Its nature was admirably put by Morris L. J. when he said that it:**
>
> **'Possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying:**
>
> **'I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant …' There are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer."**

The learned author went further to say:

> **"The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant. This is commonly divided into two parts on the basis of Erle C.J.'s famous statement in Scott v London and St. Katherine Dock Co:**
>
> **'There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."**

As stated before, the subject car was under the management and control of the Defendant's employee and in the ordinary course of things the accident should not have happened and the Deceased should not have been fatally injured. In Black's Law Dictionary the principle is defined as follows-

> **[Latin "the thing speaks for itself"] Torts. The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. Often shortened to res ipsa."**

That Dictionary goes further to explain the circumstances the Court will infer negligence as follows-

> **"The phrase 'res ipsa loquitur' is a symbol for the rule 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 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 past 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."**
>
> **"It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that defendant's negligence was responsible it must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."**
>
> **'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability … The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."**

11. The Court therefore in this case in the absence of any explanation by

the Defendant will infer that the accident was caused by the negligence of Defendant's employee.

12. On perusal of the Court file I noted that the Defendant on 22nd

October 1999 obtained leave to serve a third party Notice on a person called Christian Claus Michael Walters, the Defendant did not proceed, after the 3rd party filed appearance and defence, apply as provided by the then Order 1 R. 18 of the Repealed Civil Procedure Rules for the Court to determine the proper question to be tried as to the liability of 3rd party. Having not done so there was no question to be determined on liability of the 3rd party. Further the Defendant having not adduced evidence did not prove any liability against 3rd party. It is for that reason the liability in this case will fall wholly on the Defendant.

ANALYSIS ON QUANTUM

13. Deceased was 23 years old. His age unlike what Defendant submitted

was reflected in the Death Certificate. He would have retired at the age of 60. I do acknowledge as submitted by the Defendant that the Court should take into consideration age expectancy in Kenya is affected by various factors such as poverty, accidents amongst others. It is for that reason I will use a multiplicand of 20 years. Plaintiff did not prove whether Deceased's death was instantaneous or not accordingly there will be no award for pain and suffering on Law Reform Act. Plaintiff is awarded Kshs. 100,000/- for loss of expectation of life. On dependency Plaintiff gave evidence that Deceased supported him and their mother by a monthly allowance of Kshs. 2,000/-. Although he spoke of the Deceased having had a child, there was no evidence produced in terms of Birth Certificate and accordingly that evidence shall be disregarded. Accordingly the

Court on this head shall calculate dependency as follows: 4,092X20X12X1/2 = 491,040/-.

Although Plaintiff did not prove by way of receipt funeral expenses the fact remains that the Deceased was buried and that there were attendant expenses which I shall award as Kshs. 20,000/-.

CONCLUSION

14. There shall therefore be judgment for the Plaintiff against the

Defendant as follows-

(a) Under Law Reform Act	-	Kshs. 100,000/-
(b) Under Fatal Accident	-	Kshs. 491,040/-
(c) Special damages		Kshs. 31,000/-
TOTAL		**Kshs. 622,040/-**
Less		Kshs. 100,000/-

Total amount of this judgment Kshs. 522,040/-

d. Plaintiff shall have interest at Court rates on (a) and (b) above from date of this judgment until payment in full. On (c) above Plaintiff is awarded interest from the date of filing suit until payment in full.

e. The Plaintiff is awarded costs of the suit to be borne by Defendant.

DATED and delivered at MOMBASA this 28TH day of AUGUST, 2014.

MARY KASANGO

JUDGE