



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 188 OF 2010

PETER KARIUKI NJENGA.....APPELLANT

VERSUS

GABRIEL P. MUCHIRA.....1ST RESPONDENT

JOHN KINYUA.....2ND RESPONDENT

(Appeal against the judgment in the Chief Magistrates Court Civil Case No. 2008 of 2005

(Hon. J. Kiarie, Senior Principal Magistrate) delivered on 8th October, 2010)

JUDGMENT

The appellant filed a suit against the respondents in the magistrates' court for general and special damages; damages for loss of future earning capacity; and, costs and interests at court rates. He sued through Enos Njenga Ndirangu as his father and next friend.

According to the plaint filed in court on 18th March, 2005, the suit arose out of a road traffic accident which occurred along Embu-Makutano Road on 10th September 2004; the accident involved the 1st respondent's motor vehicle registration number KAS 404D and which was being driven by the 2nd respondent at the material time.

At the time of the accident, the appellant was the 1st respondent's employee and was travelling in that vehicle in that capacity, in the course of his employment. As a result of the accident, he suffered severe injuries particularised in the plaint as head and brain damage, fracture of the right distal ulna, multiple bruises and cut wounds on the chest, scalp and chin.

The appellant attributed the accident to the negligence of the second defendant who is said to have driven the motor vehicle so negligently that he caused it to ram or collide into a donkey cart, hence the accident. For instance, the vehicle is said to have been driven at a speed which was excessive in the circumstances; that in driving the vehicle, the second defendant failed to keep or maintain any effective control of the vehicle on the road; that he failed to stop, slowdown, swerve, break, or in any other way manage or control the motor vehicle as to avoid ramming into the donkey cart; and, that the second respondent drove without any or any proper care and attention.

The appellant's case was that by reason of the accident, the 1st respondent was vicariously liable for the

negligence of the 2nd respondent since he was his employee at the material time. He also pleaded the doctrine of *res ipsa loquitor*.

Except that the first respondent was the owner of motor vehicle registration number KAS 404D and that it was being driven by the second respondent at the material time, the respondents denied the rest of the appellants' claim and in particular denied that the appellant was the 1st respondent's employee and that the accident was caused by the negligence of the 2nd respondent. They instead attributed the accident to the negligence of the driver of a donkey cart; in their own words, "*the accident was purely caused by the driver of the donkey cart as it was dark and the donkeys(sic) cart had no reflectors.*"

According to them the 1st respondent was not vicariously liable for the accident and neither did the doctrine of *res ipsa loquitor* apply. They also denied that the appellant was injured as alleged or at all.

After hearing the evidence of both the appellant and the respondents, the learned magistrate dismissed the appellant's suit with costs; according to him, negligence was not proved against the second respondent and without such proof, the first respondent was obviously not vicariously liable.

The appellant appealed to this honourable court against the decision of the magistrate and in his memorandum of appeal he raised the following grounds: -

1. The learned trial magistrate erred in law and fact in finding that the plaintiff had not proved his case on a balance of probability and thereby dismissed the case with costs;
2. The learned trial magistrate erred in law and in fact in holding that the 1st defendant did not owe a duty of care under the common law to the plaintiff as an employee, to a risk of injury while in the course of his employment;
3. The learned trial magistrate erred in law and in fact in holding that the 2nd defendant was not negligent, or did not contribute to the causation of the accident, when all the facts pointed to his negligence;
4. The learned trial magistrate erred in law and in fact in failing to appreciate the doctrine of *res ipsa loquitor* and finding that it was not applicable;
5. The learned trial magistrate erred in law and in fact in finding the defendants were not negligent, despite attributing the causation of the accident to a third party against whom they did not institute third party proceedings;
6. The learned trial magistrate erred in law and in fact in assessing damages which were too low in the circumstances;
7. The learned magistrate erred in law and in fact in failing to evaluate the evidence on record and therefore arrived at a wrong decision;
8. The learned magistrate erred in law in failing to take cognizance of the case put to him in the submissions by the appellant.

The appellant's father testified that his son sued through him because he suffered memory lapse after the accident; however, since he was not at the scene of the accident he could not tell its cause.

But even then, his son still testified and said that he had problems in communicating and working and therefore he relied on his father. In spite of his father's testimony that he suffered from memory lapse, the appellant recalled that on 9th September, 2004 he was a conductor in the 1st respondent's motor vehicle registration number KAS 404D which was then being driven by the 2nd respondent. They were travelling from Kagio to Mwea and he was seated with the 2nd respondent in the driver's cabin. It was his evidence

that the vehicle was travelling at 60 km/h at the time of the accident but he couldn't tell how it happened because at the time it occurred he was writing and therefore he was not fully aware of the state of traffic on the road at the material time. As a matter of fact, he only learnt of the accident when he became conscious in hospital where he had been admitted. He, however, testified in answer to a question in cross-examination that the second respondent was driving the motor vehicle properly.

