REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 104 OF 2016

DANIEL KYALO MUTUKU (Suing as the

Legal representative of the Estate of

ALEX MAKAONI MUTUKU (Deceased) .....APPELLANT

VERSUS

1. HAKIKA TRANSPORTERS SERVICES LIMITED .....1ST RESPONDENT

2. LEONARD KAGIRI MUTUA .....2ND RESPONDENT

(An appeal from the judgment and decree of Hon. N.Njagi in Msa CMCC No. 197 of 2014 made on 26/7/2016]

J U D G M E N T

1. The appellant was the plaintiff before the trial court. By a plaint dated 7th February, 2014, the appellant sued the respondents claiming both special and general damages on behalf of the estate of the late **Alex Makaoni Mutuku ("the deceased")** for the death arising out of a road traffic accident that occurred on 29th August, 2013.

2. The appellant alleged that on the material date, the deceased was lawfully riding motorcycle reg. no. KMCU 461 H along Mombasa – Nairobi road when an accident occurred between the said motorcycle and the 1st respondent's motor vehicle reg. no. KTCB 214 K ZB 3163 at mainland.

3. The plaintiff set out what he considered to be the particulars of negligence of the 2nd respondent who was at the time driving KTCB 214 K ZB 3163 owned by the 1st respondent. He set out the particulars of special damages and those pursuant to both the **Law Reform Act** and **Fatal Accident Act.**

4. The respondents defended the suit vide their statement of defence dated 27th February, 2014. They denied the appellant's claim and blamed the deceased for the accident. They set out therein what they considered to be the particulars of the deceased's negligence. They prayed for the suit to be dismissed.

5. After trial, the trial court found that the plaintiff had failed to prove the claim and dismissed the suit with costs. Aggrieved by the said decision, the appellant has appealed to this court against the judgment and decree.

6. This being a first appellate court, the court is enjoined to re-appraise and re-evaluate the evidence afresh with a view to come to its own independent findings and conclusions but at all times remembering that it did not have the advantage of seeing the witnesses testifying. **(See Selle v. Associated Motor Boat Company Ltd [1968] EA 123** and **Peters v. Sunday Post Limited [1958] EA 424).**

7. The case before the trial court was that on the 29/8/2013 at mid-night, a collision occurred between motor vehicle reg. no. KTCB 214K ZB 3163 (hereinafter "the tractor") and motorcycle reg. no. KMCU 461 H ("the motor cycle"). As a result of the accident, the motor cycle rider perished. The police came and removed the motor cycle rider from the scene and took him to Coast General Hospital where he died.

8. The appellant who is a brother to the deceased, was notified of the incident on the same day and he travelled to Mombasa and confirmed the fact. Burial arrangements were made and the body was interred at Kalamba on 12th September, 2013. **PW2 John Mutuku Mutunga,** the father of the deceased, told the court that his son used to work at Kensalt earning Kshs.5,000/- a week out of which he used to give him Kshs.2,500/- per week. **PW3,** a police officer produced the police abstract and blamed the deceased for over-speeding.

9. The 2nd respondent testified on behalf of the defendants. He was the driver of the tractor. He told the court that on the material day and time, he and the deceased by passed each other while the deceased was on high speed. He then heard a loud bang at the rear. When he looked back, he saw the motor bike in the middle of the road and the deceased lying on his (the deceased's) side of the road.

10. On the foregoing, the trial court found that; the investigations had revealed that the deceased was driving the motorcycle at a high speed and could not control the same; that it is the deceased who hit the tractor and caused the accident and that the deceased was un-licenced. That in the premises, no liability attached to the respondents. On quantum, the trial court awarded Kshs.20,000/ for pain and suffering, Kshs. 100,000/- for loss of expectation of life and Kshs.480,000/- for loss of dependency using a multiplicand of 15.

11. The appellant set out a total of 6 grounds of appeal which can be summarized into two that; ***the trial court misapprehended the evidence and thereby erred in dismissing the suit and that it erred in failing to award costs to the appellant.***

12. Both parties filed their respective submissions which the court has carefully considered. The appellant submitted that the trial court took the testimony of **PW3** as gospel truth thereby absolving the 2nd respondent of any liability. That on the authority of **Embu Public Road Services Limited v. Rimi [1968] EA 26,** the trial court was enjoined to examine the evidence before absorbing the 2nd respondent of liability, which it did not. It was submitted that the court erred in its assessment of damages.

