REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 532 OF 2013

LEAH WAMBUI NGUGI.....APPELLANT

-VERSUS-

GEORGE MBUGUA KARANJA.....1ST RESPONDENT

BENSON KIHIKA.....2ND RESPONDENT

MBUGUA JOSEPH ..... 3RD RESPONDENT

(An appeal from and against the judgment and decree of the learned Honourable Senior Principal Magistrate Mrs. M. C. Chepseba at Milimani Commercial Courts, Nairobi delivered and dated 27th June, 2013 in Civil suit no. 1067 of 2008)

JUDGMENT

1. The Appellant **Leah Wambui Ngugi**, filed a compensatory suit before the Milimani Commercial Court in Nairobi against **George Mbugua Karanja**, **Benson Kihika** and **Mbugua Joseph**, the Respondents herein for the injuries she is alleged to have sustained as a result of a road traffic accident which occurred on 14th December, 2007 where she was travelling as a passenger in Motor Vehicle Registration Number KAW 327K. She claimed that the motor vehicle was negligently driven that it hit the rear of another motor vehicle.

2. The Respondents filed a defence to deny the Appellants claim. **Hon. Mrs. M. C. Chepseba**, Learned Senior Principal Magistrate heard and determined the suit. In her judgment, she held that liability against the Respondents was not proved and that being the case neither was any quantum awardable. She dismissed the suit. Being aggrieved by the decision of the Trial Magistrate; the Appellant filed this appeal to have the decision impugned.

3. On appeal, the Appellant raised the following grounds in her Memorandum of Appeal.

> ***1. THAT the Learned Magistrate erred in law and misdirected herself both in law and fact in dismissing the plaintiff's suit against the weight of unrebutted evidence.***
>
> ***2. THAT the Learned erred in law and in fact by failing to take into account relevant matters raised at the trial and consequently arriving at the wrong conclusions.***
>
> ***3. THAT the Learned Magistrate erred in law in fact in wrongly interpreting the Doctrine of Res Ipsa Loquitor in the circumstances of the plaintiff's case.***

4. THAT the Learned Magistrate erred in law and in fact in basing her decision on matters that did not go into the root of the Plaintiff's case.

5. THAT the Learned Magistrate erred in law and in fact in basing her decision on irrelevant matters.

4. When the Appeal came up for hearing, the Learned counsel appearing for the Appellant requested for the Appeal to be disposed of by written Submissions to which request I granted. Only the Appellant put in her written submissions which l have considered. I have also re-evaluated the case that was before the trial court.

5. The Appellant argued that the Learned Magistrate misinterpreted the doctrine of *Res Ipsa Loquitur* especially upon concluding that there were inconsistencies in the Appellants evidence. She specifically referred to the holding by the Learned Magistrate that the plaint suggested it was an accident between two motor vehicles but the Appellants evidence points to a self involving accident and that the two explanations of the accident cannot refer to the same incident or prove the same accident.

The Appellant further argued that the Appellant produced documents in support of her case of whether the accident involved two vehicles or one vehicle and the same was never taken up by the defence in their pleadings or on cross-examination. It was the Appellant's contention that by delving into such matters the court merely introduced extraneous matters. She concluded that it is trite law that the standard of proof in civil matters is on a balance of probability based on the evidence on record.

6. The Appellant claimed that the Learned Magistrate averred in law and misdirected herself in discussing the Appellant's suit against the weight of unrebutted evidence and by failing to take into account relevant matters raised at the trial and further by wrongly interpreting the doctrine of *Res Ipsa Loquitur*. The Learned Magistrate in her judgment held that having pleaded *Res Ipsa Loquitur,* it was upon the Appellant to prove her case or allegation of negligence and consistency in her evidence vis–a–vis the plaint. She further opined that the Appellant's case as laid out in the plaint contradicted her viva voce evidence as far as how the accident occurred. To be specific she pointed out that the plaint suggested that the subject accident involved two motor vehicles but the evidence in Court suggested that the accident was self-involving. It is based on this inconsistencies that she dismissed the case against the Respondents.

7. I have perused the evidence as adduced before the Trial Court and the pleadings filed therein. The Appellant filed a Plaint to commence the suit where she pleaded that she was travelling in Motor Vehicle Registration Number KAW 327K, when the first Defendant with the authority of the Second and Third Defendants negligently drove the Motor Vehicle causing it to hit another Motor Vehicle from behind where she sustained severe bodily injuries. The Respondents denied that an accident occurred and averred that if the accident occurred it was contributed by the negligence on part of Motor Vehicle Registration Number KAR 954 N. In her viva-voce evidence, the Appellant testified that on 14th December, 2007, she boarded Motor Vehicle Registration Number KAW 327 K which the driver was allegedly driving at a high speed down a hill stretch along Thika Road causing the Motor Vehicle to overturn at Roysambu area on Thika Road.

