**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**CIVIL APPEAL NO. 125 OF 2019**

**JANE WANJIKU NGUGI.....1ST APPELLANT**

**ANTONY KIARIE MBURU..... 2ND APPELLANT**

***(Suing as legal administrators of the Estate of JOHN NDUNG'U MBURU, deceased)***

**VERSUS**

**ANNE NYANGIGI GITAU.....RESPONDENT**

***(Being an appeal from the original judgment and decree of Hon. L.M. Wachira, Chief Magistrate delivered on 5th August 2019 in Gatundu Civil Case No. 308 of 2018)***

**CORAM: LADY JUSTICE RUTH N. SITAT**

**JUDGMENT**

**The Appeal**

1. The appellants, being dissatisfied with the decision of the trial court aforementioned lodged this appeal on 19th August 2019 seeking *inter alia* that the judgment of the lower court be set aside and the court enters judgment in favour of the appellants based on grounds THAT:

> **a) The learned trial judge erred in law and fact in disregarding statements made on oath by PW3 and which was uncontroverted evidence in favour of mere denials written in the defence.**
>
> **b) The learned magistrate erred in fact and law by disregarding the doctrine of Res Ipsa Loquitor and the irresistible inference that the Respondent was to blame for the accident despite there having been no eye witness.**
>
> **c) The learned magistrate failed to scrutinize and keenly evaluate the evidence placed before her apparently to arrive at a preconceived determination.**

**Background**

2. The appellants had filed a suit by way of a plaint in the lower court against the respondent where they sought both general and special damages together with costs of the suit and interest on the same arising out of an accident that occurred on or about the 9th day of February, 2018 involving the deceased, who was a lawful passenger on motor bike registration number KMDH 596N; and the respondent's motor vehicle registration number KCN 372S. The appellants claimed that the accident occurred along Kiganjo-Munduro Road, where the respondent or her driver, agent and or servant allegedly drove, managed and/or controlled the said motor vehicle so carelessly, negligently and/or recklessly that it left its lane in high speed knocking down and killing the deceased on the spot. The appellants stated that the accident was caused by the negligence of the respondent and/or her driver, servant and/or employee and particularized the said negligence at paragraph 4 of the plaint.

3. The appellants stated that at the time of his death, the deceased was 33 years of age, enjoyed good health and lived a vigorous life and that the 1st appellant was solely dependent on the deceased.

4. The suit was defended by the respondent who filed a statement of defence dated 27th September 2018 denying the contents of the plaint

therein and stating in the alternative that if any accident occurred, which was denied, then it was the driver of motorbike registration number KMDH 596N who was negligent and who solely caused and/or substantially contributed to the accident.

5. The suit proceeded to a full hearing and at the conclusion of the trial the learned trial magistrate held that no liability had been proved as against the respondent and dismissed the appellants' suit against the respondent with costs.

6. It is the said judgment that forms the basis of the instant appeal. The appeal was disposed by way of written submissions which are on record.

**Duty to this Court**

7. Firstly, as a first appellate court, this court has the onerous duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis while bearing in mind that this court did not have an opportunity to hear the witnesses first hand. This is captured by ***Section 78 of the Civil Procedure Act*** which espouses the role of a first appellate court which is to:*'…… re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions*.' This provision was buttressed by the Court of Appeal in the case of ***Peter M. Kariuki v Attorney General [2014] eKLR*** where it was held that:

> ***"We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See* NGUI V REPUBLIC, (1984) KLR 729 and SUSAN MUNYI V KESHAR SHIANI, Civil Appeal No. 38 of 2002 *(unreported)."***

**The appellant's submissions**

8. The appellants submitted that failure to produce an eye witness did not warrant an automatic dismissal of the suit and that they presented sufficient evidence to support their claim. The appellants stated that they were able to demonstrate that an accident occurred involving the motor cycle the deceased was riding on and the respondent's motor vehicle as per the copy of the police abstract which was produced without any objection from the respondent and that the same was not rebutted. The appellants submitted that the respondent acknowledged that he was the driver at the time and that he was the one that knocked down and fatally injured the deceased. The appellants stated that they produced the post mortem report and death certificate proving that the deceased died instantly from the injuries sustained and they further produced a copy of the motor vehicle records and proved ownership of the suit motor vehicle which was not denied. The appellants further submitted that they particularized their specialized damages and proved the same by way of receipts amounting to Kshs. 57,100/- which the trial court declined to award. In sum, the appellants submitted that they established a prima facie case against the respondent.

