Lumbasi v Lugonzo & another (Civil Appeal E011 of 2024)
[2024] KEHC 15304 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E011 OF 2024

S MBUNGI, J

DECEMBER 5, 2024

BETWEEN

LYDIA MUSUNGU LUMBASI ..... APPELLANT

AND

DAVID CHIMWANI LUGONZO ..... 1ST RESPONDENT

NCBA BANK KENYA PLC ..... 2ND RESPONDENT

(Being an appeal arising from the judgment by the Honorable C. Cheruiyot RM/ Adjudicator delivered on 2nd February,2024 at Kakamega in Small Claims Civil Case No. E366 of 2023)

JUDGMENT

1. The appellant herein filed a statement of claim dated 29.11.2023, seeking compensation for a personal injury due to a road traffic accident that occurred on 10.06.2023 where she was a pillion passenger aboard motor cycle registration number KMEX 135Z TVS STAR along Mumias-Kakamega road when at Eluche area, the Respondent's Motor vehicle registration number KDI 191P was driven negligently and recklessly behind the claimant by its driver that it violently knocked down the motorcycle and the claimant and as a result the claimant sustained serious injuries.

2. The Respondents denied the alleged particulars of negligence on their part. The Respondents also stated that if the accident occurred which they denied it was due to the sole and contributory negligence of the claimant and the motor cycle rider.

3. The case proceeded to full hearing and the trial magistrate in her judgment found no liability on the respondents. She also gave no judgment on quantum and held that the claimant (appellant herein) had not established her case to the required standards hence the claim was dismissed with no orders as to costs.

4. Having being aggrieved by the trial court's judgment, the appellant lodged a memorandum of appeal in this court on the following grounds:

    i. That the learned trial magistrate erred both in law and fact as she was unjust against the weight of evidence and dismissed the appellant's claim.

    ii. That the learned trial magistrate erred in her assessment of facts and evidence on record and consequently failed to apply the correct principles in determining that the appellant did not adduce enough evidence to hold the respondents liable for the occurrence of the accident.

    iii. That the learned trial magistrate erred in dismissing the appellant's case, failed to apply the principles applicable in determining that the appellant had proved her case on a balance of probabilities.

    iv. That the learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsuitable in law.

5. The appellant prayed that the appeal herein be allowed, the entire judgment delivered on 02.02.2024 set aside and that the costs of the trial court and of this appeal be borne by the respondents.

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

Appellant's Case.

7. The appellant submitted that the trial magistrate erred in law and fact when it made the determination that the appellant did not prove her case on a balance of probabilities when she testified in court, whereas both the appellant and DW1 who was the driver of the suit motor vehicle both confirmed the occurrence of the accident. She further produced exhibits and called witnesses to corroborate her testimony of the accident occurrence.

8. She submitted that the trial magistrate ought to have apportioned liability accordingly instead of dismissing the entire suit despite DW1 having testified that he was driving at a speed of 75-80 km/h in a built up area. She referred the court to the case of Masembe vs Sugar Corporation and Another [2002] 2 EA 434.

9. The appellant further submitted that the learned magistrate in dismissing the appellant's case in the trial court failed to assess damages in the event she would have held in favor of the appellant. On quantum, the appellant submitted that she prayed for Kshs. 800,000/- for general damages and Kshs. 85,550/- for special damages based on the injuries suffered which included serious bone injuries and moderate soft tissue injuries which comprised open fracture of the right tibia and fibula. She referred the court to the case of Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] Eklr.

Respondent's Case.

10. The respondents filed submissions dated 24.09.2024 isolated two main issues for determination.

11. On who should be blamed for the accident, the respondents submitted that it was the motor cycle rider who made an abrupt U-turn from the edge of the road and owing to the close range, the motor cycle crashed into the motor vehicle driven by the respondents or their agent thus causing a collision.

12. They urged that the appeal be dismissed with costs to the respondent.

Analysis and Determination.

13. This being a first appeal, this court is under a duty to re-evaluate and re assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. In Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, the court stated as follows:

> "...This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way..."

14. In Selle & Another vs. 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..."

15. I have looked at the memorandum of appeal, the submissions by both parties, the proceedings from the lower court and the trial court's judgment.

