REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 26 OF 2016

RICHARD KIETI KATHUU.....APPELLANT

VERSUS

MUSEE MUTEMI.....RESPONDENT

(Being an Appeal from the Judgment in Mwingi Senior Resident Magistrate's Court Civil Suit No. 51 of 2012 by G. W. Kirugumi R M on 04/07/16)

J U D G M E N T

1. **Musee Mutemi,** the Respondent herein sued **Richard Kieti Kathuu,** the Appellant and another. The Appellant was sued as the user, beneficial and/or insured owner of the motor-vehicle registration number **KAJ 968C, Nissan Datsun Minibus Matatu**. The claim was for special damages in the sum of **Kshs. 2,500/=,** general damages, costs and interest at Court rates.

2. It was pleaded that on or about the **2nd** day of **May, 2012** at about **3,00 p.m.,** the Respondent was lawfully travelling as a passenger in motor-vehicle registration number **KAJ 968C** along **Garrissa – Mwingi Road** when it was involved in an accident in which he was injured. He blamed the driver of the motor-vehicle for negligence.

3. In his defence, the Appellant denied the occurrence of the accident. On without prejudice basis, he averred that if the Plaintiff suffered injuries the Respondent was wholly to blame for failure and/or neglect to sit and fasten a seat belt.

4. The learned trial Magistrate considered evidence adduced and found the Respondent having contributed to the accident as a result of negligence on his part. He apportioned liability at **50:50** for the Plaintiff as against the Defendants jointly and severally and awarded general damages in the sum of **Kshs. 250,000/=** and special damages of **Kshs. 10,500/=** with the contribution noted, the Respondent was entitled to **Kshs, 125,000/=** in general damages.

5. Aggrieved by the Judgment of the Court the Appellant appealed on grounds that: The case was not proved to the required degree of proof; apportioning liability at **50%** was a misdirection; disregarding the P3 and relying on a Medical Report that was prepared by an unqualified Medical Officer whose report was suspect and unreliable was erroneous; the Respondent's case was fabricated and full of contradictions; the doctrine of *'res ipsa loquitor'* relied upon by the Court was not applicable; damages awarded were excessive for injuries allegedly sustained; and that the learned trial Magistrate was biased against the Appellant.

6. The Appeal was canvassed by way of written submissions. It was the submission of the Appellant that the learned trial Magistrate noted that it was the Respondent and his wife who jumped out of the moving motor-vehicle and as a result caused injuries that they sustained therefore he should have been held **100%** liable. That the Court disregarded the P3 form having noted that the Respondent did not see the Doctor and proceeded to expunge it from the list of documents on its own motion. That it was expunged because the Respondent's Advocates took the P3 form to a different hospital than the one designated by the police and had it filled in the absence of the Respondent.

7. Further, it was urged that the Respondent could not rely on the doctrine of *res ipsa loquitor* following presentation of a fake P3. The Respondent who was under the influence of alcohol could not maintain balance therefore jumping out of the moving motor-vehicle thus sustaining injuries that he could otherwise not have sustained.

8. The Respondent on the other hand submitted that some facts were proved and not objected to namely:

> ***"(i) That an accident occurred on 2nd May, 2012 involving the Respondent and the Appellants motor-vehicle registration number KAJ 968C.***
>
> ***(ii) That the Respondent was a passenger in the Appellant's motor-vehicle registration No. KAJ 968C, when the accident occurred.***

(iii) That the Appellant was the beneficial owner of suit motor-vehicle registration No. KAJ 968C, and that the said motor-vehicle was driven by the Appellants duly licensed and authorized driver, agent and/or servant.

(iv) That the Respondent sustained injuries from the said accident.

(v) That the suit motor-vehicle lost control and veered off the road to the right side and fell into a ditch.

(vi) That the accident was self involving."

9. It was urged that the P3 was filled by a Clinical Officer who is qualified and authorized to make such a Medical Report. That it was possible for the Respondent to forget how the P3 was filled as he testified some four (4) years after the accident. That the occurrence of the accident and treatment records where the Respondent was taken after the accident was not in dispute and he went to **Doctor Gitau** who prepared his Medical Report.

10. It was submitted further that the Appellants fabricated their evidence that the Respondent was negligent. The allegation that the Respondent was drunk and jumped out of the vehicle was not established. That evidence adduced by witnesses called by the Appellants was fabricated and it was established that the Respondent and his wife came out of the motor-vehicle after it landed in the ditch.

11. It was argued that the driver of the motor-vehicle who was dozing lost control of the motor-vehicle therefore was to blame for the accident. They called upon the Court to find that Respondents are entitled to **100%** compensation from the Appellants.