9. The appellants submitted that the evidence of PW3, though not being an eye witness account was an honest account on what he had seen confirming that there was an accident and placed the respondent's vehicle squarely at the scene of the accident. The appellants added that the learned magistrate erred by failing to attach any probative value to PW3's testimony

10. The appellants submitted that the very nature and circumstances surrounding the accident all pointed to negligence of the respondent and submitted that various courts had authoritatively held that where evidence is perceived to be insufficient and scanty, the court could infer negligence from the circumstances of the case. It was the appellants' submission that from the testimony of the respondent, he swerved from the left side of the road to the right where he ploughed through the deceased motorcyclist and proceeded to hit an electricity pole on the opposite side of the road. The appellants added that if at all the respondent's motor vehicle was not speeding as he claimed, then he could have had enough time to spot the deceased's motorcycle when it allegedly marginally strayed to his lane to completely avoid a collision.

11. The appellants also submitted that the respondent's driving and alleged evasive action was dangerous, imprudent and amounted to a breach of care to the deceased and was a depiction of a negligent driver totally oblivious of his duty of care towards other road users on the said road. The appellants stated that from the death certificate, the deceased died as a result of blunt traumatic head injury and it was unlikely that a man hit by a slow moving vehicle would sustain such severe injuries and die on the spot. The appellant added that it also beats logic how a slow moving vehicle would shatter into three electricity poles. It was the appellants' contention that even without evidence as to the cause of the accident, such a devastating impact would only be occasioned by a vehicle that was being driven at a manifestly high speed by a driver who was not in control of the motor vehicle. The appellants stated that the doctrine of Res Ipsa Loquitur applied even though not pleaded.

12. The appellants further submitted that the respondent relied on particulars of the deceased's negligence but he did not call any witnesses or place any evidence before the court in support of the allegations.

13. The appellants stated that the trial court's decision to absolve the respondent from any blame occasioned great miscarriage of justice to the appellants.

**The respondent's submissions**

14. The respondent submitted that she did not deny occurrence of the accident involving her motor vehicle registration number KCN 372S and that what was denied was the manner of occurrence of the accident as claimed by the appellants. The respondent submitted that the appellants' attempt to prove the cause of the accident by the evidence of PW3 did not succeed because his evidence was hearsay. The respondent urged the court to note that the trial court had an opportunity to see PW3 and assess his demeanor and that from the proceedings of the lower court, the court should note the disoriented demeanor of the witness while responding to questions posed to him.

15. The respondent further submitted that the appellants did not make a prima facie case and even if the same was made, it was effectively rebutted by the respondent and that DW1's testimony demonstrated that he met the test of a prudent driver and that he was permitted to

deflect his course which he did to avoid the cyclist. The respondent added that the accident occurred because the motor cyclist resumed his lane making the accident inevitable.

16. On the doctrine of Res Ipsa Loquitor, the respondent submitted that the same depended on the absence of explanation of the accident and could not be relied upon as the respondent gave evidence to explain how the accident occurred.

17. The respondent further submitted that the case law cited by the appellants were distinguishable from the case before the court and urged the court to note the distinctions. The respondent urged the court to dismiss the appeal with costs.