16. The issue for determination is whether the trial magistrate failed to properly evaluate the evidence placed before her and as a result arrived into erroneous decision.

17. The trial magistrate wholly blamed the rider for causing the accident and thus dismissed the plaintiff's case for she had not enjoined the rider as a defendant in the proceedings.

18. It is the appellant's case that the trial court should have apportioned liability for both driver of the motor vehicle and the rider caused the accident and as a result she sustained bodily injuries.

19. The trial magistrate analyzed the evidence as follows and I quote:

> "...It was the claimant's testimony, that the rider of the motorcycle was riding at moderate speed and on reaching Kisumu ndogo Eluche, the rider indicated that he was about to turn to the right to join a murram road leading to Shianderema when the respondent's motor vehicle registration number KDL 191P which was behind without due care violently knocked the motorcycle and claimant down as the driver was driving recklessly at a high speed. The Claimant's witness CW2, a police officer testified and produced the police abstract but failed to adduce evidence with regard to the circumstances of the accident and who was to blame for the accident. The Claimant submitted that the Respondent should be held wholly liable. The Respondent called RW1, driver of motor vehicle registration number KDL 191P who testified that he had a collision with the motorcycle and that he had swerved but did not avoid the accident. He stated that both the motorcycle and vehicle were heading in the same direction and there was GK vehicle behind which overtook the motorcycle successfully. He added that he was driving at a speed of about 75-80Km per hour and the weather was not raining and his vehicle was hit on the left side and the

front part of the motor cycle was hit. It was his further testimony that the motor cycle had missed an entrance and made an abrupt U-turn on the right side after the vehicle had finished overtaking it. The Respondent called its second witness RW2 an insurance investigator with spotlight loss assessors who testified and produced an investigation report in the matter dated 12/08/2023 on behalf of her colleague who authored the said report. The investigation report corroborated RW1's testimony specifically that soon after the motorcycle was overtaken by the GK vehicle, its rider made an abrupt U-turn from the edge of the road and owing to the close range, the motor vehicle crashed onto the third-party motorcycle. The report contained photographs of the damaged motor. vehicle which was on the left front side at the headlamp and a sketch map of the accident. The said report concluded that the motor cycle rider was to blame for the accident through careless riding. The Respondent submitted that they have proved within the balance of probability that the accident was caused by the rider of the motorcycle and contributory negligence of the claimant hence the claimant should be held 100% liable for authoring her own injury. Having considered the evidence on record and the party's submissions the court finds that the respondent's case is well supported and corroborated by the Investigations report from spotlight which evidence has not been rebutted by any contrary report or evidence. It is the duty of every motorist to all times to keep and maintain a proper lookout for other vehicles. This duty applies to all motorist. This court finds that there is sufficient evidence that the rider of motor cycle KMEX 135Z failed in his expectation as a reasonable driver to lookout for other motorists while making an abrupt U-turn and therefore is responsible for the causation of the said accident and injury to the claimant. The said driver was not sued as a defendant herein neither was he joined as a third party to the claim and therefore the claimant has failed to prove her claim on a balance of probabilities and her claims fails..."

20. In cross examination, the driver one Mr. Nixon Shilisia Shikuku testified as follows: "...I do not confirm that I hit the motorcycle. We had a collusion. I swerved but did not avoid the motorcycle. We were heading in the same direction.....I was driving at 75km/h.....We had a head-on accident....."

21. The claimant's (appellant) case is that:

> "...she was a pillion passenger on a motor cycle KMEX 135Z riding from home heading to Shianderema. The rider was riding at a moderate speed. On reaching at Kisumu-ndogo Eluche, the rider indicated and or gave signal that he was about to turn to the right to join murram road leading to Shianderema when motor vehicle registration number KDL 191P which was behind us without due care knocked them down. That the driver was driving recklessly and at a high speed to which he violently knocked us down and I was injured in the process.....
>
> I blame the driver of the motor vehicle registration number KDL 191P for inter alia driving at speed that was excessive and unsafe, driving without due care, attention and-concentration, failing to keep a proper look out, failing to maintain proper control of the motor vehicle and suddenly and without any warning knocking us from behind and 04 DEC 791 occasioning me grave injuries"

22. The appellant also relied on the doctrine of res ipsa loquitur which means the thing that speaks for itself. The import of this doctrine has been considered in many cases like in the case of Tonui v Kuber Agency (Civil Appeal E015 of 2023) [2024] KEHC 11084 (KLR) it was held as follows:

> " ...The Appellant stated that he had pleaded the doctrine of res ipsa loquitor and as a result, the burden of proof shifted to the Respondent to prove that it was not negligent in causing the accident.
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> In Susan Kanini Mwangangi & another vs Patrick Mbithi Kavita (2019) eKLR, Odunga J. (as he then was) held:-
>
> > "Therefore, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent. The exception to this rule however is where the doctrine of res ipsa loquitor applies."

