Mohamed v Remji (Civil Appeal E117 of 2021)
[2024] KECA 1311 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1311 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E117 OF 2021

KI LAIBUTA, GV ODUNGA & SG KAIRU, JJA

SEPTEMBER 20, 2024

BETWEEN

MESAIDI JUMA MWAMBUYU MOHAMED ..... APPELLANT

AND

VALJI KESRA RAMJI ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Chepkwony, J.) dated 24th June, 2021inHCCA No. E008 of 2020)

JUDGMENT

1. In this second appeal, the appellant Mesaidi Juma Mwambuyu Mohamed, is challenging a judgment delivered on 24th June 2021. In that judgment, the High Court at Mombasa (Chepkwony, J.) dismissed her first appeal from a judgment of the Magistrate's Court at Msambweni, Kwale delivered on 9th October 2020 dismissing her claim for general and special damages arising from a road traffic accident.

2. The background is that on 23rd December 2019, the appellant was walking along Likoni-Ukunda Road at Mab-River area when she was knocked down by Motor Vehicle Registration No. KBV 342C Toyota Hilux Pick-up on its way to deliver supplies to hotels. As a result, the appellant sustained injuries. In February 2020 she filed suit before the Magistrate's Court at Msambweni seeking general and special damages against the respondent, Valji Kesra Ramji, the owner of the vehicle. She pleaded that the accident was occasioned by the negligence of the respondent's driver and that she would rely on "the doctrine of res ipsa loquitur". She established during the trial that she was off the road when she was knocked down by the vehicle.

3. The relevant part of the respondent's defence was that the accident occurred without any negligence on his or his drivers part; that it was caused solely and exclusively or substantially contributed to "by supervening unforseeable circumstances and or factors beyond the control of the driver" of the vehicle, and that the respondent was therefore not liable.

4. The respondent's driver, Tunje Munga Tunje, testified that he was driving along the said road at an approximately 50 KPH when the vehicle had a sudden tyre burst of its left rear tyre; that despite all his efforts to control the vehicle by applying brakes and swerving to avoid the collision, the vehicle left the road and knocked the appellant down off the road.

5. The trial court found as a fact that the vehicle had a tyre burst, and that even though the appellant was knocked down, the respondent's driver was not negligent. In her judgment, the learned trial magistrate stated:

> " I am of the view that the driver after a tyre burst that was beyond his control tried to prevent hitting the plaintiff but failed to do despite all his efforts".

6. The learned trial magistrate found support for her conclusion in the decision in Bellita Kennedy & another v Angelina Kitili Musyoka [2016] eKLR. She accordingly dismissed the suit, with an order that each party bears its own costs. She nonetheless went ahead to render herself on general and special damages had the appellant been successful on liability.

7. The appellant challenged that judgment before the High Court on grounds that the learned magistrate: having found that the appellant was hit by the vehicle when she was off the road, erred in failing to find that she had proved her case on a balance of probabilities; misapplied the decision in Bellita Kennedy & another v Angelina Kitili Musyoka; and erred in basing her decision on a matter that was not pleaded, namely, that the accident was caused by a tyre burst.

8. Upholding the judgment of the trial court, the learned Judge of the High Court in her judgment held that trial court duly considered all the evidence and properly applied the decision in Bellita Kennedy & another v Angelina Kitili Musyoka and correctly found that negligence was not proved. Regarding the complaint that the tyre burst was not pleaded, the Judge found that the plea in the defence that the cause of the accident was an unexpected occurrence was sufficient.

9. The main complaints before this Court are that both courts erred in failing to find that the appellant established her case to the required standard; that they misapplied the decision in Bellita Kennedy & another v Angelina Kitili Musyoka; that the issue of alleged tyre burst was not pleaded; and that they failed to appreciate "the principle of res ipsa loquitur."

10. During the hearing of the appeal before us on 17th April 2024, the parties were represented by learned counsel. Mr. K. Kioko Gitonga held brief for Mr. Ikanda for the appellant. Mr. Isaac Onyango appeared for the respondent. Counsel relied on their respective written submissions.

11. Counsel for the appellant maintains that the appellant's case was established on a balance of probability; that the appellant was off the road when the respondent's driver lost control of the vehicle and knocked her down; that, prima facie, negligence was established; and that a contrary holding is perverse as the only reasonable inference is that the accident occurred due to the negligence of the respondent's driver. The case of Embu Public Road Services Limited v Riimi [1968] 1 EA 22 was cited in support.

