REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 259 OF 2014

PAUL KUNGU MWANIKI

AGNES WANGARI ERIC.....APPELLANTS

AND

ROSE KAVINDU

(Suing as Administrator of the

Estate and on behalf of the

Dependants of Donald Munge Ndaka).....RESPONDENT

(Being an Appeal from the Judgment delivered by the Honourable

T.A Odera, Principal Magistrate on the 4th of December, 2014 at Mavoko.)

=IN=

REPUBLIC OF KENYA

IN THE PRINCIPAL MAGISTRATE'S COURT AT MAKOKO

CIVIL SUIT NO. 288 OF 2013

ROSE KAVINDU

(Suing as Administrator of the

Estate and on behalf of the

Dependants of Donald Munge Ndaka).....PLAINTIFF

=VERSUS=

PAUL KUNGU MWANIKI.....1ST DEFENDANT

AGNES WANGARI ERI.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 18 March, 2013, the Respondent herein instituted a suit against the Appellants herein claiming General Damages under

the ***Fatal Accidents Act*** and the ***Law Reform Act***, Special Damages in the sum of Kshs 146,700/-, General Damages for loss of dependency, loss of expectation of life and pain and suffering, Costs and interests and any other relief the Court may deem fit and necessary to grant.

2. The Appellant's suit was premised on the fact that on the 22nd April, 2010 at about 5.40pm the deceased was a lawful pedestrian along Jogoo Road in Nairobi when the 1st Appellant who was the driver of motor vehicle Reg. No. KAM 657F Nissan Matatu, owned by the 2nd Appellant, so negligently drove the said vehicle that it veered of the road and hit the deceased occasioning him fatal injuries.

3. The particulars of the said negligence were set out in the plaint and relied on the doctrine of *res ipsa loquitor*, the Highway Code and the provisions of the ***Traffic Act***. The Respondent also set out the particulars pursuant to statute and averred that as a result of the accident, she suffered serious loss and damage and that she, together with the dependants also lost support they used to get from the deceased.

4. The Appellants, in their joint defence denied ownership of the said vehicle and further denied that the deceased was a lawful pedestrian along the said road at the time of the occurrence of the accident. They denied the particulars of negligence as pleaded in the plaint as well as the applicability of the doctrine of *res ipsa loquitor*. To them, if such an accident occurred, it was caused solely and or substantially contributed to by the deceased's negligence. They therefore denied the claim for damages and prayed that the suit be dismissed with costs.

5. According to the Respondent, she was the widow of **Donald Munge Ndaka** and the administrator of the estate of the deceased. On 22nd April, 2010, she was at home when she got the news that the deceased was hit by a motor vehicle and died. It was her evidence that the deceased used to work with the Government as an office messenger in the public works department and was earning Kshs 11,894/= per month. According to the Respondent, they had 7 children with the deceased though one passed away. The eldest was 30 years old and she could not recall the age of the others. According to her the deceased used to maintain all of them though some of the children were doing casual jobs and one was a mason. In support of her case, she produced the grant, receipts for the coffin and transport, copy of the records from the registrar of motor vehicle, receipt for the same, death certificate, police abstract, post mortem report, chief's letter showing the deceased's dependants, burial permit and the demand letter.

6. According to her, she did not witness the accident and therefore did not know who was to blame for the accident. It was her evidence that she got a call from a police officer who relayed to her the news of the deceased's death. She testified that the funeral expenses were given to her by her *chamaa*. To her, she was never informed of who caused the accident since it was indicated in the police abstract that the case was still under investigations.

7. On their part the Appellants called PC Mohamed Adan, attached to Makongeni Police Station, Nairobi Traffic Department who produced the Occurrence Book No. 15/27/4/2010 relating to the accident in question which was reported by the 1st appellant who was the driver of motor vehicle reg. no. KAM657F Nissan Matatu. According to him, it was reported that the accident occurred on 27th April, 2010 along Jogoo Road at 5.40pm involving **Donald Munge Ndaka**. According to DW1, the deceased was alleged to have been crossing the road from left to right side. After the accident, the driver took the deceased to the Hospital but was pronounced dead on arrival and the body was moved to City Mortuary. According to him, he was not the investigating officer and though it was not indicated that at the scene there was a zebra crossing, he was aware that there was a zebra crossing at the scene. He stated that the zebra crossing is about 50 metres from where the deceased was hit. He was however unaware of the outcome of the investigations which had been concluded though as at 24th October, 2013, the case was still pending under investigations. As per the records, no one was blamed for the accident.