8. The question arising therefore is whether the evidence tendered by the Appellant contains incurable contradictions. Contradictions according to the Learned Magistrate arose from the fact that in the Plaint the Appellant pleaded that the Motor Vehicle Registration Number KAW 327K hit the rear of another vehicle as a result of which she suffered injuries, whilst in the viva-vice evidence, She tendered evidence to the effect that the Motor Vehicle Registration KAW 327 K which she was aboard, was over speeding down a hill which caused it to over turn causing her injuries. In my view, the evidence suffers from omissions rather than contradictions. Even if l was to find that there are contradictions, the contradictions here are very minor to necessitate the dismissal of a suit altogether.

9. The question here is whether the accident occurred and whether the Appellant was a victim of such accident. The Appellant in her list of documents produced the Police Abstract in evidence. According to the Police Abstract the accident occurred on 14th December, 2007 involving the 3rd Respondents Motor

vehicle Registration Number KAW 327 K and KAR 954 N. The Abstract further lists the Appellant as one of the person injured. I find the Police Abstract to be proof enough that the Appellant was injured. The Respondents did not adduce any evidence to rebut the contents of the Police Abstract. In any case this being a civil case, the proof should be on a standard of probability and not beyond reasonable doubt as in criminal case.

10. No evidence was adduced to rebut the fact that the Appellant was injured while travelling as a passenger in Motor Vehicle Registration Number KAW 327 K which Motor Vehicle was involved in an accident. The Police Abstract was important proof to confirm that an accident did happen.

In law, the Court can infer negligence from the circumstances of the case in which the accident occurred. This is by applying the principle of *Res Ipsa Loquitor*. In the *Book by Winfield & Jolowicz on Tort 17th Edition* the Learned author wrote.

> ***"This has traditionally been described by the phrase Res Ipsa Loquitur – the thing speaks for itself……. Its nature was Admirably put by Morris L. J. when he said that it:' Possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying: 'I submit that the facts and circumstances which l have proved establish a prima facie case of negligence against the defendant…' There are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer."***

11. In the present case, the subject car was under the control of the 3rd Respondents' employee. In the ordinary course of duty, the accident should not have happened and the Appellant should not have been injured. The fact that an accident occurred, raises an inference of negligence as to establish a prima facie case which gives rise to the doctrine of *Res Ipsa Loquitur*. There is a presumption that an accident occurred especially given the evidence on record. I therefore find fault in the holding by the Learned Magistrate that *Res Ipsa Loquitor* did not apply in this case due to the alleged inconsistency in her evidence that purportedly did not imply that there was negligence on the part of the Respondents.

12. In the circumstances therefore, l find that the Appellant proved her case on a balance of probability and given that she was a passenger in the 3rd Respondent's Motor Vehicle. I hold the Respondents 100% liable for the accident.

Having said that, l wish to address the issue of quantum. The Appellant suffered blunt injury on the lower back, swollen bruised on both knees and blunt injury on the abdomen and loss of pregnancy at 5 months (21/40) gestation, according to the Medical Report prepared by Dr. G. K. Mwaura. He also adduced evidence in Court as PW 1 where he testified that his prognosis was assessed as fair and no future disabilities. He stated that he relied on the history, physical emaciation, P3 form and attendance card is provided by the Appellant obtained from International and Arcade Medical Centre.

13. In her Submissions in the Trial Court the Appellant, while Submitting on quantum prayed for general damages amounting to Kshs. 350,000/-. She cited the case of **Nakuru H.C.C.C. No. 40 of 1996, Ann Otieno –vs- Akamba Public Road Services** Dm Rimita J. on 6.7.2001 where the Plaintiff who sustained injury over the head, right shoulder and abortion due to the injury over the lower abdomen was awarded a sum of Kshs. 250,000/-. The Trial Magistrate also intimated that on quantum had she found the Respondents liable, she would have awarded a sum of Kshs. 300,000/=. Taking the cited case into consideration and the issues of inflation, l am of considered view that a sum of Kshs. 350,000/= is fair and is commensurate to the injuries suffered. I therefore award General Damages amounting to Kshs. 350,000/=.

14. On Special Damages, the Trial Court intimated that She would have awarded a sum of Kshs. 3,500/= which amount was proved. I have perused the Court record, the Appellant produced a receipt of payment for Certificate of Registrar of Motor Vehicles search amounting to Kshs. 500/= , the Medical Report receipt dated 30th November 2010 where she was charged Kshs. 3,000/= and the Police Abstract of Kshs.

200/=. I therefore, find the Special Damages payable to be Kshs. 3,700/=.

15. In the end, the Appeal is allowed the order dismissing the suit is set aside and substituted with an order entering judgement in favour of the appellant. The Appellant shall be paid the total sum of Kshs. 353,700/= being the total sum of the General and Special Damages awarded to the Appellant. The Appellant to also have the costs of the suit and those of the Appeal.

Dated, Signed and Delivered in open court this 9th day of September, 2016.

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

…….for the Respondents