



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL NO. 92 OF 2009

BETWEEN

DANIEL KIMANI NJOROGE.....APPELLANT

AND

JAMES K. KIHARA.....1ST RESPONDENT
JAMES M. MUCHIRI.....2ND RESPONDENT

(Being an appeal from the decision of the Senior Resident Magistrate Hon. G. Mmasi dated 23rd June, 2009 in Eldoret Chief Magistrate's Court Civil Case No. 461 of 2005)

JUDGMENT

This appeal is from the judgment and decree of the Learned Senior Resident Magistrate, G. Mmasi, dated 23rd June, 2009 in Eldoret Chief Magistrate's Court Civil Case No. 461 of 2005. The appellant, **Daniel Kimani Njoroge** (Suing as next of kin and brother to **John Njenga Njoroge** - (deceased) was the plaintiff whilst the respondents, **James K. Kihara** and **James M. Muchiri** were the defendants. The Learned Senior Resident Magistrate dismissed the appellant's claim against the respondents under the Fatal Accidents Act (Cap 32 of the Laws of Kenya). That dismissal triggered this appeal.

The appellant pleaded that he was a next of kin and brother of the deceased **John Njenga Njoroge** who was knocked down on or about 17th December, 2004 as he walked along Eldoret Nakuru road at Matharu area due to the negligent driving of motor vehicle registration No. KAQ 079A Toyota Hiace M. The appellant particularised the respondents' negligence and pleaded *res ipsa loquitur*.

In the written statement of defence the respondents denied negligence and in the alternative pleaded that if an accident did occur, the same was caused by and/or substantially contributed to by the deceased. They also pleaded that the appellant did not have the *locus standi* to bring the suit.

At the hearing the appellant gave evidence that the deceased was hit by vehicle registration number KAQ 079A Toyota Hiase but he did not witness the accident. He called **Zacharia Maina Kamau** (PW2) who testified that on the material date, at about 7:00pm, he heard a bang from the road while he was at his home. He went to the road and found the deceased lying on the ground. He also saw the said

motor vehicle which later left the scene. The deceased was taken to Moi Teaching and Referral Hospital where he died after two months. When cross examined, he stated that he did not know who was to blame for the accident.

The respondent offered no evidence at the trial. In her judgment the Learned Senior Resident Magistrate concluded as follows: -

***“In paragraph 7 of the plaint the plaintiff enumerated the particulars of negligence. The plaintiff would have proved the various particulars of negligence in this suit. No eye witness was called to confirm whether or not the vehicle was speeding or whether or not the 2nd defendant was driving at an excessive speed or whether or not the, deceased was one to blame for the accident. The investigating officer was never called to come and adduce evidence and even produce the sketch plan for the court to be in picture as to who was negligent. PW2 when cross examined by counsel for the defendant said he just heard a bang and rushed to the scene to find deceased had been hit. He said he did not know who to blame and he never saw the vehicle hit the deceased. He said he just saw a stationary vehicle registration number KAQ 079A which vehicle drove off. It is evident that a mere collusion of two vehicles or of a vehicle and a person by itself without proof of negligence is insufficient for establishing liability. In this case there was no witness who testified to the effect that motor vehicle registration number KAQ 079A hit the deceased. PW2 only said he saw a stationary vehicle which later left. It was incumbent upon the plaintiff to call an eye witness who investigated the accident drew the sketch map of the scene.*”**

The upshot of the evidence on record falls for short in going to prove this case on a balance of probabilities. The suit has not been proved on a balance of probability and the same is herewith dismissed.....”

That decision provoked this appeal by the appellant who was the plaintiff in the lower court. He has put forward three grounds of appeal which challenge the Learned Senior Resident Magistrate’s finding that the case had not been proved and that a possible award of damages should have been made.

When the appeal came up before me for hearing on 10th May, 2011 counsel agreed to file written submissions which were duly in place by 24th May, 2011.

I have considered the record of the Learned Senior Resident Magistrate, the grounds of appeal and the submissions of counsel. Having done so, I take the following view of this matter. Being a first appeal I should subject the evidence, which was adduced before the learned Senior Resident Magistrate, to a fresh scrutiny and arrive at my own independent conclusion bearing in mind that I did not see or hear the witnesses testify and must give allowance for that. The court should also be slow to disturb findings of facts of the trial, court (**See Peter -V- Sunday post Limited [1958] E.A 424**). The court is duty bound to examine with care whether the findings on facts were not based on evidence adduced before the trial court or whether there was a misapprehension of the evidence or that the trial court acted on wrong principles in arriving at those findings of fact.

I ask myself whether on the evidence adduced before the Learned Senior Resident Magistrate, the appellant proved his claim on a balance of probabilities. The appellant, at the trial freely admitted that he never witnessed the accident. His witness **Zacharia Maina Kamau** (PW2), did not also witness the accident. He indeed went to the scene soon after it had occurred and saw the deceased lying down after he had been knocked down. He also saw a “Nissan” KAQ 079A Toyota Hiace at the scene which later left. He did not suggest that the said vehicle had knocked down the deceased. He indeed expressly stated that he did not know who was to blame for causing the accident. None of the particulars of negligence alleged were proved against the respondents. The findings of the Learned Senior Resident cannot therefore be faulted.

The principle of *res ipsa loquitur* did not, in my judgement, apply. The principle was discussed in the case of **Mary Ayo Wanyama and 2 others -V- Nairobi City Council [Civil Appeal No. 252 of 1998] [VR]** There, the court said as follows:-

“We doubt whether it is right to describe res ipsa loquitor a doctrine. We think it is no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was prima facie evidence of negligence and that the onus lay on the defendant to rebut that prima facie case. It means that a plaintiff prima facie establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible which act or omission constitutes a failure to take proper care for the plaintiff’s safety.”

In view of that definition, I cannot say that the appellant presented before the trial court evidence which would suggest that the accident itself was evidence of negligence on the part of the respondent. It could not be said that the plaintiff established, prima facie, that the accident was caused by some act or omission of the respondent.

Therefore I have no difficulty in concurring with the Learned Senior Resident Magistrate’s decision that the appellant failed to prove negligence against the respondents on a balance of probability.

With regard to the ground of appeal that the Learned Magistrate erred in Law and in fact by not awarding damages as required had the case been successful, there can be no gainsaying that the Learned Senior Resident Magistrate indeed erred in not assessing damages in the event she would be overruled on appeal. However that failure does not change the final results of this appeal since I have concurred with her on the issue of liability.

Accordingly and for the reasons above stated the Learned Senior Resident Magistrate reached the correct conclusion. She was plainly right and this appeal must fail. It is accordingly dismissed and there is no necessity to consider the question of damages further.

The respondents shall have the costs of the appeal.

It is so ordered.

**DATED AND DELIVERED AT ELDORET
THIS 27TH DAY OF JULY, 2011**

F. AZANGALALA

JUDGE

Read in the presence of :-

Mr. Omusundi H/B for Mr. Andambi and

Mr. Kimani for the Respondent.

F. AZANGALALA

JUDGE

27TH JULY, 2011