Kimani & another (Suing as the Legal Representatives of the Estate of the late Jacob Kimani Kamande - Deceased) v Macharia (Civil Appeal 15 of 2019) [2023] KEHC 1701 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1701 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 15 OF 2019

DKN MAGARE, J

MARCH 10, 2023

BETWEEN

FRANCIS KAMANDE KIMANI ..... 1ST PLAINTIFF

JANE WANGUI KAMANDE ..... 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JACOB KIMANI KAMANDE - DECEASED

AND

DAVID KIHANGA MACHARIA ..... DEFENDANT

JUDGMENT

1. This matter is an Appeal from the judgment given on 16th January, 2019 in Molo CMCC 143 of 2018 by the Senior Resident Magistrate Hon. Rita Amwayi dismissing the Appellant's suit in limine. The Appellant raised a grounds of Appeal that is: -

    a. The learned trial Magistrate erred in fact and in law in finding that the Appellant had not proved their case on a balance of probability.

    b. The learned trial Magistrate erred in fact and in law in in absolving the Respondent from any liability yet the Appellants evidence was unchallenged and uncontroverted.

    c. The learned trial Magistrate erred in fact and in law in dismissing the Appellants suit while ample evidence way led in support of the case.

    d. The learned trial Magistrate erred in fact and in law in family to appreciate the evidence given by the Appellant in totality.

e. The learned trial Magistrate erred in fact and in law in finding the plaintiffs had not proved claim for General damages under *Law Reform Act* and Fatal Accident Acts on a balance of probability.

f. The learned trial Magistrate erred in fact and in law in disregarding submissions of the Appellant.

2. They pray that the appeal be allowed with costs.

3. This matter came before me during RRI and only the Appellant attended. Later the Respondent made an application to be allowed to file submissions. This was allowed at debito justiciae and the parties filed submissions for equality of arms.

Background To The Case

4. The Appellant pleaded that claimed for damages under Law Reform and Fatal Accident Act from an accident of 18th October, 2017 at Sachangwan where Jacob Kimani Kamande (Deceased) lost his life. He was a passenger in motor vehicle Registration No. KCG 993C.

5. The Appellant/Administrator blamed the Respondent who was the owner of motor vehicle Registration No. KCE 993C. Particulars of negligence were set out in paragraph 9 of the plaint dated 23rd April, 2018.

6. The plaintiffs were the only beneficiaries pleased in the suit. However, from evidence the deceased also had 5 sisters. He was the only son. The deceased was said to be a sales executive at Joy Super Bakers earning 20,000/= special damages to 49, 600/= were pleaded.

7. By a Defence dated 18th may, 2018 the Respondents denied liability. They attributed the occurrence of the accident to motor vehicle Registration No. KAZ 186Z/ZB 9423. They attributed vicarious liability to the owner of the said Motor vehicle

8. Francis Kamande Kimani testified that the deceased was his only son and a 6th born. He was earning 20,000/=. He produced several exhibits. On cross examination he confirmed he received a call of the son's death. He went to the scene of accident.

9. On the losses he testified that the deceased used to send the witness about plaintiff 5,000 to 6,000/= per month. Both parties closed their respective cases. The Defendant indicated that they will rely on the plaintiff's testimony. This is crucial for the case before the court now. By relying on the Plaintiff's testimony, his evidence also became Defence evidence. It remains accepted and non-controverted.

10. Limited grant ad litem issued on 21st December, 2017 was produced. The death certificate, exhibit 1 showed the cause of death was Hemorrhage secondly to road traffic Accident.

11. The court relied on written submission and dismissed the claim by the Appellant. He stated that no cogent evidence related to negligence was adduced. He assessed damages, at Ksh. 2,160,00/= and special damage of Ksh 49,000/=

The Issues.

12. There are two issues that emerge from the submissions of parties

a. Whether the Appellant proved this case on liability.

b. What reliefs are to issue.

Determination

13. The case is unique in that the testimony was the most unique and the Defence also relied on the plaintiff's evidence. The Court did not hear testimony on who is to blame. Ordinarily the court will have no difficulties dismissing this appeal in limine were it not the special position of pleadings in this matter.

