



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 97 of 1998

MUNYAO KYAA NGUTA.....APPELLANT

VERSUS

MALDE TRANSPORTERS LIMITED & ANOTHER.....RESPONDENTS

JUDGMENT

This is an appeal against the judgment and decree of Miss. F.N, Muchemi, Senior Principal Magistrate in the Civil Suit No.634 of1995 (Kiambu) dated the 13th day of March 1998. The followinggrounds of appeal inter alia have been submitted for thedetermination of the court:-

1. The Learned Magistrate erred in law and in fact infinding the appellant did not prove negligence againstthe respondents.
2. The Learned Magistrate erred in law in failing to findthat since STEPHEN NZOMO MUNYAO (deceased) was a lawfulpassenger in the 1st defendant's vehicle No. KAC 703 C, the burden of proof shifted to the respondents once theplaintiff relied on the principle of res ipsa loquitur.It was consequently the respondents' duty to show thatthey were not negligent, and consequently not liable tosatisfy the appellant's claim.they did in conformity with the court order made by their consent.I have as an appellate court of first instance perused thememorandum of Appeal and the judgment of the Learned TrialMagistrate and have considered it in the light of the record of thecourt. The Learned Trial Magistrate's judgment is short andconcise. It deals with two issues.

The first issue was whether or not the deceased was a lawfulpassenger in the defendant's motor vehicle KAC 703C and in respectto this issue the Learned Trial Magistrate observed:-

"Looking at the evidence the deceased was a lawful passengersince he was hired by the second defendant and carried by thevehicle on the authorised route".

The second issue was whether the deceased was negligent intravelling and controlling the vehicle. In respect of this issue, the Learned Trial Magistrate held that negligence on the part ofthe second defendant, which would have rendered the first defendantvicariously liable, has not been proved.

The Appellant's counsel submits that the Learned Trial Magistratewas wrong to base the case on the ground that the negligence on thepart of the defendant was not proved. Counsel submits that therewas ample evidence to prove that there was negligence on the partof the driver of the motor vehicle, causing it to crash, as aconsequence of which, the plaintiff lost his life.

The Magistrate's reasoning for this decision is based on thefact that no witness was called to testify as to

how the lorry was driven at the time of the accident."

The Learned Counsel for the Appellant further submits that from the proceedings and from the evidence adduced before the court it has been established that there was an accident involving the first defendant as the owner of motor vehicle KAC 703 C.

It is also further submitted that the said motor vehicle lost control and landed on its side in a ditch as a consequence of which the deceased sustained fatal injuries. It is contended that the first defendant in paragraph 3 of his defence admitted the facts of the said accident but denied the allegations of negligence.

The counsel states that the plaintiff in para.5 of the plaint relies upon the doctrine of *res ipsa loquitur*.

It is contended that the Learned Trial magistrate did not take this doctrine and the evidence adduced into consideration, and consequently did not consider the application of the principle of the doctrine cited.

I am, inter alia, referred to:-

(a) TEXTBOOK ON TORTS, 4TH Edition, Blackstone Press Limited (1993) by Michael A. Jones at page 131. the writer states;

"Sometimes an accident may occur in circumstances in which accidents do not normally happen unless there has been negligence by someone. Where the plaintiff has no or sufficient knowledge about how the accident occurred it would be unfair to require him to prove negligence, particularly if the defendant does not know what happened and could choose not to give any evidence. Thus the fact of the accident may itself give rise to an inference of negligence by the defendant which, in the absence of rebuttal, would be sufficient to impose liability."

A number of authorities have also been cited by the plaintiff on the application of this doctrine. I do not wish to re-produce all of them in this judgment except to state that I have noted the wise decision cited and the principles narrated therein.

It is the submissions of the Plaintiff's Counsel that *res ipsa loquitur doctrine* was applicable in this case.

I have considered the Appellant's submissions and I have also noted that the issue of *res ipsa loquitur* was not considered and determined by the Learned Trial Magistrate in her judgment.

