REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 95 OF 2019

FLORENCE MUTHEU MUSEMBI and GEOFFREY MUTUNGA KIMITI

(Suing as legal and personal Representatives for the Estate of

KAMENE KIMITI *(Deceased*).....APPELLANT

-VERSUS-

FRANCIS KARENGE.....RESPONDENT

(Being an appeal from the judgement and decree of Honorable G. O. Shikwe (Mr.) SRM

in Kithimani PMCC No. 384 of 2016 delivered on 19.6.2019)

BETWEEN

FLORENCE MUTHEU MUSEMBI and GEOFFREY MUTUNGA KIMITI

(Suing as *legal* and personal Representatives for the Estate of

KAMENE KIMITI (Deceased).....PLAINTIFF

VERSUS

FRANCIS KARENGE.....DEFENDANT

JUDGEMENT

1. This appeal arises from Kithimani PMCC No. 384 of 2016 which was originally instituted by the deceased herein, **Kamene Kimiti** seeking general damages, special damages, costs of the suit and interests. The cause of action was a road traffic accident that occurred on or about 21st September, 2015 while the deceased was aboard Motor Vehicle Registration No. KBB 604X which was being driven from Donyo Sabuk to Tala along Donyo Sabu-Tala Road. Following the death of the said **Kamene Kimiti**, the Appellants herein, **Florence Mutheu Musembi** and **Geoffrey Mutunga Kimiti** in their capacity as legal and personal Representatives of the Estate of **Kamene Kimiti** (Deceased) were substituted in place of the deceased

2. It was pleaded that the said vehicle was owned by the Respondent herein. The said vehicle, according to the appellant, was driven carelessly, negligently and/or without due care and attention by the Respondent that it was pursued (sic) into a burning farm as a result of which the deceased sustained severe burns on her body whose particulars were disclosed. The particulars of negligence and special damages were similarly pleaded.

3. In his defence, the Respondent denied ownership of the said vehicle and further denied that the deceased was a fare paying passenger aboard the said vehicle. He also denied the occurrence of the accident as well as the allegation of negligence and instead averred in the alternative that if the accident occurred it was caused by the sole or substantially contributed to by the negligence of the Appellant,

particulars whereof were pleaded. It was further pleaded that the said accident occurred without the negligence of the Respondent and was an act of God or act of a 3rd party.

4. The Respondent similarly challenged the particulars of injuries and special damages pleaded by the Appellant and urged that the suit be dismissed with costs.

5. In support of the Appellant's case, **Florence Mutheru**, who testified as PW1 testified that the deceased was her mother and she relied on her statement dated 5th December, 2017. According to the said statement, on or about 21st September, 2015, the deceased was a passenger on board a Nissan motor vehicle registration no. KBB 604X from Donyo Sabuk to Tala along Donyo Sabuk-Tala Road when upon reaching Kyanzavi Estate Area, there was a burning bush of Kyanzavi Estate and the road was smoky. Instead of stopping the driver proceeded to drive through the smoky road ad in the process, the smoke overcame him, causing him to direct the vehicle into the burning estate. Consequently, the deceased who was inside the vehicle sustained severe burns on the left leg and left hand and was rushed to Donyo Sabuk Nursing Home for treatment where she was admitted and referred to Kangundo District Hospital the following day for further management where she was admitted for four months and was discharged on 11th January, 2016. Later, she was admitted at the same Hospital from 18th January, 2016 and discharged on 5th February, 2016. She was later re-admitted at the same Hospital from 13th June 2016 and discharged on 11th July, 2016. Thereafter, she was routinely attended to at various clinics but the injuries weakened her body compelling her to use wheel chair till she passed away on 1st November, 2016.

6. In her oral evidence, PW1 blamed the driver for the accident and asserted that the deceased was burnt as a result and was hospitalised for a period of 4 months wherein she passed away leaving a bill of between Kshs 46,000/- and Kshs 56,000/-. According to her the deceased was taking care of the family of 7 children and was also taking care of a number of orphans. He therefore sought damages and costs. She exhibited the documents filed with the pleadings.

7. In cross-examination, PW1 disclosed that she was not at the scene and did not witness the accident and that she only received the information from the deceased who was aged 70 years at the time of the accident but died when she was 76 years old when she could barely walk.