14. The ownership and occurrence of the accident is not denied. The only questions is who is to blame for the accident and where is that evidence. Absent such evidence, there is no basis for liability.

15. It is advisable that parties tender all the evidence thus have instead of such a highly summarized version of evidence that does not reflect the seriousness this case has in the lives of parties involved.

16. It was clearly admitted that the Appellant did not see the accident. He produced the police abstract, where the case was pending their investigations.

17. The Court blamed the Appellant however for failure to tender evidence how the accident occurred. Further, the Appellants were blamed for no calling the people who gave information on how the accident occurred.

18. The court was at sea as to whether both vehicles were involved or going to opposite directions. However, the court reached a verdict that did not give a accord to the evidence and Pleadings on record.

19. The Respondent in their Defence, did not blame the Appellants or the deceased for the accident. The Respondent raised 2 cogent Defences: -

    a. The accident was inevitable and could not be averted despite all reasonable steps taken.

    b. Without prejudice the accident was wholly substantially contributed to by the negligence of the driver of motor vehicle Registration No. KAZ 186/ZB 9423.

20. The Respondent threatened to institute Third Party Proceedings which never came to be. There are particulars of negligence attributed to Motor Vehicle Registration No. KAZ 186L/ ZB 9423. To date, that vehicle is roaming free, un-sued.

21. The two Defences are absolute Defences. This means that if the particulars are proved liability moves out of the parties.

22. The court is aware that the absoluteness of the Defence of inevitable accidence, accords with section 107 of the *evidence act*, which provides as doth: -

> " 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.

23. It is agreed that the fact of occurrence of the accident is not an issue. What is in issue was whether, it was an inevitable accident or the other Motor Vehicle Registration No. KAZ 186L/ ZB 9423 was to blame.

24. The issue of blame of Motor Vehicle Registration No. KAZ 186L/ ZB 9423 is a matter that the Respondent wanted the court to belief. This is because the accident was a collision. The duty to proof

that particular fact lay on the Respondent. He was the one who alleged the same as the cause of the accident.

25. Indeed, Section 109 of the *evidence act* placed the burden of proof of such a fact on the Respondent. The section provides as doth: -

> "
>
> " 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."

26. This is compounded by the next Defence the Respondent set up. This was an inevitable accident. By such a pleading, the Defendant avers that there was no negligence. It then behooves him to tender evidence which is exclusively within their knowledge. This is covered under section 112 of the *Evidence Act*. it provides: -

> " 112. Proof of special knowledge in civil proceedings In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

27. This was considered in the case of Re JF (Minor) [2019] eKLR, where Justice D S Majanja stated as follows: -

> 10. The Respondents did not call any evidence to show that the accident was inevitable and it was wrong for the trial magistrate to infer the Defence of inevitable accident and reverse the burden of proof by requiring the appellant to disapprove a non-existent Defence. The Defence of inevitable accident was considered in Dewshi v Kuldip's Touring Co. [1969] E.A 189. 192 where the Court of Appeal for East Africa quoted Lord Esher in the Schwan v The Albano [1892] P. 419 who observed as follows;
>
> What is the proper definition of inevitable accident? To my mind these cases show clearly what is the proper definition of inevitable accident as distinguished from mere negligence –that is a mere want of reasonable care and skill. In my opinion, a person relying on inevitable accident must show that something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill. That seems to me to be the very distinction which was taken, and was meant to be taken between the case of inevitable accident and a mere want of reasonable care and skill.

28. The deceased was no a pedestrian but a passenger in a collision accident. There was no way he could have had evidence on who between the two vehicles were to blame. Further, by pleading inevitable accident, the Defendant has removed the case from the Plaintiff to himself. In other words, the Defendant is not inviting the plaintiff to show who is to blame.