**Issues for Determination**

18. I have gone through the record and written submissions together with the authorities cited therein by both parties and in my considered view, the following are the issues for determination:

**a) Whether the trial court erred in not finding the respondent liable for the accident.**

**b) If (a) is in the affirmative, what is the appropriate quantum of damages to be awarded to the appellants.**

**Whether the trial court erred in not finding the respondent liable for the accident**

19. From the record and from the submissions of the appellants, there was no eye witness to the accident. The appellants urged the court to give the evidence of PW3 more probative value and weight. From PW3's testimony, he stated that he "heard a vehicle going downhill" and then heard a loud bang and the lights went off. PW3 stated that he went out and saw a vehicle that had knocked the electricity post. PW3 added that the road was steep from Mundoro towards Kiganjo and "**that is how the motor vehicle was moving**". PW3 added that the motor cycle was moving from Kiganjo towards Mundoro and that he blamed the driver of the motor vehicle. Even though the court did not see PW3 testify, I do not find his evidence credible and if anything, the said evidence begs for more questions than answers. For starters, how did he know how the vehicle was moving and yet from his testimony he did not see but only 'heard' it? How did he know that the vehicle he had "**heard moving downhill**" was the same double cabin that was involved in the accident if he did not see it? How did he know that the motor cycle was moving from Kiganjo towards Mundoro and yet from his testimony he only got out of his house after the accident happened? How could he blame the driver of the motor vehicle and yet he did not witness the accident happening and only came to the scene after the accident had happened? The evidence of PW3 cannot be given much weight as was submitted by the appellants and by PW3's own admission, he was just giving his opinion. With all due respect to the appellants, no reliance can be placed on PW3's testimony that can find the respondent liable for the accident and I am in agreement with the learned trial magistrate that PW3 was no expert in road accidents and he could not give an opinion as to what he thought may have happened which could help the trial court make a determination on liability.

20. The appellants invoked the doctrine of *Res Ispa Loquitor* to prove negligence on the part of the respondent's driver by stating that the scene of the accident '**spoke for itself'** as to how the accident happened and the court could infer negligence on the part of the respondent's driver. On her part, the respondent submitted that the doctrine depended on the absence of explanation of the accident and could not be relied upon as the respondent gave evidence to explain the cause of the accident

21. The 2nd appellant who testified as PW2 stated that he went to the scene after the accident happened and found the body of the deceased and the motor cycle on the road. The motor vehicle was off the road and "**facing upwards and appeared to have hit a post**". PW3 testified that he found the vehicle was off the road and had knocked down an electricity post and that the motor cycle and the deceased were on the road.PW3 added that the opposite side of the road had a bump. **Paul Kuria Mungai,** testified as DW1 and stated that he was driving the motor vehicle when the motor cycle encroached to his lane and swerved. DW1 stated that the motor cycle had hit the bump and lost control and came to his lane. DW1 added that he swerved to the other lane to avoid a head on collision with the motor cycle which was now on his lane but then the motor cycle swerved back and the collision was inevitable. DW1 stated that the case was still pending with the police and that he recorded a statement with them but the police have never followed up with him. DW1 denied that he lost control and went to the lane of the motor cycle and then knocked the motor cycle and then off the road to hit the electricity post. DW1 stated that the motor cycle rested in the middle of the road after the accident.

22. The Court of Appeal, in the case of ***Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR*** *(*WAKI, NAMBUYE & KIAGE, JJ.A) held as follows on res *ipsa loquitur*:

> ***"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 Charlesworth & 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."***

***24. The same sentiments were expressed by Hobhouse L.J. in the case of Ratcliffe v. Plymouth & Tobay HA 1998 PIQR 170:***

***".....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."***

***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"***

***Whether it be referred to as a maxim, doctrine, principle or merely a rule of evidence affecting the onus of proof, it is our conclusion, in view of the learning cited above, that it was unnecessary to apply it in this matter since the negligence of the respondent's driver was proved on a balance of probability."***

23. The Court of Appeal, differently constituted in the case of ***Fred Ben Okoth v Equator Bottlers Limited [2015] eKLR*** (MUSINGA, GATEMBU & MURGOR, JJ.A) held that:

***"Proof of causation is crucial to the success of most of the actions in tort, except in instances where the doctrine of "res ipsa loquitur" is applicable."***

