**Alubai v County Government of Bungoma & 2 others (Civil Appeal E065 of 2021) [2023] KEHC 2089 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2089 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL APPEAL E065 OF 2021**

**DK KEMEI, J**

**MARCH 21, 2023**

**BETWEEN**

**DANIEL WANYONYI ALUBAI ..... APPELLANT**

**AND**

**COUNTY GOVERNMENT OF BUNGOMA ..... 1ST RESPONDENT**

**MICASIO MAKOKHA ..... 2ND RESPONDENT**

**AMACO INSUARANCE COMPANY LTD ..... 3RD RESPONDENT**

***(Being an Appeal from the Judgement of the Senior Principal Magistrate Hon. M. Munyekenye delivered on 17th day of June 2019 in Webuye PMCC No. 24 of 2020)***

## JUDGMENT

1. By a plaint dated 16th February 2016, the Appellant as the Plaintiff sued the Respondents as the Defendants claiming special damages, general damages, costs and interests.

2. The cause of action, according to the plaint, arose on or about 2nd July 2015, along Kakamega-Webuye. According to the Appellant, he was lawfully walking on the grass verge at Matete area or thereabouts when the 2nd Respondent drove motor vehicle registration number KBY 870C negligently and caused the said motor vehicle to lose control, veered off the road into the foot path and knocked down the Appellant thereby occasioning the Appellant severe injuries thus warranting him to be admitted at Webuye District Hospital for some days.

3. The Appellant's defence was that the accident was caused by the negligence of the 1st and 2nd Respondent, particulars whereof, were pleaded. It was further pleaded that the Appellant relied on the doctrine of *res ipsa loquitor*, the highway code and the provisions of the *Traffic Act* Cap 403 Laws of Kenya.

4. The Appellant who testified as PW1, adopted his witness statement in which he stated that on or about 2nd July 2015, while walking on the grass verge along Kakamega-Webuye road heading to Matete Market and while at Mapapai stage, the Motor Vehicle Registration number KBY 870C Ford S. Wagon which was coming from Kakamega direction suddenly lost control and knocked him from behind. He told the Court that he lost consciousness and found himself at Webuye District Hospital where he was admitted for three days before his discharge. After his discharge, he reported to the Police. He told the Court that he was issued with a P3 form that was duly filled by a doctor and on inquiry he got to know the vehicle's registration details vide the police abstract.

5. According the Appellant, he sustained head, waist and chest injuries and that he broke his right leg, and that he also got several bruises on his body. He blamed the driver of the said motor vehicle as he drove carelessly and that he did not do anything to cause the accident.

6. On cross-examination, he told the Court that he was knocked from behind and as a result of the same accident he lost consciousness waking up in the hospital later on. It was his evidence that he did not see the motor vehicle and only came to know about the same vide traffic police and from the people who rushed him to the hospital. On the police abstract, his evidence was that the 2nd Respondent was not charged for driving carelessly.

7. On re-examination, he told the Court that the driver was charged with the offence of failing to renew his license.

8. The Appellant called Erick Cheteka Timbiti, a clinical officer at Webuye who testified as PW2. According to him, on examination of the Appellant, he looked well oriented on time, place and person but with head and neck injuries. He observed deep bruises on scalp and both facial regions, thorax and that there were healed bruises on the back region. He noted no injuries on the upper and lower limbs but that he had a fracture on both. He approximated the age of the injuries as five months one week. He produced the Appellant's discharge summary and P3 form in Court as P. exhibit 1 and 2 respectively.

9. On cross-examination, he told the Court that he did not author the exhibits produced in Court but by his colleagues who were at the hospital. He told the Court that the accident occurred on 2nd July 2015 as per the admission to the hospital and that the P3 form was filled after five months and that he could not testify to the state of the patient when the same was filled as he was not there.

