

deceased was killed by a disengaged run-away tyre from his motor vehicle. Thus, there was no dispute as to how the deceased met his death. Nor indeed was there any dispute that the deceased was hit by the run-away tyre from the same motor vehicle while lawfully cycling on his side of the road.

The only issue that the honourable trial magistrate found himself faced with was whether or not the sudden disengagement of the wheel and its crashing of the deceased, was caused by the negligence of the appellant/defendant through the principle of vicarious liability.

The honourable lower court magistrate in part of his judgment made a finding that there was a later/mechanical defect in the subject motor vehicle which gave way and released the rim or wheel that eventually crashed the deceased. He found no evidence of high speed of the motor vehicle or even negligent driving by the driver. Indeed there was evidence from the driver that he was driving at a safe 20 K.p.h when the wheel disengaged.

The trial magistrate also made a finding, if I understand his judgment, that there was no evidence on the record to lead to the conclusion that the driver of the motor vehicle registration KAS 428N-ZC-1375 did not keep a proper look out to the other road users on the road. The court concluded that there was no evidence from the plaintiff whose burden it was to prove his case on the balance of probability, that the defendant or his driver or agent was negligent in using or permitting the lorry to be used on the road in a condition which was known or ought to have been known to be a danger or likely to be a danger or likely to cause a danger road users.

In the above analysis, the honourable trial magistrate concluded that there was no evidence that the defendant or its driver or agent had any personal knowledge of the defects that finally led to the disengagement of the rim or wheel that crashed the deceased. Nor was there evidence, the honourable magistrate found, that the defendant had failed to inspect the vehicle before the accident or failed to maintain the motor vehicle regularly.

Another important aspect of this case was the honourable magistrate's conclusion that the burden of proving the immediately above condition of the motor vehicle was upon the plaintiff/appellant who had alleged it, although of course, the standard of proof was on the balance of probability.

I have carefully considered the manner in which the honourable lower court magistrate treated the evidence and the conclusions which he arrived at. He had no doubt that it was upon the plaintiff to prove his case on the balance of probability but that the appellant/plaintiff, had failed to discharge that burden. That the plaintiff had not adduced evidence to prove that the relevant motor vehicle was not the mechanically sound immediately before the accident occurred. That there was no evidence from the plaintiff that the driver of the motor vehicle became aware of and ignored a defect in the motor vehicle before the accident occurred. Or finally, that the motor vehicle wobbled or moved unsteadily before the accident but the driver or his employer ignored it. For these reasons, the trial court found no negligence or carelessness on the part of the defendant, his driver or agent and dismissed the claim.

In my view the honourable trial magistrate ignored the principle of "Res Ipsa Loquitur". The basis of the principle in summary, is that when something happens which in the ordinary or natural way of things would only happen if some was at fault, then the law presumes that such fault was the cause of the event. That is to say, in respect of this case, that the fact that the wheel or rim suddenly disengaged from the motor vehicle registration KAS 328 N-ZC-1375 means that it was so caused by some cause. If such cause were shaking due to poor road for example or because the wheel or rim was pushed or pulled from its fastening bolts etc, then such should be explained by the person whose duty it was to have it securely fastened always, in this case the appellant.

It is my view accordingly and I so hold, that if in this case the rim or wheel disengaged itself from the defendant's vehicle and caused damage or injury, then the presumption would be that the same disengaged due to the negligence or carelessness of the owner of the motor vehicle or its driver or agent. It may explain this away by showing that it always had the wheel or rim properly checked to avoid its disengagement and that such checking was recently done before the motor vehicle started traveling

from Mombasa or Nairobi facing to Uganda. That way the defendant would prove on the balance of probability that the disengagement of the wheel or rim led to the accident was purely accidental and that negligence or carelessness of the defendant was totally lacking.

To suggest that it was the plaintiff who should have proved by evidence that the defendant checked or maintained the motor vehicle in relation to the wheel or rim is in my view, contrary to the said principle of Res Ipsa Loquitur and contrary to the ordinary or natural course of things in this world.

In this case the defendant/respondent failed to explain why the wheel or rim disengaged and killed the deceased. The defendant as well failed to show that it had done everything possible in terms of maintaining or checking its motor vehicle to avoid the occurrence that took place. It cannot accordingly be heard to argue that the plaintiff cannot look up to it for compensation. That is to say that the mere fact that an otherwise securely fastened rim or wheel could contrary to things disengage, means that it was not properly engaged or had recently become loose but the defendant failed to notice it or check it or tighten it. The defendant or its agent had accordingly failed to fulfill its duty or care which caused the disengagement of the wheel and eventual crash on the deceased.

As far as issue of ownership of the motor vehicle was concerned, there was in my sufficient evidence to prove ownership to the defendant. It was properly pleaded to belong to the defendant/respondent. The driver of the respondent proved that he had been employed by the defendant to driver the motor vehicle for several years. The driver did not suggest the motor vehicle was not his employer's or was borrowed. In other words although the defendant may in its pleadings had denied ownership, it did not pursue the defence during the hearing. Further, the police abstract had confirmed that the motor vehicle belonged to the defendant which was not much denied in actual evidence in court. Although the honourable lower court magistrate did not make a specific finding on ownership, he all through took it as undisputed. He referred to the motor vehicle as defendant's motor vehicle throughout the proceedings. I would not fault him.

As to the issue of representation, the appellant had taken a grant of letters of administration jointly with his son. There was no dispute between them to deny the appellant the right to act to protect the best interest of the estate of the deceased.

Finally, the trial magistrate in the alternative found that the deceased earned a net Kshs.8430/- per month and had 8 years yet to reach retirement. He applied a 2/3 dependency formula most probably because the deceased left nine (9) young dependants who were still at school. He got – $8430 \times 12 \times 8 \times \frac{2}{3} = 539,520/-$ as dependency. Loss of expectation of life he gave Kshs.80,000/- while pain and suffering he gave Kshs.10,000/-. The total became Kshs.629,520/-. I find all the awards reasonable and indeed moderate. I would in my findings award it.

In conclusion, I find the appeal as having merit. I substitute the order of dismissal of the suit with the alternative finding of the lower court. The end result is that I award the plaintiff the total sum of Kshs.629,520/- with costs and court interest from the date of the lower court judgment until full settlement.

Orders accordingly.

Dated and delivered at Bungoma this 23rd day of February 2011.

D.A. ONYANCHA
JUDGE