Riungu v Mark 1 Express Limited (Civil Appeal E022 of 2021)
[2023] KEHC 20716 (KLR) (11 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20716 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL APPEAL E022 OF 2021

LW GITARI, J

JULY 11, 2023

BETWEEN

PURITY MAKENA RIUNGU ..... APPELLANT

AND

MARK 1 EXPRESS LIMITED ..... RESPONDENT

JUDGMENT

1. By a plaint dated February 20, 2017 followed by an amended plaint filed on October 29, 2019, the appellant sued the respondent for damages in Chuka CMCC No 28 of 2017 for injuries she sustained in a road traffic accident. The appellant claimed that on October 10, 2014, she was lawfully travelling in motor vehicle registration number KBC 015J along Chuka-Meru road when the same was so negligently driven and/or controlled or managed resulting in the accident. She blamed the driver for the accident in which she sustained bodily injuries. The defendant denied liability.

2. This appeal arises from the judgment delivered on September 16, 2021 in which the trial court dismissed the appellant's case against the respondent with costs after finding that the appellant had failed to prove her case against the respondent on a balance of probabilities.

3. The appeal was instituted *vide* the memorandum of appeal dated October 12, 2021 and is based on the grounds that:

    a. The learned magistrate erred in law and fact in finding that the appellant had not established liability against the respondent to the required standards.

    b. The learned magistrate erred in law and fact in failing to find that the appellant's evidence on the occurrence of the accident that gave rise to the claim remained unchallenged.

c. The learned magistrate erred in law and fact in placing reliance on the report appearing in the police occurrence book without the supporting evidence of any investigation done and the findings thereof.

d. The learned magistrate erred in law and fact in disregarding the applicable principle on determination of liability in accident cases.

4. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

5. The appellant argued all the four grounds together as thy all related the issue of liability.

It was the appellant's submission that the trial court erred on basing its finding on liability in the police occurrence book produced by DW1. According to the appellant, the driver of the respondent was speeding before the accident. For this reason, the appellant urges this court to allow the appeal by setting aside the lower's court's judgment on liability and substituting it with an order allowing the appellant's claim against the respondent with costs and affirm the award on special and general damages.

The appellant relied on the following decisions:

Michael Hubert Kloss & another v David Seroney & 5 others (2019)eKLR.

Kennedy Macharia Njeru v Packson Githongo Njeru & another (2019)eKLR.

The Respondent's Submissions

6. On the other hand, it was the respondent's submission that the appellant (PW1) never proved her claim that the motor vehicle was speeding as she was seated at the back and could not see the speedometer. The respondent emphasized that it was the testimony of PW2, CPL Susan Muchemi, that the driver of motor vehicle KBC was not to blame for the accident. Further, the respondent submitted that the driver of motor vehicle KBC did not contribute to the occurrence of the subject accident and what happened to him and his passenger on the material day was beyond his control as he was hit while on his own lane. It was thus the respondent's submission that the judgment of the trial court should be upheld and this appeal dismissed with costs.

Analysis

7. As a first appellate court, this court has a duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses firsthand. This duty was stated in the case of *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular this 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 (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270)."

8. In this case, the occurrence of the accident is not in dispute. What is in dispute revolves around the question of liability. This court is called upon to determine who was to blame for the accident. The appellant's contention is that it was the respondent. He who alleges must prove.

9. Section 107 (1) of the *Evidence Act*, cap 80 Laws of Kenya provides that:

> " 1. 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."
>
> 2. When a person is bound to prove the existence of any facts it is said that the burden of proof lies upon that person."

10. 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."

11. The above provisions were discussed in the case of *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."

This was further discussed by the Court of Appeal in the case of *East Produce Kenya Limited v Christopher Astiando Osiro* civil appeal No 43/2001 where it was held:-

> " 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 v Kenya Cargo Hauling Services Ltd* 1991 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."

12. It follows that the burden of proof was and still is on the appellant to prove her case against the respondent on a balance of probability.

The burden which the appellant has to prove is that the respondent was at fault and bears the blame for the accident as submitted by the respondent, the elements of negligence which the appellant had to prove are that the defendant owed a legal duty to the plaintiff under the circumstances, the respondent

was in breach of this duty, by failing to exercise his duty of care, causation by actually causing the appellant's injury and damages for the harm that resulted from the respondent's actions.

The burden was on the appellant to prove negligence.

13. As per the amended plaint filed on October 29, 2019, the appellant claimed that the accident was caused by the negligence on the part of the driver of the motor vehicle registration number KBC 015J which she was travelling in on the material day. The appellant pleaded the particulars of negligence as follows:-

    i. Driving without due care and attention

    ii. Driving at an excessive speed.

    iii. Ramming into motor vehicle registration numer GK B 712B.

    iv. Driving with regard to persons using or likely to use the said road.

    v. Causing the accident.

14. On the other hand, the respondent *vide* his amended defence filed on December 11, 2019 attributes the negligence resulting in the accident to the drivers of motor vehicle registration numbers GKB 712B and KBU 947L Toyota Saloon, who were joined in the suit as third parties.