8. PW2, **George Njoroge Gitau**, a registered clinical officer testified that on 3rd October, 2016 he received the deceased who was a victim of road traffic accident along Donyo Sabuk and sustained burns in the accident. According to the treatment notes the deceased sustained severe burns on the left ankle joint and left thigh, left elbow to shoulder and second degree burns on the left leg and suffered a lot of pain. Upon examination she noted a scar on her left foot step and on her left ankle joint to mid thigh and left elbow. As a result of her inability to use the left lower leg she was confined to a wheel chair. According to his assessment the degree of injuries was grievous harm. She exhibited his medical report.

9. In cross-examination, PW2 stated that he physically examined the deceased at his facility and that the areas which had scars are where she was injured. According to her, only the scar to the left in-step had not healed. Due to the fact that the deceased was 75 years old, it was possible that her death was accelerated by the injuries.

10. PW3, **Cpl Eliud Ngare**, testified that they received a report of a road traffic accident along Donyo Sabuk – Tala road involving motor vehicle reg. no. KBG 604X which was being driven by **Macharia Njoroge** on 25th September, 2019 which was attended to by his colleague, **PC Ngoha**. According to the said driver, upon reaching a place with coffee plantation at Kwa Mwaura there was grass burning. It was his evidence that the smoke was dense and the driver was forced to land on the ditch and the motor vehicle caught fire. As a result, some passengers sustained burns and the deceased was one of them. According to PW3, the matter was still pending under investigations and they were still to determine who was to blame. He however admitted that he never visited or interviewed the victims and exhibited the police abstract.

11. In his evidence though the occurrence was reported as an incident and not as a road traffic accident, upon vising the scene they established that it was partly fire incident and road traffic accident both of which were pending under investigations. He testified that the vehicle was damaged on the bumper and not inside. It was his evidence that the fire was not caused by the driver who tried to avoid the fire and landed into a ditch. In his opinion, the passengers did not get burnt inside the vehicle.

12. In re-examination, he stated that the driver drove through the fire though he did not visit the scene.

13. Upon the close of the Plaintiff's case, the defence did not adduce any evidence as the witness was dead.

14. In his judgement, the Learned Trial Magistrate relied on **Frida Kimoth vs. Ernest Maina** and found that there was no affirmative evidence of negligence on the part of the defendant which caused the accident. He found that there was no eye witness account on how the accident occurred and the police officer who testified was unable to apportion blame as they were still to conclude the investigations. He therefore found that liability was not established to the required standards since it was not enough to prove that an accident occurred but must go further and prove that the accident was caused due to the negligence of the defendant which has not been done in this case. He proceeded to dismiss the case with no order as to costs.

15. It was however the court's view that had the liability been proved, he would have accessed quantum in the sum of Kshs 200,000/-.

16. In this appeal, the Appellant has raised the following grounds:

> **1. That the learned trial magistrate erred in law and in fact in dismissing the suit contrary to the weight of evidence before him.**

2. That the learned trial magistrate erred in law and in fact by failing to appreciate the burden on the plaintiff/appellant's law in establishing that the deceased was a lawful passenger without negligence and further by failing to appreciate that the plaintiff/appellant had discharged that burden.

3. That the learned trial magistrate erred in law and in fact in believing in whole that testimony of the defendant/respondent and disregarding the testimony and evidence of the plaintiff/appellant.

4. That the learned trial magistrate failed to properly and/or at all evaluate the evidence on record cumulatively and hence reached a wrong conclusion in view of the evidence on record.

5. That the trial magistrate erred in law and in fact in disregarding the plaintiff/appellants submissions on both liability and quantum.

17. It was submitted that the matter was part of a series filed in Kangundo and Machakos Law Courts for the rest of the victims and none of them was dismissed. According to the Appellant, the following were proved and are not disputed and/ or opposed:

1. That an accident occurred on 21st September, 2015 involving the plaintiff/appellant and the respondent/defendant's Motor vehicle registration no. KBB 604X.

2. That the plaintiff/appellant was a lawful passenger in the respondent's motor vehicle registration number KBB 5604X, when the accident occurred.

3. That the defendant/respondent was the beneficial and registered owner of the suit motor vehicle registration number KBB 604X and that the said motor vehicle was driven and/or controlled by the respondent/defendant's duly licensed and authorized driver/agent.

4. That the plaintiff/appellant sustained injuries as a result of the said accident.

5. That the plaintiff/appellant was not the only passenger who sustained injuries and on board in the suit motor vehicle registration number KBB 604X.

6. That the suit motor vehicle lost control and veered off the road and landed into a ditch in the burning coffee farm hence causing the accident.

7. That the accident was self involving.

18. It was the Appellant's view that from the forgoing, the only issues left for determination by this court are as follows:-

a. Whether the appellant/plaintiff contributed to her injuries.

b. Who was to blame for the accident?

