REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CIVIL APPEAL NO. 94 OF 2016

MUTINDA MUTUKU.....APPELLANT

VERSUS

ANNE NDUKU MUTUA.....1ST RESPONDENT

KIMEU NDONYE.....2ND RESPONDENT

(Being an appeal from the whole judgement delivered by the

Honourable L. Simiyu, Senior Resident Magistrate in Machakos

Chief Magistrates Court Civil Suit No 708 of 2015 on 25.8.2016)

JUDGEMENT

1. According to a plaint filed in the subordinate court, the appellant was a passenger in a Motor Vehicle registration number KAC 912V registered in the names of the 1st respondent and beneficially owned and controlled and in custody and possession of the 2nd respondent. While he was travelling on 4.1.2015 along Nairobi- Mombasa Road, the respondents' vehicle was involved in an accident and as a result the appellant suffered severe injuries. The appellant claimed damages and **pleaded *res ipsa loquitor***.

2. The 1st Respondent did not file a defence. In his statement of defense, the 2nd Respondent denied the accident and further denied the fact that the vehicle was being driven by him and denied the applicability of *res ipsa loquitor*. The 2nd respondent denied the injuries and prayed that the suit against him be dismissed. He pleaded that the accident was caused or substantially contributed by the appellant by exposing himself to danger.

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 13th September 2016.

5. Counsel for the appellant, Sila and Co Advocates, augmented the grounds of appeal and submitted that the grounds of appeal are on the issues of liability and quantum. On the issue of liability, counsel submitted that the trial magistrate in holding that failure to call the investigating officer was fatal erred because the appellant was an eye-witness and therefore his evidence was sufficient and there was no need to call the investigating officer; therefore the court should proceed and make a finding of liability of 100% on the part of the 2nd respondent and set aside the finding of the trial court. On the issue of quantum, counsel submitted that the amount of Kshs 2,000,000/- ought to have been awarded and cited the case of **John Joel Koskei v Kenya Power & Lighting CO Ltd, Nakuru HCCC 171 of 1998** .

6. Counsel for the Respondent has not filed any submissions.

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 or not to uphold the judgement. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**.

8. The principal witness on the issue of liability was the Respondent who was PW 2. He testified that he was a passenger in the vehicle KAC

912V and that the driver in an attempt to avoid a head on collision with an on-coming vehicle swerved to the right as a result of which the vehicle fell outside the road and he suffered injuries as a result of the accident. He produced the abstract, copy of records and receipts for treatment. On cross-examination, he testified that he had been given a lift by his neighbour and who was overtaking before the accident occurred. The Appellant closed his case and one witness testified for the Respondent's Dw1 was the driver of the accident vehicle who testified that the appellant was a non-fare paying passenger aboard the accident vehicle and that the said vehicle was hit by a truck from behind and as a result it was shoved to the right side of the road and rolled and fell on the right.

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 2 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. The officer who investigated the cause of the accident did not testify.

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 loquitor* to make the case that the respondent was liable?

11. In the case of ***Barkway v South Wales Transport Company Limited*** **[1956] 1 ALL ER 392**, **393 B** the nature and application of the doctrine of *res ipsa loquitur* was stated 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. Apart from the fact that the accident took place, the evidence of PW.2 as to how the accident could have occurred is non-existent as the evidence of the person who did investigate the matter was not provided neither was there 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 2nd Respondent in his testimony stated that there was a truck that hit him from behind and shoved his vehicle off the road. Could it be that the truck could be blamed? We cannot tell because there is no evidence from the scene of the accident on the position that the vehicle was found so as to enable court make an inference.

14. In **Dorcas 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. In this case, there was no evidence on how the accident could have occurred. The driver of the vehicle indicated that he was hit from behind hence the evidence of the investigation was crucial so as to enable court make an inference of liability for negligence and to dislodge two different theories of the cause of the accident that were evident from the testimonies of the Appellant and the Respondents. In the absence of such evidence, I find and hold that the appellant failed to prove negligence against the respondents on the balance of probabilities. I would therefore agree with the findings of the trial court and dismiss the suit for want of proof. Further there was no evidence presented as to whether the Respondents or any other person was charged with a traffic offence.

16. On the issue of Liability, the appellant has cited the case of **John Joel Koskei v Kenya Power & Lighting Co. Ltd [2005] eKLR.** I agree with the reasoning of the case but dispute it's applicability for the reasons that the matter related to a suit against an employer; it related to the compensation from an employer for injuries occasioned as a result of the an accident arising from the use of a faulty motor-cycle that was provided by the employer

17. As regards the issue of quantum of damages, Learned Counsel for the Appellant relied on the case of **John Joel Koskei =Vs= Kenya Power & Lighting Co. ltd – NKU HCC No. 171 of 1998** where a Plaintiff who sustained a fracture of skull, two broken teeth and soft tissue on the knee was awarded Kshs.1,700,000/= general damages. The Appellant herein was admitted at Kenyatta National Hospital for 15 days having sustained several injuries namely a degloving injury to the scalp, open skull fracture, bruises to the face, blunt chest injury, blunt injury to both shoulders, blunt injury to the right waist joint and blunt injury to right leg. Indeed the injuries sustained by the Appellant were more or less similar to those in the cited authority and that due to effects of inflation the award of Kshs. 2 million proposed by the Appellant's Counsel was reasonable. Had the appeal succeeded then I would have awarded the sum of Kshs. 2 million as general damages and set aside the trial court's award of Kshs.800,000/=. For special damages the sum of Kshs.9,250/= having been specifically pleaded and proved would have been awarded.

18. The upshot is that the appeal is devoid of merit and is dismissed with costs. The judgement of the subordinate court is upheld.

It is so ordered.

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

D.K. KEMEI

JUDGE