REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 16 OF 2017

P M M (A minor suing through the mother

and next friend, M N M.....APPELLANT

VERSUS

FAMILY BANK LIMITED.....1ST RESPONDENT

MALKIA TRANSPORTERS.....2ND RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate at Machakos Hon. C A Ocharo, PM delivered on 2nd February, 2017 in Machakos CMCC No. 875 of 2015)

BETWEEN

P M M (A minor suing through the mother

and next friend, M N M).....PLAINATIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT

MALKIA TRANSPORTERS.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 15th September, 2015, the Appellant herein instituted a suit against the Respondents herein claiming Special Damages in the sum of Kshs 7,775/- General Damages for pain suffering and loss of amenities, Costs and interests and any other or further relief the Court may deem fit and necessary to grant.

2. The Appellant's suit was premised on the fact that on or about the 11th July, 2015, the Plaintiff was lawfully travelling as a passenger in motor vehicle Registration No. KBA 241 registered in the name of the 1st Respondent and beneficially owned by the 2nd Respondent when the said vehicle which was being driven by their driver was caused to negligently lose control and veer off the road. As a result the said vehicle rolled several times and the appellant sustained injuries. The particulars of the said negligence were set out in the plaint. The Appellant also relied on the doctrine of *res ipsa loquitor* and contended that the defendants were vicariously liable for the accident.

3. In support of the plaintiff's case, **M N M**, the appellant's mother and next of friend adopted her witness statement filed before the trial court and added that after the accident they went to Machakos Level 5 by an ambulance where the appellant was treated , an x-ray done after which they went home. She accordingly produced the appellant's birth notification card, treatment note, bundle of receipts and x-ray request form as exhibits. According to her the appellant was injured on the left foot and they were advised to attend the nearby clinic.

4. According to the witness the police went to the hospital and recorded their statements and they were later issued with the police abstract form and p3 form which she produced as exhibits. She also produced a copy of the records of the vehicle and the demand notice.

5. According to her witness statement which she adopted as part of her evidence she stated that on 11th July, 2015 she boarded *matatu* registration number KBA 241N at Machakos Bus Stage destined for Nairobi with her son, the Appellant herein. Upon approaching Kilima Stage along Machakos-Nairobi road the said vehicle lost control and rolled severally leading to the said accident. The appellant was thereafter assisted by good Samaritans and taken to Machakos Level 5 Hospital for medication and was later discharged.

6. Although the defendants filed their defence, they did not call any rebuttal evidence.

7. In her judgement, the Learned Trial Magistrate found that it is not enough to simply plead negligence as it is upon the plaintiff to prove the same which the appellant failed to do in this case.

8. In the submissions filed on behalf of the appellant it is contended that though the plaintiff is obliged to prove negligence by the defendant, if in the course of the trial there is proved a set of facts which prima facie raise inference that the accident was caused by negligence the issue will be decided in favour of the plaintiff in absence of an answer from the defendant. In this case it was submitted that the appellant relied on the doctrine of *res ipsa loquitor* which according to the appellant provides that in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case.

9. On behalf of the 2nd Respondent, it was submitted that the appellant never indicated how the driver of the vehicle was negligent and how the negligence led to the accident. It was the Respondent's view that the only person who could shed light on the circumstances leading to the accident would have been the police officer who investigated the accident and this must be so because the police abstract was not conclusive as who was to blame for the accident as the matter was pending investigation.

Determination

10. I have considered the submissions of the parties 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."**

11. 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.

12. 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."**

13. However in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held 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."

14. In this case, it is clear that the issue to be resolved is whether the appellant, based on the evidence presented before the Trial Court proved her case. 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.

15. 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.

16. 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."

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

18. In this case, the appellant was clearly a passenger in the vehicle concerned. It is not stated that he was in charge of or in control of the same. It is contended which contention is not denied by evidence that the said vehicle was under the control of the defendants' agent or servant. According to the statement which was adopted on behalf of the appellant, the vehicle in question lost control veered off the road and rolled severally. The plaintiff relied on the doctrine of *res ipsa loquitor*. 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."

19. 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."

20. 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."

21. In this case the appellant by her witness statement, which statement formed part of her testimony in court, stated that the accident was as a result of the driver of the vehicle losing control of the same. Drivers when driving carefully do not ordinarily lose control of the vehicles they are charged with. However there may be circumstances that may lead to such loss of control without any negligence being attributed to the driver. It is however upon the driver to explain what led him to lose control of the vehicle and where no such evidence is forthcoming it must be presumed that the driver was negligent. **Okwengu, J** (as she then was) in **Samuel Mukunya Kamunge vs. John Mwangi Kamuru NyerI HCCA No. 34 of 2002** held that:

"Where the deceased was a passive passenger in the motor vehicle and the evidence adduced shows that the accident was caused by a tyre burst and that the driver lost control of the motor vehicle, without an explanation how the accident occurred, the evidence was sufficient to establish on a balance of probabilities that there was negligence on the part of the Respondent's driver hence his inability to control the vehicle as a rear tyre burst would not ordinarily cause a motor vehicle to overturn if the vehicle is being driven at a reasonable speed with due care and attention."

22. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "*marketing language*", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

23. Similarly in **Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749**, the Court held that:

"As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

24. As was held by **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007**:

"Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."

25. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

"Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

26. In this case the Learned Trial Magistrate does not seem to have addressed her mind to the applicability of *res ipsa loquitor* to the case. Had she done so, I have no doubt that she would have arrived at a finding that the only evidence on record brought the case within that "doctrine". The Court seems to have been influenced by the fact that the police investigations were still pending. However as was held by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

27. It is therefore my view and I find that the Learned Trial Magistrate failed to take account of particular circumstances or probabilities material to an estimate of the evidence and arrived at an erroneous conclusion. That justifies this Court in interfering with her decision.

28. In the premises this appeal succeeds, the decision dismissing the appellant's suit is hereby set aside and is hereby substituted with a judgement in favour of the appellant against the 1st Respondent (since no evidence was adduced connecting the 2nd Respondent with the ownership of the vehicle). Since the Learned Trial Magistrate, and rightly in my view, assessed the damages she would have awarded, which opinion I associate myself with, the appellant is hereby awarded Kshs 100,000.00 as general damages for pain suffering and loss of amenities. The said sum will accrue interest at court rates from the date of the judgement of the lower court till payment in full. I further

award the appellant Kshs 800/= being proved special damages to accrue interest at the same rate from the date of filing of the suit till payment in full.

29. The costs of the lower court and of this appeal are awarded to the appellant.

30. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 5th day of November, 2018

G V ODUNGA

JUDGE

Delivered the presence of:

Miss Loko for Mr Musembi for the Appellant

CA Geoffrey