8. In cross-examination the witness stated that not being the investigating officer he had never seen the police file and was unaware of how the investigations went though no one was indicated was to be. According to him, there was a zebra crossing where the accident occurred.

9. In his judgement the learned trial magistrate found that since the deceased died and there was no witness to the accident, and the driver was not called to tell the court what transpired, though the burden of proof was on the plaintiff, the driver could have come to tell the court how exactly the accident occurred and any efforts he made to avoid the accident. He therefore found that the doctrine of res *ipsa loquitor* applied and found the defendant 100%. He proceeded to award the plaintiff Kshs 150,000/= for loss of expectation of life, pain and suffering Kshs 30,000/=, loss of expectation of life Kshs 475,760/=, special damages 50,500/=.

10. In this case, it is submitted by the appellant that from the evidence on record it is clear that motor vehicle KAM 657 F was not to blame since the defendants called a witness exonerating them from any blame. `In this regard the appellants relied on **Oluoch Eric Gogo vs. Universal Corporation Limited [2015] eKLR**, regarding the duty of the first appellate court. It was submitted that the deceased was a pedestrian who is alleged to have been crossing the road from left to right side. According to the testimony by DW1 there was a zebra crossing about 50 meters from the scene of the accident and the deceased failed to use the said Zebra crossing. As such your Lordship, the deceased was the author of his own misfortune and the trial court ought not to have found the Appellants 100% liable. In support of their submissions the appellants relied on the case of **Peter Okello Omodi vs. Clement Ochieng [2006] eKLR.**

11. It was submitted that in the said case, the court re-apportioned liability at 50:50 where the Plaintiff/Respondent was a pedestrian. The appellants therefore submitted that the Respondent failed to prove the particulars of negligence as set out in the Plaint. On the other hand, the Appellant through Dw1 adduced evidence to prove that the Plaintiff caused the accident by crossing the road without observing the traffic regulations expected of a pedestrian. It was therefore urged that the Plaintiff/Respondent should have been held 100% liable for causing the accident based on the case of **Joseph Muturi Koimburi vs. Mercy Wahaki Mugo Nairobi HCCA 693 of 2002** where the court held on page 3, as follows:

12. According to the appellants, this position, where the pedestrian was found 100% liable for causing the accident due to his/ her reckless behaviour while crossing the road, was upheld in the case of **Julius Omolo Ochanda &Another vs Samson Nyaga Kinyua Nairobi HCCA 680 of 2007**.

13. In view of all the foregoing, it was the Appellants' submissions that the trial court erred in fact and in law and this Court ought to re-evaluate the evidence afresh and arrive at the proper conclusion with regard to the causation and exonerate the Appellant of any blame as

alleged by the Respondent in her plaint. The appellants asserted that in an action for negligence the burden of proof falls against the plaintiff alleging to establish each element of tort, hence it is for the plaintiff to adduce evidence of facts on which he bases his claim. As such, it was submitted that causation of the accident by the Appellant was not established by the Respondent at all and equally the negligence of the driver of the subject motor vehicle was never established and/or demonstrated by the Respondents. As such, the conclusion that the driver of KAM 657F was 100% liable was wrong and erroneous. It is the Appellant's submission that negligence of the driver was not established

14. Regarding quantum, it was submitted that the deceased died at the age of 55 years as at the time of his death. He was a married man earning Kshs. 11,894/= as a civil servant. Since during trial the Respondent failed to prove that the deceased wife failed to prove the dependency which she was supposed to prove by producing the birth certificate, it was submitted that the trial court erred in finding that 2/3rds of the deceased income was used to maintain his wife. Since dependency was never proved, the court was urged to adopt computation under the head of loss of dependency as follows.

11,894x12x5x1/3=Kshs 237,880/=

15. It was however submitted that this Appeal be allowed as prayed and the award of the trial court be set aside in terms of the foregoing submissions.