19. Regarding the first issue, it was submitted that based on the testimony of the Police officer, the issue whether the plaintiff was burnt while inside or outside the motor vehicle does not change the fact that the driver was to blame for pursuing the vehicle into the smoke negligently. It was noted that though the defendant/respondent alleged that the passengers, the plaintiff in particular sustained injuries while outside the Matatu, he never brought any witness or evidence to controvert the plaintiff statement/averments. It was therefore submitted that from the facts, it is clear that the defendant/respondent fabricated their evidence to allege that the plaintiff/appellant contributed to her injuries in order to deny that the accident happened from the negligence of their driver/agent.

20. As regards the issue of who is to blame for the accident, it was submitted that the defendants duly authorized driver/agent negligently ignored the passengers' pleadings to stop driving the vehicle through the dense smoke and carelessly pursued it in the burning farm after veering off the road and landed in a ditch, hence causing injuries to the passengers, the plaintiff in particular. It was submitted that the respondents' driver negligently exposed the passengers, in particular the plaintiff, in danger and caused the accident and that the above accident is self-involving and was solely caused by the careless driving and/or negligence of the respondent's duly authorized driver/agent.

21. It was therefore submitted that the appellants are entitled to 100% compensation from the respondent and the Court was urged to find that the appellant/plaintiff's appeal herein succeeds and that the appellant proved her case on a balance of probabilities.

22. As regards the quantum, it was submitted that the appellant/plaintiff's injuries were not disputed and from the treatment records and the medical report, the appellant/plaintiff sustained second degree burns on left lower limb calf region; severe burns from left ankle joint to left mid-thigh; severe burns on left upper limb from the elbow to the shoulder; and severe burns on left instep. It was submitted that the injuries were grievous in nature and upon examination by the medical report doctor, it was found that the plaintiff was of weak health and had scars on the injured area with a contracture of left lower limb knee joint which limited her left leg from stretching hence unable to walk.

23. Based on **Dennis O. Nyangilo Alias Otieno -vs- African Marine & General Engineering Company Limited Mombasa HCCC No. 468 of 2001** where the plaintiff was involved in an industrial accident and sustained second degree burns over his abdomen and right upper limb and trunk with contracture of right elbow, general damages was assessed at Kshs 600,000/- in a judgment delivered on 30th September, 2005. It was submitted that in this case a sum of Kshs 2,500,000 on general damages would adequately compensate the plaintiff for pain,

suffering and loss of amenities.

24. As for special damages it was submitted the Court ought to award Kshs. 56,740.00. The Appellant also prayed for costs and interests of the suit from the lower court.

25. On behalf of the Respondent, it was submitted that from the evidence, the Appellant did not prove negligence on the part of the Respondent. From the evidence presented by the Police Officer, it was submitted that the same exonerated the Respondent. In support of his submissions, the Respondent relied on **Treadsetters Tyres Ltd vs. John Wekesa Wepukhulu [2010] eKLR**, **Dare vs. Pulham (1982) 148, CLR 658 at 664**, **Farida Kimotho vs. Ernest Maina [2002] eKLR**, **East produce (K) Limited vs. Christopher Astiado Osiro Civil Appeal No. 43 of 2001** as well as sections 107, 108 and 109 of the ***Evidence Act*** and submitted that the causation of the accident by the Respondent was not established by the Appellant at all and equally the negligence of the driver of the subject motor vehicle was never established hence the trial court did not err in its decision.

26. As regards the quantum, it was submitted that the Appellant neither produced a death certify. According to the Respondent, he Appellant sustained soft tissue injuries and as such an award of between Kshs 90,000.00 and Kshs 120,000.00.

27. It was therefore urged that the appeal be dismissed with costs.

Determination

28. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."**

29. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

30. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

31. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

32. In this appeal, it is clear that its determination revolves substantially around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellant to prove his case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

> **"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."**

33. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

34. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

> **"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-**
>
> > **"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 probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."**

35. Therefore, as a general rule, the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Respondent chose to remain silent. In this case, the evidence was that PW1 received the information of the occurrence of the accident from the deceased. She did not himself witness the accident and no one else was called to testify as to how the accident occurred. The Appellants relied on the fact that the accident was reported to the police and a police abstract was issued. Similar circumstances faced **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** and he expressed himself as hereunder:

> **"In the instant case the plaintiff did not adduce any evidence beyond stating that the accident was reported to police and produced a Police Abstract of the accident and all that is recorded therein is the fact of an accident involving the deceased and the 1st defendant's motor vehicle which was being driven by the 2nd defendant. The burden of proof was on the plaintiff and she had to prove her case on a balance of probabilities. On the undisputed facts, it is entirely probable that the accident was caused by the negligence of the second defendant who offered not to adduce evidence. It is equally probable that it was caused by the negligence of the deceased. And it is equally probable that it was caused partly by the negligence of the deceased and partly by the negligence of the defendant. Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, the court must, not without a little anguish dismiss the plaintiff's suit on the ground that fault has not been established against the defendants be that as it may, it is enjoined."**

36. A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim and the name of the investigating officer. There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents.

