



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL CASE NO. 270 OF 2014**

**HANNAH NYAMBURA** (suing as the.....**APPELLANT**)

Legal Representative of the estate of **WILSON KANGETHE NYAMBURA**)

**VERSUS**

**FRED OTIENO OGUNDA**.....**1<sup>ST</sup> RESPONDENT**

**ROTICH DAVID**.....**2<sup>ND</sup> RESPONDENT**

**(Being an appeal from the Judgment delivered on 24<sup>th</sup> June, 2014 by Hon. M. Murage (Mrs.) (Chief Magistrate) Chief Magistrate's Court at Milimani Commercial Court in CMCC No. 3345 of 2013).**

**JUDGMENT**

1. The Appellant filed suit as the legal representative of the deceased, Wilson Kangethe Nyambura who died in a road traffic accident on 23<sup>rd</sup> July, 2011. The Appellant blamed the accident on the alleged negligent manner in which the 1<sup>st</sup> Respondent drove motor vehicle registration No. KBG 352F which collided with motor cycle registration KMCP 508V. The 2<sup>nd</sup> Respondent was sued as the registered owner of motor vehicle.
2. The Respondents filed a joint Statement of Defence dated 14<sup>th</sup> August, 2013. The Respondents admitted the occurrence of the accident but denied any negligence on their part. It was stated that the accident was solely caused by the negligent manner the deceased was riding motor cycle.
3. The Appellant filed a reply to the defence and joined issues with the defence. The contents of the plaint were reiterated.
4. The case proceeded to a full hearing. The Appellant called two witnesses. The Respondent did not call any witness. At the conclusion of the case the trial magistrate dismissed the Appellant's case. That is what triggered this Appeal.
5. The Appellant raised five grounds of appeal which can be summarized into two as follows:
  - 1) That the dismissal of the Appellant's suit was against the weight of the evidence.
  - 2) That the trial magistrate failed to consider the doctrine of *Res ipsa loquitur*.
6. The Appeal was canvassed by way of written submissions which I have duly considered.
7. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

**“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 demeanor of a witness is inconsistent with the evidence in the case**

generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)".

8. The Appellant, Hannah Nyambura (PW2) testified that she went to the scene after she was informed of the accident. She found the deceased had already passed away.

9. P.C Nicodemus Anunda (Pw1) testified on behalf of the Investigating Officer. His evidence was that the accident occurred at a junction in Moitoni area of Karen. His further evidence was that the motor vehicle was the one on the main road. He further testified that the accident occurred in a residential area where reasonable speed is expected. The police abstract was produced as an exhibit. The same reflects that the deceased was fatally injured in the accident which occurred at Moitoni/Nandi road junction and that the accident is pending under investigations. Pw1 further testified that an inquest file was opened.

10. The evidence of Pw1 and Pw2 confirms that the accident occurred. The police abstract reflects the motor vehicle and the motor cycle details herein and the driver of the motor vehicle as Fred Otieno Agunda the 1<sup>st</sup> Respondent. The Copy of Records from Kenya Revenue Authority reflects the registered owner of the motor vehicle as at 8<sup>th</sup> June, 2012 as Equity Bank Ltd & Mwema Fredrick. There is no mention of the 2<sup>nd</sup> Respondent in the evidence adduced by Pw1 & 2 or in the Police abstract and Copy of Records.

11. Both PW1 & PW2 were not at the scene of the accident at the material time. No eye witness was called. The evidence adduced by Pw1 and Pw2 confirms the occurrence of the accident but there is no evidence that reflects the manner in which the accident occurred. There is no evidence that blames the driver of the motor vehicle in any way. During cross-examination, the evidence of Pw1 was that the motor vehicle was on the main road. The motor vehicle had the right of way. Although the accident is stated to have occurred in a residential area where driving in a reasonable speed is expected according to Pw1, there is no evidence to show what kind of speed the motor vehicle was being driven. I find no evidence of negligence on the Respondents' side.

12. The Plaintiff relied on the doctrine of *res ipsa loquitur* to make the case that the Respondents were liable. The **Black's Law Dictionary (8<sup>th</sup> page Ed.)** page 1336 defines *res ipsa loquitur* as, **"the thing speaks for itself."** It goes on to explain that, **"The doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a prima facie case"**.

13. In *Nandwa v Kenya Kazi Limited* [1988] eKLR, the Court of Appeal cited, with approval, a portion *Barkway v South Wales Transport Company Limited* [1956] 1 ALLER 392,393 B on the nature and application of the doctrine of *res ipsa loquitur* as follows:

**The application of the doctrine of *res ipsa loquitur*, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.**

(See also *Margaret Waithera Maina v Micheal K Kimaru* [2017] eKLR, Court of Appeal and *Beatrice Kavindu Musembi* (suing as the legal representatives of the Estate of *Peter Muteti Musembi – Deceased*) V *Patrick Mbithi Kavita* [2019] eKLR)

14. The doctrine of *Res ipsa loquitur* does not have to be pleaded. This was stated by the Court of Appeal in *Margaret Waithera Maina V Michael K. Kimaru* [2017] eKLR Cited by the plaintiff that;

**25.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. 91/1987 for the reason that evidence is not to be pleaded. Also see *Bennet v 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"**.

15. In the case at hand, the occurrence of the accident herein was at a junction. One cannot deduce from the circumstances of the accident who the negligent party was.

16. No issue was raised in respect of the quantum of damages awarded.

17. With the foregoing, I find no merits in the Appeal and dismiss the same with costs.

Date, signed and delivered at Nairobi this 3<sup>rd</sup> day of June, 2021

**B. THURANIRA JADEN**

**JUDGE**