



Ndege & another (Suing as Administrators of the Estate of Moses Kariuki Muthaga Deceased) v Ontumbi & another (Civil Appeal 176 of 2018) [2023] KEHC 19905 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 176 OF 2018**

**A MSHILA, J
JULY 7, 2023**

BETWEEN

**MERCY ANASTASIA WANGECI NDEGE 1ST APPELLANT
ROBERT WACHIRA NDEGE 2ND APPELLANT
SUING AS ADMINISTRATORS OF THE ESTATE OF MOSES KARIUKI
MUTHAGA DECEASED**

AND

**DANIEL KARARIA ONTUMBI 1ST RESPONDENT
P.KARIUKI 2ND RESPONDENT**

(Being an appeal against the Judgment and Decree of the Honorable E.Olwande in Limuru CMCC No. 231 of 2013 delivered on 22nd November 2018)

JUDGMENT

Background

1. By a Complaint filed on 28/08/2013, the Appellants herein being the legal representatives to the estate of Moses Kariuki Muthaga (Deceased) sued the Respondents claiming compensation for the fatal injuries sustained by the deceased on or about 14th September, 2012 where the deceased was a lawful travelling passenger in motor vehicle registration number KAP 593Z along Nairobi-Limuru Road when the Respondents and/or their driver so negligently drove motor vehicle registration number KAP 593Z and KRS 854 respectively thereby causing the said motor vehicles to ram into each other. As a result the deceased suffered severe injuries which led to his death 10 days later.
2. The 1st Respondent filed his Defence denying any liability for the accident. In particular, he denied being the registered owner of motor vehicle registration number KAP 593Z. Further, he stated that if



- any accident occurred the same was caused by the 2nd respondent and/or the driver of motor vehicle registration number KRS 854.
3. The matter proceeded to a full hearing. At the conclusion of the trial, the Honorable Trial Magistrate dismissed the suit with costs to the Respondents.
 4. The Appellants are dissatisfied with the lower Court's judgment and have preferred the present Appeal. In their Memorandum of Appeal, they have listed nine grounds of appeal as follows:
 - a) That the Learned Magistrate erred in law and in fact in dismissing the Appellants' case.
 - b) That the Learned Magistrate erred in law and in fact in failing to take into account the submissions given on behalf of the Appellant and into coming to a conclusion that the Respondents were not liable even after the evidence was clearly led to prove that the deceased died in an accident involving motor vehicles registration number KAP 593Z and KRS 854.
 - c) That the Learned Magistrate erred in law and in fact in finding that no negligence was proved in light of the fact that the 1st Respondent blamed the 2nd Respondent who did not file any defence.
 - d) That the Learned Magistrate erred in law and in fact in finding that no negligence was proved against the 1st Respondent in light of the fact that the 1st respondent called no evidence to prove his averments in his defence.
 - e) That the Learned Magistrate erred in law and in fact in finding that no negligence was proved against the 2nd Respondent in light of the fact that the 2nd Respondent did not enter appearance or file any defence within the stipulated time despite having been duly served and an interlocutory judgment that was entered against him.
 - f) That the Learned Magistrate erred in law and in fact in finding that the Appellants had not discharged their evidential burden of proving the liability.
 - g) That the Learned Magistrate erred in law and in fact in failing to put into consideration the relevant legal principles hence arriving at the wrong conclusion of the matter.
 - h) That the Learned Magistrate erred in law and in fact in her assessment of quantum of damages of Kshs. 120,000/= for loss of expectation of life, Kshs. 60,000/= for pain and suffering and Kshs. 450,000/= for loss of dependence figures that is manifestly too low.
 - i) That the Learned Magistrate erred in law and in fact in failing to make an award for special damages.
 5. The court directed the parties to canvass the appeal by filing written submissions; hereunder is a summary of the submissions.

Appellants' Submissions.

