REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 102 OF 2005

SALLY KIBII

CORNELIUS K. CHEPSOI…….....APPELLANTS

VERSUS

DR. FRANCIS OGARO……..…….....DEFENDANT

(An Appeal from the Judgment of the Chief Magistrate Mrs. Muchemi delivered on 13.10.2005 in Eldoret CMCC No. 5 of 2003).

JUDGMENT

This is an appeal from the Judgment of the Chief Magistrate, F. N. Muchemi, delivered on 13th October 2005 in Eldoret CMCC No. 5 of 2003. In the subordinate court, the learned magistrate dismissed the plaintiff's suit with costs to the defendant, thus the present appeal.

The Appellant filed her Record of Appeal on the 13th March 2006 and by consent of parties filed a Supplementary Record of Appeal on the 24th July 2006. The Appellant and Respondent also filed their respective authorities on the 23rd January 2007 and 16th October 2006 respectively.

At the hearing, Mr. Chemitei appeared for the Appellant while Mr. Kimani for the Respondent.

The Appellant who was the Plaintiff in the trial court testified therein as PW 1. She testified that she was the wife of the late Chepsoi and had two minor children with him. She successfully applied for letters of administration and sued the defendant for the death of her husband through a road accident. She also testified that her late husband worked with World Vision and was earning Kshs. 33,609/= per month at the time of his death. Prior to his death, the deceased used to give her financial assistance, to be precise he would give her Kshs. 20,000/= every month. She further testified that the deceased died at the age of 37 and she incurred Kshs. 20,000/= for funeral expenses and a further Kshs. 20,000/= to obtain letters of administration. PW2, Thomas Wambae Sanguti, was a Programme Manager with World Vision. He confirmed that the deceased worked for World Vision as a development facilitator and earned Kshs. 33,609/=. He died in a road accident on 3rd September 2001.

The above averments were supported with documentary evidence. These being issues were not contested, the Defendant did not attempt to challenge.

However, the issue before the trial court and subsequently this appeal was narrowed to whether there was a liability on the part of the defendant.

The Appellant widow during her evidence in chief testified that,

"My husband died in a road accident on 3rd September 2001. I got a report through World Vision and I went to the Police Station. I produce the Police Abstract as exhibit 3. My husband was handling (sic) a motor vehicle KAK 766 J P. 505 as a passenger."

In cross examination she testified, in this regard, that

"I do not know how the accident occurred as I was not there."

Of further importance to this issue, PW2 testified that,

"He died in a road accident on 3rd September 2001 as he drove to his house."

The Police Abstract was produced by the plaintiff as exhibit 3 without any objection by the defendant. I have looked at the Police Abstract and wish to highlight the following;

I) That the accident occurred on 3rd September 2001 at 6.30 p.m. along Nakuru – Nairobi road involving vehicles KAK 746 J, Peugeot 505, and KAG 331 K Nissan matatu.

II) That the cause of accident was 'pending under investigation'

III) William Kibet Chepsoi died as a result of the accident.

IV) Ezekiel Terer, Elizabeth Ndunge and I.P Matoke were listed as witnesses.

On her part and in a two page Judgment, the learned magistrate held, thus

"In the case before me the Plaintiff and her witness PW2 did not witness the accident. As such they did not adduce any evidence on liability. The police officer who investigated the accident was not showed (sic) that the case was still pending under investigations." There is no evidence to show who was to blame for the accident. The plaintiff alleges negligence against the defendant driver in the plaint. She therefore, has the duty to prove her case against the defendant which she has failed to do. The defendant in this case did not admit liability. In the absence of admission of liability and in the absence of evidence on how the accident occurred, the Plaintiff's case must fail."

I have also ventured to read the written submission of the Appellant in the Subordinate court and I wish to reproduce her entire submissions in relation to liability.

"On the issue of who was to blame for the accident, we invite the court to find that accidents do not happen in the normal cause of events unless someone is responsible for the same. The moment it was established that the defendant's motor vehicle was involved in an accident which caused fatal injuries to <u>WILLIAM KIBET CHEPSOI</u> a passenger therein, the doctrine of res ipsa loquitor came into play and the burden shifted to the defendant to prove that he was either not personally liable and/or vicariously liable. Failure to discharge that burden by the defendant meant that the Plaintiffs have on a balance of probability proved that the accident in question was caused due to negligence on the part of the defendant and/or his servant and/or his driver. We therefore urge the court to hold the defendant 100% liable."

These submissions form part of the record of the appeal herein. The able Learned Counsel for the appellant Mr. Chemitei submitted before me that the trial magistrate did not deal with the principle of *res ipsa loquitor*. Mr. Chemitei urged me to find that once there was proof that the deceased died as a result of a collusion between KAK 746 J (Defendant/Respondent's vehicle) and KAG 331 K, then the principle of *res ipsa loquitor* comes in to play and the burden shifts to the Defendant.

