



Musila v Kenya Power and Lighting Company Limited (Civil Appeal 10 of 2023) [2024] KEHC 7297 (KLR) (19 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7297 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 10 OF 2023
FR OLEL, J
JUNE 19, 2024**

BETWEEN

JONATHAN MWANGANGI MUSILA APPELLANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED RESPONDENT

(BEING AN APPEAL FROM THE JUDGEMENT AND DECREE OF HON K. KENEL, RESIDENT MAGISTRATE DATED 15TH DECEMBER 2022 IN MACHAKOS CMCC NO 751 OF 2019)

JUDGMENT

A. Introduction

1. The Appellant was the Plaintiff in the primary suit, where he had sued the respondent, claiming general damages, special damages of Kshs.24,425/=, costs of the suit and interest arising from a road traffic accident which occurred on 03.08.2018 along Machakos-Kitui road at Kaseve area. He alleged that on the said date, he was walking off the road as a pedestrian enroute to his home, when the defendant's driver, servant and/or agent driving Motor vehicle registration number KBT 241N (hereinafter referred to as the suit lorry), caused it to veer off the road and violently knocked him down as a result of which he sustained a fracture of the right tibia and right fibula.
2. The respondent entered appearance and filed their statement of defence where they denied liability for causing this accident either directly and/or vicariously and put the Appellant to strict proof thereof. The respondent further denied owning the suit motor vehicle and/or the fact that an accident did occur on the material date as between the suit lorry and the Appellant. In the alternative and without prejudice to the above the respondent did aver that if indeed an accident did occur, then it was caused by the negligence of the Appellant, and therefore they was not to blame for the accident.



B. Evidence at Trial

3. PW1, the Plaintiff adopted his witness statement, where he stated that he was a mason, who resided with Machakos town. On the 03.08.2019, he was walking from Kaseve Market heading to his house, when he was knocked down by the suit lorry. He was taken to hospital and was admitted for one day as he had sustained a fracture of his right tibia and right fibula. He blamed the driver of the suit lorry for driving at high speed and not keeping a proper look out for the other road users.
4. The Appellant produced his claim supporting documents and further stated that he had not fully healed from the injuries suffered and still felt pain on the right leg-heel while walking. Upon Cross examination, it was his testimony that he was walking from Kaseve market from Machakos direction and the suit lorry was from Kitui heading to Machakos. He confirmed that the accident occurred at a corner, where there was no zebra crossing and that he did not see the registration number of the vehicle that knocked him down, but it belonged to the respondent company.
5. PW2, PC Gideon Kipruto stated that the accident occurred on 03.08. 2018 at Kaseve area along Machakos- Kitui road around 2300hours and that the Appellant was walking along the road when he was knocked down by the suit lorry belonging to KPLC Machakos Branch; Isuzu lorry registration number KBT 241N. The suit lorry fled the scene of the accident and was chased by a probox before the driver stopped at Kenya Israel area. As a result of the accident the Appellant had sustained serious injuries and was issued with the police Abstract, which was produced into evidence.
6. Upon cross examination PW2 confirmed that CPL Meeme was investigating officer and had the OB in court, but did not visit the accident scene. The details of the probox that followed the suit lorry nor its driver details were capture in the OB, which had only indicated that an accident did occur along the road. He did not know if there was a pedestrian path or corner since he did not visit the scene of the accident. In reexamination, he confirmed that the initial details in the OB, were recorded by the investigating officer, after he had visited the scene of the accident.
7. PW3 Dr. Washington Wokabi produced the medical report concerning the Appellant and a receipt issued for payment made for the said Medical report. He confirmed that as a result of the said accident, the Appellant fractured his leg and had right tibia fibula plaster applied to hold it and help the healing process. As at the time he was examining the Appellant, the fracture injury had healed. Upon cross examination, he confirmed that the Appellant had fully healed, and no disability, nor was any implant put to hold the fracture. Full recovery was anticipated.
8. DW1 Lawrence Mulwa Musau, adopted his witness statement, wherein he confirmed that on 03.08.2018 he drove the suit lorry on Kitui Road, from Syokisinga Katangi to Machakos town. He arrived safely and parked the suit lorry safely within Machakos office. On 07.08.2018, he got a call from a police officer based at Machakos traffic department, who informed him that he had hit a pedestrian and had failed to stop at Kaseve area. He took the suit lorry for inspection and recorded his statement. He was never prosecuted over the matter. Upon cross examination, DW1 denied knocking down the Appellant or causing any accident on the said 03,08. 2018 and further confirmed that had recorded his statement with the police, though it was not him who made the initial report.
9. The trial Magistrate, considered the evidence adduced, and made a finding that the Appellant had failed to prove his case on a balance of probabilities and dismissed the suit with costs to the respondent.