13. For the respondents, it was submitted that the appellant had not proved the particulars of negligence that he had pleaded in his statement of claim; that the respondents having pleaded that the deceased was to blame for the accident and had set out particulars of negligence which were not responded to by way of a 'reply to defence', by dint of **Order 2 Rule 11 (1),** the same were deemed to have been admitted. The case of **Eastern Produce (K) Limited v. Christopher Atiado Osiro Eld HCCA** was cited in support of that proposition. That the appellant had admitted the negligence attributed to the deceased. That the plaintiff was not entitled to claim under the law. Finally, that no witness had tendered evidence to prove the appellant's case.

14. I have carefully considered the respective submissions and the authorities relied on. As already stated, although the memorandum of appeal set out six grounds of appeal, they were repetitive and amounted to only two as set out above.

15. The main complaint was that the trial court misapprehended the evidence on record. The starting point is that, ***section 107 of the Evidence Act, Cap 80 of the Laws of Kenya*** is clear as to who bears the burden of proof. It is aptly put, he who alleges must proof. The appellant had pleaded that the 2nd respondent was negligent in his driving the tractor. It was upon him to profer evidence in support thereof.

16. The particulars were that the 2nd respondent drove; *without due care and attention; without any or proper look out; at an excessive speed in the circumstances; without due regard to other road users and that he failed to adhere to the provisions of the Highway Code Chapter 403 of the Laws of Kenya.*

17. To prove these particulars, the appellant paraded 3 witnesses. It should be remembered that, the accident occurred at mid-night along the old Mombasa-Nairobi highway at Magongo Mainland. There were no eye witnesses. The only eye witness was the 2nd respondent who testified as **DW1.** Both **PW1** and **PW2** were not at the scene. They only testified to prove other aspects of the case and not negligence.

18. The most important witnesses were therefore **PW3** and **DW1. PW3** was a police officer from the Changamwe Police Station Traffic Department. He produced the *Police Abstract* dated 9/10/2013. He told the court that, the motor cycle and the tractor were passing each other when the rider rammed onto the extreme right side of the trailer and died. In cross-examination, he told the court that the deceased was to blame for riding at a high speed. That the only eye witness was **DW1.**

19. On the other hand, **DW1** told the court that at the material time he was driving the tractor at a speed of 30 km per hour. He did not see the accident occur. After the accident, he saw the motorcycle lying in the middle of the road while the deceased was lying on his (deceased's) side of the road.

20. On the foregoing, the trial court found that the appellant had not proved his case. I will agree with the trial court. It is not clear which of the particulars of negligence set out in the plaint, the appellant had proved through his witnesses in order to expect a decision in his favour.

21. In his submissions, Learned Counsel for the appellant urged that the court should have inferred negligence on the 2nd respondent in that, an accident occurred and the 2nd respondent's explanation was not consistent with the absence of negligence.

22. I will point out here that, the said submission was perfectly in order but was misplaced. The appellant had not pleaded the doctrine of *res ipsa loquitur*. Had that doctrine been pleaded, the appellant would have succeeded in his claim because; here was an accident between a tractor and a motor cycle in the middle of the night. The tractor is said to have been on its side of the road; the tractor and the motor cycle pass each other and the driver of the tractor hears a bang. On turning, he sees the motor cycle in the middle of the road while the rider is lying on his, the rider's, side of the road.

23. There was no allegation that the trailer had any reflectors on its front to mark its edges. The 2nd respondent admitted that the final resting place of both the motorcycle and the rider were not on the side of the tractor but, on the middle of the road and the rider's side, respectively. The court would take judicial notice that ordinarily, the edges of a trailer being pulled by a tractor extends beyond the width of the tractor. From the final positions of the motorcycle and the rider, it is clear that the trailer must have extended beyond the side of the tractor onto the path of the motor cycle, thus the collision.

24. However, the court could not make this inference without a pleading to that effect. The court would have only applied the dicta in the **Embu Public Road Services Ltd Case** if the appellant had pleaded the doctrine of *res ipsa loquitur*. It is only then that the court would have

been perfectly entitled to infer that, the 2nd respondent was driving the tractor without *due care and attention and regard to other road users* as pleaded by the appellant.