10. PW3 was No. 62803 Sgt. Jariau Okero who is stationed at Kabras Police Station traffic duties. It was his evidence that they received a report of an accident on 2nd July 2015 at 7.30 pm which occurred along Kakamega-Webuye road, Matete road Pawpaw stage involving motor vehicle KBY 870 C Ford Everest. The vehicle was being driven towards Webuye direction and on approaching the place of accident the driver swerved to avoid hitting a motor cycle and as a result hit a pedestrian (Appellant herein) who was walking along the pavement. The Appellant was rushed to Webuye Hospital and later proceeded to report the accident to the police where he was issued with a P3 form and a police abstract. He told the Court that he was not the investigating officer and that the officer who visited the scene and investigated the accident was not there. After investigations, the driver was charged with failing to renew his driving license and that it was his take that the driver was to be charged with careless driving. He produced in Court a police abstract marked as P. exhibit 3.

11. On cross-examination, he told the Court that the investigating officer was in training at Kiganjo at the time of testifying and that the police abstract was filled on 16th December 2015 and that he did not have the police file. He further told the Court that as per the police file the police abstract indicated that the investigations were closed and that the driver was only charged with failing to renew his driving license.

12. On re-examination, he told the Court that in the absence of a police file he could not ascertain whether the investigations were closed or pending and that the driver was only charged with the offence of failing to renew his license.

13. By consent, the medical report by Dr. Muhanga Ekesa was produced in Court as P. exhibit 4(a), a receipt initially marked as PMFI 4(b) was produced in Court as P. exhibit 4 (b) and a receipt of Kshs. 500/= was produced as P. exhibit 4(c). the Court proceeded to adopt the consent.

14. At that juncture the Appellant proceeded to close his case and the matter proceeded to defence hearing.

15. The Respondents called Micasio Makokha Wekesa as DW1. It was his evidence that he is employed by the 1st Respondent as a driver and that he wished to adopt his witness statement recorded on 1st April 2016 as his evidence in chief. He told the Court that at 7. 30 pm on 2nd July 2015 his motor vehicle was involved in an accident after swerving in order to avoid hitting a motor cycle rider thus veering off the road and while trying to get back on the road, he hit a pothole thereby losing control prompting the vehicle to roll off the road but he did not knock anyone. He reported the matter to Matete Police station. According to him, the next day he proceeded to Malava Police Station and recorded a statement and was charged in Court at Butali for failing to renew his license and not knocking someone.

16. On cross-examination, he told the Court that the said motor vehicle belongs to the County Government of Bungoma and that it was true that he lost control of the same and ended up rolling two times but did not see what the motor vehicle knocked as it rolled.

17. On re-examination, he told the Court that he was charged with failing to renew his driving license.

18. At the close of the defence hearing, the parties were directed to file and exchange submissions and the matter was scheduled for judgement.

19. In her judgement, the learned trial magistrate found that from the evidence, the Appellant failed to prove on a balance of probability the negligence of the 2nd Respondent and vicariously blame the 1st Respondent. She further held that no eye witness was called, there were no sketch plans produced in Court and the document that the Appellant relied upon to show that he was involved in the indicated that the 2nd Respondent was only charged with failing to renew his license. She proceeded to dismiss the Appellant's claim.

20. Regarding quantum, she held that had the Appellant proved his claim for the injuries he sustained of fracture of the right tibia and fibula, soft tissue injuries with a concussion, she would have made an award of Kshs. 800,000/= placing refence to the case of *Francis Ndungu Wambua & 2 others v VK (a minor suing through next friend and mother MCWK* (2019) eKLR). She further held that special damages would have been Kshs. 2, 500/=as the same were pleaded and strictly proved by receipts. On future medical expenses, she held that the same were not well articulated by the medical personnel who gave evidence on behalf of the Appellant and that the same could not be awarded. In a nutshell, the Appellant's case failed due to lack of sufficient proof that he was involved in the accident.