It is the respondent's contention that the failure of the Plaintiff to proceed against the second defendant was fatal to the plaintiff's claim. The respondent has cited two decisions in favour of his arguments these are

1. NBI HCCC NO. 3938/1990 - Samalla Hassan vs. Dajmar service Line.
2. HCCC NO.4708/1989 - Grace Kanini Muthini vs. Kenya Bus Service Ltd. & Another

I have considered these two decisions and I find that the facts pertaining to them were clearly distinguishable from the facts pertaining to the appeal now before this court. In the first decision there are two vehicles which were involved in a collision. It was impossible for the court to determine which of the two caused the accident. Clearly this was not a case of *res ipsa loquitur*. In the case of HCCC NO.4708/1989 - Grace Kanini Muthini vs Kenya Bus Service Ltd. & Another., the deceased jumped off a moving bus so there were a number of possibilities as to the cause of the accident. Clearly this was also a case distinguishable from the one now before the court.

In the case of *Kenya Bus Service Ltd. vs. Rehema Hassan Mwangi, Civil Appeal No. 62 of 1992*, a similar objection was raised by the defendant's advocate. It was argued on behalf of the defendant that the alleged driver (of the defendant) had not been joined in the action against the Defendant company, or identified and, as such, vicariously liability could not be established on the part of the defendant company. The Court

of Appeal rejected that submission by the appellant.

Having considered all the submissions and the Learned Counsel's arguments I find that the doctrine of *res ipsa loquitur* applicable to the case before the court; for the following reasons:-

- (a) This is an accident where the vehicle overturned and *landed* in a ditch without any collision with any other motor vehicle or object.
- (b) This can only, have been due to the negligence of the person having the control and management of the motor vehicle, which, overturned and *landed* in a ditch. However, a reasonable explanation would have been admissible to disprove negligence. This has not been done in this case.
- (c) It is not part of the defence of the respondent that this accident was due to either an act of God or some other reason beyond the driver's control,
- (d) It was also established that the second defendant was the first defendant's authorised driver, the person in control and management of motor vehicle KAC 703C on the date of the accident. This was not a matter in contention before the subordinate court.

In these circumstances it was the duty of the trial court to consider, in the light of the evidence adduced whether or not this was an accident which would not normally have happened in the *ordinary course* of events.

I accept that there is substantial merit in the argument of the counsel for the appellant/plaintiff that no reasonable explanation was advanced or offered for the accident. The cause of the accident, or the manner in which it happened, was within the knowledge of the defendants. The plaintiff, who is the father of the deceased relied in this case on the doctrine of *res ipsa loquitur* namely that the "presumption of fault is raised against the defendant. If he is to succeed in his defence, it must be overcome by contrary evidence. The burden is on the defendant to show either that *in fact* he was not negligent or the accident might probably have happened in a manner which did not connote negligence on his part..... "

The burden is on the defendant to disprove his liability Halsbury's Laws of England, Vol.28, The decision made in *Henderson Vs. H.E. Jenkins & Sons* (1970) AC 282 where the defendant's lorry

Failed to stop, the defendants were held liable under this doctrine. This decision, in my view, supports the arguments advanced by the counsel for the Appellant. It is noted that the Learned Trial Magistrate dismissed the Plaintiffs suit on the *ground* that the negligence of the driver was not established. This is clearly a misdirection.

On the totality of the evidence adduced before the Learned Trial Magistrate and having perused the judgment of the Learned Trial Magistrate *and* the submissions made before the trial court, and upon the fresh consideration and evaluation of the entire evidence *in its totality*, this court comes to the conclusion that the Appeal before this court is well merited. Consequently the Appeal is allowed with costs.

As far as the question of assessment of damages is concerned the court will hear further arguments in this respect prior to making an *order*.

Order accordingly.

Read, delivered and dated at Nairobi this 22nd day of NOV - - 2000.

SHAIKH M. AMIN

JUDGE