The Appellant emphasized that the Respondent did not call any witnesses or lead evidence to rebut the principle of *res ipsa loquitor*. The Appellant's Counsel further submitted that '*Someone has to explain how the accident took place. Someone must be liable*." He produced a number of authorities that I must admit were helpful to this court.

Finally, the learned counsel concluded his submissions by urging the court to confirm that justice should not be sacrificed at the altar of technicalities. The young widow had young children and her marriage was still young. The deceased was a bread winner and was travelling in a vehicle which he had not control of.

Mr. Kimani, Learned Counsel for the Respondent submitted and placed before the court a number of authorities. I thank him too for this. The Respondent's opposition to the appeal was narrowed to whether liability was proved against it or not. Mr. Kimani strongly submitted that the facts of the accident leading to the presumption of negligence on the part of the Respondent had to be established before the burden of proof shifts to the Defendant.

I have considered the respective arguments presented before me and find that the only issues before me is whether liability was proved against the Respondent and the application of *res ipsa loquitor*.

As stated earlier, the Judgment appealed against was all of two pages. In the case of **KENITAL (K) LTD VS CHARLES MUTUA MULU & OTHER (ELDORET HCCA NO. 103 OF 2001) unreported** I stated that it was not a requirement that a court should set out at length the evidence of each party and the submissions. In this case, I am satisfied that in the two pages, the trial magistrate captured the issues in contention and addressed her mind.

The Plaintiff in the trial court only produced two witnesses who admitted they did not witness the accident and could not tell how it happened. The Police Abstract showed that the accident was by collusion of two vehicles and investigations were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to be blamed and the absence of an eye witness evidence diminishes the Appellant's chance to prove a case for negligence against the Defendant.

The Plaintiff also elected or failed to call the witnesses listed in the police abstract and the investigating officer also listed with all their addresses. I am uncertain if those witnesses would have helped the court since the blame could not be apportioned at the scene by the police officers who stated in the police abstract that investigation was still pending.

In the **Kenital** case (above) I held that in all adversarial legal systems like ours, a party undermines his case drastically by not calling or failing to call witnesses. The Plaintiff simply did not adduce any evidence before the trial court on liability. They could have called eye witnesses and/or the investigating Police Officer. Proof of negligence was material in this case and the burden of proof was upon the Plaintiff. She did not discharge the burden and the appellant's Counsel Submission before me that '*someone*, has to explain how the accident took place, is telling. That '*someone*' is the Plaintiff who alleges negligence on the part of the Defendant.

As stated earlier herein, the appellant submitted that it was enough to prove that an accident took place to rely on the principle *res ipsa loquitor* and subsequently the burden shifts to the defendant. I am not persuaded by this argument.

To my understanding, "res ipsa loquitor" would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence. See **BIKWATIRIZO v RAILWAY CORPORATION [1971] E.A 82.** To successfully apply this doctrine, there must be prove of facts that are consistent with negligence on the part of the defendant as against any other cause.

This is a case of two cars colliding. What facts have been proved by the Plaintiff to presume negligence on the part of the defendant as against the other vehicle? Can I safely presume that the mere

fact that the two cars being KAK 746 J and KAG 331 K collided, negligence was on the part of the defendant's case and not the other? The Plaintiff must prove facts which give rise to what maybe called the *res ipsa loquitor* situation. There cannot simply be an assumption in the Plaintiff's case in this case. If the deceased was in a self involving accident as against a collision, then perhaps, such a presumption can be made against the owner of the car.

With respect, I disagree with the Appellant's Counsel that the burden of proof of occurrence of an accident shifted to the other side. I hold the view, that the Defendant is only enjoined to rebut the presumption of *res ipsa loquitor* after the Plaintiff has established a *prima facie* case by relying on the facts of an accident. It is after this that the court is called upon to evaluate the evidence and find if the inference of negligence should be drawn against the defendant.

In this case I share the sentiment of Khamoni J. in **HCCC NO. 991 OF 1995 MARY AYO WANYAMA & OTHERS V NAIROBI CITY COUNCIL;**

"it is unfortunate in this sad case but I think the blame rests squarely upon the Plaintiff and their advocates who chose to handle the case without caring to prove negligence as liability had not been admitted by the defendant or agreed between the parties. It follows that the Plaintiffs' suit herein should be dismissed."

I must state that the plaintiff was represented by immensely able counsel in this matter. However, the quality of the case is compromised by the lack of eye witness evidence or failure of the police to determine who should be blamed for the accident from the evidence gathered from the scene of the accident. I think I have said enough. I hold that there is no basis in law or in fact to fault the trial magistrates Court. I do hereby dismiss the appeal. In view of the fact that the appellant is a victim of the circumstance, I order parties to bear their respective costs. It is so ordered.

Dated AND Signed At Nairobi ON This 23rd Day Of august 2012.

M. K. IBRAHIM
JUDGE

DATED AND Delivered At Eldoret on This10th day of Day Of october 2012.

F. Azangalala
JUDGE

Delivered in the presence of: Mr. Kiboi h/b for the appellant and Mr. Omusundi h/b for Mr. Kimani for the respondent.