IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, G. B. M. KARIUKI & KANTAI, JJ.A)

CIVIL APPEAL NO.97 OF 2009

BETWEEN

FRANCISCA NJERI MWANGI…….....……APPELLANT

AND

JAMES K. MWANGI…….....…..…1ST RESPONDENT

JOSEPH GITHINJI MAGENDA…….....……..…….2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ang'awa, J.), dated 21st May, 2004

in

H.C.C.C. No.567 of 2002)

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JUDGMENT OF THE COURT

The appeal herein arises from the judgment of the High Court (***Ang'awa, J.***), delivered on 21st May, 2004 by which the suit filed by the appellant was dismissed with costs.

On 3rd April, 2002, the appellant filed her suit by way of plaint against the respondents, averring that the motor vehicle registration number KAJ 703J was registered in the name of the 1st respondent. On 14th November, 1999 while the said motor vehicle was being driven by the 2nd respondent in the course of his employment to the 1st respondent, it was involved in an accident in which the appellant, travelling as a passenger in it was injured. Negligence was alleged on the part of the 2nd respondent.

The particulars of negligent driving included going too fast, in the circumstances; failure to keep proper look-out for the safety of the passengers; failure on the part of the 2nd respondent to slow down, stop or control the motor vehicle so as to avoid the accident and

"(e) So far as may be necessary, the plaintiff will rely upon the doctrine of *Res Ipsa Loquitur****."***

The appellant pleaded further that in the accident, she sustained injuries to the back of the neck, compression to the C5 and T3 vertebral bones, flexus nerve injury to the right arm, 2nd rib, cut wounds on the head, ear and left ankle joint. So she prayed for special damages (Sh.30,798/=), general damages plus costs and interest.

By their joint statement of defence dated 18th March, 2003, the respondents denied that if any accident occurred, it was due to their negligence. It was added in the alternative that otherwise, the occurrence of the accident was contributed to by circumstances beyond their control thus even due care and diligence could not avoid it. The injuries the appellant claimed to have sustained were equally denied.

A reply to the defence was filed by the appellant joining issues with the respondents and reiterating the contents of the plaint. The appellant filed seven issues for determination along with a list of documents and authorities.

On 6th May, 2004, the trial got under way after the parties were called out. Only the appellant was present. The respondents were absent and so an *ex parte* hearing proceeded under ***"Order 9b rule 3(a) of the Civil Procedure Rules"***. After hearing the appellant (PW1), who produced some reports, receipts and other documents, ***Dr. Ruga*** testified and the trial closed with submissions by ***Mr. C. N. Kihara***, learned counsel for the appellant.

The learned judge reviewed the evidence and submissions before her on liability and on that aspect delivered herself thus:

> ***"As the plaintiff was a passenger and from the evidence before court, it would have been easy to conclude that indeed an accident occurred on the material day. This though would have been sustained by the production of a police abstract report. None was produced despite the plaintiff being given further adjournment of about 14 days. I find that in absence of the police abstract report, possibly by any other evidence to confirm an accident did occur that the plaintiff has failed to establish that an accident in itself did occur as a result of the negligence of the defendant*** (sic)***."***

The learned judge also found that as per the certificate of registration produced from the Registrar of Motor Vehicles, the subject motor vehicle was registered in the name of the 1st respondent, ***James Karume Mwangi***. Then she added:

> ***"I would accordingly dismiss this suit."***

Proceeding to possible award had the suit succeeded, ***Ang?awa, J.*** reviewed the relevant authorities tendered, the medical reports and the appellant's evidence and proposed a sum of Sh.200,000/= in general damages and Sh.2,000/= for special damages. In conclusion, the record had the following:

> ***"The suit stands dismissed with no orders as to costs because the defendant*** (sic) ***having been duly served was absent during the hearing."***

From the foregoing, it would appear that the suit was dismissed on two bases, firstly that the appellant had not proved liability and secondly, because the respondents had not come to court for the hearing despite having been duly served. In the anomalous situation, we heard the appeal on the basis that the appellant had failed to prove liability against the respondents because the suit could not be dismissed because the respondents failed to attend trial.

Mr. Kihara filed the memorandum of appeal with eight grounds which he appeared to argue together, as we shall presently show. On the other hand,

Mr. A. M. Mulandi, learned counsel holding brief for Ms. ***Njeri Mburu*** for the respondents, opposed the appeal.

Mr. Kihara?s position was that his client's suit ought not to have been dismissed by the High Court on the basis that she had not produced the police abstract report regarding the accident. She had pleaded the doctrine of *res ipsa loquitur* and given evidence in court on how that accident occurred. She was an eyewitness to the accident and her testimony was never rebutted. A police abstract report could not be evidence in support of liability on the part of the respondents. It was sufficient that evidence demonstrated that the respondent's motor vehicle in which the appellant was, rolled while going downhill and she was injured. Without evidence in rebuttal or explanation, the accident must be attributed to the negligent driving of the 2nd respondent, an employee of the 1st respondent.

