



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 87 OF 2013

RICHARD KORIR.....APPELLANT

VERSUS

BOLPAK TRADING CO LTD.....1ST RESPONDENT

BEN MWATHI KARIITHI.....2ND RESPONDENT

(Being an appeal from the decision of the Honorable Chief Magistrate Maryanne Murage on 27.3.2013 in Machakos Chief Magistrates Court Civil Case No 220 of 2009)

JUDGEMENT

Background

1. According to the plaint filed in the subordinate court, the Appellant was a passenger in a Motor Vehicle registration number KAQ 237V registered in the names of the 1st Respondent and beneficially owned by the 2nd Respondent. While he was travelling on 12th June, 2008 along Mombasa- Nairobi Road, the respondents' vehicle was involved in an accident and as a result the Appellant suffered severe and extensive bodily injuries. The Appellant claimed damages and ***pleaded vicarious liability*** against the Respondents.
2. In their statements of defense, the Respondents denied the accident; the 1st respondent denied the cause of action against it for as at the date of the accident, the vehicle had been sold to the 2nd respondent. The 1st respondent denied the fact that the vehicle was being driven by its driver. The 2nd respondent denied the injuries and both respondents prayed that the suit be dismissed.
3. After hearing the matter, the learned magistrate held that the appellant had failed to discharge his duty of proving his case on a balance of probabilities and dismissed the suit which decision has precipitated this appeal.
4. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal dated 7th May 2013. The said appeal was filed outside time and without requisite leave and is liable to be dismissed in limine.

Submissions

5. Counsel for the appellant, B.M Mungata and Co Advocates, augmented these grounds and submitted that because the respondents called no witnesses, the appellant's evidence was uncontroverted and therefore the court should proceed to make a finding that the appellant proved negligence on the part of the 2nd respondent. He relied on the case of **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another (2015) eKLR**. Counsel for the appellant contended that the court award the damages as pleaded in the plaint.
6. Manthi Masika and Co Advocates for the respondent in their written submissions supported the findings of the trial magistrate. Counsel pointed out that the appellant had failed to demonstrate how the trial magistrate erred. Further that the appellant did not bring sufficient evidence to discharge their burden thus the appeal has no merits and should be dismissed. He submitted that in the alternative, the court orders for a pre trial in the Chief Magistrates Court since the errors of the trial magistrate should not be visited on the respondent.

Analysis

7. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see **Selle v Associated Motor Boat Co. [1968] EA 123**).

8. The principal witness on the issue of liability was the Appellant who is a police officer, PC Richard Koros (PW 1) attached to Salama Police Station who confirmed that an accident took place on 12.6.08 along Mombasa-Nairobi road and involving the vehicle KAQ 237V and that the said vehicle overturned. He testified that he was a passenger in the said vehicle and that he suffered injuries as a result of the accident. He produced the P3 form, the treatment notes and copy of search as exhibits and stated that the vehicle was being driven at high speed. On cross-examination, he testified that he had been given a lift and there was heap of soil on the road and the said soil made the vehicle overturn, however he did not blame the contractor though there were no warnings of diversions on the road. The Appellant closed his case and the case against the 1st defendant was withdrawn. The 2nd defendant did not testify and the trial court reserved the suit for judgement.

9. Was liability proved in these circumstances? Sections 107, 108 and 109 of the *Evidence Act (Chapter 80 of the Laws of Kenya)* places the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the Appellant to prove liability on the balance of probabilities. Although, PW 1 did not investigate the accident, he produced the police abstract which confirmed the fact of the accident, the date it occurred, the fact that he was a passenger and that he sustained injuries, however the cause of the accident was unknown. The police abstract relied on was produced.

10. The question then is whether the appellant established negligence by establishing that an accident occurred. In other words, could the appellant rely on the doctrine of *res ipsa loquitur* to make the case that the respondent was liable?

11. In *Nandwa v Kenya Kazi Limited [1988] eKLR*, Court of Appeal (Gachuhi JA) 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

12. As the Court of Appeal explained, once the plaintiff establishes a prima facie case, the defendant must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on its part. Apart from the fact that the accident took place, the evidence of PW 1 as to how the accident could have occurred is non-existent as he did not investigate the matter or provide an official record of the accident which showed, for example, the condition of the road, the speed of the driver from which the court could infer negligence on the part of the respondent.

13. The Pw1 in his testimony stated that there was a heap of soil on the road and that there were no warning signs. Could it be that the contractor could be blamed? We cannot tell because Pw1 has not brought evidence from the scene of the accident on the position that the vehicle was found so as to enable court make an inference. Even though the 2nd Respondent did not adduce evidence the onus of proof still lay upon the Appellant to discharge.

14. In *Dorcias Wangithi Nderi v Samuel Kiburu Mwaura & Another [2015] eKLR*, the court observed that:

The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2nd respondent.

15. I agree with this decision but I would distinguish it from the present case because in this case and the others cited by the appellant there was evidence of how the accident occurred and the issue before the court was how to apportion liability between the defendants. In this case, there was no evidence on how the accident could have occurred and in the absence of such evidence, I find and hold that the appellant failed to prove negligence against the respondent on the balance of probabilities. I would therefore dismiss the suit for want of proof. Further it is noted that the judgement by the trial court was delivered on 28/03/2013 while the Memorandum of Appeal was filed on 7/05/2013 outside the stipulated period and there is no evidence of whether leave was obtained to lodge it out of time.

Determination

16. The appeal is dismissed. The judgment of the subordinate court is upheld. Since the appellant is a civil servant, I find it is fair and just to order that each party bears their own costs of this appeal.

It is so ordered.

Dated and Delivered at Machakos this 21st day of January 2019.

D.K. KEMEI

JUDGE