24. Can negligence be inferred on the part of the respondent from the circumstances of this case? I do not think so. The cause of the accident is not so obvious as the appellants would want the court to believe. The police abstract on record indicates that the matter was still under investigations and in the absence of an independent witness to explain or shed light as to how the accident happened other than DW1, it makes it even harder for the court to hold that negligence can be inferred on the part of the respondent by way of '**common sense'**. The scene of this accident required more than a lay person or the court to determine whether or not the motor vehicle was at high speed; what was the point of impact and more so an expert opinion from investigative authorities on how the accident might have happened based on the resting positions of the motor vehicle, the motor cycle and the deceased. The situation is not made any easier by the fact that the accident happened at around 9pm at night. The evidential burden of proof was on the appellants to call an expert or independent witness and in the absence of that, then the evidence of DW1 gives the best and direct account as to how the accident happened and I find no reason to disbelieve that evidence on appeal. In my humble view, the appellants did not discharge the burden of proof as they failed to produce sufficient evidence and as ***section 108 of the Evidence Act*** provides, the burden lies on that person who would fail if no evidence at all were given on either side.

25. This being the case, I find that the learned trial magistrate's decision on liability was sound and judicious and I find no reason whatsoever to interfere with the same.

**If (a) is in the affirmative, what is the appropriate quantum of damages to be awarded to the appellants**

26. Having found that the first issue is in the negative, the court can only determine whether the quantum of damages that the learned trial magistrate could have awarded was based on the correct principles of law. (See **Kneller J.A** in the Court of Appeal decision of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** at p. 730)

27. The trial court stated it would have awarded Kshs.10,000/- for pain and suffering, taking into account the fact that the deceased died on the same day of the accident. In my considered view, this is nominal and standard compared to awards made in the past under this head in respect of persons who died instantly. (See ***Jennifer Odhiambo and Another*** *v.* ***Elizabeth Mbuka Acham & Another*** *and* ***Meneza Adhiambo*** *v.* ***Agnes Susan Wairimu & others*** where Kshs.20,000/= and 30,000/= respectively was awarded.

28. The trial court also stated it would have awarded Kshs. 100,000/- under the head of loss of expectation of life noting that this was a conventional figure. This is correct as most comparable awards have had the same figure and I see no reason why the court should interfere with the same.

29. On loss of dependency, the trial court noted that as per the evidence, the deceased was a trader at Gikomba selling ladies' clothing and since there was no documentary evidence, she adopted the legal minimum wage of Kshs. 12,926.55 for the year 2018 which is applicable within Nairobi County where Gikomba Market was situated. This was in line with the Court of Appeal decision in ***Jacob Ayiga Maruja & Another v Simeone Obayo KSM CA Civil Appeal No. 167 of 2002 [2005] eKLR*** where it was held that *"****We do not subscribe to the view that the only way of proving earnings is equally the production of documents.****"* I find that the learned trial magistrate applied the correct principles in arriving at that multiplicand.

30. The trial court adopted a dependency ratio of 2/3. I am satisfied this was sound as she took into consideration the fact that the deceased would have spent most of his money on his family and little on himself. I find that she applied the correct principles in determining the said dependency ratio

31. The trial court further adopted a multiplier of 25 years taking into account the deceased's age, the common retirement age, vicissitudes of life, standards of living and general life expectancy in Kenya in arriving at the decision. These indeed are the correct factors in the determination of the correct multiplier and I find no reason to disturb this finding.

32. Lastly the trial court noted the receipts produced by the appellant in court amounting to Kshs. 57,100/- and held that she would have allowed the same in special damages. This is the position in law on special damages that they must be pleaded and strictly proved which was the case and I have no reason to interfere with the same.

33. In the foregoing I find that the trial court's final tabulation for loss of dependency as 25 x 12 x 12,9626.55 x 2/3 = Kshs. 2,585,310.00 and the other awards was sound and judicious as it was founded on the correct principles and factors required by the law and as enunciated by the Court of Appeal in the case of ***Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727*** **(supra)** on the assessment of damages.

**Conclusion and Disposition**

34. For the reasons given above, I find and hold that this appeal lacks merit. The same be and is hereby dismissed in its entirety. The decision of the trial court accordingly upheld on both liability and quantum.

35. As regards costs, I order that each party bears its own costs for this appeal.

Judgment written and signed at Kapenguria.

**RUTH N. SITATI**

**JUDGE**

**Judgment delivered, dated and countersigned in open court at Kiambu on this 11th day of June, 2020**

**.....**

**CHRISTINE W. MEOLI**

**JUDGE**