



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**( Coram:Gachuhi, Muli & Tunoi JJ A )**

**CIVIL APPEAL NO. 79 OF 1988**

**BETWEEN**

**MARTIN A. WAINDI.....APPELLANT**

**AND**

**PHARMACEUTICAL MANUFACTURING CO.LTD & ANOTHER.....RESPONDENTS**

**(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (A M Cockar, J)  
dated 25th April, 1986**

**in**

**Civil Case Number 1624 of 1979)**

\*\*\*\*\*

**JUDGMENT**

This is an appeal from a decision of the High Court of Kenya at Nairobi (Cockar J as he then was) dismissing a claim for damages for injuries sustained by the appellant following an accident which occurred on 9th January, 1978 when she was hit and knocked down by a motor vehicle Volkswagen combi registration number KPN 514 whilst she was walking across Haile Selassie Avenue, Nairobi. By her plaint dated 22nd May, 1979 she claimed that the second respondent who was driving the said vehicle in the course of his employment was negligent in that he drove at an excessive speed in the circumstances; that he failed to take any proper look out for other road users; that he drove on the wrong side of the road and that he failed to see the appellant in sufficient time to avoid the accident.

In the morning of the material day the appellant was sent by her superior from her place of work in the Ministry of Water Development, Industrial Area, to the Central Bank of Kenya behind the Extelcoms Building. Having finished with her errand she crossed Haile Selassie Avenue from the Extelcoms House at about 10.30 am in order to catch a bus on the other side of Haile Selassie Avenue to take her back to her place of work. After crossing the nearer half of the road she reached the middle yellow line and then halted to allow a lorry coming from her left, that is, the railway station round about and proceeding towards Uhuru Highway direction to pass. After that she did not know what happened since she was knocked down and was rendered unconscious; and, only came to herself seventeen days after the accident when she found herself in the hospital tied to the bed with her wrist, left leg below the knee, her right

collar bone areas in plaster, a bandage all over and round her head and forehead. She was assertive that she had not seen any motor vehicle behind her.

The second respondent described how the accident occurred. He was driving along Haile Selassie Avenue at a speed of about 30-35 Kph from Uhuru Highway direction towards the railway station round about which is at the junction of Haile Selassie Avenue and Moi Avenue. Haile Selassie Avenue is made up of four lanes – two for traffic travelling towards railway station round about and two for traffic travelling in the opposite direction. He was travelling in the extreme left side lane, that is, the lane running along the stone kerb and a lorry was travelling in his off side lane that is, the lane running along the middle yellow line. Beyond the kerb was a wire fence with flowers growing there. Both the vehicles were travelling in the same direction towards the railway station round about. The lorry was a little faster than the combi and was slightly ahead of it. As they were travelling in that position the lorry slowed down and his combi came up along side it. Suddenly someone crossed in front of the lorry and entered the lane he was travelling in when his combi was still just behind the cabin of the lorry. He just saw the pedestrian in front of his combi and in the middle of his lane. He could only brake. He could not turn to either side because of the presence of the lorry and the stone kerb. The distance between the combi and the pedestrian was so short that despite his braking, the near side of the combi hit the pedestrian who fell in front of it which was at that moment at a stand-still. The lorry moved on. The only damage to the combi was a slight dent in the front part of the near side front light. The windscreen had come out and was hanging down with the rubber fitting. He took it off completely and put it down on the road. It was not broken.

Immediately after the accident, and luckily for the appellant, an ambulance which was closely following came up to the scene and stopped. It took the injured appellant to hospital. Soon thereafter the police arrived as well as the first respondent.

The learned judge held that the combi was travelling in the outer of the two lanes from Uhuru Highway direction towards the railway station and that the accident happened in the outer lane which was the nearest to the road kerb. He found that the accident occurred in the manner described by the second respondent. In dismissing the suit the learned judge concluded:

“After considering the cause of the accident from all its

angles in my view there was no negligence at all on the part of the 2nd defendant. The accident had been made inevitable by the action of the plaintiff herself.”

The appellant is aggrieved by the learned judge’s decision and has challenged it on several grounds, the most substantial one being that the judge erred in not finding negligence on the part of the second respondent or that he had substantially contributed to it. The other ground of appeal which is of some significance is that the judge should have applied the doctrine of *res ipsa loquitor*.

In an action for negligence, as in every other action, the burden of proof falls upon the party alleging it. Hence it was for the appellant to give evidence of the facts, on which she based her claim for damages. In that regard her evidence must consist of facts either proved or admitted, and after the trial was concluded, two questions then would arise for the judge to decide. Those were, (1) whether, on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence was in fact inferred. See *Charlesworth & Percy on Negligence: 7th edition* at page 315.

The sum total of the appellant’s evidence is that she had no recollection whatsoever of what happened to her or as to how the accident occurred. That could be due to the fact that she had suffered a loss of memory as to the cause of the accident and events immediately preceding the accident on account of post-trauma and shock.

We would also observe that though the police went to the scene they did not supply a sketch-plan showing the point of impact.

In our view, the learned judge cannot be criticised for not accepting the evidence of the appellant in that,

although there were several allegations of negligence in the pleadings, not even one was proved. The appellant did not discharge the onus which lay upon her to show, on the balance of probabilities, that the accident was occasioned due to any fault on the part of the second respondent. The evidence led, in fact, did not allow a reasonable finding of causation which could show that the most likely cause of the accident was negligence on the part of the second respondent. Since she had failed to establish this her action was doomed to fail as the learned judge could not reasonably infer negligence on the part of the second respondent.

The maxim *res ipsa loquitur* comes into operation:

- (1) on proof of the happening of an unexplained occurrence;
- (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff; and
- (3) the circumstances point to the negligence in question being that of the defendant, rather than that of any other person. See *Charlesworth & Percy on Negligence: (supra)* 7th edition at page 350.

Is the maxim applicable in this case? We do not think so. There is no doubt whatsoever as to how the accident occurred. There is nothing inexplicable about it. The appellant dashed in front of the combi putting the second respondent in the agony of the moment. Moreover, the second respondent was able to show that he personally was not negligent even if the accident remained inexplicable and neither could negligence be proved nor inferred on his part. There was no contributory negligence on his part either.

We would accordingly dismiss this appeal with costs to the respondents. It is so ordered.

**Dated and Delivered at Nairobi this 9th day of June 1994.**

**J.M.GACHUHI**

.....

**JUDGE OF APPEAL**

**M.G.MULI**

.....

**JUDGE OF APPEAL**

**P.K.TUNOI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of  
the original.

**DEPUTY REGISTRAR**