He reiterated that as a result of the head injuries he sustained, he suffered memory lapses and could not perform many tasks including communicating effectively and that he relied entirely on his father to perform such tasks. Due to this incapacity, he had lost capacity to earn; prior to the accident, the 1st respondent used to pay him Kshs 3,700/= per month.

Mr Zachary Githui Muriuki who described himself as an occupation therapist holding a Bachelor of Science Degree and a higher diploma in Orthopedics and Traumatology testified he had occasion to "see and examine" the appellant on 26th October, 2009. Though he admitted that he was not a medical doctor and that he was only a physiotherapist, he proceeded to testify on the nature and extent of the injuries that the appellant sustained and their effect on the rest of the appellant's life. He assessed his disability at 30%. His findings and opinion were captured in his "medical report" which was produced and admitted in evidence.

The 1st respondent admitted that he was the owner of the ill-fated motor vehicle and that it was being driven by the 2nd respondent at the time of the accident. Despite his denial in their joint statement of defence, the 1st respondent admitted that the appellant was a loader apparently of that same vehicle. When he was informed of the accident, he proceeded to the scene where he found a donkey cart and the vehicle. The appellant and the driver had been taken to the hospital but the donkey cart driver had apparently fled from the scene.

The second respondent testified that the accident happened at about 7:30 PM; according to him, he was driving at 60 km/h but he could not avoid ramming into the donkey cart because it suddenly emerged from a feeder road into the tarmac road in the lane in which his vehicle was travelling.

That was the evidence proffered at the hearing.

Two major issues stand out from this evidence; one is whether negligence was proved against the 2nd respondent and therefore whether the 1st respondent was vicariously liable for the road traffic accident. Secondly, whether the injuries the appellant is alleged to have sustained in the accident were proved. The first of these two questions is more fundamental because if negligence was not proved, it mattered little to the appellant's claim whether the appellant sustained any injury or not. It is apt to consider this question in detail at this point.

As noted earlier in this judgment, the appellant particularised in his plaint specific acts of negligence against the 2nd respondent. The latter, on the other hand, denied and traversed the allegations against him and thereby put the appellant to strict proof. Rather than support his allegations with proof, the appellant conceded that he could not tell how the accident happened since his attention had been drawn elsewhere; all he could remember was that prior to the accident, the 2nd respondent was not only driving the motor vehicle at a moderate speed of 60 Km/h but also that he was driving it properly. With this testimony, it became obvious that the appellant's evidence was inconsistent with the averments made in his pleadings; to be specific his own evidence exculpated the 2nd respondent.

The question that then follows is, would liability attach where there is no proof of negligence? This is a question of law and fortunately for me it is not a new question; it has been raised and answered in several cases before and I need not do anything more than trace the beaten path and follow it. In **Muthuku versus Kenya Cargo Handling Services (1991) KLR 464** the appellant who was an employee of the respondent was injured while offloading heavy duty nuts from a vessel. One of the nuts rolled and caught his finger fracturing it in the process. He attributed the accident to his employer alleging that the latter was negligent. In his plaint, he pleaded particulars of negligence against the respondent as follows:

- a. failing to take any or any adequate precautions for the safety of the plaintiff when he was engaged in his work;
- b. causing or requiring the plaintiff to engage in a method of unloading which was dangerous and unsafe;
- c. failing to provide any or any effective supervision;
- d. exposing the plaintiff to risk of damage or injury;
- e. failing in respect of aforesaid to provide a safe system and place of work.

In spite of these contentions, his evidence at the trial went as follows:

“True this injury was merely accidental. We were not being directed by supervisors on when and how to lift the nuts. No special implements were required... I had worked in other ships before doing similar work. There was nothing unusual with the ship-Kota Mewah. Working conditions were same as in other ships when performing that type of work...”

The High Court considered this evidence and dismissed the suit holding that the appellant had failed to prove negligence against the respondent. When he appealed, the Court of Appeal also considered the appellant’s own evidence and concluded as follows:

On the face of that evidence by the appellant himself, where was the alleged negligence by the respondent to be found? If there had been evidence that the nuts were too heavy for one person to lift or that those lifting them should have done so under some supervision, that could have been a factor from which it could be inferred that in asking the appellant to lift them alone and under no supervision, the respondent was negligent. That was not the appellant’s case. Nor was it his case that the nuts had been carelessly or dangerously loaded in the vessel as was the case in Denny versus Supplies & Transport Co Ltd (1950) 2KB 374 upon which the judge relied.

