



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 2 OF 2016**

**HERBERT MASINDE JUMA & JUMA WANGILA WASIKE**

**(Suing as the personal representatives of the estate of the late**

**RNJ.....).....APPELLANTS**

**VERSUS**

**ROSE MUDIBO.....RESPONDENT**

***(Being an appeal from the judgment and decree of Honourable P.W MBULIKA, Chief Magistrate delivered on 9<sup>th</sup> December, 2015 in Eldoret Cmcc No. 159 of 2013).***

**JUDGMENT**

**1. HERBERT MASINDE JUMA and JOHN WANGILA WASIKE** hereinafter referred to as the Appellants filed suit in the subordinate court seeking damages for pain and suffering and damages under **the Law Reform Act, cap 26 and the Fatal Accidents Act, cap 32** , costs of the suit. Their case was that on or about the **18th day of January, 2018** the Late RNJ (the deceased herein) was a pedestrian along the **Eldoret- Nairobi** road when the Respondent (**ROSE MUDIBO**) by herself, her servant and/or agent caused to be driven and/or controlled the motor vehicle **KBP 505 make BMW X5** in a negligent manner as a consequence of which it violently hit he late RNJ

**2.** The Respondent in her defence denied the Appellants' allegations.

**3.** The trial magistrate gave judgment in favor of the Respondent (**ROSE MUDIBO**) dismissing the appellant's plaintiff's suit. The appellants being aggrieved with the said judgment preferred an appeal before this court on grounds that: -

**1. The trial Magistrate erred in finding that the ownership of motor vehicle which caused the accident had not been proved by the appellants yet the evidence given by the appellants and the testimony of the driver clearly indicated that the vehicle belonged to the respondent.**

**2. The trial magistrate erred in failing to evaluate the entire evidence on record, and finding that liability for the accident had not been established yet the facts on record clearly contained direct evidence of negligence and admission of culpability on the part of the respondent for the accident.**

**3. The trial magistrate erred in failing to find that the evidence lead by the respondent regarding the conduct of the deceased minor in crossing the road and being unaccompanied by a guardian may only have amounted to contributory negligence but, would not defeat the**

appellants' actions against the respondent based on provisions of section 4 of the Law Reforms Act cap 26 of the laws of Kenya.

4. The trial Magistrate erred in failing to find that based on the evidence on record as tendered by the appellants and the Respondents and the Respondent's liability in negligence could be determined based on the doctrine of res-ipsa loquitor.

5. The trial Magistrate erred in holding that a failure to enjoin the driver of the suit motor vehicle was fatal in establishing liability on the part of the Respondent.

6. The trial magistrate erred in law and in fact in failing to consider the pleadings the evidence on record, submissions by parties and the law in arriving at the decisions.

7. The trial Magistrate erred in failing to assess the quantum of damages that would have been awarded to the appellants.

4. The appellants thus pray that:

a) the appeal be allowed the judgment and decree of the lower court be set aside,

b) judgment be entered for the appellants; and

c) an assessment of the damages be carried out.

5. **HERBERT JUMA (PW1)** received information from his son **JOHN WANGILA**, that his 12-year-old grand-daughter RN who was a class 6 pupil at **TARAKWA PRIMARY SCHOOL**, had been hit by a motor vehicle along the **ELDORET\_NAIROBI** road within **BURNT FOREST** area, between **TARAKWA** police station, and **BURNT FOREST** market. She had died on the spot, and by the time PW1 went to the scene, her body had been removed to the mortuary, and the offending vehicle was also not there. He eventually got information from police regarding the offending motor vehicle as **KBP 505 make BMW X5** owned by **ROSE MUDIBO**

6. On cross examination PW1 stated:

*“R was seen by Ibrahim Makokha, I was told by my son he was the person on the scene who saw it happen...A woman was driving and a man passenger”*

7. **PC. JAMES KIPSANG (PW2)** produced a police abstract form which recorded that the accident occurred on 28/01/2013 at about 4pm involving motor vehicle **KBP 505 make BMW X5** and a pedestrian who was crossing the road at a shopping centre. The car did not stop, but after a report was made to police, police at **Kapsabet** junction were alerted, and they intercepted the vehicle.

8. PW2 did not witness the accident, but the information he obtained from the investigation file showed that the driver was one **MICHEAL MWIMA**, although no eye witness recorded any statement. Further, that the vehicle had two people i.e. a woman and a man, being **KBP 505 make BMW X5** owned by **ROSE MUDIBO**. Although at the date of hearing the matter, the driver of the said vehicle had not been charged, PW2 blamed him for failing to slow down as he approached the trading centre.

