REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NUMBER 22 OF 2011

BETWEEN

CHARLES KAVAI [SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE KEVIN KIOKO CHARLES].....APPELLANT

-VERSUS-

BONFACE MUTUNGA.....1ST RESPONDENT

KATHI NAKAKOKA BUS SERVICE.....2ND RESPONDENT

**[*Being an appeal from the judgment and decree of the Hon. J. Omange*

Principal Magistrate at the Chief Magistrates Court at Machakos Law

Courts issued on the 7th February 2011 in CMCC number 1261 of 2009]**

BETWEEN

CHARLES KAVAI [SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE KEVIN KIOKO CHARLES].....PLAINTIFF

-VERSUS-

BONFACE MUTUNGA.....1ST DEFENDANT

KATHI NAKAKOKA BUS SERVICE.....2ND DEFENDANT

JUDGEMENT

1. This appeal arose from the judgement of the Learned arises from the decision of the Chief Magistrates Court at Machakos Courts (**Omange, PM**) issued on the 7th February 2011 in CMCC number 1261 of 2009.

2. In the said case, the Appellants had contended that on or about 21st February, 2009 at around 3.00pm along Ilangine-Tawa Road, the deceased was lawfully and carefully riding his bicycle on his correct side of the road when the 1st Defendant's driver, servant or agent so negligently, recklessly, drove, managed and or controlled motor vehicle registration number KBA 187A and as a result it knocked down the deceased killing him instantly. The Appellant particularised the facts constituting negligence as well as special damages in the total sum of Kshs 39,570.00. He also particularised the facts pursuant to the ***Fatal Accidents Act*** and claimed both general and special damages.

3. On their part the Respondent filed a defence in which they denied being the owner of the vehicle in question as well as the fact of driving the same. They similarly denied that the deceased was involved in the said accident and denied the allegation of negligence against them and instead blamed the negligence of the deceased as the cause of accident particulars where they gave and sought that the suit be dismissed.

4. In support of the case, the Appellant called one witness, **Charles Onzere Kavai**, the Appellant who testified that on 21st February, 2009 he was on his usual duties while the deceased, his son had gone to the market. He then received a report from the Chief that the deceased had been hit by a vehicle along Itangine-Tawa Road and that he died on the spot and that his body had been taken to the mortuary by the culprits.

5. According to the Appellant, the accident was reported and the police found that the vehicle was at fault. In support of the case, the Appellant exhibited the police abstract report, and the receipt for the same, the death certificate, the receipts for the expenses, the search and the receipt for the same and the report card.

6. As no evidence was adduced on behalf of the Respondents, the case for the Appellant was closed after his testimony.

7. In her judgement, the Learned Trial Magistrate dismissed the same on the ground that the Appellant failed to prove liability on the part of the Respondents.

8. In this appeal it is submitted on behalf of the Appellant that since the respondent failed to call any witness before the trial court, the evidence and testimony before the trial court remained uncontroverted. It was contended that the defence filed by the respondents before the trial court remains mere statements of fact with no probative value. It was submitted that since the Appellant pleaded the doctrine of *res ipsa loquitor*, that had the effect of shifting the burden of proof to the Respondents, requiring the Respondents to counter the said inference by producing evidence to the contrary. In support of this position the Appellant relied on **Susan Kanini Mwangangi & Another vs. Patrick Mbithi Kavita [2019] eKLR**. It was also submitted that the award was inordinately low and that this Court ought to interfere with the same.

Determination

9. 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."**

10. 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.

11. 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."**

12. 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."**

13. In this appeal, it is clear that its determination revolves around the question whether the appellant proved his 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."**

14. 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."**

15. 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."**

16. 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 the Appellant received the information of the occurrence of the accident from the Chief. He did not himself witness the accident. It is not clear whether the said Chief himself did witness the same. No one was called by the Appellant to testify as to how the accident occurred. The Appellant 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."**

17. 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. That document could not therefore be the basis of finding liability on the part of the Respondents.

18. 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."

19. 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."**

20. 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."**

21. 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."**

22. 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.

23. As stated hereinabove in ordinary cases a case such as the present one would fail for failure by the Appellant 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.

24. 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."**

25. 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."

26. 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."

27. 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.

28. 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.

29. Consequently, this appeal has no merit and the same is dismissed but with no order as to costs.

30. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 1st day of December, 2020

G V ODUNGA

JUDGE

Delivered the presence of:

Mr Kamau Muturi for Mr Mukele for the Appellant

CA Geoffrey