REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT NO 1786 OF 1984

ANASTASIA KAMENE CHEGE…….....PLAINTIFF

AND

LAWRENCE NDUATI KIGUTA…….....DEFENDANT

JUDGMENT

The claim against the defendant herein is founded on negligence. Particulars thereof included:-

(a) That the defendant drove (the motor vehicle) at a speed which was excessive in the circumstances;

(b) He failed to take any or any adequate precaution to ascertain whether the motor vehicle was in a road worthy condition before embarking on th journey.

(c) He failed to have any or any sufficient regard in the safety of passengers in the motor vehicle.

(d) He failed to exercise or maintain any or any sufficient or adequate control of the said motor vehicles;

(e) He failed to stop, slow down, to swerve or in any other way so to manages or control the said motor vehicle to prevent the said accident.

At the time scene time the plaintiff seeks in paragraph 4 of the plaint to rely on the doctrine of Res Ipsa Loquitor. No defence was filed to refute the particulars of negligence alleged. The evidence adduced in the formal proof proceedings was solely that of the plaintiff. She simply said –

"while we were traveling, I heard something like a bomb. I do not know

what happened. I lost consciousness and when I regained, it at 9 a.m.

I was at Nakuru General Hospital."

The "something like a bomb" the plaintiff refers to is confirmed by paragraph as a rear/right tyre of the motor vehicle in which the plaintiff was traveling on 21st January, 1983 busting thereby causing the said vehicle to violently roll, causing the accident subject to this case.

From the evidence, the accident appears to have occurred suddenly. There was a tyre bust followed

by loss of control and rolling of the vehicle in question. What then could have caused a sudden burst of the tyre? Over speeding or unroadworthiness of the vehicles tyre in question? No evidence was adduced on these 2 aspects of the particulars of negligence alleged in the plaint.

The plaintiff did not even say in evidence the speed at which the vehicle may have been traveling immediately before the accident or any observation of the defendant's conduct during the travel. In light of the above, is these a prima facie presumption of negligence on the part of the defendant which arose from the circumstances in which this accident arose?

In the case of Embu Public Road Service Ltd. vs Riimi (1968) E A 22 where the vehicle traveling at between 20-25 M.P.H. which had its spring suddenly broken thus causing an accident in which a passenger was injured, the trial judge accepted an expert witness evidence that a reasonably competent driver should have been able to control the bus at such speed; the view which the court of appeal did not disagree with.

The question of res IPSaLoquitus also arose in the case of Msuri Muhiddin v Nazzar Bin Saif (1960) E A 201 and there the question of what the defendant should do in order to avoid liability on a presumption of negligence on his part in light of the circumstances also arose. Sir Alistain Forbes V. – as he then was – said at page 207:-

> "In light of the dicta set out I accept (counsel for the respondents) proposition that
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> the respondents can avoid liability if they can show either that there was no negligence
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> on their part which contributed to the accident or that there was a probable cause for
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> the accident which does not connote negligence on their part; or that the accident
>
> was due to the circumstances beyond their control."

In the current, case, though the plaintiff alleged over speeding as a possible cause of the tyre burst, hence the accident, no defence was filed to rebut the allegation. The question of res Ipasa loquitun has been raised thus giving rise to presumption of defendant. No evidence has been adduced to rebut this presumption, for example – inspection of the tyres before the vehicle the left Maji Masuri or the state of the road as a possible cause of the tyre burst and so on and so forth.

(Dewshin v Kuldips Towriag Co. (1969) E A 189). Thus there is absolutely no explanation as to the possible cause of the tyre burst which is consistent only with an absence of negligence.

This being so, the defendant has no way of avoiding liability herein for the accident of 21st January, 1983.

As a result of this accident the plaintiff suffered several injuries on the head, vulva and pelvis and lower back and she was unconscious for about 12 hours and hospitalized for 10 days according to a medical report prepared by Dr R Shah. The doctor says there is no long term or permanent disability as a result of this accident.

In the circumstances, what reasonable damages can the plaintiff be awarded? As was said in Stoomvant Maatschappy Nederland v P & Navigation Co. (1980) 5 APP cas. 876):

"When a man is suddenly and without warning thrown into a critical position due to allowance should be made for this, but not too much."

The defendant no doubt was suddenly and without warning thrown into a critical position and lots of confusion must have surrounded the whole accident but yet the duty on the driver is not to drive perfectly but to show that standard of care which a competent driver of a passenger vehicle should show.

Defendant herein has shown none.

Considering the evidence and all the circumstances of the case as a whole and the state of emergency into which the defendant was suddenly thrown and that the plaintiff had healed well except the inconvenience of having sexual intercourse with her husband which she says she does with slight difficulties, and doing the best I can, I would award the plaintiff 25,000/= for pain suffering and loss of amenities.

On top of this is shs.600/= special damages for which an interlocutory judgment was entered on 8th October, 1984. In the ultimate result, I would enter judgment for the plaintiff for shs.25,600/= together with interest and costs.

Delivered this 6th day of December, 1984.

D K S AGANYANYA

JUDGE