

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 164 OF 2002**

MERCY SHOBOI MUGUNYA & OTHERS PLAINTIFFS

- Versus -

ABDALLA SAID ABDALLA DEFENDANT

J U D G M E N T

This is an appeal against the judgment of C.O. Obulutsa Esq., Resident Magistrate in Kilifi SRMCC No. 212 of 2002 in which he dismissed the Appellants' claims. He, however, assessed the damages he would have awarded if he had found the defendant liable. He awarded the first Appellant Sh. 150,000/= and Sh. 45,000/= each to the second and third Appellants.

The reason why the trial magistrate dismissed the Appellants' case was that there was no evidence of negligence on the part of the Respondent's driver.

Only the first Appellant testified on behalf of the Appellant. Although she was a passenger in the accident vehicle in her testimony she stated in examination in chief that "I cannot say what happened the vehicle just overturned". In cross examination she is recorded as having stated that "I do not know if I can blame the driver for the accident".

The defendant on his part testified and called his driver as his witness. The defendant's evidence is not relevant as he was not in the vehicle at the time of the accident. That of his driver is however relevant. He testified that he was driving at a speed of between 40 and 50 KPH when the leaf spring of the front wheel (he did not say which) snapped and in spite of his effort to keep the vehicle on the road he lost control and the vehicle landed on its left side. He said he was not charged for any offence arising from the accident.

While arguing this appeal before me Mr. Obara for the Appellants submitted that although the Appellants did not adduce any direct evidence of negligence on the part of the defendant's driver the trial magistrate should have applied the doctrine of *res ipsa loquitur* and held the defendant liable.

The doctrine of *res ipsa loquitur* is rule of evidence affecting the onus of proof. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant. It is, however, dependant on the absence of any explanation from the driver as to the cause of the accident but if the cause of the accident is proved the doctrine is of little moment.

In this case the first Appellant said she did not know the cause of the accident. The vehicle just overturned. But the defendant's driver said that the leaf spring, apparently of one of the front wheels, snapped and he lost control. That is an explanation on the cause of the accident. The doctrine of *res ipsa loquitur* therefore does not apply to this case. But that does not mean that there was no evidence of negligence on the part of the defendant's driver.

Vehicles do not just go overturning on the roads without any cause. In this case the accident was self involving. If the Appellants knew the cause of the accident then they were duty bound to prove it. If, however, they did not know as was the case in this matter all that they were required, in my view, to say was that they were passengers in the vehicle which overturned and as a result of which they were injured. That they said loudly through the first Appellant. Having done so it was incumbent upon the Respondent to give an explanation as to the cause of the accident. If he had not the doctrine of *res ipsa loquitur* could

have applied and he could have been held liable. He, however, explained the cause of the accident as the snapping of the leaf spring of one of the front wheels. The question is whether that exonerates him of liability.

It is the duty of any public transporter to maintain his vehicle or vehicles by taking all reasonable precautions for the safety of his passengers and not to expose them to danger of a risk he knows or ought to know. Commenting on such duty, Eric, CJ, in *Scott Vs London Dock Co.* (1865), 3 H & C 596; 13 L.T. 148 cited in *Barkway Vs South Wales Transport Co. Ltd.* [1950] ALL ER 395 said:

“... 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 of explanation by the defendants that the accident arose from want of care.”

In this case the Respondent’s driver said that the cause of the accident was the snapping of a leaf spring. In the ordinary course of things leaf springs don’t just snap. The defendant did not say what precautions, if any, that he had taken to safeguard his passengers. He did not say whether or not his vehicle was regularly inspected and serviced. He did not even explain what caused the leaf spring to snap. In my view the Respondent failed to establish that he had discharged his duty of care to his passengers and it is for that reason that I find that he is liable to the appellants for damages. The trial magistrate erred in failing to so find.

On the issue of damages, the first appellant, according to the medical report of Dr. Mwadena, suffered fractures of the 2nd and 3rd left side ribs, multiple cuts on the left cheek, cut on the left elbow and soft tissue injuries to the chest. The trial magistrate awarded her Sh. 150,000/= if he had held the Respondent liable. I think that is a reasonable award and I confirm it. The second appellant Nancy Ndaa suffered soft tissue injuries to the chest and left shoulder while the third Appellant, Naomi Ndaa, suffered cut wounds on the left fore arm and left side of the neck and a soft tissue injury to chest. The trial magistrate awarded them Sh. 45,000/= each. Although I would myself, if I was trying the case, have awarded the third Appellant a little more than that, the award is, however, not so inordinately low as to represent an erroneous estimate. And in such circumstances an appellate court should not substitute its own award for that of the trial court. I therefore confirm the awards the trial court gave to the second and third Appellants as well.

For the foregoing reasons I allow this appeal set aside the trial magistrate’s finding on liability and substitute therefor a finding that the Respondent is liable to compensate the Appellants and confirm the awards the magistrate made for the Appellants if he had found for them. The Appellants shall have the costs of this appeal and those in the lower court.

DATED and DELIVERED this 8th day of November, 2004.

D.K. Maraga

Ag. JUDGE