16. In the submissions filed on behalf of the Respondent, it was simply contended that the decision ought not to be interfered with. In the Respondent's view, there is no evidence to challenge the finding on liability while the award is not excessive by any stretch of imagination hence the appeal ought to be dismissed with costs.

Determination

17. I have considered the issues raised 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."**

18. 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.

19. On the power to interfere with factual findings of the trial court, it was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

> **"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."**

20. 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."

21. 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."**

22. In this appeal, it is clear that its determination revolves around the question whether the respondents proved her case on the balance of probabilities. That the burden of proof was on the respondent to prove her 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."**

23. 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."

24. 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."**

25. It is clear that the only evidence adduced by the Respondent failed to place liability on the Appellants since there was no evidence emanating from the Respondents as to how the accident occurred. The learned trial magistrate however relied on the doctrine of *res ipsa loquitor* to find liability. Section 107(1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

26. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

> ***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***
>
> ***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

27. The two provisions were dealt with in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** in which the Court of Appeal held that:

> **"As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."**

28. It follows that the initial burden of proof lies on the plaintiff, the Respondent in this appeal, but the same may shift to the defendants, the Appellants in this case depending on the circumstances of the case.

29. 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."

30. 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."

31. 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."

32. In this case the deceased was a pedestrian as opposed to a passenger. With due respect, in those circumstances, the learned trial magistrate improperly invoked the doctrine of *res ipsa loquitor* in order to find the appellants liable.

33. This being a first appeal, this court is obliged to consider the evidence on record and make a determination as to whether independent of the said doctrine, there was evidence that tended to make the appellants liable. According to DW1, though he was not the investigating officer and though it was not indicated that at the scene there was a zebra crossing, he was aware that there was a zebra crossing at the scene. Though he stated that the zebra crossing is about 50 metres from where the deceased was hit, in cross-examination he stated that there was a zebra crossing where the accident occurred.

34. **Apaloo, J** (as he then was) in **Wambua vs. Patel & Another [1986] KLR 336** held that:

"If the collision occurred on the Zebra/pedestrian crossing, then *prima facie,* the driver must be negligent unless he shows that it occurred in circumstances in which he is wholly free from the blame… If the 1st defendant had been driving at a reasonable speed knowing full well that he was traversing a road sandwiched between two pedestrian crossings, he would have easily brought his vehicle to a stop when he sighted the plaintiff. In driving at the speed he did and in a built up area where there are two zebra crossing within 100ft of each other, the first defendant was negligent and his negligence was the substantial cause of the accident…Had the plaintiff looked right, he cannot have failed to notice a Peugeot pickup which was approaching with speed and which was to knock him down in minutes. The plaintiff himself admitted that it was a clear day and visibility presented no problem. Accordingly, the plaintiff was, in part, to blame for the accident although his error of omission was not great, nor was it the decisive cause of the accident. Tragic consequences light up small errors. The plaintiff ought not to have been unmindful of other road users especially, motorists. His degree of blameworthiness is assessed at twenty per cent, which means that the 1st defendant is to blame for the accident to the extent of eighty percent."

35. Similarly, in **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142**, it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. In my view, the evidence of the driver of the vehicle might have thrown more light with respect to the circumstances under which the accident took place.

This does not necessarily amount to shifting the burden of proof to him but as stated in section 109 of the ***Evidence Act***, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In this case, the driver never testified. There is no evidence as to why he failed to see the deceased in time at a place where there was a zebra crossing hence the need to slow down. Conversely there is no evidence as to why the deceased was unable to see the vehicle approaching him.

36. In those circumstances, I agree with **Apaloo, J** as he then was, that liability ought to have been apportioned 80:20 in favour of the plaintiff/respondent. I am however not prepared to interfere with the quantum.

37. In the premises, I substitute the award of Kshs 676,260/= with Kshs 541,008/=. The respondent will have the costs and interests before the trial court but there will be no orders as to the costs of the appeal.

38. It is so ordered.

Read, signed and delivered in open Court at Machakos this 1st day of October, 2019

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Kamau for Mr Kariuki for the Appellant

Mr Kanyangi for the Respondent

CA Geoffrey