



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 91 OF 2018

BETWEEN

**DAVID ONCHANGU ORIOKI (Suing as personal representative of
ANTHONY NYABONDO ONCHANGU (Deceased) ..APPELLANT**

AND

ISMAEL NYASIMI.....1ST RESPONDENT

CHARLES MICHIEKA NYOUNGO.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

at Kisumu, (Majanja J.) delivered on 19th March 2018

in

HCCA No. 98 of 2016)

JUDGMENT OF THE COURT

1. The appellant filed suit against the respondents before the Chief Magistrates Court in his capacity as the personal representative of the estate of Anthony Nyabando Onchongu (deceased).
2. At all material times, the 1st respondent was the registered owner of motor vehicle Registration No. KAY 718 S make Toyota Hiace Matatu and the 2nd respondent was the driver of the said vehicle.
3. On or about 31st May 2012, the deceased was lawfully travelling along Ahero-Katito road when near Ayweyo area, the 2nd respondent as the driver/servant of the 1st respondent, negligently drove the said motor vehicle causing it to collide with motor vehicle registration No. KBA 553 T as a result of which the deceased sustained fatal injuries and lost his life.
4. By a plaint dated 15th March 2015, the appellant filed suit against the respondents claiming general and special damages against the respondents. The appellant claimed damages for pain and suffering as well as loss of future earning under the Law Reform Act. At the time of his death, the deceased was 25 years old. He was an engineer by profession and had a bright future ahead of him.
5. The particulars of negligence as pleaded in the plaint were that the 2nd respondent drove motor vehicle KAY 718 S at a fast and excessive speed; that he failed to keep any or proper lookout for motor vehicle registration KBA 553 T Isuzu; that he failed to give any or adequate warning on his approach; that he failed to exercise effective control of motor vehicle KAY 718 S; and that he failed to stop, slow down or swerve or in any way to manage and control motor vehicle KAY 718S.
6. The appellant claimed special damages itemized as funeral expenses Ksh. 134,000/=; death certificate Ksh. 150/=; grant of letters of administration Ksh. 25,000/= and coffin Ksh. 20,000/=.

7. The respondents filed a defence to the suit dated 28th May 2015. In the defence, the particulars of negligence as pleaded in the plaint were denied. It was further averred that it is the deceased who was negligent; that the deceased failed to take any or adequate precaution for his own safety; that he failed to heed instructions on safety precautions when travelling and that he failed to heed to the traffic rules and regulations when travelling.

8. Upon hearing the parties and evaluating the evidence tendered, the trial magistrate found the respondents 100% liable and entered judgment in favour of the appellant. The magistrate in finding the respondent's liable applied the principle of *res ipsa loquitur*. On quantum of damages, the trial magistrate awarded Ksh. 20,000/= for pain and suffering; Ksh. 100,000/= for loss of expectation of life, Ksh. 5,000,000/= for lost years and Ksh. 25,000/= as special damages. The total sum awarded in favour of the appellant against the respondents was Ksh. 5,145,000/=.

9. Aggrieved by the judgment of the trial magistrate, the respondents lodged an appeal to the High Court. In a judgment dated 19th March 2018, the learned judge (Majanja J.) set aside in entirety the judgment of the trial court and dismissed the appellant's suit with costs.

10. Dissatisfied, the appellant has lodged the instant second appeal to this Court. The grounds of appeal as stated in the memorandum include:

- i. The judge erred and completely misdirected himself on the application of the principle of *res ipsa loquitur*.
- ii. The judge erred in setting aside the judgment of the trial court and erroneously placed too much premium on the absence of an eye witness to the accident.
- iii. The judge erred and misdirected himself when he failed to be guided by the contents of the police abstract which contents were never challenged.
- iv. The judge erred in applying the burden of proof and disregarded judicial precedents by the Court of Appeal on liability in civil cases.
- v. The judge erred when he failed to be guided by the contents of the pleadings as filed by the parties.