23. In Embu Public Road Services Ltd. vs. Riimi [1968] EA 22, the East African Court of Appeal held 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, 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. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident... Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."

24. Similarly, the Court of Appeal in Margaret Waithera Maina vs. Michael K. Kimaru (2017) eKLR held:-

> " Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that "the thing speaks for itself". It is said to be a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible. In the text book Charles worth & Percy on Negligence, 12th edition, appears this passage:'Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine:I think that it is no more than an exotic although convenient, phrase to describe what is in essence no more than a common-sense approach, not limited by

technical rules, to the assessment of the effect of evidence in certain circumstances.The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed."

25. Additionally, the Court of Appeal in Keziah & another (Personal Representatives of the Late Isaac Macharia Mutunga) v Lochab Transport Limited (Civil Appeal 82 of 2018) [2022] KECA 477 (KLR) held:-

> ".....Hobhouse L.J. in the case of Ratcliffe vs. Plymouth & Tobay HA 1998 PIQR 170 as hereunder:-".....the expression res ipsa loquitur should be dropped from the litigator's vocabulary and replaced by the phase 'a prima facie case'.
>
> Res ipsa loquitur is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case has been made out. Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of *Nandwa Vs. Kenya Kazi Ltd, Civil Appeal No. 91 of 1987* for the reason that evidence is not to be pleaded.
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> Also see Bennet Vs. Chemical Construction (GB) Ltd 3 All ER 822 where the Court emphasized that:"It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable"

26. Flowing from the above, it is clear to me that the respondents had the burden to disapprove the accident was not caused by their negligence but the negligence of the motorcycle rider. Moreso and more importantly, the appellant never blamed the motorcycle rider for causing the accident.

27. The trial magistrate dismissed the appellant's case because she did not sue the motor cycle rider who according to the trial court's finding was to blame for the accident. I find the trial magistrate erred in her finding for one, the appellant had no issue with the rider and secondly, the respondents had the burden to prove that it was the motorcycle rider who caused the accident.

28. Ordinarily, it is a defendant who takes out third party proceedings where the liability is in issue between two or more parties.

29. Order 1 Rule 15 of the Civil Procedure Rules, 2010 which states: -

15.

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party) —

(a) that he is entitled to contribution or indemnity; or

(b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff

and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.

(2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.

(3) The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the court, be filed within fourteen days of service, and shall be in or to the effect of Form No. 1 of Appendix A with such variations as circumstances require and a copy of the plaint shall be served therewith.

(4) Where a third party makes as against any person not already a party to the action such a claim as is mentioned in subrule (1), the provisions of this Order regulating the rights and procedure as between the defendant and the third party shall apply mutatis mutandis as between the third party and such person, and the court may give leave to such third party to issue a third party notice, and the preceding rules of this Order shall apply mutatis mutandis, and the expressions "third party notice" and "third party" shall respectively apply to and include every notice so issued and every person served with such notice.

(5) Where a person served with a notice by a third party under subrule (4) makes such a claim as is mentioned in subrule (1) against another person not already a party to the action, such other person and any subsequent person made a party to the action shall comply mutatis mutandis with the provisions of this rule.

30. The driver of the respondent's motor vehicle in cross examination said there was a collision between the motor vehicle he was driving and the motor cycle driven by the rider contradicting his earlier testimony that the motor cycle hit the motor vehicle.

31. The investigator who testified as the respondents' second witness produced the investigation report dated 12.08.2023 and in page 8, the investigator stated as follows:

> "...The accident occurred when the third party motorcycle rider made an abrupt u turn in front of the Insured's vehicle Owing to distance and proximity. the Insured's vehicle crashed onto the third party motorcycle where the rider and his pillion passenger fell on the ground sustaining varying degrees of injuries..."

