



Keziah & another (Personal Representatives of the Late Isaac Macharia Mutunga) v Lochab Transport Limited (Civil Appeal 82 of 2018) [2022] KECA 477 (KLR) (18 March 2022) (Judgment)

Neutral citation: [2022] KECA 477 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 82 OF 2018
DK MUSINGA, HM OKWENGU & MSA MAKHANDIA, JJA
MARCH 18, 2022**

BETWEEN

**TERESIA WANGARI KEZIAH AND MUKUHI MUIGAI APPELLANT
PERSONAL REPRESENTATIVES OF THE LATE ISAAC MACHARIA
MUTUNGA**

AND

LOCHAB TRANSPORT LIMITED RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Naivasha (C. Meoli, J.) dated 22nd September, 2017 in Civil Appeal No. 37 of 2015)

JUDGMENT

1. This is a second appeal emanating from the judgment and decree of Honourable Mwinzi, the then Acting Senior Resident Magistrate at Naivasha Law Courts, delivered on 25th March 2015. In the suit leading to the said judgment and decree, the appellants had sued the respondent in their capacities as personal representatives of the estate of the late Isaac Macharia Mutunga who died in a road traffic accident on 2nd January 2009 while travelling in a motor vehicle registration number CHS-ST- 190-404 8254 Yuasa. ("Yuasa"). The said motor vehicle collided with motor vehicle registration number KAV 265 F/ZC 38822 ("ZC") owned by the respondent along Naivasha-Maai Mahiu road as per the pleadings by the appellants. The appellants claimed that were it not for the negligence of the driver of the ZC aforesaid, particulars of which they gave, the accident would not have occurred. The suit was defended by the respondent who filed a statement of defence denying the appellants' averments. It asserted that the accident was solely caused by the negligence of the driver of Yuasa or that he was the substantial cause of the same, particulars whereof were given.



2. Thereafter a full trial ensued. In his judgment, the trial magistrate found in favour of the appellants and awarded them general damages in the total sum of Kshs. 2,080,500/- with costs and interest. The respondent was aggrieved by the said decision and appealed to the High Court. The High Court (Meoli J.) in its Judgment agreed with the respondent and allowed the appeal holding that;-

“I am satisfied that the lower court finding on liability was primarily based on no evidence, and/or a misapprehension of the same as well as misapplication of the principles regarding joinder of 3rd parties. Consequently, the entire judgment cannot stand. I hereby set it aside and substitute therefore for dismissal with costs of the lower court suit.”

3. The appellants, being aggrieved by the judgment and decree of the High Court have sought the intervention of this Court on second appeal by way of a memorandum of appeal dated 26th April 2018 in which they complain broadly that the High Court erred in law by: misdirecting itself on the question of the respondent’s negligence; shifting the burden of proof to the appellants; demanding corroboration; requiring the appellants to have taken out third party proceedings and misapplying the doctrine of *res ipsa loquitur*.
4. The appeal was canvassed virtually through written submissions on 23rd November 2021 where learned counsel, Mr. Karanja and Mr. Tombe appeared for the appellants and respondent respectively.
5. The appellants on the 1st ground submitted that due to the High Court’s erroneous reading of pleadings and evidence resulted in a decision that was hasty and one which did not appreciate the clear facts on record. The appellants buttressed this submission by citing some excerpts from the judgment which contradicted the evidence tendered in the trial court. On account of this, the High Court was faulted for importing its own facts and theories in the case contrary to the long-held tradition that parties are bound by their pleadings. For this proposition we were referred to the Malawian Supreme Court case of *Malawi Railways Limited Vs. Nyasulu* [1998] MWSC 3.
6. The appellant further submitted that the judge made baseless adverse findings against the appellants to the effect that the evidence of DW1, John Macharia Wambugu, the driver of ZC, exonerated the respondent from liability as his evidence was tainted with glaring inconsistencies and contradictions. The appellants while placing reliance on the case of *John Fanuel Awiti Ogol Vs. Murithi* [1985] eKLR submitted that the court ought to have been mindful of the advantage enjoyed by the trial court which heard and saw the witnesses, thus the said trial court was in a better position to assess the significance of what was said and equally what was not said. On the aspect of duty of care and negligence, the appellants submitted that it is a cardinal principle of civil law that if at the trial there is proved a set of facts which raises a prima facie inference that an accident was caused by the negligence on the part of a defendant, then the issue will be decided in the Plaintiff’s favour, unless the defendant’s evidence provides some adequate answer to displace that inference. For this proposition we were referred to the case of *Embu Public Road Services Limited Vs. Riimi* [1968] EA 22 as quoted by this Court in the case of *Turfena Achieng Abuto & Another Vs. William Ambani Mise C/o Abero Total Service Station & Another* [1995] eKLR. This threshold was met by the appellants and was not displaced by respondent, it was so submitted.
7. On the ground of deviating from the set principles on the burden and standard of proof, the appellants submitted that the trial court chose to highlight the law selectively and its approach to the same was a fundamental error as Section 107 of the *Evidence Act* is to the effect that he who alleges must prove and DW1 did not give a full disclosure of what happened at the scene of the accident as the only one who was present. That since the respondent alleged that it was solely the driver of Yuasa who was the author of the accident, it was its duty to prove it and not leave it to the appellants to do so.