11. The learned judge in setting aside the judgment of the trial court considered the question of liability of the respondents and the quantum of damages as awarded by the trial magistrate. In finding that the respondents were not liable for the accident, the judge expressed himself as follows:

Was liability proved in the circumstances? ...The burden of proof of a fact is on the person who wishes the court to believe in the existence of such fact. It was the duty of the respondent to prove liability on the balance of probability. Although PW1 did not investigate the accident, he produced the police abstract which confirmed the fact of the accident, the date it occurred, the fact that the deceased was a passenger and that he died and that the accident was the result of a collision between 2 vehicles....

The question then arises is whether the respondent established negligence by establishing the fact that collision took place between two vehicles. In other words, could the respondent rely on the doctrine of *res ipsa loquitur* to make the case that the appellants were liable?.....

Apart from the fact that the accident took place, the evidence of PW1 as to how the accident could have occurred is merely hearsay as he did not investigate the matter or provide an official record of the accident which showed, for example, the point of collision from which the court could infer negligence on the part of the appellant's driver.

I am aware that courts have held that where a collision involving two motor vehicles is established, the court is entitled to infer negligence.....I agree with the decisions but I would wish to distinguish them from the present case because in those cases, there was evidence of how the accident occurred and the issue before the court was how to apportion liability between the defendants.....In this case, there is no evidence on how the accident could have occurred and in the absence of such evidence, I find and hold that the respondent failed to prove negligence against the appellant on the balance of probabilities. I would therefore dismiss the suit for want of proof. (Emphasis supplied)

12. The learned judge proceeded to state that even though he had dismissed the appellants suit, on the issue of quantum of damages, he would have set aside the total of Ksh. 5,145,000/= awarded by the trial magistrate and would have awarded a total of Ksh. 12, 135,000/= broken down as follows: Ksh. 20,000/= for pain and suffering; Ksh. 150,000/= for loss of expectation of life; Ksh. 11,900,000/= for lost years and Ksh. 65,000/= for special damages.

13. In this appeal, the appellant appeals against the dismissal of the suit on the issue of liability of the respondents. He does not appeal on the quantum of damages that would have been awarded by the learned judge.

14. At the hearing of the appeal, learned counsel Mr. Meroka I.O. appeared for the appellant while learned counsel Mr. Anthony Mbugua appeared for the respondents. Both parties filed written submissions in the appeal.

APPELLANT'S SUBMISSIONS

15. Counsel for the appellant in his written submissions focused on the issue of *res ipsa loquitur*. He faulted the judge for finding that the

appellant had not proved negligence on the part of the respondents; that the judge failed to appreciate the deceased was a fare paying passenger and the respondents could not escape blame after failing to call any evidence in defence; that the judge erred in failing to find that the doctrine of *res ipsa loquitur* is applicable to the facts of this case; that the judge failed to appreciate the evidence of PW1, PC John Mukanda, as to how the accident occurred.

16. Counsel cited several authorities to support the submission that *res ipsa loquitur* is applicable to this case. The case of **Geoffrey Mureithi Juma – v- Robert Kariuki & 5 others [2012] eKLR** was cited to support the proposition that where the circumstances of the accident give rise to the inference of negligence, then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with the absence of negligence.

17. The appellant faulted the judge in failing to give sufficient weight to the police abstract that was produced in evidence indicating that the 1st respondent was the owner of the motor vehicle and that the deceased was a passenger in the vehicle. That the contents of the police abstract were not challenged.

RESPONDENT'S SUBMISSIONS

18. The respondent's counsel rehashed the background facts leading to the suit between the parties. On the issue of liability of the respondents to the appellant, counsel submitted that the judge did not err in arriving at the decision that the appellant had not proved his case on balance of probability. That the judge did not misapprehend the legal doctrine of *res ipsa loquitur*; that upon re-evaluation of the evidence on record, the judge properly arrived at the determination that the appellant did not discharge its evidentiary burden to prove that the respondent was at fault and responsible for the accident.

