KOO & another ((Suing as personal representative the Estate of EOO (Deceased – Minor)) v Postal Corporation of Kenya & another (Civil Appeal 7 of 2018) [2023] KEHC 2104 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 7 OF 2018

MM KASANGO, J

MARCH 17, 2023

BETWEEN

KOO ..... 1ST APPELLANT

PN ..... 2ND APPELLANT

(SUING AS PERSONAL REPRESENTATIVE THE ESTATE OF EOO (DECEASED – MINOR)

AND

POSTAL CORPORATION OF KENYA ..... 1ST RESPONDENT

DANIEL LANGAT ..... 2ND RESPONDENT

(Being an appeal from the judgment of the Senior Principal Magistrate's Court at Limuru (Sandra Ogot, RM) in Civil Case No. 147 of 2014 dated 22nd December, 2017)

JUDGMENT

1. KOO the appellant has filed this appeal after being aggrieved by the judgment of the trial court whereby his case was dismissed.

2. The appellant had sued before the subordinate court the respondents as administrator of the estate of EOO deceased. In the claim before the trial court, the appellant pleaded that the deceased was on August 26, 2012travelling along Naivasha Highway in motor vehicle registration NO. KBQ 845P. It was pleaded that the 2nd respondent while driving the 1st respondents' registration NO.KBJ 191U was negligent and consequently caused an accident with that vehicle where the deceased was a passenger causing the deceased to suffer fatal injuries. Appellant set out particulars of the respondents' negligence which included dangerously overtaking driving without care and attention, failing to slow down and

avoid an accident leaving the vehicle stationery amongst others. appellant also relied on the doctrine of *Res Ipsa Loquitor.*

3. At the trial, only the appellant adduced evidence. The respondent did not provide any evidence in support of the defence. The appellant after testifying on the age of the deceased and producing evidence to prove pecuniary loss that the deceased's estate suffered stated that he did not witness the accident. This is what the appellant stated:-

> " I did not see the accident happen but I came and found the accident had happened. I was at the scene after one (1) hour and I found my son dead but I did not witness the accident happen.

4. The trial court in its judgment ofDecember 22, 2017found that the appellant failed to prove his case on balance of probability. The case was dismissed with costs to the respondent.

Analysis And Determination

5. The appellant has presented the two grounds of appeal, that is; that the trial magistrate misdirected herself to consider the pleadings and evidence; and that the trial magistrate failed to appreciate the case law and submissions made.

6. The appellant gave evidence in support of his case while the respondents did not call any evidence. The appellant, even if the respondents failed to adduce evidence in support of the defence filed, was obligated to adduce evidence that proved his claim. appellant needs to be reminded that pleadings are not evidence. Evidence is given under oath. appellant therefore ought to have given or called evidence to prove his pleadings. This is more so because appellant's case was a claim in negligence, it was not liquidated claim.

7. Although appellant by his submissions stated that his evidence was uncontroverted by the respondents, the appellant was required to discharge the evidential burden of proof in order to succeed in his claim in respect to the facts in issue. The fact in issue was whether the accident which resulted in death of the deceased was caused by the respondent's negligence.

8. In this regard, I cite the case of House of Lords *Re H And others (Minors) (Sexual Abuse: Standard of Proof)* (1969) where their Lordship had this to say on Civil standards of proof:-

> " 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 event was more likely than not. When assessing the probability the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious 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."

9. In this case, to reiterate the appellant in evidence informed the court that he did not witness the accident which lead to the death of the deceased. A case in point is *Miller v. Minister of Pension* (1947) ALL ER 373 where the court discussing civil standard of proof stated:-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which

evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

10. The trial court in its well considered judgment made a finding that the appellant had failed to prove his case, that is that the appellant failed to prove the respondents were negligent which led to the accident. Having considered and re-evaluated the evidence adduced by the appellant, I concur with the finding of the trial court. The appellant failed to prove what he alleged in his pleadings. The appellant's case also failed to prove that the operation of the doctrine of res ipsa loquitor was applicable. That doctrine depends on reasonable evidence of negligence being adduced by the claimant. This court had occasion to consider applicability of that doctrine in the case *Netah Njoki Kamau & another vs. Eliud Mburu Mwaniki* (2021) eKLR thus:-

> " 19. Appellants sought to rely on the doctrine of re ipsa loquitor. The appellants, in the evidence adduced that the trial court did not in any way show that the causal 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 appellants'. In other words the doctrine did not shift the burden of proving negligence from the appellants. 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."
> >
> > 21. 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.'"
>
> 20. For the appellants to successfully rely on the doctrine of res ipsa loquitor they should have established on a balance of probability a prima facie case of negligence against the respondent."

11. It is for the reasons set out above that I find there is no merit in this appeal. The same fails. The respondents did not participate in the hearing of the appeal and they will therefore not be awarded costs of the appeal.

Conclusion

12. This appeal is hereby dismissed with no order as to costs.

JUDGMENT DATED and DELIVERED at KIAMBU this 17th day of MARCH, 2023.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court Assistant : Mourice/Julie

Instructed by Kulencho & Co. Advocates for appellants: - N/A

1st Respondent:- N/A

2nd Respondent:-N/A

COURT

JUDGMENT delivered virtually.

MARY KASANGO

JUDGE