12. It was urged that in the circumstances, the evidential burden shifted to the respondent to show that the accident was not caused by negligence and that the doctrine of Res Ipsa Loquitur applies. In support, reference was made to the case of Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR; and Nandwa v Kenya Nazi Limited [1988] eKLR, among other cited authorities.

13. It was submitted that the respondent did not prove that the accident could not have been avoided by exercise of the greatest care and skill and that it was not shown that there was a probable cause of the

accident which does not connote negligence. The case of Dewish v Kuldip Touring Company Limited [1969] EA 198 which also involved a tyre burst, was cited at length. It was urged, that had the courts below correctly applied the decision in Bellita Kennedy & another v Angelina Kitili Musyoka, they would have reached the conclusion that the respondent did not discharge the burden of showing there was absence of negligence.

14. It was submitted further that the two courts based their decision on a matter that was not pleaded; that parties and courts are bound by pleadings as pronounced in Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule & 3 others [2014] KECA 890 (KLR); that a tyre burst was not mentioned in the statement of defence and neither was a plea of act of God or inevitable accident made; and that the plea in the defence that the accident was caused by "supervening unforeseeable circumstances and factors beyond the control of the driver" without providing particulars was insufficient.

15. The High Court was also faulted for not assessing damages notwithstanding the conclusion on liability.

16. On the other hand, counsel for the respondent submitted that it was incumbent upon the appellant to prove negligence, but failed to do so; that the mere fact that an accident occurred does not of itself mean that there was negligence; and that the appellant had the burden to prove negligence, but failed to do so. In support, reference was made to Section 107 of the *Evidence Act* and the case of Jamal Ramadhan Yusuf & another v Ruth Achieng Onditi & another [2010] eKLR. It was urged that the appellant failed to prove any of the particulars of negligence that she pleaded, and that the burden of proof did not shift to the respondent; and that the evidence tendered before the trial court fully supports the conclusions reached by both courts.

17. It was submitted that, considering the evidence tendered by the respondent, the appellant did not demonstrate that there was more the respondent's driver could have done to avoid the accident; that the findings and conclusions by the two courts below are reasonable and consistent with the decision of this Court in the case of Kago vs. Njenga [1979] eKLR and that there is no basis for this Court to interfere with the High Court decision.

18. It was urged that res ipsa loquitur is an evidentiary principle enabling courts to draw inferences from evidence presented and does not excuse the appellant from discharging her burden of proof. The High Court decision in Paul Kungu Mwaniki & another v Rose Kavindu (suing as Administrator of the Estate and on behalf of the dependants of Donald Munge Ndaka [2019] eKLR was cited in support. Furthermore, it was urged that the principle of res ipsa loquitur is concerned with matters of fact outside the remit of this Court on a second appeal. Moreover, it was urged that the defence evidence presented before the trial court displaced any application of the principle.

19. As regards the contention that the courts below relied on a matter that was not pleaded, counsel submitted that the respondent's defence gave sufficient particulars; and that the respondent was only required to plead material facts and not evidence.

20. On damages, it was submitted that the High Court duly considered the award that had been proposed by the trial court and declined to interfere with it, and that it is not correct that it did not address itself on the matter of damages.

21. We have considered the appeal and submissions. On a second appeal such as this, the mandate of this Court is confined to questions of law only, unless it is shown that the courts below considered matters, they should not have considered or failed to consider matters they should have considered, or looking at the entire decision, it is perverse.

22. We are obliged to accept the concurrent findings of fact by the Magistrate's Court and by the High Court unless it is demonstrated that such findings are not based on the evidence. See Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR where Onyango Otieno, JA stated as follows:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another v Republic [1982-88] 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:-
>
> " We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.""

23. With those principles in mind, the overarching issue for our consideration is whether the two courts below erred in concluding that the appellant failed to establish liability in negligence against the respondent. Within that, is the secondary question as to whether the "principle" or "doctrine" of res ipsa loquitur was misapplied by the courts below. There is also a second issue which is whether the courts erred in basing their decision on unpleaded matter.

24. Putting aside the controversy as to whether res ipsa loquitur, is a maxim, a principle, or a doctrine, there is no contest as to how the accident occurred. It was established that the respondent's vehicle left the road and found the appellant off the road and knocked her down. Absent a plausible explanation, negligence on the part of the driver of the vehicle would ordinarily be inferred. The editors of the text book Charlesworth & Percy on Negligence, 12th edition, state in reference to of res ipsa loquitur state that:

> " The question whether to apply the maxim has usually arisen where the claimant is able to prove the happening of an accident but little else. He might well be unable to prove the precise act or omission of the defendant which caused an accident to occur, but if on the evidence it is more likely than not that its effective cause was some act or omission of the defendant, which would constitute a failure to take reasonable care for his safety, then in the absence of some plausible explanation consistent with an absence of negligence, the claim would succeed." [Emphasis added].