37. In **Mary Wambui Kabugu vs. Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995**, it was held by the Court of Appeal that:

> **"The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the Appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed."**

38. In **Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR**, **Ibrahim, J** (as he then was) cited ***Charlesworth & Percy on Negligence***, 9th Edition at pg 387 inn which it is stated that:

> **"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."**

39. Similarly, in **Nickson Muthoka Mutavi vs. Kenya Agricultural Research Institute (2016) eKLR, Nyamweya, J** quoted ***Halsbury's Laws of England***, 4th Edition at paragraph 662 at page 476 where it is stated that:

> **"The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established."**

40. In the case of **Henderson vs. Henry E Jenkins and Sons [1970] AC 232 at 301** it was held that:

> **"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by the negligence on the part of the defendant. That is the issue throughout the trial, and in giving judgement at the end of the trial, the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by the negligence on the part of the defendant, and if he is not satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a *prima facie* inference that the accident was caused by the negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the *prima facie* inference. In this situation there is said to be an evidential burden of proof resting on the defendants."**

41. In **Simpson vs. Peat (1952) 1 All ER 447** it was held that errors of judgement do not amount to careless driving and that the mere fact that an accident occurs does not follow that a particular person has driven dangerously or without care and attention. That was the same position in **Rambhai Shivabhai Patel & Another vs. Brigadier-General Arthur Corrie Lewin [1943] 10 EACA 36** where it was held that the mere occurrence of an accident is not in itself evidence of negligence and that there must be reasonable evidence of negligence.

42. As stated hereinabove in ordinary cases a case such as the present one would fail for failure by the Appellants to prove that the accident was caused by the negligence of the Respondent. In that case there would be no evidence as to whether it was the deceased who was liable or the driver.

43. However, the Appellant relied on the doctrine of *res ipsa loquitor*. 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."**

44. Dealing with the said doctrine, the Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** expressed itself as hereunder:

> **"In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of *res ipsa loquitor*…If a "*matatu*" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle."**

45. However, in **Mary Ayo Wanyama & 2 Others vs. Nairobi City Council Civil Appeal No. 252 of 1998**, the same Court held that:

> **"It is not right to describe *res ipsa loquitor* as a doctrine as it is no more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was *prima facie* evidence of negligence and the onus lay on the defendant to rebut that *prima facie* case. It means the plaintiff *prima facie* establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety… *Res ipsa loquitor* applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made…The plaintiff must prove facts which give rise to what may be called the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence."**

46. It is therefore clear that the doctrine of *res ipsa loquitor*, if a doctrine it be, is not a doctrine that determines liability. It is simply a common sense rule of evidence and even where it applies the burden still lies on the plaintiff to prove facts which give rise to the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence. In **Susan Kanini Mwangangi & Another vs. Patrick Mbithi Kavita [2019] eKLR** the Court was clear in its mind that before the doctrine is invoked, there must be credible evidence upon which negligence can be inferred since the mere fact of the occurrence of an accident does not connote that someone was negligent.

47. In the submissions filed in this appeal, attempts were made to introduce evidence which was not part of the record. With due respect, parties ought not to sneak in evidential facts via submissions since submissions are not acts. In the said submissions, it was contended that in matters arising from the said incident, there were findings of liability against the Respondent. That was a matter of fact that either the witnesses in those other cases ought to have been called or the determinations on liability therein ought to have been brought either before the trial court or before this court. In the absence of the same, there is no material on the basis of which this court can find that there was in fact a finding of liability against the Respondent.

48. In my respectful view, this matter was conducted in a rather casual manner and having considered the facts of this case, I agree with the finding of the Learned Trial Magistrate that the Appellant failed to prove liability on the part of the Respondents and his case was properly dismissed.

49. Consequently, this appeal has no merit and the same is dismissed but as the Respondent failed to comply with the directions of this court to furnish the court with soft copies in word format, there will be no order as to costs.

50. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 15TH DAY OF MARCH, 2021

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Kariuki for the Respondent

CA Simon