12. On quantum, it was urged that the Respondent sustained serious injuries therefore should have been entitled to **Kshs. 600,000/=** a sum that would adequately compensate them for pain, suffering and loss of amenities. On special damages it was stated that the sum pleaded was specifically proved.

13. This being the 1st Appellate Court, it is my duty to re-examine a fresh the evidence and material tendered before the Lower Court and draw my own conclusions, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility **(See Selle vs. Associated Motor Boat Company Limited (1968) EA 123).**

14. It is urged that the case was not proved to the required standard. The burden of proof was upon the Plaintiff (Respondent) and the standard of proof was on a balance of probabilities. It was not in doubt that an accident involving motor-vehicle registration number **KAJ 968C** in which the Respondent was travelling as a passenger. Beneficial ownership of the motor-vehicle was also admitted by the Appellant.

15. Further, per the evidence adduced by both the Respondent and Appellant's authorized agent and/or driver, the motor-vehicle veered off the road and landed into a ditch.

16. It was pleaded by the Respondent that the accident was caused by negligence on the part of the person who was in control of the motor-vehicle. Negligence on his part was particularized as driving at an excessive speed, and without due care and attention; failure to keep proper look out, to swerve, slow down or brake so as to avoid the accident and in so far as applicable he did plead *res ipsa loquitor*.

17. In her finding the learned trial Magistrate found that the rule of *res ipsa loquitor* had been demonstrated. In the case of **Nandwa vs. Kenya Kazi Limited (1988) eKLR** the Court of Appeal cited the case of **Barkway vs. South Wales Transport Company Limited (1956) 1 ALL ER 392, 393** on how the doctrine applies thus:

"The application of the doctrine of res ipsa loquitor, which was no more that a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of thins 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."

18. The **Black Law Dictionary** defines the principle as:

"The thing speaks for itself."

And it goes on to explain that:

"…. the doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."

19. This is a case where the Respondent adduced direct evidence on how the accident occurred and blamed it to the actions of the Respondent's authorized driver. He blamed him for over speeding, and failing to control the motor-vehicle. Having analyzed evidence adduced she reached a finding that there existed some presence of contributory negligence by the Respondent. In the circumstances the doctrine of *res ipsa loquitor* was not applicable. If indeed she found that the facts as presented were so obvious then she could not have apportioned liability between the Appellant and Respondent.

20. In his testimony the Respondent stated that the motor-vehicle swerved from the left to the right side of the road. According to him the

motor-vehicle rolled and stopped approximately **20 meters** away from the main road. That the driver was over speeding as he was moving fast and as a result the driver failed to do anything to avert the accident.

21. It was pleaded that the Respondent was to blame as he: failed to sit and fasten the safety belt; was hanging on the door of the moving vehicle oblivious of the dangers involved; jumped out of the motor-vehicle hence landing on the earth surface without control. These allegations were denied by the Respodnent.

22. DW1 **Philip Munuve Munyithya** the driver of the motor-vehicle stated that the Respondent sat behind the driver's seat which was a confirmation of what the Respondent stated. It was alleged that the Respondent was drunk hence acting by pulling his wife out of the vehicle an action that made him sustain injuries. This was however not pleaded. In the case of **Adetoun Oladeji (NIG) Limited vs. Nigeria Breweries PLC SC 91/2002 Adereji JSC** stated thus:

> ***"…. It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***

23. The Appellant should not have departed from his pleadings by introducing allegations that the Respondent acted negligently by virtue of having been drunk. Such evidence should have been disregarded.

24. The Respondent having sat behind DW1 (the driver) he would not have been in a position to see what was happening at the rear part of the motor-vehicle. DW1 stated that he asked the conductor who told him how the Respondent was acting. The conductor was not called as a witness. DW2 **Simon Mwangangi** stated that he was a passenger in the motor-vehicle and when the vehicle landed in the ditch the Respondent held his wife's hand and they jumped out and as a result he got hurt.

25. In his defence the Appellant's driver stated that the steering locked hence the accident occurring. His witness, DW3 stated that there was confusion such that he could not tell why the motor-vehicle veered off the road. A steering wheel could lock up for various reasons including making sharp turns, a power steering pump failure or even an ignition lock. The effect of a steering wheel lock can be fatal. In the instant case DW1 stated that when he joined the tarmac at East View Academy the steering wheel locked. He did not suggest what caused it lock if it did or his manner of driving prior to it happening. His witness, DW2 heard of the allegation of the steering wheel having allegedly locked up while at the police station. The police abstract on the accident issued by the police in respect of the accident had no result of the investigations. Had the steering wheel locked as alleged this could have been noted.

26. From the foregoing, it is apparent that the Applicant's agent/driver owed the Respondent a duty of care; having driven the vehicle negligently he breached the duty and by so doing the Respondent sustained injuries. In the circumstances, the negligence is attributed to the Appellant having authorized DW1 to drive the motor-vehicle who committed the tortious act. Therefore, I set aside the decision of the learned trial Magistrate apportioning liability and substitute it with an order holding the Appellant and is Co-Defendant jointly and severally **100%** liable for the accident.

27. On quantum, immediately after the accident the Respondent sought treatment at **Mwingi District Hospital.** The Respondent adduced in evidence treatment notes issued at the outset, a P3 form that was duly filled at **Matuu District Hospital** and a Medical Report. In her Judgment the learned trial Magistrate stated thus in respect of the P3:

> ***"The Court will disregard the P3 since it was completed in a different hospital from where the Plaintiff was treated and the Plaintiff was not examined by the doctor. The Plaintiff was examined by George Njoroge Gitau who completed a Medical Report."***

28. In his testimony the Respondent stated that: P3 form was filled at **Matuu District Hospital** which was the nearest hospital to where he resided with his sister. On cross examination however, the Respondent contradicted himself regarding being present at the time of filling of the P3 form. It was not clear if he was seen and examined by the Clinical Officer who filled the P3. What was however not in dispute was the fact that per the treatment notes adduced in evidence the Respondent sustained the following injuries:

(i) A blunt trauma to the left elbow joint.

(ii) Bruised left elbow.

(iii) A cut wound.

(iv) A fracture metatarsal bone on the left limb.

29. The P3 form adduced in evidence and not objected to by the defence was a document filled in a public hospital and admitted in evidence therefore the learned trial Magistrate fell into error in disregarding it. The document that should have raised doubts was the Medical Report that was made by **Gitau G. N.** whose letter head reads thus:

> ***"DAKTARI GITAU***
>
> ***R.C.O. DCM.DENT (NAIROBI)***
>
> ***E.N.T. CONSULTANT***

OL-DONYO SABUK MEDICAL & ENT CLINIC

P.O. BOX 1481."

30. This particular individual testified. He described himself as an ENT Consultant. At the outset he did not give his qualifications. On cross examination he stated that he holds a diploma in Clinical Medicine. What is however not in doubt is that following the accident the Respondent sustained injuries that were captured at the outset when he was treated at **Mwingi District Hospital.** What remained in doubt was the prognosis. Therefore the likely cause of the medical condition/situation that resulted could not be established. In his own words the Respondent did not tell the Court the effects of injuries sustained to his person. Therefore in assessment of damages I will have to be guided by previous and comparative awards. In the case of **S. J. vs. Dinello & Another (2015)** the Court stated as follows:

> ***"The assessment of damages…… is not an easy one as there is no possible mathematical calculation because it is impossible to assign any formula for determination of the extent to which a plaintiff would be handicapped by his disability if he is thrown on the open labour market."***

31. In the case of **Kemfro Africa Limited T/A Meru Express Services, Gathongo Kanini vs. A. M. Lubia and Olive Lubia** the Court of Appeal stated thus:

> ***"….the principles to be observed by this Appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge are that it must be satisfied that either the Judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages."***

32. In the case of **Jabane vs. Olenja (1986) KLR 661** the Court of Appeal stated that:

> ***"The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by this court to an award of damages by a trial Judge.***
>
> ***(1) Each case depends on its own facts.***
>
> ***(2) Awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes.***
>
> ***(3) Comparable injuries should attract comparable awards.***
>
> ***(4) Inflation should be taken into account and***
>
> ***(5) Unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave it alone."***

33. In the case of **Naomi Wambua Njiraini vs. Prof. Ezra Kiprono Martin (2010) eKLR, Anyama Emukule J.** awarded **Kshs. 450,000/=** in general damages where the Plaintiff suffered injuries as follows: fracture and dislocation of the left hip joint; compound dislocation of the left knee joint; compound fracture left patella and left upper 1/3 tibia and metatarsal fracture of the left foot.

34. In the cited case of **Rivotex Limited vs. Phillip Mochache Nyabeyo (1999) eKLR, Nambuye J.** (as she then was) awarded a sum of **Kshs. 240,000/=** as general damages for a fracture of the first toe metatarsal bone and bruises on the right leg.

35. I am reminded of the fact that each case is based on its circumstances. In light of injuries sustained and the fact that the injuries healed completely, I find a sum of **Kshs. 150,000/=** having been reasonable. Therefore I allow the Appeal partially by setting aside the award of general damages by the Lower Court which I substitute with an award of **Kshs. 150,000/=.** Special damages of **Kshs. 10,500/=** awarded was not in dispute. Interest on the sum awarded shall accrue from the date of Judgment of the Lower Court.

36. The Respondent shall have costs of the Appeal.

37. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th Day of November, 2018.

L. N. MUTENDE

JUDGE