9. **GEORGE ODUNGA (DW1)** who was driving from **MUMIAS** to **NAIROBI**, on the same date, described the area where the accident occurred as being generally hilly with lots of corners. It was his evidence that:

*“From the blues, a kid ran to the road, from the left side facing Nairobi. I tried to break, and swerved to the right to avoid her. We hit her on the left side of the road. The rowdy crowd came so we ran off to the next police station. We reached TARAKWA and reported at Tarakwa Police Station. We were 4 people in the vehicle, ROSE MUDIBO, LINAD KAMENJI, and VIOLET*

***MUDIBO...the road is hilly and winding. The road was bushy on both sides. I did not see the child before she just bolted in.”***

**10.** Upon cross examination **DW1** stated that **ROSE MUDIBO** was the owner of the said motor vehicle. He stated that he was driving at 50 Kph and when the child got onto the road, he braked, but the distance between her and the car was so short, and that is why he swerved to the right to avoid hitting her, but he ended up hitting her after the yellow line.

**11. ROSE MUDIBO (DW2)**, who was a passenger in the said vehicle, described what she witnessed, saying that as they were going downhill in a portion which had plantations on both sides, a child just jumped onto the road, and although the driver tried to swerve to the right, the child got hit. She estimated that the vehicle was moving at 60 Kph, and denied being its owner.

**12.** The trial magistrate held that the evidence clearly showed that an accident occurred when the minor ran into the road, but the failure by police to present the investigation file to court made it difficult to determine the issue of liability. Further, that the driver of the vehicle was the one who was not sued, yet no conclusive evidence of ownership as contemplated under **Section 8 of the Traffic** was produced to confirm ownership

**13.** The appellants faulted the trial magistrate’s conclusion that there was no proof of ownership of motor vehicle that the vehicle that was involved in the accident belonged to the respondent.

They contend that the evidence presented by the police as contained in the police abstract indicated the respondent as the owner of the vehicle registration **No. KBP 505 Z** make **BMW**.

**14.** It is argued that the respondent was under a duty to demonstrate that she was not the owner of the Motor Vehicle. That based on the evidence by the respondent, it is the driver who at the time of the accident gave the information on ownership, and the address to the police pursuant **section 73 of the traffic act cap 403**.

**15.** Further, that the occurrence of the accident and the involvement of the deceased were confirmed by the death certificate and the police abstract. That in any event, PW2 in his evidence confirmed that the accident occurred at a shopping Centre at a place where pedestrians cross.

**16.** The appellants point out that the driver’s evidence also confirmed that he was driving the vehicle on the wrong side of the road when he hit the deceased.

It is thus submitted that based on the evidence on record, liability in negligence could also be determined based on the doctrine ***of res-ipsa-loquitur***.

**17.** The appellants also argue that the failure to call an eye witness ought not to have been found fatal to its case since a police abstract was produced which that showed that the matter was still under investigations.

**18.** The court ought to have found the fact of the minor having run into the road the same would not defeat the claim. It had a duty to adjust and apportion liability as between the parties.

**19.** Lastly, that the court did not make an assessment of the award that would have been made to the plaintiff in the event he was successful. This was an error.

**20.** The respondent maintains that the occurrence of the accident was not as a result of the negligent manner in which the vehicle was being driven or managed. She pointed out that the evidence of the driver of motor vehicle **KBP 505Z** indicated that he was driving at a speed of 50km/h. It was the respondent’s case that the deceased jumped on the road hence the accident. That he swerved on the right side of the road to avoid hitting the deceased in vain.

That having denied liability in her evidence and having called witnesses who proved her position that she was not liable for the accident the ball rested with the appellants to prove their case.

21. As regards to the doctrine of ***Res-ipsa loquitor***, the appellants are faulted for invoking it as they did not plead nor lead any evidence to lay any basis for the application of the doctrine.

22. It is also argued that the issue of damages could only arise upon determination of liability, and since the trial court found that the appellants had not established their claim and proceeded to dismiss the claim. Therefore, the failure to assess damages cannot be used as a ground for setting aside the lower court judgment as this court has jurisdiction as a first appellate court to re-evaluate the evidence before it.

23. Lastly, as regards to special damages, it is argued that none of the receipts produced bore a revenue stamp, a fact which PW1 conceded to and were thus in admissible.

24. **The main issues for determination are:**

**a) whether the ownership of the subject motor vehicle was proved; and**

**b) who was liable for the accident.**

25. This being a first appeal; the court should, therefore, must analyze, re-assess the evidence on record and reach own conclusions but bearing in mind that this court neither saw nor heard the witnesses testify. See ***SELLE V ASSOCIATED MOTOR BOAT CO. [1968] EA 123 and KIRUGA V KIRUGA & ANOTHER [1988] KLR 348***).

26. The trial court dismissed the Appellant's suit on the grounds inter alia it was not proved that the subject motor vehicle was owned by the Respondents and that the particulars of negligence were not proved against the Respondents.