25. In the same vein, this Court in the case of Margaret Waithera Maina v Michael K Kimaru [2017] eKLR stated that the literal meaning of res ipsa loquitur is that "the thing speaks for itself" adding that it is

> " a mechanism whereby the claimant can be relieved of the burden of proving the negligence, and the court can infer negligence in those situations where the factual circumstances of the case would make proving it almost impossible."

26. In Embu Public Road Services Ltd. v Riimi [1968] EA 22, the predecessor of this Court stated that:

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."

27. There is, therefore, ample guidance for a matter such as this where an accident occured in circumstances giving rise to a rebuttable presumption that negligence was involved. As stated by Law, JA of the predecessor of this Court in Kago v Njenga [1979] eKLR:

> " For the defence to rebut the presumption of negligence arising from "res ipsa Loquitur", it was for the defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part, or that the accident was due to circumstances not within their control..."

28. Was the presumption rebutted in this case? We think it was. The trial magistrate was impressed by the candor of the driver who explained every effort he made to control the vehicle after a tyre burst. The learned Magistrate stated in her judgment:

> " The fact that he hit her but that she had no bones broken is indicative in my opinion that he was not speeding and that he really tried to control the vehicle. I opine that a vehicle that was out of control would have caused more serious injury to the plaintiff other than the ones she got. According to the doctor's report she suffered cuts and bruises. That's all. No fractures or broken bones. I am of the opinion that everything that he did after the tyre burst was indicative of his obligation to control the vehicle so as to avoid an accident. He himself testified that he braked in short bursts every so often to control the vehicle and to avoid a collision. This was not rebutted. He said he only hit her when he tried to swerve further to avoid the accident but because the vehicle was loaded the same turned to its left, hit her and stayed there."

29. Based on the evidence, we share the view expressed by the learned magistrate and the High Court that the respondent was able to demonstrate that there was absolutely no negligence on the part of the driver which caused the accident. An inspection report tendered into evidence showed that the vehicle had no pre-accident defects. There was no evidence that the driver was overspeeding. And there was evidence of all efforts he made in addition to hooting, to control the vehicle, including breaking, and swerving. We find no fault in both courts below having found support for their decisions in the case of Bellita Kennedy& another v Angelina Kitili Musyoka [2016] eKLR. We concur with the lower courts that the driver, (in the words of Law, JA in Kago v Njenga) "faced with a sudden emergency, he did all that could be expected of a reasonably competent driver, but could not prevent" the accident.

30. We turn to the complaint that "tyre burst" was not pleaded. Order 2 of the Civil Procedure Rules requires that every pleading shall contain, and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved. In this case, the respondent's plea in the statement of Defence dated 18th March 2020, after denying the appellant's claim and denying that res ipsa loquitur applied, was that if the accident occurred, "the same was caused solely and exclusively and or substantially contributed to by supervening unforeseeable circumtances and or factors beyond the control of the driver...".

31. Although it would have been useful to give particulars of the "supervening unforeseeable circumtances" in the defence, the same were supplied soon thereafter in the driver's witness statement which was filed before the trial court on 13th July 2020, long before the trial. In that statement, the driver explained at length the circumstance in which the accident occurred, stating that "on reaching Mab River, the vehicle had a sudden tyre burst on its left rear tyre" and went on to explain what followed thereafter in his efforts to control the vehicle. The appellant therefore had ample notice of the respondent's defence and no prejudice at all is shown to have been suffered by the omission to specifically mention tyre burst in the statement of defence.

32. As for the complaint that the High Court did not deal with the quantum of damages, this is not borne out by the record. Although, as already indicated the trial magistrate dismissed the appellant's claim on liability, she considered at length the rival submisssions on quantum and rendered an opinion on the awards the court would have granted. The High Court reviewed the same and concurred with the trial court. There is no merit in this complaint.

33. In conclusion, the appeal fails. It is accordingly dismissed. Given the unfortunate circumstances that befell the appellent through no fault of anyone, we make no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

.....

DR. K. I. LAIBUTA, C. Arb, FCIArb.

JUDGE OF APPEAL

.....

G. V. ODUNGA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.