6. The Appellants submit that the trial court erred in its finding that the Appellants had failed to call an eye witness or a police officer. They contend that the doctrine of *res ipsa loquitur* applied. Reliance was



placed in the case of *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School* [2018] eKLR. Failure by the Respondents to call any witnesses would be taken to mean that the Appellants proved their case on a balance of probabilities. Counsel placed reliance on the case of *Susan Kanini Mwangangi & another v Patrick Mbiti Kavita* [2019] eKLR where *res ipsa loquitor* was involved where there was no eye witness to the accident that resulted in the death of the deceased. The deceased in the instant case herein was a passenger. The respondents were said to owe the deceased a duty of care. The doctrine of vicarious liability was said to apply as the drivers were employees of the 2nd respondent operating under his instructions. Reliance was placed on the case of *P.A. Okello & M.M.Nsereko T/A Kaburu Okello & Partners v Stella Karimi Kobia & 2 others* [2012] eKLR. The Plaintiff's evidence stood uncontroverted since the defendants did not call any witness. The court was urged to award Kshs. 12,096,000/= for loss of dependency, Kshs. 100,000/= for pain and suffering, Kshs. 200,000/= loss of expectation of life and special damages of Kshs. 94,430/=.

Trial Court's Record

7. At the hearing of the case in the trial court Mercy Anastasia Wangeci Ndege (PW1) testified that the deceased who is her husband was involved in an accident and he passed on. She obtained a grant to sue on behalf of the deceased's estate. She placed reliance on her witness statement. She produced the Grant, police abstract, death certificate, receipts for medical expenses and copy of records.
8. PW2 Robert Wachira Ndege testified that he is the brother to the deceased's wife. He stated that the deceased died in a road traffic accident involving motor vehicle registration number KRS 854 and KAP 593Z. That they incurred Kshs. 35,950/= as funeral expenses. He blamed the defendants for the accident. He also sought damages as he is the one taking care of the deceased's children.

Issues For Determination

9. Having read and considered the submissions by both parties and the case law relied upon. It is my opinion that the issues arising for determination is whether the Appellants proved their case on a balance of probabilities and whether the doctrine of *res ipsa loquitor* is applicable herein.

Analysis

10. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."

Whether the doctrine of *res ipsa loquitor* is applicable

11. The trial court in its judgment dismissed the suit as against the Defendants as the Plaintiffs failed to prove their case on a balance of probabilities. The court held that it could not make any assumption on the occurrence of the accident as the two Plaintiffs witnesses did not witness the accident hence could not give an account on how the accident occurred thereby making it hard for the court to apportion liability as against the Defendants.



12. In the Plaintiff it is averred that the deceased was a passenger aboard motor vehicle registration number KAP 593Z along Nairobi-Limuru Road when the Respondents and/or their driver so negligently drove motor vehicle registration number KAP 593Z and KRS 854 respectively thereby causing the said motor vehicles to ram into each other. As a result the deceased suffered severe injuries which led to his death 10 days later.
13. At this point it is not clear who was to blame when the two vehicles rammed into each other. The Plaintiffs' witnesses both testified that they were called and informed that the deceased had been involved in a road accident and had been rushed to hospital. That they went to the said hospital and found the deceased in a serious condition. The deceased passed on after ten days while at Kenyatta Hospital due to the injuries suffered during the accident.
14. Both the Plaintiffs' witnesses did not witness the accident. The police abstract could also not shed light on who was to blame for the accident as it was indicated that the matter was pending under investigation. The same did not indicate who was to blame for the accident.
15. Refer to the case in ZOS & CAO (Suing as the Legal Representatives in the Estate of SAO (Deceased) v Amollo Stephen [2019] eKLR where the Court held as follows;

“The Police Abstract form of the material accident was also produced as an exhibit. However, a police abstract is not and cannot be proof of occurrence of an accident, but proof of the fact that following an accident, the occurrence thereof was reported to the police, who took cognizance of that accident. It is therefore the police, having received information or a report of the occurrence of an accident, who would investigate and establish circumstances under which such an accident occurred.”
16. In the case herein, being that there are two Respondents, the court is at a loss as to whether the Respondents are jointly liable and/or who amongst the two Respondents is liable for the accident. When in doubt and/or when the court is faced with difficulty in determining which vehicle was to blame for the accident, liability ought to be apportioned on a 50:50 basis.
17. Refer to the case of Multiple Hauliers v Patricia Anyango & 2 Others [2012] eKLR where Muchemi J. stated that:-

“My findings from the entire evidence is that it is difficult to establish who was actually negligent or who actually caused the accident. Both witnesses laid their blame on each other. The independent witness who was to unravel the stalemate was PW2 the police officer. Unfortunately, they did not carry out any meaningful investigation.