32. The driver's testimony that there was a collision between the motor vehicle and the motor cycle is at variance with the findings of the investigating officer that the motor vehicle crashed onto the motor cycle which implies that the motorcycle was stationary as stated by the appellant who said the rider slowed down and stopped, indicating that he wanted to join an entrance. The failure by the driver of the motor vehicle to avoid crashing onto the motor cycle shows that he was at a high speed and he had not kept safe distance.

33. From the above analysis, it is clear that the appellant had nothing to prove against the motor cycle rider so she had no business in suing the motor cycle rider. It was the burden of the respondents to show that the motor cycle rider was to blame and since they failed to join him as a party, they bear the whole blame.

34. The appellant was only required to prove that the accident occurred and how it occurred outrightly manifested negligence on the part of the respondents (The doctrine of res ipsa loquitor).

35. I therefore find that the trial magistrate was wrong to find that the appellant had not proved her case on liability on a balance of probability. I set aside that finding and replace it with a finding that the appellant proved her case on a balance of probability.

36. On the issue of quantum, the trial magistrate also erred in failing to assess the damages even after dismissing the appellant's case. It is trite law that the assessment of damages must be done. In the case of Frida Agwanda & Ezekiel Onduru Okech vs.Titus Kagichu Mbugua 12015| eKLR it was held:

> " ...Indeed even when the learned trial magistrate dismissed the claim in such a case he should have assessed damages notwithstanding the dismissal. That now will be done by this court for convenience instead of returning the file to the lower court for assessment...."

37. Instead of returning the file to the lower court for assessment of costs, I will proceed and assess them.

38. The appellant's evidence in the lower court proves that she was involved in an accident and sustained the following injuries according to a medical report by Dr. Charles M. Andai: Open fractures of the right tibia and fibula, At the time of examination, she was walking with a limping gait supporting herself on crutches. The appellant's counsel submitted for an award of Kshs. 800,000/- as compensation for pain, suffering and loss of amenities. He cited the case of ALPHONCE MULI NZUKI -VS- BRIAN CHARLES OCHUODHO [2014] EKLR wherein the court maintained an award for Kshs. 800,000/- for a compound comminuted fracture of the tibia and fibula and degloving injury on the medical aspect of the right leg and foot and the case of GODFREY WAMALWA WAMBA & ANOTHER V KYALO WAMBUA [2018] eKLR where the Respondent suffered compound fracture of the right distal tibia/ fibula, cut wound on the scalp, cut wound on the chest and cut on the lower lip and was awarded Kshs. 700,000/-

39. Taking into consideration the nature of injuries suffered by the appellant, the cited authorities and the changing economic times, I find an award of Kshs. 600,000/- is a reasonable award to the appellant as compensation for pain, suffering and loss of amenities.

40. On special damages, the appellant claimed Kshs. 85,550 /-. I have seen receipts amounting to Kshs. 85,550/- and I do award the same.

41. The lower court did not award costs to either party. No reasons were given for arriving to such a decision. Section 27 of the *Civil Procedure Act* sets out as follows:

> " Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be at the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order. (2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such."

42. An award of costs in a suit is a discretion of the court. However, the discretion must be exercised judiciously and costs should not deprive a winning party of his or her costs unless it can be shown that such a party acted unreasonably. Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16 reads:

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

43. Being satisfied that the appellant's evidence in the lower court was enough to prove her case on a balance of probability I will award the appellant costs of the suit in the lower court and the appellant also being successful in this appeal, I will also award the appellant the costs of the appeal.

44. In summary, I make the following orders.

i. The appeal has merit. It is hereby allowed.

ii. The lower court's judgment dismissing the appellant's suit in the lower court is hereby set aside.

iii. Judgment on liability is entered in favor of the appellant against the respondents in the lower court suit at 100%.

iv. The appellant is awarded Kshs. 600,000/- as general damages for pain, suffering and loss of amenities.

v. The appellant is also awarded Kshs. 85,550/- for special damages.

vi. Costs for both the lower court and the appeal awarded to the appellant.

vii. Right of appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 5TH DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Appellant – absent

Respondents - absent

Counsels for the parties absent.

Court Assistant – Rono