C. The Appeal.

10. Being aggrieved by the judgment of the trial court, the Appellant filed his memorandum of Appeal dated 16.01.2023 seeking to have the judgment set aside on the following grounds;
 - a. The learned Magistrate erred in law and in fact by dismissing the Appellant's case with costs to the Respondent.
 - b. The learned Magistrate erred in law and in fact in holding that the appellant failed to prove its case on a balance of probabilities as against the respondent.
 - c. The learned Magistrate erred in law and in fact in holding that the appellant did not prove that it was Motor vehicle registration number KBT 241N that caused the accident.
 - d. The learned Magistrate erred in law and in fact in failing to consider the evidence of PW1 & PW2 which was tendered during the hearing on liability and who was to blame for the accident.
 - e. The learned Magistrate erred in law and in fact in failing to accord the Appellants evidence and submissions due consideration.
 - f. The learned Magistrate erred in law and in fact in finding that the Appellant failed to show that indeed it was the Respondents vehicle that cause the accident.
1. The Appellant thus urged this court to set aside the Judgment of the trial court and proceed to allow the suit together with costs thereof. This Appeal was canvassed by way of written submissions.

C. Submissions

(i) The Appellants submissions

12. The Appellant filed submissions on 9.10.2023 and raised two issues. That he had proved his case on a balance of probabilities, as DW1 stated that on the material date and time he was driving the subject suit lorry along Kitui – Machakos road. Reliance was placed on the cases of William Kabogo Gitau vs George Thuo & 2 others [2010] e KLR and Regina Wangechi vs Eldoret Express Company Limited [2008] e KLR, where it was held that if the plaintiff establishes that an incident more likely happened than not, his/her case on a balance of probability should be allowed.
13. Secondly, the appellant submitted that the trial magistrate erred in reaching her decision but failed to put into consideration the doctrine of res ipsa loquitor as plead in the plaint. There was enough material on record to infer negligence on the part of the Respondent and that DW1 may not have seen the Appellant after hitting him proving his lack of focus. This point was buttressed by the cases of Uchumi Supermarket Limited & Another vs Boniface Ouma Were [2021] e KLR, Stephen Maina Kimang'a T/A Acacia Crest Academy & another vs Sarah Cherere Obara (suing as the legal representative of Debra Wambui Njogu (deceased) [2019] e KLR, Nzoia sugar Company Limited vs DAVID Nalyanya [2008]e klr, Silvanice Ojwang Odero vs Eldoret Express co limited and another [2014] e KLR, Susan Kanini Mwangangi & Another vs Patrick Mbithi Kavita [2019] e KLR and Amani Kazungu Karena vs Jackmash Auto Limited & Another [2021] e KLR.



14. The Appellant reiterated, that there was enough material on record to make an inference of negligence on the part of the respondent, and DW1 in response had presented insufficient evidence to rebut the same. The court could therefore safely make an adverse inference against the respondent herein and hold them liable for the accident which they occasioned. In the alternative if the court were to hold otherwise, the Appellant urged the court to apportion contributory negligence based on the pleadings and evidence presented.

(ii) The Respondent's Submissions.

15. The Respondent filed submissions on 23.11.2023 and while relying on the case of Kirugi & Another vs Kabiya & 3others [1987] KLR 347, Statpack Industries vs James Mbithi Munyao [2005] e KLR and Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi and another [2014] e KLR submitted that the Appellant had not proved how he captured the registration number of the suit lorry at night and neither did the police establish how the identity of the Respondent's vehicle was captured thus the appellant had failed to establish the link of causation on a balance of probability.