19. Further submitting on liability, it was urged that the appellant only called one principal witness PW1 PC John Mukanda. That the testimony of PW1 merely established that an accident had taken place involving two motor vehicles; that no other evidence was tabled to show as between the two vehicles, which one was at fault.

20. In urging us to dismiss the instant appeal, the counsel submitted that the judge did not err in distinguishing the cases in which *res ipsa loquitur* had been held to apply; that the judge was correct in holding that from the facts of this case, *res ipsa loquitur* is inapplicable; that the judge was correct in so holding because there was no evidence of a sketch map and or photographs of the scene of accident; that a police abstract by itself is insufficient to prove negligence and to make an inference that the respondents are liable for the accident.

ANALYSIS and DETERMINATION

21. As this is a second appeal, **Section 72 (1) of the Civil Procedure Act, Chapter 21 Laws of Kenya** restricts this Court to consideration of matters of law only. In **Kenya Breweries Ltd - v- Godfrey Odoyo, Civil Appeal No. 127 of 2007**, Onyango Otieno, J.A expressed himself 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 in a 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.”

22. There are two fundamental points of law for determination in this appeal. The first is whether the learned judge erred in holding that the doctrine of *res ipsa loquitur* did not apply to the facts of this case. Tied to this is the question whether the learned judge correctly distinguished the decisions of this Court that have held that *res ipsa loquitur* applies when *prima facie* a claimant has proved that a road traffic accident occurred and a passenger was suffered injury or died. The second pertinent issue is whether the learned judge erred in his re-evaluation of the evidence on record in relation to probable liability of the respondents.

23. The relevant facts in issue are not in dispute. It is not in dispute that the deceased was a passenger in motor vehicle registration No. KAY 718S and which vehicle was owned by the 1st respondent and was being driven by the 2nd respondent at the time of the road accident. It is also not in dispute that the accident was fatal and the deceased lost his life. It is also not in dispute that the accident was a head on collision between two motor vehicles. It is also not in dispute that the appellant never filed suit against the owner of the second motor vehicle.

24. There are two pertinent legal questions in this matter. First is whether a passenger in a vehicle that is involved in accident has the burden to prove how the accident occurred and second, whether a court can infer negligence upon proof that an accident occurred. The learned judge considered and determined these two questions and held that a claimant has the burden to prove how the accident took place on a balance of probabilities and a court cannot infer negligence unless there is evidence as to how the accident occurred. In setting aside, the trial court's judgment, the learned judge held that in the absence of evidence as to how the accident occurred, the appellant had not discharged the evidential burden to prove negligence on the part of the respondent.

25. In our considered view, in a cause of action founded on negligence, there are two elements in the assessment of liability, namely causation and blameworthiness. (See **Baker v Willoughby [1970] AC 467**).

26. In **Ogol – v- Murithi, [1985] KLR 359**, it was held that in a road traffic accident, in the absence of any explanation to show that a respondent was on the balance of probabilities not negligent, a finding of negligence is inevitable once it is shown that the doctrine of *res ipsa loquitur* applies. That is not to say a respondent has to prove how and why the accident happened; it would suffice if he is able to show he was not personally negligent even if the accident remained inexplicable. (See **Woods – v- Duncan [1946] AC 401**).

27. We have considered the learned judge's finding that a claimant must prove how the accident occurred. To this end, the judge held that the testimony of an eye witness is necessary or a police abstract and report from the investigating officer with sketch maps of the scene of

accident. Ordinarily, in a road traffic accident, a claimant must lead evidence to prove not only the occurrence of the accident but how it happened. The learned judge correctly appreciated this when he cited dicta by Lord Denning in **Baker – v- Market Harborough Industrial Cooperative Society Limited [1953] 1 WLR 1472, 1476** where it was stated “Every day, proof of collision is held to be sufficient to call on the defendants for an answer. Never do they both escape liability....” Likewise, the learned judge correctly cited dicta from this Court in **Hussein Omar Farah – v- Lento Agencies, CA Nai. Civil Appeal No. 34 of 2005 [2006] eKLR** where it was stated “It has been held in our jurisdiction and also in other jurisdictions that if there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame.”