29. The Defendant is pleading that yes the accident occurred and it was beyond my control. By that pleading, to escape liability, the Respondent must show, how he is not to blame. There is no burden of proof on the plaintiff beyond proving involvemnte

30. The court in In re JF (Minor) [2019] (supra) continued as doth: -

> " 11. It was the duty of the Respondents to plead inevitable accident and to call evidence to support that Defence as required by sections 109 and 112 of the *Evidence Act* particularly given the roadworthiness was a matter within their knowledge. They did not. The appellant's case was uncontroverted and having

evaluated the evidence as the first appellate court, I find the Respondents fully liable. The plaintiff was a passenger and no evidence was let to show that he contributed to the accident in any way."

31. The Defence of inevitable accident places the burden of proof on the Defendant. This is worse in case of collisions. Two vehicles travelling at moderate speed, taking into consideration the circumstances and condition of the road, cannot inevitably be involved in an accident.

32. In Kimeu v Kasese [1990] eKLR, the court stated as doth: -

> " Even if there was and the Defence of inevitable accident had been pleaded, there is no evidence that a vehicle traveling at moderate speed and being driven carefully, would inevitably skid. It is the emergency braking which caused the skidding, if any. I say, "if any" because, DW 3 stated that the vehicle left the road suddenly. Those circumstances give rise to the inference of negligence. To escape liability, the Defendant would have to show that there was a probable cause of accident which does not connote negligence or that the explanation for the accident was consistent only with the absence of negligence – Embu Public Road Services v Riimi [1968] CA 22.

33. Inevitably, it follows that the Defendant by pleading inevitable accident, he is pleading that he will be able to show that contrary to the assertion by the Plaintiff, the accident occurred independent of negligence. It is a herculean task which, if undertaken and failed, the Defendant shoulders liability. It means that the Defendant is categorically removing the issue of negligence and saitiny that the accident occurred not only without negligence but that he has evidence, cogent evidence of what caused it. That knowledge is within the defendant. Without unleashing such evidence, the Defendant trips on his on trap.

34. In case of a collision there is a presumption that if the parties are unable to proof who among the two vehicles is to blame, then the vehicle are equally to blame. For the court to make that finding it was important the Defendant applies and join the other tortfeasor to the case. a Defendant. This is more so when the Plaintiff is a passenger.

35. The Appellant were able to proof that: -

    a. An accident occurred

    b. The same involved two motor vehicles

    c. The Deceased died as a result of the accident.

36. Proof of the foregoing is in line with the burden placed on the Appellant under Section 107 of the *Evidence Act* as aforesaid.

37. "(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."

38. The question this Court will ask itself is what evidence remains even if the parties were called, they are equally no eye witnesses. The matter is indicated to be pending their investigations.

39. Who was to be called to explain how the accident occurred. In other words, is there someone, who could best explain why vehicles which were on the road, did not arrive safely.

40. In the case of Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR the court stated as follows: -

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the Defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the Defendant...The Defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."
>
> 16. From the foregoing, I observed that once pleaded, the res ipsa loquitur doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a Defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.

41. The Appellant having pleaded the doctrine, the burden of proof shifted to the Respondent to either disprove the same or to show that the Deceased contributed to the accident, but they did not. Effectively, the doctrine of res ipsa loquitor reverses the burden though pleadings. This was pleaded. The Defendant could not simply close their evidence and hope for a dismissal.

42. The Appellant could only give evidence on what they heard as they w came to the scene after the accident. The one person who was there and evidence have shown he was there is the driver.

43. The Driver chose not to testify because he thought that the plaintiff's evidence is necessary. It is true it is hearsay but admissible hearsay as the person who could have testified, that is the deceased cannot be called as a witness.

44. Further, the 2 Defences set up by the Defendant call that there be supported by evidence.

45. Justice Mary Kasango, had this to say in Obed Mutua Kinyili v Wells Fargo & another [2014] eKLR

> " That Dictionary goes further to explain the circumstances the Court will infer negligence as follows-
>
> "The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for Defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the Defendant's negligence, in the absence of explanation or other evidence which the jury believes."
>
> "It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the

Defendant's act or inference that Defendant's negligence was responsible it must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."

46. Section 112, of the *Evidence Act* provides that-

"

"112. Proof of special knowledge in civil proceedings
In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

47. The driver who averred that the accident was inevitable chose not to testify how inevitable it was. The Court is therefore bound to presume that the evidence will have been adverse to the Respondent.

48. In the case Simeon Nyachae v Eric Ongeri & 2 others [2015] eKLR, Justice J. K. Sergon

8. . In Janet Kaphiphe Ouma & Another v. Marie Stopes International(Kenya) HCCC No. 68 of 2007, Ali-Aroni j, stated:-

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

49. The court proceeded as doth in relation to adverse inference from failure to tender evidence: -

"9. In addition to these holdings I must also mention that it is a presumption in the law of evidence that a party who has in his possession evidence which he fails to tender, that evidence is presumed to have been adverse to him."

50. Further, the Respondent chose to blame not the Deceased but Motor Vehicle Registration No. KAZ 186L/ZB 9423. The Defendant in their defence prays that, "the plaintiff's suit be dismissed with costs of substantial contributory negligence be made against the owners of motor vehicle Registration KAZ 186L/ZB 9423.

51. The court therefore fell into error by placing the burden of proving negligence in a collision on the Appellant. The duty of the Appellant was to show that a collision occurred. It is not their business on which of the collisions partners is to blame. In cases where pedestrians are involved, the burden is heavier as either of the parties can be to blame. However, in cases involving passengers in a collision, prove of the collision is enough.

52. It is now settled that where there is a dispute or the court is uncertain as to which party to blame in a collision, the parties are paid equally. In this case however, despite blaming motor vehicle registration NO. KAZ 186L/ZB 9423, the Defendant/Respondent did not seek to join the owners to the suit. And this is for a good reason, the Driver knew who is to blame.

53. Therefore, had the Respondent joined the third party to this suit, the court could have found both 50% liable unless evidence of culpability was tendered. In absence of joining of the three parties, the collision partner will shoulder the entire blame.

54. I therefore find and hold that the court erred in placing an unnecessary burden on the Appellant when pleadings pointed elsewhere. Pleadings are not evidence. Failure to testify the pleadings remain bare. The finding on liability is hereby set aside.

55. In final analysis, I find the Appellant to have proved their case on a balance of probability. I hold the Respondent 100% liable for the accident. I dismiss the Defence of inevitable accident, and the contribution by motor vehicle registration No. KAZ 186L /ZB 9423. This is because no evidence was led and thus the Defence remained bare.

56. In Billiah Matiangi v Kisii Bottlers Limited & another [2021] eKLR11, the court stated as doth: -

> " Where a plaintiff gives evidence in support of her case but the Defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of Defence remains mere allegations. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:
>
> "In this matter, apart from filing its statement of Defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the Defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence".

57. This does not reduce the burden of adducing cogent evidence even in a formal proof. Havelock j in Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR, stated as doth: -

> " Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

58. Inevitable it follows that in spite of the casual nature of the proceedings, the Appeal will succeed with costs in this court and the court below Ksh. The Respondent dug their own downfall. Had pleadings been differently done or if the vehicle was involved with a pedestrian the burden of proof on the plaintiff could have been higher.

Quantum

59. There is no cross appeal or appeal on quantum. I therefore adopt the finding of the trial court.

Determination

1. I set aside the finding on liability and substitute thereto a finding of 100% liability against the Respondent

2. Judgment is entered accordingly for the Appellant against the Respondent for –

a. 100% liability

b. damages are awarded as follows

    a. pain and suffering Ksh 20, 000/=

    b. Loss of expectation of life Ksh 150,000/=

    c. loss of dependence Ksh Ksh 2,160,000/=

    d. Special damages Ksh 49,000/=

    Total Ksh 2,379,000/=

    e. Cost of this appeal Ksh. 137,500/=

    f. The damage do attract interest from the date of judgment in the lower Court, that is, from 16th January, 2019.

60. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF MARCH, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

Nancy Njoroge for the Appellant present

Miss Kamau for Murimi present

Oliver Musundi – Court Assistant.