16. The Appellant had further failed to discharge the burden placed on him under Section 107(1), 109 and 112 of the *Evidence Act* to specifically prove that it was the suit lorry that knocked him down. PW2, the police officer too did not have the details of who made the report of the incident to the police station, which report was made two days later after the accident, nor were the details of the Probox that gave chase provided. The Appellant having failed to prove that the accident was caused by the suit lorry therefore failed to discharge the burden placed on him and his suit had to fail. Reliance was placed on Supreme court in Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others, Petition No 2B of 2014 Eklr.

17. As to the applicability of the doctrine of Res ipsa loquitur, the respondent stated that from the evidence adduced, it could not be inferred or presumed that the accident was caused by the respondent's lorry, and no negligence could therefore attach on them. The respondent therefore prayed that this Appeal be dismissed.

C. Determination

18. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the parties' respective Counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses who testify and make allowance for the said fact. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”



19. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

20. Similarly, in *Butt v Khan* (supra) it was held –

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

21. This court has considered the memorandum of Appeal, the lower court record and the submissions of the parties and find that the issues raised can be narrowed down to one issue; Whether the Appellant proved that the Respondent was liable for the accident, which occurred on 03.08.2018.

22. It is trite law that he who alleges must prove. The *Evidence Act*, cap 80 of the Laws of Kenya at section 107 and 109 provide as follows;

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

23. This court is also guided by the observation of the court in the case of *Rajah J A in Britestone Pte Ltd v Smith & Associates Far East Ltd* {2007} 4 SLR 855 where the court stated that :

“The Court’s decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him. Since the terms proved, disapproved and not proved are statutory definitions contained in the *Evidence Act*. The term proof whenever it appears in the *Evidence Act* and unless the context otherwise suggests, means, the burden to satisfy the Court of the existence or non-existence of some fact.”

24. Also as held in *Eastern Produce {k} Limited Vs Christopher Atiado Osiro* {2006} eKLR

“it is trite law that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid in the case of *Kiema Mutuku Vs Kenya Cargo Hauling*



services Ltd (1991) 2KAR 258, Where it was held that “ there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence”.

I have in mind the description of negligence as is to be found in Salmond and Houston on the law of torts 19th Edition. Where it is described as “conduct, not a state of mind-conduct which involves an unreasonably great risk of causing damages..... negligence is the omission to do something much as a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do. The position is laid more clearly as “in strict legal analysis, negligence means more than needless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty is owing.”(Lord Wrigley in *Lochgelly Iron and Coal Co Vs M’Mullan* {1934} A.C. 25).

25. Finally, on the Question of what amounts to proof on a balance of probabilities. Kimaru J in *William Kabogo Gitau Vs George Thuo & 2 others* (2010) 1 klr 526 stated that;

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.

26. In this case, the Appellant’s case is that he was walking from Kaseve Market heading home at about 11.00pm when he was knocked down by the suit lorry and as a result fractured his leg. Though he did not see the registration Number of the suit lorry, he confirmed in his evidence in chief that; “There was no zebra crossing, there was a corner. Vehicle was for KPLC.” DW1 admitted that on the said date he drove the suit lorry on Kitui road from Syokisinga Katangi to Machakos, where he parked the lorry safely at their office and closed for the day’s operation. He was called two days later and informed of the said accident, where upon he proceeded and took the vehicle for inspection and wrote his statement.
27. PW2 also produced the police abstract, confirmed that indeed the said accident did occur along Machakos- Kitui road at 2300hrs, where the Appellant was knocked down by the suit lorry, which did not stop after the said accident. The lorry was chased by a good Samaritan driving a probox and stopped at Kenya Israel Area. In cross examination, PW2 confirmed that he was not the investigating officer and did not visit the scene of the accident. Further he did not have the details of the Probox that followed the suit lorry nor did he have the driver’s name. But in reexamination he confirmed that he had the OB with him in court and that the information contained therein was recorded by the investigating officer, after visiting the scene and the OB acted as the initial report.
28. Upon considering the evidence adduced the trial Magistrate did find that the Appellant had not proved his case on a balance of probability and hence dismissed his case, but having critically reexamined the evidence adduced I do find that this was an error. Though the Appellant did not see the registration Number of the suit lorry, that knocked him, he was sure it was a KPLC lorry and stated as much in conclusion of his evidence in chief, where he stated that “Vehicle was for KPLC.” The court must consider this evidence, while taking judicial notice of standard color of paint applied on all of the respondents Motor vehicles, which gives them a unique identification.
29. This incident happened as the suit lorry approached the Appellant from the opposite end. Him walking towards his home from Kaseve Market, while facing Kitui direction, while the suit lorry was