25. If a party wants the court to infer negligence on another, by reason of not having direct evidence of such negligence, such party must of necessity plead the doctrine of *res ipsa loquitur*. It is by doing so that the opposite party would be put on notice that the court will be asked to make an inference of negligence on its/his conduct and prepare to meet that case appropriately. This did not happen in this case.

26. In **Turfena Achieng Abuto & Another v William Ambani Mise c/o Ahero Total Service Station & Another [1995] eKLR,** the Court of Appeal observed: -

> ***"In the case of Embu Road Servises v. Rimi [1968] EA 22 at 25, Sir Charles Newbold P in his leading judgment after considering the then two leading East African authorities on the doctrine of res ipsa loquitor namely, Mzuri Muhhidin v Nassor Bin Seif [1960] EA 201 and Menezes v Stylianides ltd (Civil Apeal No. 46 of 1962 unreported) went on to say:***
>
> ***'As I understand the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence, the defendant, in order to escape liability, has to show, in the words of SIR ALISTAIR FORBES , 'that there was a probable cause of the accident which does not create negligence' or in the words which I have previously used 'that the explanation for the accident was consistent only with an absence of negligence'. The essential pointin this case, therefore, is a question of fact, that is, whether the explanation given by the defendant shows that the probable cause of the accident was not due to his negligence or that it was consistent only with the absence of negligence."***

26. In this regard, since the doctrine of *res ipsa loquitur* was not pleaded by the appellant, the trial court was right in not making the inferences it is being accused of.

27. The burden of proof rested with the appellant who failed to discharge it.

28. Learned Counsel for the appellant complained that the trial court elevated the evidence of the police as regards the police abstract. That is not correct. Firstly, the police officer was called by the appellant, and secondly, the evidence of what was the outcome of the traffic investigations was never challenged by the appellant.

29. The appellant is to blame in the way he conducted his case. He was aware that the Police Abstract he was relying on had blamed the deceased, for no reason at all, of riding the motorcycle at high speed. It was expected of the appellant to ask **PW3** to come and produce the entire police file. It is from that file that **PW3** would have been asked to clarify the basis upon which it was concluded that the deceased was riding at high speed. He would have laid before court the sketch map to show the point of impact amongst other explanations. This the appellant failed to do and he cannot therefore blame the trial court for making the conclusions it made based on the evidence before it.

30. As regards costs, as a general rule, costs follow the event unless there is reason to depart therefrom. In the present case, the trial court having found that the appellant had not proved his case was entitled not to award him any costs.

31. The appellant did not challenge quantum in his memorandum of appeal. It is therefore not open to him to challenge the same in his submissions.

32. Be that as it may, this not being the last court of appeal, it has to give its opinion on quantum. Had the appellant succeeded, I would have awarded the following: -

a) **Pain and suffering**

The deceased did not die at the scene. He died on the same day in hospital. In **Stella Kanini Jackson & Anor v. Kenay Power and Lighting Company Ltd [2012] eKLR,** the court awarded Kshs.20,000/- where the deceased died after some minutes. I will award Kshs. 50,000/-.

b) **Loss of expectation of life**

The deceased was said to be 27 years. In **Ahmed Mahfudhi Awadh v Mombasa Wholesalers Msa HCCC. No. 610 of 1995,** a sum of Kshs.150,000/- was awarded for a 12 year old boy. I will award Kshs.150,000/-.

c) **Loss of dependence**

The deceased was 27 years. The trial court used a multiplier of 5 years. There was no basis for such. The deceased would have worked up to the age of 60 years. I will use a multiplier of 30. The sum of Kshs 8,000/- used was reasonable as the income of the deceased was not proved. The sum used was that of a casual labourer at the time. The deceased was not married. His only dependant was **PW2.** The ratio applicable would be 1/3. The amount would therefore be 8,000x12x30x1/3= 960,000/-.

d) Special damages. Receipts for Kshs.45,000/- was produced. The appellant claimed Kshs.10,000/- for obtaining the limited grant of letters of administration. The police abstract was said to cost Kshs.50/-. I will allow Kshs.55,050/- which was proved.

33. However, for reasons set out above, I find that the appeal is without merit and I dismiss the same with costs.

DATED and **DELIVERED** at Mombasa this 11th day of September, 2019.

A. MABEYA

JUDGE