8. On corroboration, the appellants submitted that there was no rule under statute and or common law that requires corroboration of evidence; that this is the essence of Section 143 of Evidence Act, yet this was what was demanded of the appellants by the 1st appellate court.
9. On third party proceedings the appellants submitted that the finding by the High Court was peculiar and made nonsense of the principle of joinder of parties to suits and the principle that underlies third party proceedings; that Order 1 Rule 15 of the Civil Procedure Rules places that duty on the defendant who might wish to claim against the third party to initiate third party proceedings and in any event, by dint of Order 1 Rule 9, no suit ought to be defeated by reason of misjoinder and non-joinder of parties. Accordingly, the appellants were not bound to pursue third party proceedings against the driver and owners of Yuasa.
10. On the application of the *doctrine of res ipsa loquitor*, the appellants submitted that for the respondent to rebut the presumption of negligence arising from the application of the aforesaid doctrine it had to show either that there was no negligence on the part of its agent or that the accident was due to circumstances beyond its control. The appellants cited and relied on the cases of David Onchangu Orioki suing as personal representative of Anthony Nyabondo Ochangu (Deceased) Vs. Ismael Nyasimi & Charles Michieki Nyaungo [2019] eKLR and Fred Ben Okoth Vs. Equator Bottlers Limited [2015] eKLR to justify the invocation of the doctrine of *res ipsa loquitor* given the circumstances in which the accident occurred. It was further submitted that the doctrine was rightly pleaded, and the respondent was therefore liable to the deceased pursuant to the said doctrine. The appellants therefore prayed for the appeal to be allowed and the judgment of the trial court reinstated.
11. The respondent in opposition to the appeal condensed the issues into three, whether there was negligence attributable to any party, the standard of proof in civil cases and the interpretation of the doctrine of *res ipsa loquitor*. But to begin with, the respondent maintained that the appellants had not complied with the provisions of Section 72(1) of the Civil Procedure Act. That this being a second appeal only matters of law could be canvassed. The case of Naomi Kemunto Vs. Total (K) Limited and Kisii Total Service Station (Kisumu Civil Appeal No. 211 of 2008 (UR) was cited in support of this submission.
12. On the evaluation of evidence, the respondent submitted that the High Court did evaluate the circumstances of the accident and came-up with the right decision. The respondent cited instances in its submissions which informed the decision of the High Court which included the fact of the accident, the respective pleadings; the evidence adduced by the parties, the essence of which was that none of the appellants' witnesses actually saw the accident as it occurred; that a police officer P.C Alice Mathenge, did not give any evidence as to how the accident occurred, whether she visited the scene and or drew sketch map and who in her opinion was to blame for the accident, as she claimed that the "Investigations were never concluded and the driver was not charged". On the other hand, the respondent adduced evidence through DW1 admitting that the accident occurred but denied having caused the same. He maintained that the Yuasa driver came from the other side of the road and ploughed into him; that the evidence of respondent's witness remained steadfast and unshaken during cross-examination and for some reason; the appellants did not sue the owner and or driver of Yuasa in which the deceased was travelling.
13. The respondent therefore submitted that the accident was wholly caused and or contributed to by the negligence of the driver of Yuasa and this was the proper finding of the High Court which this Court ought not to interfere with. The respondent further submitted that in an action for negligence, the burden of proof lies upon the party alleging it, hence it was upon the appellants to show that the respondent's driver was wholly responsible or contributed to the accident. The appellants failed to