15. The appellant testified as PW1. She adopted as her evidence her statement which she recorded on February 20, 2017. In the statement she stated that on October 10, 2014 she was travelling in a public service vehicle registration number KBC 015J along Chuka-Meru road. As the vehicle approached Keria area it collided with motor vehicle registration number GKB 712 B. It was her evidence that she was injured on the right leg, got a hip dislocation and a cut wound on the right side of the chin. She also got an extraction of the molar teeth. She stated that she was treated at Chogoria PCEA Hospital and Chuka District Hospital. She produced as exhibits a bundle of the treatment notes (P Exhibit 1), an invoice from Chogoria Hospital for Kshs 65,118/= (P Exhibit 2), and the demand letter to the respondent (P Exhibit 5). She stated that she had not healed completely as her she felt pain on her right leg and that she had to get teeth dentures.

16. On cross examination, the appellant stated that she was seated on seat no. 7 in the motor vehicle. That the motor vehicle was speeding and wanted to overtake on the highway. She further stated that the hospital bill was paid by NHIF but she had to pay for her teeth dentures. She however did not have a receipt for the same.

17. By consent, the medical report by Dr Koome was produced in evidence as P Exhibit 4.

18. PW2 was CPL Susan Muchemi, the investigating officer. She produced in evidence the police abstract as P Exhibit 3 and the OB Extract of the subject accident. On cross examination, she stated that she never visited the scene and that her testimony was only as per the OB record.

19. DW1 was PC Janet Nyatichi attached at Chuka Traffic Base. She confirmed that the subject accident occurred on October 10, 2014 at around 7.30 p.m. along Chuka-Meru at Keria bridge and involves motor vehicles registration numbers GKB 712B Isuzu Lorry, KBU 947L Toyota Saloon, and KBC 015J Toyota Matatu. She produced in evidence OB extract 5/10/10/2014 as D.Exhibit 1. She stated that she did not visit the scene of the accident. That one CPL Maguti and one CPL Kibos were the ones who visited the scene. It was her testimony that the point of impact was at Keria bridge. That the GKB 712B Isuzu Lorry was coming from Chuka direction heading to Meru and KBU 947L was heading from Meru to Chuka direction while KBC 015J was coming from Nairobi heading to Meru. That the findings at scene were that Toyota Saloon KBU 947L was on high speed and had full lights. That the

driver of GKB 712B Isuzu Lorry from the opposite direction saw the Toyota Saloon KBU 947L and tried to signal the driver before swerving to the left side of the road. That due to the speed and the bridge being narrow, the saloon motor vehicle hit the GK lorry and as a result of the impact, the GK lorry hit the KBC 015J matatu which was coming from the Nairobi direction. It was DW1 testimony that according to the OB, the driver of Toyota Saloon KBU 947L was to blame for the accident. She stated that the driver of KBC 015J also got injured and produced the OB Extract 5/10/10/2014 as D Exhibit 2.

The appellant raised the doctrine of 'res-ipsa –loquitor'. This is a doctrine which states that the case speaks for itself and is relevant in determining whether there was negligence on the part of the respondents. This doctrine was discussed in *Susan Kanini Mwangangi & another v Patrick Mbithi Kavita* (2019) eKLR which quoted the decision in *Embu Public Road Services Ltd v Riimi* (1968) E.A 22 where the court stated that-

> "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 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 cause the accident. The plaintiff in those circumstances does not have to show any specific evidence but merely show that an accident of that nature should not have occurred in those circumstances which leads to the only inference, that the only reason for the accident must there 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 on his part, or that the accident was due to circumstances not within his control."

This can be summed up that once pleaded, the plaintiff presumes that she has discharged his burden of proof and shifts the burden to the defendant to demonstrate that that there was no negligence on his part or there was contributory negligence.

In this case the appellant called as his witness PW2 who testified that the driver of the motor vehicle KBU 947 L was to blame for the accident On the other hand the respondent called DW1 testified that the driver of KBU 947L was to blame for the accident. The respondent was exonerated by PW2 and DW1. The respondent submits that what happened was beyond his control because he was hit by the lorry. I find that the burden did not shift on the respondent. The doctrine of res-ipsa-loquitor does not apply. The fact of the accident per se does not prove negligence, evidence must be adduce to prove negligence. The allegation that the respondent was speeding was not proved on a balance of probabilities. It was upon the appellant to prove the particulars pleaded on the plaint. In *Halsbury's Law of England*, 4th Edition Volume 17 paragraph 13&14 it is stated:-

> "The legal burden of proof is the burden of prof which remains constant throughout the trial; it is the burden of establishing facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these appropriate standards, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied."

20. It was the lower court's finding that while the appellant blamed the driver of the KBC 015J matatu which she was travelling in for the accident, the occurrence book extract exonerated the said driver of the matatu. As such, the trial court held that the plaintiff failed to prove her case against the defendant

on a balance of probability. After considering the evidence, I am in agreement with the trial court's decision on liability. The finding by the learned trial magistrate on liability was proper in view of the evidence and I find no reason o interfere with it.

Conclusion

21. The upshot of the foregoing is that the appeal is without merits.

I order that:-

1. The appeal is dismissed.
2. I award the costs of the appeal to the respondent.
3. Cost be taxed by the Deputy Registrar.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 11TH DAY OF JULY 2023.

L.W GITARI

JUDGE