21. Being aggrieved by the said decision, the Appellant lodged the present appeal where he raised eight (8) grounds of appeal as set out in the memorandum of appeal dated 1st November, 2021. They are as follows: -

    i. That the learned trial magistrate erred in law and in fact in holding that the Appellant had not proved his case on a balance of probability.

ii. That the learned trial magistrate erred in law and in fact when she raised the standard of proof from the balance of probability to that of beyond any reasonable doubt thus arriving at an erroneous decision.

iii. That the learned trial magistrate erred in law and in fact in holding that failure by the Appellant to call an eye witness was fatal thus arriving at unpopular judgement.

iv. That the Appellant having pleaded the doctrine of res ipsa loquitor and the 2nd Respondent having admitted that his vehicle was involved in the accident at the time and place of the accident, the trial magistrate was therefore in error of law and in fact in holding that the Appellant's case lay in the realm of conjecture or speculation.

v. That the learned trial magistrate failed to adhere to the civil law principle of balance of probability hence her findings being unsupportable both in law and in fact.

vi. That the learned trial magistrate erred in law and in fact in holding that failure by the Appellant to call an eye witness and or avail witnesses to produce a sketch plan was fatal to his case thus arriving at a biased judgement.

vii. That the learned trial magistrate erred in law and in fact in holding that failure by police officers to charge the 2nd Respondent with careless or reckless driving absolved the Respondents from causing the accident.

viii. That the learned trial magistrate erred in law and in fact in holding that the evidence of the 2nd Respondent after the accident that he was solely charged with the offence of failing to renew his driving license and which rebutted the Appellant's particulars of negligence against the Respondents.

22. The Appellant seeks to have the appeal allowed, the trial court's judgement set aside and a fresh determination on liability and quantum be made.

23. The appeal was canvassed by way of written submissions. The Appellant vide his submissions dated 27th October 2022, submitted that as per the material time and area it was clear that the 2nd Respondent confirmed that an accident occurred but could not tell whether anyone was crushed at the time his car rolled off the road. The Appellant on the other hand failed to see the motor vehicle that hit him from the back but only relied on the police abstract report duly produced in Court with no objection from the Respondents to show that he was involved in an accident and that the same was reported and that the trial Court holding that since there were no traffic proceedings to guide it and that the abstract displayed a different offence was erroneous to have the claim of the Appellant fail. He urged this Court to allow his appeal and set aside the judgement of the trial Court.

24. Opposing the appeal, Respondents submitted that the police failed to produce any police file indicating that another person was injured or involved in the accident other than the 2nd Respondent and that the Appellant cannot force liability to be visited upon the Respondents when there was no evidence linking them to the incident. It was submitted that if the allegations by the Appellant were true then he would have been found at the scene by the police and/or even the good Samaritan/ witness who carried him to the hospital would have been called to record statements with the police and that the driver would have been charged with careless driving. He relied on the case of *South Nyanza CO. Ltd v Wilson Ongumo Nyakwemba* (2008) eKLR and Nairobi HCCA No. 119 of 2022 *Midans Services limited v Dan Mbugua & Ronaldo Kapute*.

25. Having considered the submissions of the parties in this appeal, this is the view I take of this matter. This being a first appellate court, as was held in *Selle v Associated Motor Boat Co.* [1968] EA 123:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. In *Coghlan v Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

27. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

28. In this appeal, it is clear that the determination of the appeal revolves around the question of liability and what ought to have been the quantum of damages. That the burden of proof was on the Appellant to prove his case is not in doubt. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> ''Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.''

29. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 and 112 of the same *Act* as follows:

> 109. 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 the fact shall lie on any particular person.
>
> 112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

30. The two provisions were dealt with in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the *Act*."

31. It follows that the general rule is that the initial burden of proof lies on the plaintiff, the appellant in this appeal, but that the same may shift to the respondents, the appellant in this appeal depending on the circumstances of the case.

32. In *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

33. I agree that the Court of Appeal's position in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

34. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 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 opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

35. Similarly, Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent

is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

36. A similar case to this appeal was decided by the Court of Appeal and the holding of the Court of Appeal in that case is applicable to this case. That case is *Mary Wambui Kabguo v Kenya Bus Services Limited* (1997) eKLR. The Court of Appeal stated: -

> " The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case."

37. The Appellant stated that the accident which resulted in his injuries was caused by negligence of the 2nd Respondent. The 2nd Respondent has made a lot play about not being charged with a traffic offence arising from the said accident. The mere fact that a driver involved in an accident is not charged does not of itself absolve a driver of tortious liability. Traffic and civil proceedings are separate. If the police, or the Office of Director of Public Prosecutions, decide not to prosecute does not bar the injured person from initiating civil proceedings to recover damages in tort, and it does not bar the Court either in determining the liability of the driver. In this particular appeal, even the police abstract which the Appellant produced in evidence indicated that the police did not blame the 2nd Respondent for the accident but rather for failing to renew his license. The Appellant's witness, PW3, did not avail in Court any police file and sketch plans to prove the allegations by the Appellant that he was knocked by the motor vehicle driven by the 2nd Respondent and no witnesses, even those who took him to the hospital were called in Court to help the trial magistrate in the determination on the question of liability. The Court must always record the incidence of burden of proof to be that it was always the duty upon the Appellant, as plaintiff then, to prove the case on a balance of probabilities.

38. Appellant sought to rely on the doctrine of re ipsa loquitor. The appellant, in the evidence adduced that the trial Court did not in any way show that the cause of the accident was in any way attributable to the Respondent's actions. There was no evidence to the effect whether the accident occurred in or outside the road. The operation of the doctrine of rep ipsa loquitor depends on reasonable evidence of negligence being adduced by the claimant, here the Appellant. In other words, the doctrine did not shift the burden of proving negligence from the Appellant. The Canadian case, which is persuasive to this Court, *Fontaine v British Columbia (Official Administrator)* 1998 CanLII 814 (SCC) (1998) ISCR 424 considered *res ipsa loquitor* and stated: -

> " 19. For res ipsa loquitur to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the factual circumstances of the case. As described in *Canadian Tort Law* (5th ed. 1993), by Allen M. Linden, at

p. 233, "[t]here are situations where the facts merely whisper negligence, but there are other circumstances where they shout it aloud."

39. Where there is direct evidence available as to how an accident occurred, the case must be decided on that evidence alone. K. M. Stanton in *The Modern Law of Tort* (1994), stated at p. 76:-

> "Res ipsa loquitur only operates to provide evidence of negligence in the absence of an explanation of the cause of the accident. If the facts are known, the inference is impermissible and it is the task of the court to review the facts and to decide whether they amount to the plaintiff having satisfied the burden of proof which is upon him." ...
>
> 'Since various attempts to apply res ipsa loquitur have been more confusing than helpful, the law is better served if the maxim is treated as expired and no longer a separate component in negligence actions. Its use had been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. The circumstantial evidence that the maxim attempted to deal with is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. If such a case is established, the plaintiff will succeed unless the defendant presents evidence negating that of the plaintiff."

40. For the Appellant to successfully rely on the doctrine of *res ipsa loquitor*, he should have established, on a balance of probability, a prima facie case of negligence against the Respondents. The discharge summary shows that the Appellant was admitted at Webuye District Hospital on 2nd July 2015, and later discharged on 4th July, 2015. The police abstract also indicates that the investigations into the accident involving motor vehicle registration KBY 870C were concluded and that the 2nd Respondent was charged with failing to renew his driving license.

41. The Appellant did not give evidence to support the allegations of negligence in his plaint and those allegations in the plaint therefore remained unproved. In the absence of witnesses especially those who assisted him to hospital, there is some doubt created as to how the appellant got involved in the accident and whether the same involved the respondents' vehicle or somebody else altogether. It is not surprising to find that certain persons could take advantage of accidents along the high way and seek to join in some bandwagon regarding claims of having been involved in some accident. It was necessary for the appellant to avail even his initial report and statement made to the police over the alleged accident. Had the police been convinced of the claim, then they could have given evidence supporting the appellant's claim since the police decided to charge the 2nd respondent with a minor offence of failing to carry his licence instead of causing an accident. It was appropriate for the appellant to first convince the police about being involved in the accident over the respondent's vehicle after which he could then mount the suit. Under those circumstances, I find the decision arrived at by the trial magistrate was sound and I see no reason to doubt the same.

42. It is in view of the above, I find the Appellant appeal is without merit. The same is dismissed. Each party to bear their own costs of the appeal.

**DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF MARCH, 2023.**

**D. KEMEI**

**JUDGE**

**In the presence of:-**

Wekesa for Juma for Appellant

Mrs Nyiva for Alwenga for 3rd Respondent

Kizito Court Assistant