It has always been heard as a “Rule of the road” that:-

“The rule of the road is that when two vehicles are approaching each other from opposite direction, each must go “on the left or near side of the road for the purposes of allowing the other to pass. Failure to observe this rule is a prima facie evidence of negligence” (Charlesworth & Peray on negligence 8th Edith page 202).

I do find therefore that both drivers failed to avoid the accident. As observed above failure by the police to draw any sketch plans or maps was a negligent on their part as it would have given the court an independent piece of evidence.”
18. In regard to the doctrine of res ipsa loquitor, the Appellants submitted that the same should apply.



19. In the case of *Sally Kibii & another v Francis Ogaro* [2012] eKLR Ibrahim J (as he then was) pronounced himself as follows: - “To my understanding, “res ipsa loquitor” would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence. See *Bikwatirizo v Railway Corporation*[1971] E.A 82. To successfully apply this doctrine, there must be prove of facts that are consistent with negligence on the part of the defendant as against any other cause.
20. As discussed above, the accident herein occurred when two motor vehicles rammged against each other. It is not clear how the accident occurred or which vehicle rammged into the other. However, the deceased was a passenger in motor vehicle registration number KAP 593Z when it collided with motor vehicle registration number KRS 854 as such he cannot be blamed for the accident that occurred when he was merely a lawful passenger.
21. A passenger cannot be held liable when a vehicle he/she is travelling in is involved in an accident. Refer to the case of *Rosemary Wanjiku Kungu v Francis Mutua Mbuvi & another* [2014] eKLR.
22. In the instant case both Respondents owed the deceased a duty of care such that their negligence caused the two vehicles to collide with each other thereby causing an accident that occasioned fatal injuries to the passenger. For the doctrine to apply, the facts must be so clear that the Respondents must have been negligent and there should be no other possible explanation as to who caused the accident.
23. Upon re-evaluating the evidence on record it is this courts considered view that the doctrine of res ipsa loquitor applies herein having determined that the Respondents were negligent as they owed the deceased a duty of care when they failed to take necessary steps to avoid the accident as such caused the two motor vehicles to ram into each other.
24. With regard to quantum, the trial court proposed awards of Kshs. 120,000/= for loss of expectation of life, Kshs. 60,000/= for pain and suffering and Kshs. 450,000/= for loss of dependency are found to be reasonable as the same are not too high or too low in the circumstances.
25. Refer to the case of *Butt v Khan* 1982-1988 1 KAR where the court pronounced itself as follows: -

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded 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.” (See also P.A. Okelo & M.M. Nsereko T/A Kaburu Okelo & Partners v Stella Karimi Kobia & 2 others [2012] eKLR).
26. Having now re-evaluated the evidence on record as this court is required to do, this court is satisfied that the Learned Trial Magistrate erred in dismissing the appellants’ suit on the basis that the doctrine was not applicable.
27. This court is satisfied that the appeal has merit and therefore succeeds on liability which shall be apportioned on a 50;50 basis as between the respondents; as for award for quantum this court will adopt the trial courts proposed award; and Special Damages shall be as per the receipts produce for funeral expenses in the total sum of Kshs.35,950/-

Findings and Determination

28. For the forgoing reasons this court makes the following findings and determinations;
 - i. This court finds the appeal has merit and it is hereby allowed.



ii. The Judgment of the Honorable E.Olwande in Limuru CMCC No. 231 of 2013 delivered on 22nd November 2018 is hereby set aside and substituted with the a judgment in favour of the Appellant (Plaintiff) against the Respondents (Defendants).

iii. In respect of liability it shall be apportioned at 50:50 as between the two Respondents.

iv. The award for damages shall be as follows;

a. Kshs. 120,000/= for loss of expectation of life,

b. Kshs. 60,000/= for pain and suffering and

c. Kshs. 450,000/= for loss of dependency

d. Kshs.35,950/= For Special Damages

Total Kshs.665,950/-

v. The Appellants shall have costs and interest at court rates on (iv) above.

vi. The Appellants shall also have costs of the appeal.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 7TH DAY OF JULY, 2023.

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Miss Muthoni h/b for Miss Inyanje – for the Appellants

N/A – for the Respondents