meet the threshold. The respondent thus prayed that this Court agrees with the finding of the High Court and dismiss the appeal.

14. Before we delve into the determination of the appeal, we must remind ourselves of our mandate in a second appeal which has been enunciated in a long line of cases by this Court. See for instance *Maina Vs. Mugiria* [1983] KLR 78, and *Stanley N. Muriithi & Another Vs. Bernard Munene Itbiga* [2016] eKLR, for the holdings that, on a second appeal, the Court confines itself to matters 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.
15. We have perused the entire record of appeal, considered the submissions by counsel for both parties, the authorities cited and the law. We discern only one issue of law that calls for our determination in this appeal; whether the High Court was right in overturning the judgment and decree of the trial court on account of failure by the appellants to prove the respondent's culpability.
16. On the issue of liability in road traffic accidents, it has been stated time without number that the determination thereof is not a scientific affair. Lord Reid put it more graphically in *Stapley Vs. Gypsum Mines Limited (2)* (1953) A.C 663 at P. 681 as follows;

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.....”

“The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly the accident. I doubt whether any test can be applied generally.”

17. It was thus upon the appellants to discharge the burden of proof of negligence aforesaid against the respondent. This Court in *East Produce Kenya Limited Vs. Christopher Astiado Osiro* [2006] eKLR, reiterated that he who alleges negligence bears the burden of proof. The court further quoted with approval the case of *Kiema Mutuku Vs. Kenya Cargo Hauling Services Ltd* [1991] 2 KAR 258 on the holding that ‘there is yet no liability without fault in the legal system in Kenya and the plaintiff must prove some negligence against the defendant where the claim is based on negligence.’
18. From the record, the accident happened when the weather was not clear and the only witness who testified as to the accident was the driver of the respondent. No other eye witness was called to testify for the appellants. In fact, the only witnesses who testified for the appellants were the appellants themselves who never witnessed the accident. When the police officers came to the scene, the accident had already occurred and the injured ferried to hospital. The driver of the respondent was upon interrogation at the scene regarding the circumstances of the accident, was released and allowed to proceed on with his journey. He was never charged with any traffic offence thereafter and the police abstract tendered in evidence indicated that the matter was pending investigation. The question that remains unanswered is who was then on the wrong, or caused and or contributed to the accident? From the record it is difficult to blame the respondent for the accident given the foregoing scenario. The mere fact that an accident involving the two vehicles occurred does not *per se* translate into the respondent's driver being



culpable. It was the duty of the appellants to call evidence to prove the particulars of negligence or any one of them that they attributed to the respondent's driver. We do not think just like the High Court that they discharged this burden.

19. Secondly the deceased was not a passenger in ZC but in Yuasa. For all intents and purposes, it is this motor vehicle that owed the deceased a greater responsibility of duty of care than the respondent. In the English case of *Hay or Bourhill Vs. James Young* [1943] AC 92, the House of Lords held as follows on the duty of care imposed on the drivers of motor vehicles:-

“No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway but, it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be the injured by the omission to take such care.”