Turning to the issue of damages, counsel urged us to find that Sh.200,000/= proposed by the High Court was too low in the circumstances of the injuries sustained and the same should be enhanced. The appellant had sought a sum between Sh.450,000/= and sh.550,000/= which bracket we should consider and make award and also order that the appellant gets costs here and in the court below.

Mr. Mulandi opposed the appeal and maintained that the High Court was correct to dismiss the suit because the appellant did not produce police abstract as evidence to prove that the accident occurred. Also the P3 form was not produced. To counsel, these two documents had to be produced as a matter of practice for the appellant to prove liability. Then ***Mr. Mulandi*** stood by the quantum of general damages proposed by the High Court.

In determining this appeal the two issues that appear are whether the appellant's suit was properly dismissed because she did not produce a police abstract report together with a P3 form regarding the subject accident; and whether we should interfere with the proposed quantum of damages.

This being a first appeal we are enjoined to go over the evidence tendered in the High Court as if the suit is being tried afresh, going by the recorded evidence only. By that, we will agree or not agree with the trial judge as regards her findings (see ***Selle vs Associated Motor Boat Co. Ltd & Others [1969] EA 123)***. As noted earlier, an *ex parte* hearing proceeded in the High Court, in absence of the respondents who, though duly served, did not appear on the appointed day.

The appellant (PW1) told the trial judge that on 14th November, 1999 she was travelling in motor vehicle registration No.KAA 702J herein, from Nairobi going towards Murang'a. She said:

> ***"When I reached at Murang?a the vehicle had an accident on a hill. It was on the road. It went down a hill following 5.00 meters. This is a cliff. I was inside. We stood under the hill at the bottom. The driver was careless in driving the vehicle. That was the cause of the accident. I had injury on the neck right side; right hand and leg. I went to hospital."***

The appellant then narrated how she visited Kenyatta National Hospital, collected treatment documents and was examined by doctors who issued medical reports that she produced. She also produced an x-ray report and receipts for expenses incurred. This was a fatal accident because the appellant testified that she saw two dead people.

Dr. Maina Ruga (PW2), a general medical practitioner examined the appellant on 9th August, 2001. She gave him a history of traffic accident on 14th November, 2009, the injuries she sustained and how/where they were managed. His own report stated that the appellant had stiffness of the right shoulder and weakness in the arm. She could not move the shoulder. The main injuries were in the neck, back, chest right shoulder and they affected the nerves. The residual pain and stiffness prevented the appellant from using her right arm. The pain could be recurrent, over a long time. She required physiotherapy and would likely develop arthritis of the neck and upper thoracic spine. PW2 produced his report (Exh. P3) and also that of ***Dr. J. C. Mwangi*** whose signature he knew and could recognize (Exh.P.7).

To begin with the issue of liability, we are not in doubt that as the learned judge observed, the appellant did not produce the police abstract report in respect of the subject accident. It was among the documents marked for identification by that court but it does not appear from the record that it was later produced. But then we ask ourselves: Was it central to proof of liability against the respondents? We think not. But

let us begin with the Police Form 3, simply called a P3 which ***Mr. Mulandi*** said was not produced.

It is issued by the Kenya Police.

The officer filling it requests a medical officer or practitioner to examine the victim of an assault, accident or other offence, who has reported the incident, or injuries that may have been suffered. A doctor or even a clinical officer completes the form and returns it to the requesting police station. That form may then be tendered in evidence during a trial. The tendering of the P3 does not constitute proof of the incident involved. It simply indicates that a reported incident occurred and the victim sustained injuries found. The form may include even the management of those injuries. In short a P3 form does not prove the incident occurred or who was responsible for it, even if it contains the nature of the incident in question. In sum, a P3 form does not prove liability.

Liability is proved by evidence usually of the victim and or witnesses.

The police officer requesting the medical officer to examine the victim may not have been a witness to the assault or accident. In this case the appellant was a victim/witness of the road traffic accident in issue. She gave evidence in the trial court how the driver of motor vehicle registration number KAA 702J, drove over the cliff and the appellant and others, found themselves at the bottom of the hill. She was injured as a result and she told the trial judge that the driver was driving carelessly and that is how the accident occurred. He could have been driving at an excessive speed in the circumstances and so he lost control of the motor vehicle which plunged down a cliff. That is a probable explanation by the victim. Although the P3 form was not produced stating the injuries, the appellant produced medical reports. The respondents did not rebut that evidence even as they stated in their defence that the accident occurred due to circumstances beyond their control. Which circumstances, if we may ask?

