REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

CIVIL APPEAL 78 OF 2006

ANN MUKAMI MUCHIRI ..... APPELLANT

VERSUS

DAVID KARIUKI MUNDIA ..... RESPONDENT

(Appeal from original Judgment and decree of the Chief Magistrate's Court at Nyeri in Civil Case No. 853 of 2003 dated 20th day of July 2005 by R. Nyakundi – C.M.)

J U D G M E N T

The appellant herein was the unsuccessful Plaintiff in the case before subordinate court giving rise to this appeal whereas the respondent was the successful defendant. The appellant filed the suit as the administratix of the estate of **Joseph Mathenge Macharia** against the respondent seeking damages under the fatal accidents Act and the law reform Act following a fatal accident involving the respondent's vehicle registration number KAL 675P in which the deceased was travelling as a lawful passenger on 15th May 2001 at about 11 p.m. Following the accident the deceased was fatally injured and passed on later that night. By a judgment dated 20th July 2005, **Mr. R. Nyakundi**, Chief Magistrate having heard the evidence of the appellant and her one witness as well as the respondent ordered the dismissal of the appellant's case with costs to the respondent. That order of dismissal triggered this appeal.

By her plaint dated 3rd November 2003 and filed in court on the same day the appellant had pleaded in paragraph 5 thus:

"**On the 15th day of May 2001, the deceased was a lawful passenger in the said motor vehicle registration KAL 675P along Nyeri/Mathari road when due to the negligence of the defendant, his driver, agent and/or servant in the manner he drove and/or controlled the said motor vehicle, it veered off the road and hit a big tree by the road side and as a result thereof the deceased suffered fatal injuries."**

The particulars of the negligent on the part of the respondent's driver, agent and/or servant were stated to be:

(a) Driving at an excessive speed in the

circumstances

(b) Failing to keep any or any proper control of

the said motor vehicle.

(c) Driving without any regard to the safety of

the passengers in the said motor vehicle.

(d) Driving without care and attention.

(e) Failing to apply his brakes in sufficient time

or at all.

(f) Failing to swerve, steer, stop, slow down

and/or do any other act so as to control the

said motor vehicle.

(g) Driving a defective motor vehicle

(h) Veering off the road and ramming into tree.

The plaintiff averred that as far as the same is applicable the doctrine of Res-ipsa-Loquitor applied in the circumstances of the case.

The long and short of the appellant's case is that her husband was in the respondent's motor vehicle which veered off the road and hit a big tree by the roadside due to the negligent driving and management of the respondent's motor vehicle by the respondent, his driver, agent and or servant. As a result thereof the deceased suffered fatal injuries and passed on as a result.

It was further pleaded that as a result of the fatal accident caused by the negligence of the respondent, the deceased's estate had suffered loss and damage.

The appellant went on to give the particulars of damage. With regard to special damages the total came to Kshs.46,548. This money was credited to the purchase of coffin, a hearse, mortuary fees, police abstract, meeting venue expenses, Radio announcements, death certificate, newspaper announcements and filing fees for the Petition for Limited grant.

At the time of the accident, the deceased it was claimed was aged 38 years old, in good health and a businessman with a monthly income of Kshs.50,000/= which he used to support the appellant, their two minor children, **Claire Nyokabi Mathenge** and **Lucky Wambui Mathenge**, his aged parents, **Bethuel Macharia Kibui** and **Silipha Nyokabi Macharia**. Accordingly by his premature death the appellant and these dependants had lost such support and his estate had thus suffered loss and damage.

Upon the respondent being served with the plaint, he reacted by entering appearance and subsequently filed a defence. In his defence, the defendant admitted the occurrence of the accident but denied that the same was occasioned by his negligence or indeed that of his driver, agent and or employee. He further and without prejudice pleaded two alternative defences; contributory negligence by a third party's motor vehicle whose driver was negligent. He gave the particulars of such negligence as follows:-

(a) Driving at an excessive speed in the

circumstances.

(b) Getting into and obstructing the lawful path of travel of the motor vehicle registration number KAL 675P thereby causing it to swerve off the road.

(c) Failing to stop, slow down serve or in any other way manage and/or control the motor vehicle so as to avoid coming into the lawful path of and dangerously obstructing the motor vehicle registration number KAL 675P.

(d) Failing to have due regard for the safety of other road users and especially the occupants of motor vehicle registration number KAL 675P.

(e) Failure to dim the lights and keep to his/her legitimate side of the road.

(f) Being in contravention of the provisions of the Traffic Act and Highway Code.

(g) Causing the accident.

Secondly, the respondent pleaded that the accident was inevitable and its occurrence had been compounded by a tyre burst.

Upon considering and evaluating the evidence tendered by the parties, the trial magistrate ruled against the appellant on the issue of liability, holding thus:

"**I am satisfied as I do that the plaintiff has not discharged the burden of proof in this case on a balance of probabilities traffic (sic) negligence against the defendant. Being a matter based on negligence I hereby dismiss the same against the defendant accordingly with costs."**

Through **Messrs Wachira Nderitu Ngugi & Co. Advocates**, the appellant has impugned the decision of the learned magistrate on the following grounds:-

1. The learned trial magistrate erred in law and in fact in finding that the Plaintiff had not discharged her burden of proof on a balance of probabilities against the Defendant.

2. The learned trial magistrate erred in law and in fact in finding that the doctrine of

"Res-ipsa-loquitor" did not apply in favour of the appellant in the light of the circumstances and evidence of the case.

3. The learned trial magistrate erred in law and in fact in finding that the cause of the accident, the subject of the trial in the lower court was due to alleged negligence of a Third Party, who was not identified at all, heap of marram on the road, potholes and a tyre burst, yet there was no congent, plausible, credible and concrete evidence or no evidence at all to support such a finding and as a result he came to the wrong judgment.

4. The learned trial magistrate erred in law and in fact in relying on allegations of an acquittal of the Respondent in an alleged Traffic offence of dangerous driving arising out of the accident the subject of the suit herein, yet no proceedings or judgment in respect of the same were adduced in evidence in court and as a result the court relied on non-existence evidence.

5. The learned trial magistrate erred in law and in fact in not explaining to the Appellant her right of Appeal within the prescribed time thereby prejudicing her case.

When the appeal came up for hearing **Messrs Ngugi** and **Mugambi** learned counsels for the appellant and respondent respectively agreed to have the appeal argued by way of written submissions. Consequent upon that agreement and which was endorsed by court, parties to this appeal filed their respective written submissions on which they attached several relevant authorities. I have carefully read and considered the same together with the attached authorities although I may not deal with and or refer to each one of them separately.

This being a first appeal, this court is mandated to reconsider and re-evaluate the evidence adduced before the trial court and come to its own independent findings. Of course in so doing, this court must also take cognizance of the fact that it did not have the benefit of seeing the witnesses as they testified and cannot therefore assess their demeanour. See **Jabane v/s Olenja (1986) KLR 664**.

It is common ground that the accident complained of occurred at night. It was about 11.30 p.m. It is also common ground that the condition of the road at the scene of the accident was anything but safe. According to PW2 "**..... The road was extensively damaged ..... There were hips of murram, the road was under holes (sic) between the heaps of murram were on the tarmac right hand side. ..... It was two way traffic. The width of the road somehow narrow ..... It was worn out at the ages. The road service (sic) was rough the road was under repair....."** It is also common ground that the subject motor vehicle was being driven by the owner, the respondent herein and he was driving it at a speed of 60 – 70 and or 80 kph. Under cross-examination by counsel for the appellant, the respondent made this rather curious and startling admission**. "..... My vehicle had no lighting system at the time ....."** I have checked the original record of the trial magistrate and it is in agreement with the above admission. Could this mean that he was driving the subject motor vehicle at that particular time of the night without his lights on? Gauging by the manner the accident occurred this possibility is not remote. The respondent did not counter this fact although it had been raised in the appellant's written submissions served on him. Taking all these factors in consideration it is the contention of the appellant that the respondent was negligent in the driving managing and controlling his subject motor for he drove it at a speed that was excessive in the circumstances, did not keep proper control of the motor, drove without due care and attention and finally driving a defective motor vehicle without lighting system. There can be nothing as negligent and reckless as driving a motor vehicle at this hour of the night without lights on.

The respondent in his defence blames the accident on a third party motor vehicle whose driver he claims blinded him with his full lights and in the process of avoiding a head on collision with him he hit a pot hole and or a stone and as a result his motor vehicle had a tyre burst veered off

the road and hit a tree. The respondent also contended that the accident was inevitable. It is however important to note that the respondent made no efforts at all to enjoin this offending third party motor vehicle in these proceedings despite his threats to do so as contained in paragraph 4 of his defence. His threats that "**at the earliest opportunity seek leave of this Honourable Court to issue Third Party Notice to the owner of the Third Part's motor vehicle"** never came to pass. It is also significant to note that, there were several occupants in the motor vehicle besides the deceased and the respondent. Actually there were two others, **Ndungu** and **Kinyanjui**. The respondent never called these witnesses to back up his story about the third party motor vehicle and or the accident being inevitable.

It is important to note that apart from the respondent and the surviving occupants of the ill fated motor vehicle, no one else witnessed the accident. PW2 who the learned magistrate found his testimony as corroborative to the evidence of the respondent came to the scene much later after the accident had occurred. On my part I am unable to find anything corroborative of the evidence of the respondent by PW2. The respondent having been the only witness to testify as to how the accident occurred and being the defendant in the suit, it is highly likely that the evidence he tendered was self-serving and calculated to shield him from liability. Is it possible that had he called those witnesses who survived the crash, they would have been able to rip open the respondent's theory regarding the offending third party motor vehicle and or the accident being inevitable? I cannot rule out that possibility.

As already stated and which fact was conceded to by the respondent, the road at the scene was rough with heaps of murram all over. Time was 11.30 p.m. or so and he was doing a speed of 60 – 70 and or 80 kph. Certainly a speed as aforesaid in the circumstances outlined above must be excessive considering further that the motor vehicle had no lighting system. I am aware that speed perse is not negligence. It must be accompanied with other rush and reckless acts. See **Barkway v/s Southwales Transport Co. (1948) 2 ALL ER 470, Peter Kinyanjui Mburu v/s Geoffrey Kinyua Muchoya & 2 others, NBI HCCC No. 1400 of 1992** (unreported). In the circumstances of this case however, the respondent was doing that speed in darkness, the road was narrow and rough with heaps of murram all over. As correctly submitted by **Mr. Ngugi**, the respondent must have been negligent to the extreme when he chose to drive his motor vehicle in those conditions. He could have avoided the whole incident by not driving the said motor vehicle at all in the first place and if he had to, the circumstances obtaining called upon him to be extra cautious and vigilant as he was driving under extra ordinary circumstances but unfortunately he did not and as a result he caused the accident for which he must be held to account.

In my view had the learned magistrate approached this case with the foregoing in mind, I doubt that he would have held as he did that the doctrine of *Res ipsa loquitor* did not apply. The doctrine of *res ipsa loquitor* was enunciated in the case of **Scott v/s London Dock Co. (1885) 3 H & C 596** in the following terms:-

"**..... where 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 or explanation by the Defendant, that the accident arose from want of care ....."**

The respondent contends that the appellant did not offer any conclusive evidence that the motor vehicle was being driven at a high speed. That she did not give any evidence which counters that of the respondent that he was doing a speed of 60 – 80 kph. I agree with **Mugambi** that where over speeding is alleged as the cause of the accident, it is incumbent upon whoever alleges and it is of paramount importance, that plausible evidence be adduced so that the court does not make its finding based on conjecture. However as I have already demonstrated, the circumstances obtaining at the scene of accident could not have favoured that speed. The respondent was in my view rash and negligent to the extreme. That fact having been established, the burden of proof to the contrary shifted to the respondent. In my view the

respondent was unable to demonstrate to the trial magistrate that the said accident was not caused by his own negligence. He failed to rebut the obvious inference of negligence given in the circumstances of this case; hence the application of the maxim *res ipsa loquitor*. Further even if the learned magistrate was compelled to reject the application of the aforesaid maxim, I still believe that there was sufficient evidence on record to prove that the respondent was negligent as he drove the motor vehicle at an excessive speed in the circumstances, he was unable to control the motor vehicle, he drove without due care and attention and finally he drove a defective motor vehicle that had no lights. Those particulars of negligence were sufficient to turn the case against the respondent.

How about inevitable accident? Once again this court can only go by the word of the respondent. The survivors of the crash would have beefed up this defence. I have already discounted the evidence of the respondent as self-serving. He was unable to demonstrate that the accident was as a result of some sudden and unforeseeable circumstances, so as to make the accident herein unavoidable or inevitable as he alleges. As correctly pointed out by **Mr. Ngugi** in his submissions, it was foreseeable that a serious accident was bound to occur when the respondent took the risk of driving a motor vehicle at night without any lighting system and wading through heaps of murram and or a rough road undergoing repairs. In those circumstances he was bound to run into stones, potholes or other objects resulting into a tyre burst. By failing to appreciate all these foreseeable dangers, the respondent undertook an obvious risk and therefore set upon himself a very high standard of duty of care to the passengers he was carrying, which duty he failed to discharge. Knowing the prevailing conditions of the road, the respondent went ahead to drive at a speed that was dangerous. The extensive damage to the subject motor vehicle is a testimony to the speed at which it was being driven. Further considering that the deceased passed on and the other occupants were seriously injured the impact must have been intense pointing once again to excessive speed. I am in total agreement with the sentiments expressed by the learned judges of appeal in the case of **Hellen Mueni Mwathi v/s Julius Kiilu Sila & Another C.A. No. 352 of 2005 (Nyr)** (unreported) when they said:

"**..... In those circumstances, we agree with Mr. Ochieng that whether the vehicle ran into a hippopotamus or into a tree did not really matter. The immediate and proximate cause of the accident was speed at which the 1st respondent drove his vehicle .....**" The same situation obtains here.

Finally I would wish to touch briefly on the learned magistrate's reliance on the acquittal of the respondent in the traffic case resulting from the accident to fortify his position that the respondent was not to blame for the accident. First and foremost the learned magistrate ought to know and he knew that the standard proof in criminal matters is not the same as in civil proceedings. Whereas in criminal proceedings the standard of proof is beyond reasonable, in civil proceedings, it is on balance of probability. It is therefore much lower. The mere fact that the respondent was acquitted in the traffic case does not

necessarily mean he cannot be held liable in subsequent civil proceedings. Secondly, the learned magistrate acted on hearsay evidence as neither the proceedings and judgment in respect of the same were tendered in evidence. The acquittal might have been on a technicality and not on insufficiency of evidence. Clearly therefore the trial court allowed itself to be influenced by extraneous and non-existent evidence and accordingly arrived at a wrong judgement.

The deceased was not without blemish either. He chose to ride in motor vehicle in very dangerous conditions. The vehicle had no lights; the road narrow and undergoing repairs. It was potholed with hips of murram all over. It was at night. He took a risk to himself. I would have been minded to apportion liability on the basis that he was equally or substantially to blame for the accident. He brought it to himself. In fact I would have invoked the doctrine of *volent*

non fit injuria in the circumstances. However the respondent did not plead the same in his defence, nor lead evidence to that effect during the trial. Never has he raised it in this appeal. Parties are bound by their pleading and evidence. A court can only act on what has been pleaded, the evidence and the law. It cannot grant what has not been asked.

That being the view I take of this appeal, I must reverse the learned magistrate's finding that the appellant had not proved that the respondent had been negligent in his driving and control of the vehicle. I find and hold that the appellant proved on a balance of probabilities that the respondent drove the vehicle in rash, reckless manner and at an excessive speed in the circumstances. He also drove the vehicle without lighting system being in place. As a result he caused the accident. Accordingly I set aside the

order of the learned magistrate on that aspect of the matter and find the respondent to have been wholly liable for the accident in which the appellant suffered fatal injuries.

On damages, the learned trial magistrate went on to assess them and held that had he found for the appellant on the issue of liability he would have awarded to the appellant a total of Kshs.1,355,398/= as general damages made up as follows:-

(i) Pain and suffering – Kshs.10,000/=

(ii) Loss of expectation of life – Kshs.100,000/=

(iii) Loss of Dependency – Kshs.1,200,000/=

(iv) Special damages of – Kshs.45,398/=.

On the evidence on record I do not think that the learned magistrate could be faulted on those awards.

In the event, I set aside the order dismissing the appellant's suit with costs and substitute therefor with an order entering judgment for the appellant in the total sum of

Kshs.1,355,398/= together with the costs of the suit in the lower court as well as in this appeal. I order that the decretal sum shall bear interest at court rates with effect from the date of judgment by the lower court in respect of the general Damages. However special damages shall attract interest from the date of the filing of the suit. The general damages aforesaid however, shall be apportioned among all the dependants as follows:-

Appellant – Kshs.300,000/=

2 minor daughters – Kshs.400,000/= each

Father – Kshs.105,000/=

Mother – Kshs.105,000/=

For the minors aforesaid their respective shares of Kshs.400,000/= each shall be invested in a reputable finance house as usual in the joint names of the appellant and the registrar of this court. Those shall be the orders of this court in this appeal.

Dated and delivered at Nyeri this 9th day of October 2008

M. S. A. MAKHANDIA

JUDGE