coming from the opposite kitui direction headed towards Machakos town and therefore his evidence of noticing that it was a lorry of Kplc cannot be discounted.

30. Further, it is worth noting that DW1 indeed admitted that on the said date he was on the same road, and in his witness, statement dated 18.08.2021, which he adopted as his evidence, never denied causing the said accident. His denial only came out during cross examination. Therefore, in all probability it is more likely than not, that indeed an accident took place on the said date, time and it involved the suit lorry. Therefore, in percentage terms, the Appellant had established his case on a balance of probabilities. He has established that it is more probable than not that the allegation that he made as to the occurrence of the accident were factual and as a consequence thereof had been injured.

31. Further, having found that indeed an accident did occur, the doctrine of *res ipsa loquitur* as plead by the Appellant in the plaint, would kick in. In the case of *Christine Kalama v Jane Wanja Njeru & another* [2021] eKLR the court in discussing this principle stated as follows;

“It cannot be doubted that this maxim has to be proved by way of evidence in support of the pleading by the plaint filed in Court. The phrase *res Ipsa Loquitur* found its ground under paragraph 4. In consonant with this maxim, Learned authors of *Halsbury’s Laws of England* Vol. 78 5th Edition discussed the doctrine and its application in the following words:

“Where the claimant successfully alleges *res Ipsa Loquitur* its effect is to furnish evidence of negligence on which a Court is free to find for the claimant. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability. However, it seems that the maxim does not reverse the burden of proof, so that where defendant provides a plausible explanation without proving either of those matters, the Court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference.”

32. In *Nzoia sugar Company Ltd Vrs Dvid Nalyanya* (2018) eKLR, while dealing with the said principal, the Court of Appeal stated that;

“I am aware of the principle that where negligence is pleaded, the acts of negligence must be proved and that there should be no liability without fault. Nonetheless, I note that in this case the doctrine of “*Res ispa loquitur*” is pleaded in the plaint. My finding is that the same would be applicable herein. I say so because the accident did happen; the lorry was not being driven recklessly; there was no other motor vehicle or other object whatsoever that got into the driver’s way. There is no evidence of bad weather etc. The only presumption one can make is that the driver was the sole cause of the accident. Accidents don’t just happen on their own in absence of any of the above situations and in the absence of any of the above situations and in the absence of any evidence of mechanical defects on the motor vehicle driver must therefore be held responsible for the same.

33. As a result of the said accident, the Appellant did suffer fracture of the tibia and fabula of his right leg, the defendant did not offer any explanation to deflect the particulars of negligence pleaded as against them in the plaint and therefore must be held responsible for the injuries suffered by the Appellant.



C. Disposition

34. The Appellant did not appeal as against the quantum awarded. The upshot is that I do allow this Appeal and set aside the Judgment/decreed of Hon K.Kenei (RM) dated 15th December 2022, with respect to his finding on liability and substitute the same to find that the respondent was 100% liable for the accident that occurred.
35. The trial Magistrate finding on quantum being Kshs.470,765/= was not Appeal against and the same is upheld.
36. The Appellant is granted costs of the primary matter and costs of this Appeal, which is assessed at Kshs.150,000/= all inclusive.
37. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 19th day of June, 2024.

In the presence of:-

Ms Wambua for Appellant

Mrs Mwangangi for Respondent

Sam Court Assistant