Our attention was also drawn to the case of *Lochgelly Iron Court Co. Ltd Vs. Mcmillan* [1934] AC where Lord Right held:

“In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission. It properly involves the complex concept of guilty, breach and damage thereby suffered by the person to whom the duty was owing.”

20. Further, Lord Denning in his decision in the case of *M. Jones Vs. Livior Quarries Ltd* [1992] 2QB 608 took this view on the doctrine of contributory negligence:-

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man or woman he or she might be hurt himself or herself and in his or her reckonings he or she must take into account the possibility of others being careless”.

21. It was therefore imperative that the appellants bring on board the owner and driver of Yuasa so that the issue of liability, whether wholly or contributory, could effectively be determined by the trial court, given the defence advanced by the respondent. We still cannot fathom why the appellants could not have amended their plaint so as to join the owner and driver of Yuasa in the suit given the said defence. We note though that the respondent attempted to do so by instituting third party proceedings against the driver and owners of Yuasa, albeit unsuccessfully, for reasons which are not readily apparent on the record. In the absence of evidence from the appellants in support of their allegations of negligence and the particulars thereof against the respondent, the averments remained just that, mere allegations with no evidential value.

22. Was the doctrine of *res ipsa loquitur* nonetheless applicable in the circumstances of this case? The appellants submitted that the trial court should have invoked the doctrine to find liability on the part of the respondent considering how the accident occurred.

23. This Court in the case of *Margaret Waitthera Maina Vs. Michael K. Kimaru* [2017] eKLR held as follows on the application of the doctrine of *res ipsa loquitur*:

“Firstly, it is doubtful whether it is a doctrine, a maxim or a principle of law. Its literal meaning is that “the thing speaks for itself”. It is said to be 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. In the text book Charles worth & Percy on Negligence, 12th edition, appears this passage:

‘Although use of the maxim is periodically discouraged, it is so well entrenched that it may take some time to dislodge entirely. However, it has never been correct to describe it in terms of doctrine:

I think that it is no more than an exotic although convenient, phrase to describe what is in essence no more than a common-sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances.

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.”

24. The same sentiments were expressed by Hobhouse L.J. in the case of *Ratcliffe Vs. Plymouth & Tobay* HA 1998 PIQR 170 as hereunder:-

“.....the expression *res ipsa loquitur* should be dropped from the litigator's vocabulary and replaced by the phrase 'a prima facie case'. *Res ipsa loquitur* is not a principle of law: it does not relate to or raise any presumption. It is merely a guide to help to identify when a prima facie case has been made out. Secondly, it does not have to be pleaded, as erroneously held by the High Court in this case. This Court so stated in the case of *Nandwa Vs. Kenya Kazi Ltd*, Civil Appeal No. 91 of 1987 for the reason that evidence is not to be pleaded. Also see *Bennet Vs. Chemical Construction (GB) Ltd* 3 All ER 822 where the Court emphasized that:

“It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable”

25. Whether it be referred to as a maxim, doctrine, principle or merely a rule of evidence affecting the onus of proof, it is our view that it was unnecessary to apply it in this matter since the negligence of the respondent's driver was not proved on a balance of probability to begin with. To fortify our position aforesaid, we revert to the persuasive case of *Sally Kibii & Another Vs. Francis Ogaro* [2012] eKLR where Ibrahim, J. (as he then was) pronounced himself as follows: -

“To my understanding, “*res ipsa loquitur*” 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 proof 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 may be called the *res ipsa loquitur* 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 loquitur 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."

26. As already stated, there was no eye witness to the accident as would have shed light as to how it occurred. The police abstract on record showed that the accident was under investigation. The accident involved two motor vehicles and from the evidence adduced, there is nothing to show that the respondent was culpable. There cannot be an assumption of liability as the appellant failed to prove facts which give rise to what may be called the res ipsa loquitur situation or moment. In our view, the doctrine was inapplicable in the circumstances of the case and the High Court was right in so holding.
27. The upshot of all the foregoing is that we find no merit in this appeal. It is accordingly dismissed. Due to the nature of the litigation, we direct each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