27. According to the records from the police, the owner of the said motor vehicle was the Respondent herein and its driver at the material time of the accident was **MICHAEL ODUNGA**. The testimony of **PW2** and that of the driver of **KPB 505Z** leaves no doubt that motor vehicle registration number **KPB 505Z** is the one that was involved in this accident.

28. The appellants relied on a Police abstract which showed that the owner of the subject motor vehicle was the Respondent herein. The question is, where did police get this information from? It is not a wild guess to say that his information was given to them by **DW1**

29. The Police Abstract even gave details of the insurance cover on the vehicle at the time. The appellants contend that the Respondents did not call any evidence to rebut the contents of the police abstract.

30. The Respondent argue that a Police Abstract could not be relied upon to prove ownership of a motor vehicle and that the only way of proving ownership of a motor vehicle is by production of a search certificate issued by the Registrar of Motor vehicles.

31. However, the Court of Appeal in **JOEL MUGA OPIJA Vs EAST AFRICAN SEA FOOD LIMITED [2013] eKLR** stated that:

***“In any case in our view, an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when***

**the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.**”(Underlining for Emphasis mine)

32. It was also stated in **NANCY AYEMBA NGAIRA vs. ABDI ALI Civil Appeal 107 of 2008[2010] eKLR, Ojwang, J** (as he then was) that:

***“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1<sup>st</sup> defendant was one of the owners of the matatu in question.”***

**From the foregoing, I hold and find that on a balance of probability, based on the evidence presented, ROSE MUDIBO was the owner of the motor vehicle in question. To that extent then the trial magistrate erred failing to consider the evidence presented, and legal concepts developed by the Court of Appeal concerning proof of ownership. She thus erred in holding otherwise, and that finding be and is hereby set aside**

33. On the issue of liability, the court must decide whether the child herein was guilty of contributory negligence.

The Court of Appeal in **RAHIMA TAYAB & OTHERS –VS- ANNA MARY KINANU [1983] KLR 114 & 1 KAR 90** and stated -

***“Since the learned judge found that the plaintiff paused on the side of the road before beginning to cross, the defendant should have seen the plaintiff before the moment of impact and had she seen the plaintiff at the roadside, she might have been able to avoid hitting her by slowing down or taking avoiding action. Therefore, the finding that the defendant was negligent is correct....***

***The practice of the court ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of the doing of the act or making the omission he had the capacity to know that he ought not to do the act or make the omission....***

***The foregoing decision does not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. In dealing with contributory negligence on the part of a young boy, the age of the boy and the ability to understand and appreciate the dangers involved have to be taken into consideration. A Judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders and therefore cannot be found negligent unless he or she is blameworthy....***

***In the present case, the trial judge held in clear terms that the plaintiff had the requisite road sense and therefore her failure to see the approaching car was blameworthy. In the case of a grown-up person the proportion of blame would have been substantial, but having regard to the plaintiff’s tender years the degree of liability is assessed at 10%....***

**34. In determining what is a reasonable standard of care, the four factors, *inter alia*, that have to be considered are:**

- (1) the likelihood of a pedestrian crossing the road into the motorist's path**
- (2) the nature of the pedestrian, whether a child or adult**
- (3) the degree of injury to be expected if the pedestrian was struck**
- (4) the adverse consequences to the public and to the defendant in taking whatever precautions were under consideration...**

**35.** In the instant case, there were no obstructions like parked cars but the respondent alluded to have had an unclear immediate field of vision from the sides of the road which were consistently described as bushy/having plantations- this was not contested. Whereas at such a time of the day, and with a trading centre in the vicinity the motorist is put on notice that he or she must exercise particular care for keeping an eye out for pedestrians anticipating that they might cross without looking. However, in this instance it is not denied that the minor bolted out of the bushy roadside, and was hit by the left side of the vehicle which had tried to swerve, to the right hand side just a little past the yellow line which divides the road. I must construe contributory negligence on the part of the minor at 70% and find that the other two factors on standard of care discussed in the afore-going decision were not met by the appellant who thus bears 30% liability.

Liability having been settled, the appeal is allowed and the judgement be and is hereby set aside. The same be substituted with a judgment on quantum of damages be entered as hereunder having paid due regard to the contribution percentage:

- 1. Pain and suffering-died on the spot.....Kshs 10,000**
- 2. Loss of expectation of life at age 12 in Primary 6.....Kshs 200,000**
- 3. Loss of dependency was not proved as no evidence was led to support that. PW1 merely expressed the wish that every parent would want for their kin, i.e. to pursue further education. There were no academic records presented to demonstrate her projected academic path.**

**Total damages awarded is Kshs. 210,000/-**

**The respondents shall bear the costs of this appeal.**

**Delivered Signed and dated this 9<sup>th</sup> day of October 2019 at Eldoret**

**H. A. OMONDI**

**JUDGE**