In dismissing the appeal, the court concluded that:

In my view, it was for the appellant to prove, of course upon a balance of probability, one of the forms of negligence as was alleged in the plaint. Our law has not yet reached the stage of liability without fault. The appellant clearly failed to prove any sort of negligence against the respondent and in my respectful view his claim was rightly dismissed. (per Omolo Ag JA at page 468)

In **Kago versus Njenga (1981) KLR 186**, the appellant was a passenger in a car that collided with a bus driven and belonging to the respondents. The appellant commenced in the High Court a suit seeking damages for injuries suffered as a result of the accident. His case was that the accident was caused by the negligence of the respondents and he sought to rely on the doctrine of *res ipsa loquitor*. The respondents maintained, *inter alia*, that the accident occurred on account of factors beyond the driver’s control. The trial judge found the respondents not negligent the accident having been caused by a tyre burst. In dismissing the appellant’s appeal the Court of Appeal held as follows:

For the defence to rebut the presumption of negligence arising from res ipsa loquitor it was for the defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part or that the accident was due to circumstances not within their control.

These decisions are consistent that whenever a claim is based on a tort of negligence, the burden is always on the claimant to prove, on a balance of probabilities, that the accident was caused by the negligence of the defendant.

Besides the pronouncements in the foregoing decisions, **Section 107,108 and 109** of the Evidence Act, cap 80 embrace this notion of the incidence of the burden of proof; **section 107 (1)(2)** is clear that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts bears the burden to prove those facts; in other words, he who asserts must prove. **Section 108** goes further to emphasise this point and states that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 109 on the other hand, is specific on proof of a particular fact that 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.

It is apparent that the appellant did not discharge the burden placed upon him and prove negligence against the second respondent; in the absence of such proof, the learned magistrate was correct in coming to the conclusion that the respondents were not liable in negligence either directly or vicariously.

In the same breath, the appellant did not surmount the next hurdle which was proof of the injuries sustained in the road traffic accident. It is noted that just as the respondents denied negligence on their part, they also denied that the appellant suffered any injuries and once again put the appellant on strict proof. Though the appellant testified that he was examined by Dr P.K.Njuguna who subsequently made a medical report on his examination, he did not testify or produce the report. There is no doubt that the medical report by Dr Njuguna must have captured his findings and opinion on the nature of the injuries the appellant sustained and their extent and impact on his life; however, since neither the doctor's testimony nor his report was received and admitted in evidence, the court was deprived of the necessary proof upon which it could deduce the extent and the nature of the injuries sustained by the appellant and therefore the extent of damages payable. It is obvious that the evidence of **Mr Zachary Githui Muriuki** could not make up for the missing expert evidence of Dr Njuguna since Mr Muriuki himself acknowledged that he was only a physiotherapist and not a medical doctor. As a physiotherapist, he was not an expert in the particular medical field; in short, he was ill-equipped to provide the court with the vital information concerning the appellant's injuries, his diagnosis and future prognosis the basis upon which the court would assess the damages payable to the appellant.

Section 48 of the **Evidence Act, cap 80** provides the basis upon which expert opinion is admissible and it is in accordance with this provision of the law that the evidence of Dr Njuguna and his report ought to have been admitted. That section provides:

48. Opinions of experts

(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

(2) Such persons are called experts

The law is clear that it is only persons who are specially skilled in a particular field or area of interest to the court in a particular case whose opinion is acceptable. This provision of the law was considered and applied in **Mutonyi versus Republic (1982) KLR 203** which though a criminal appeal, is relevant to the issue at hand only to the extent that the Court shed some light on the application of this particular provision which, subject to the variations in standard of proof, guides the admission of expert opinion in civil proceedings as much as it does in criminal ones. The court stated:

Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by his tests, measurements and the like.

In Cross on Evidence 5th Edition at page 446, the following passage from the judgment of

President Cooper in Davie versus Edinburgh Magistrates (1933) SC 34,40, is set out as stating the functions of expert witnesses:

“Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of the conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts put in evidence.”

So an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion:

- 1. Establish by evidence that he is specially skilled in his science or art.***
- 2. Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.***
- 3. Give evidence of the facts on which may be facts ascertained by him or facts reported to him by another witness.***

Dr Njuguna who examined the appellant did not testify and therefore none of these criteria set forth by the Court of Appeal was satisfied. In the final analysis, there was no proof of injury and therefore no basis for an award of either special or general damages.

In conclusion, I would reiterate that without proof of negligence on the part of the respondents or any sort of damage to the appellant, the appellant’s suit was unsustainable. Accordingly, his appeal to this court against its dismissal has no merit and it is hereby dismissed with costs.

Signed, dated and delivered in open court this 17th day of February, 2017

Ngaah Jairus

JUDGE