28. In the instant matter, the learned judge having correctly appreciated the law as enunciated in the above cases erred in the distinguishing the cases. In distinguishing the cases, the judge expressed that the issue before the court in the two cases cited above was how to apportion liability between the defendants. With due respect, this distinction is erroneous. When a collision occurs between two vehicles, as between them, the issue of contributory negligence and apportionment may arise. However, as between a passenger and the owners/drivers of the two vehicles involved in the accident, liability on the part of the owners is 100% joint and several and no question of apportionment arises unless it is proved the passenger was negligent.

29. In the persuasive case of **Jackline A. Obondo –vs- Kenya Bus Services & Another (2007) eKLR**, Kimaru, J observed as follows: -

“However, upon evaluating the evidence on record, it is clear that when the plaintiff boarded the said motor vehicle at Bondo, she expected to be ferried safely to her destination, Nairobi. She did not reach safely to her destination. The bus which she was travelling in was involved in an accident as a consequence of which she was injured. I agree with the finding of the Court of Appeal in the case of **Embu Public Road Services Ltd. –Vs-Riimi (1968) EA 22** where it was held that where an accident occurs and no explanation is given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of *res ipsa loquitur* and hold the defendant liable in negligence.” (See also **P I - v - Zena Roses Ltd & another [2015] eKLR**)

30. In the instant matter, the respondents pleaded negligence on the part of the deceased. No evidence was led to prove the alleged negligence. The doctrine of *res ipsa loquitur* applies in cases where the deceased or an injured person is a passenger in a motor vehicle involved in an accident. In such cases, what must be proved is the occurrence of the accident and that the person injured or deceased was a passenger in vehicle.

31. In this matter, we are satisfied that PW1 testified and tendered in evidence a police abstract proving the occurrence of the accident and establishing that the deceased was a passenger in the motor vehicle. We are fortified in our finding when we consider that the respondents did not lead any evidence to demonstrate that the 2nd respondent, as the driver of motor vehicle KAY 718S, was not negligent.

32. For the foregoing reason, we find the judge erred in finding that the doctrine of *res ipsa loquitur* did not apply in this case. We find that the principle of *res ipsa loquitur* was applicable and negligence on the part of the respondents was proved. We accordingly set aside the decision of the learned judge in dismissing the appellant’s suit and find that liability on the part of the respondents was proved.

33. Having made a finding that liability on the part of the respondents was proved, we adopt the findings and determination by the learned judge on the issue of quantum of damages. We accordingly enter judgment in favour of the appellants as against the respondents jointly and severally in the sum of Ksh. 12, 135,000/= broken down as follows: Ksh. 20,000/= for pain and suffering; Ksh. 150,000/= for loss of expectation of life; Ksh. 11,900,000/= for lost years and Ksh. 65,000/= for special damages.

34. The upshot is that this appeal has merit and is hereby allowed. We vary the judgment of the learned judge to the extent that we set aside the order dismissing the appellant’s suit and substitute in its place a finding of liability on the part of the respondents in favour of the appellant. We adopt and affirm the quantum of damages proposed by the learned judge and we hereby enter judgment against the respondents jointly and severally in the sum of Ksh. 12, 135,000/= broken down as follows: Ksh. 20,000/= for pain and suffering; Ksh. 150,000/= for loss of expectation of life; Ksh. 11,900,000/= for lost years and Ksh. 65,000/= for special damages. The appeal be and is hereby allowed with costs.

Dated and Delivered at Kisumu this 31st day of July, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR