IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox, Nyarangi JJA & Gachuhi Ag JA

CIVIL APPEAL NO 125 OF 1984

Between

JOHN FANUEL AWITI OGOL.....APPELLANT

AND

MURITHI.....RESPONDENT

(Appeal from the High Court at Kisumu, Schofield J)

JUDGMENT

June 25, 1985, **Nyarangi JA** delivered the following Judgment.

The appellant, John Fanuel Awiti Ogol, who was employed in the Medical Department as a Clinical Officer at Siaya, sued the respondent and claimed, by his plaint, that on or about December 2, 1977 at about 12.20 pm in Nairobi he was crossing Haile Selassie Avenue close to a roundabout when the respondent so negligently drove, controlled or managed his vehicle registration mark KQD 967, that it hit and knocked down the appellant, as a result of which he broke two bones of his right leg.

Explaining the incident, the appellant said he was going to the railway headquarters on Haile Selassie Avenue and had crossed a pedestrian crossing when all of a sudden a vehicle registration mark KQD 967 which he did not see (he observed the registration mark after he regained consciousness) struck him. He was admitted at the Kenyatta National Hospital for eight days and then transferred to the Nyanza General Hospital on December 10, 1977 where he was admitted and remained until January.

Before the judge, Mr. Menezes, for the defendant, submitted that there was no case to answer. Mr. Gumba thought that the appellant had proved his case on the balance of probabilities. The judge upheld the submission of no case to answer and concluded with the following statement:

> "I do not consider that the fact that the plaintiff was on a pedestrian crossing at the time of the accident is, in itself, evidence of negligence on the part of the defendant." (the underlining is mine).

The appellant is aggrieved by the judge's decision and challenges it on six grounds whose summary goes like this: the judge erred in law in holding that the respondent was not negligent in any way, in finding that the appellant had not adduced probative or circumstantial evidence showing any negligence on the part of the respondent, in failing to take into account that the respondent had a duty to the appellant at the pedestrian crossing whether or not the appellant was on the pedestrian crossing and in concluding that the

doctrine of *res ipsa loquitur* did not apply to this action.

In an eloquent submission, Mr. Gumba argued all the six grounds of appeal together, and urged and stressed that the most significant point about the appellant's testimony is that he did not see the material vehicle, that the judge wrongly solely relied on that to absolve the defendant. He did this because he was under the impression that the appellant was obliged to prove that the respondent was negligent notwithstanding that the appellant had adduced all available evidence to bring into play the doctrine of *res ipsa loquitur*, where upon the burden would shift to the respondent to provide a plausible explanation before he could escape liability. Mr. Gumba complained that it was not open to the judge to shift to the appellant the burden of proving negligence as no evidence had been given on behalf of the respondent. The most the judge could do was to attribute some negligence to the appellant.

In reply Mr. Menezes supported the judge's decision and said the respondent was within his rights in remaining silent and rely on a submission of no case to answer. He contended that the plaint does not indicate that the accident happened on a pedestrian crossing, that the police abstract is similarly silent about the pedestrian crossing and therefore that the judge could not have held otherwise. He also submitted that the appellant's evidence does not tell how far the vehicle was from where he had been knocked down, and that although there were several allegations of negligence in the pleadings, not one was proved by the evidence except to fall back on the doctrine under which a *prima facie* case has, to be made out to shift the burden. Moreover, a sketch plan showing the point of impact should have been prepared and produced to the trial court.

From this passage I have already set out, it is clear that the judge found as a fact that the appellant was at pedestrian crossing at the time of the accident. Of that finding I say of myself:

> "it is important that sitting in the appellate court, I shouldever be mindful of the advantage enjoyed by the trialjudge who saw and read the witness(es) and was in anincomparably better position than mine to assess thesignificance of what was said, how it was said andequally important, what was not said."

- see *Sotiros Shipping Inc & Another v Slimejet Solhot,* the Times,Wednesday March 16, 1983.

It was not suggested that the judge misdirected himself in that finding and therefore Mr. Menezes could not, with respect, properly argue that the appellant did not prove that he was hit while on the pedestrian crossing. Mr. Menezes pointed out correctly, that the appellant did not expressly rely on the fact that he was on a pedestrian crossing in his plaint. It is nevertheless clear from the reference to the principle of *res ipsa loquitur* in para 4 of the plaint that the appellant intended to seek to rely on the circumstances of the accident so as to shift the burden. The appellant mentioned the pedestrian crossing to describe where he was knocked down and thus give weight to his evidence that the respondent was negligent. The respondent had been aware from the beginning that the appellant would rest his case on the presumed negligence of the respondent.

Once it was proved that the appellant was hit while on the pedestrian crossing, an accident blameable on the respondent was disclosed. The burden of proof was then on the respondent to explain and demonstrate that the accident was not due to any fault of his: *Cole v De Trafford* [1918] 2 KB 523. That is not to say that the respondent had to prove how and why the accident happened. It would suffice if he was able to show that he personally was not negligent even if the accident remained inexplicable: *Woods v Duncan* [1946] AC 401 and Bingham's Motor Claims Cases, by Taylor 7th edition, page 47. Mr. Menezes relied on the decision in *Hunter v Wright* [1938] 2 All ER 621 to argue that no negligence could attach to the respondent as driver. However, Mr. Gumba stated, in *Hunter's* case Mrs.Grasty, the driver, gave evidence which went to show that the skid was not caused by any act of negligence and, Goddard LCJ said at page

> "It is perfectly clear that Mrs.Grasty did discharge the onus, which lay upon her, of showing that she was guilty of no negligence."

Applying the relevant principles, what it boils down in the case is that the respondent did not discharge

the onus which lay on him to show the balance of probabilities that the accident was not done due to his fault. So the fact that the appellant was on a pedestrian crossing at the time of the accident is *prima facie* evidence of negligence on the part of the respondent. Failure to explain and discharge the onus thus shifted fixed the respondent with negligence. Having in effect found that the respondent had an onus to discharge, and the respondent having failed to discharge that onus which lay upon him, the correct course which was left to the judge to take was to hold, as I do, that the respondent was liable.

I would allow the appeal and set aside the judgment of the High Court. I would give costs both here and below to the appellant.

I would order that the case be remitted to the High Court for the judge to assess damages on the basis of 100% liability on the part of the respondent.

Hancox JA. I have had the advantage of reading in draft the judgment of Nyarangi JA. I agree with it and that once the learned judge made a finding, as he clearly did, that the appellant was on the pedestrian crossing when he was struck by the respondent's vehicle, it was upon the respondent to produce an explanation not a conclusive explanation, but one at least which would show on the balance of probabilities that he was not negligent. It may be that strenuous efforts were made unsuccessfully to secure witnesses but, in the absence of any explanation a finding of negligence was inevitable once it was shown that the doctrine of *res ipsa loquitur* applied, as it did in this case.

I agree therefore that the appeal should be allowed and with the orders proposed by Nyarangi JA.

As Gachuhi Ag JA concurs the order of this court is that the case be remitted to the High Court for the judge to assess damages on the basis of the respondent being wholly liable for the accident. I also agree with the order of costs proposed by Nyarangi JA.

Gachuhi Ag JA. I have had the advantage of reading the judgment of Nyarangi JA in draft. I concur.

Dated and delivered at Kisumu this 25th day of June , 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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AG.JUDGE OF APPEAL

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

DEPUTY REGISTRAR