None was proffered and on the basis of the appellant's evidence the trial judge should have found that the accident took place due to negligent driving of the 2nd respondent, by which act the 1st respondent, the registered owner of the motor vehicle then, was vicariously liable. And as the appellant was injured as a result, the next step was for the trial judge to assess general damages and from the receipts tendered, consider the pleaded and proved special damages.

Turning to the police abstract report which the judge said was not produced, this was another form filled and issued by the police. It was not central in proving liability. It merely gives the details entered about the road accident in issue but it, too, does not prove liability even as it contains the details of the motor vehicle involved and /or its owner. Again, as in the case of a P3, the evidence leading to whether someone was liable or not comes from the witnesses who may include the victim. We hasten to add however that P3 form and abstract reports should not be obtained and even produced. All we are saying is that the two documents are not central to prove liability.

In sum we find that the trial court fell in error when it found that liability had not been proved because a police abstract together with the P3 form, was not tendered in evidence by the appellant. The evidence of the appellant established that the accident occurred due to the negligent driving of the motor vehicle by the 2nd respondent over a cliff.

We are also satisfied that even had the appellant not testified with the clarity that she did, for instance she would have dozed off only to wake up from the motor vehicle having fallen off the cliff, she had pleaded the doctrine of *res ipsa loquitur*. This is a Latin phrase which translates in ***Blacks Law***

Dictionary as

> ***"„the thing speaks for itself?.***
>
> ***The doctrine providing that in some circumstances, the mere fact of an accident?s occurrence raises an inference of negligence that establishes a prima facie case."***

The occurrence of the accident herein by itself established a prima face case that it was due to the negligent driving of the 2nd respondent – a state of things he could controvert by placing before the trial court, as had been pleaded in the defence, that the accident took place because of circumstances beyond control. That was not done.

From the foregoing, it is our finding therefore that the appellant led evidence which established that the respondents were liable for the accident in question in which she was injured and so she deserved to be compensated.

Thus turning to the issue of damages we proceed as follows:

General Damages: The trial judge after dismissing the suit, a move we have found was in error, nonetheless, properly proceeded to pronounce possible award of damages. She put this at Sh.200,000/=.

In this regard, we have perused the medical reports of ***Dr. Maina Ruga*** dated 9th August, 2001 and that of ***Dr. J. C. Mwangi*** dated 22nd August, 2001. They are thirteen days apart and are thus agreed in most, if not, all respects. The reports have recounted the injuries set out above as per the plaint. The appellant was initially admitted and treated at Murang'a Hospital for eight days. Then she attended Kenyatta Hospital where more treatment was given and x-rays taken in respect of the fractures. She paid for all that. And if we may quote from the last report, by ***Dr. J. C. Mwangi***, his conclusion was that:

> ***"She sustained neck and chest injury associated with bone and soft tissue injury in both areas. She also had ankle injury but this recovered without any problem. She has had extensive physio with improvement but still has pain and weakness in raising her right upper arm. She will require pain killers on occasions when she has pain. Her capacity to earn a living has been compromised and being right-handed makes the problem even bigger. Residual incapacity of a permanent nature is estimated to be thirty five per cent (35%)."***

The appellant's side had, with relevant case law tendered, proposed a sum between Sh.450,000/= and Sh.550,000/= in general damages. The respondent's counsel told us to maintain the sum proposed by the trial judge.

On our review of the medical evidence, we are of the opinion that Sh.200,000/= considered by the judge was so low as to warrant our departure from it. The appellant sustained fractures and other injuries that necessitated hospital admission. Thereafter she attended several private clinics, underwent radiology examinations and physiotherapy sessions. In light of that, our award is Sh.450,000/= in general damages, having considered the relevant cases cited: ***Lenson Nchogo vs Tara Xmet Ltd & Others HCCC No.397/97***, ***Edith Wanja vs Newton Mbuthia HCCC No.554/96***. These cases were decided in 2001 and the general damages for more or less similar injuries ranged between Sh.450,000/= and Sh.550,000/=.

Special Damages: The appellant tendered paid receipts in excess of Sh.2,000/= which the trial judge proposed as an award. We note that for instance, she paid Sh.3,000/= to Dr. J. C. Mwangi for his report; well over Sh.1,400/= to Kenyatta National Hospital plus a host of other bills paid to chemists. The total sum paid in that regard appears substantial. But in this case, and in the evidence adduced, we award a total of Sh.10,000/= as special damages. Therefore we give the total award as follows:

General	Damages	-	Sh.450,000/=
Special	Damages	-	Sh.10,000/=
Total	- Sh.460,000/=		

(In words, Four Hundred and Sixty Thousand Shilling only)

In the result, we allow the appeal by setting aside the High Court decision and in its place give judgment in the above terms. The appellant also gets costs both in this Court and the court below.

Dated and delivered at Nairobi this 31st day of July, 2015.

J. W. MWERA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR