



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 16 OF 2015

BETWEEN

MARGARET WAITHERA MAINA.....APPELLANT

AND

MICHAEL K. KIMARU.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Kerugoya(Limo, J.) dated 17th March, 2015

in

H. C. C. C. No. 18 of 2013)

JUDGMENT OF THE COURT

1. What is the standard of proof by a passenger or a pedestrian in a road traffic accident? What is *res ipsa loquitur*—a maxim, doctrine or rule of law? When does it apply? What are the consequences of failure by the defendant to enjoin a third party in the proceedings? These are the crucial questions raised in the appeal before us.

2. The facts are simple enough. The appellant was a third year University of Nairobi student travelling from Nairobi to her home in Nyeri. At around 1pm on 1st April 2010, she went to Nairobi Tea Room stage, boarded a Toyota *matatu* vehicle Reg. No. KBK 301A, paid the fare and sat directly behind the driver on the first row, and the vehicle left for Nyeri. She never got to Nyeri.

3. According to her, at a point on the single road between Kenol and Makuyu, the driver of the *matatu* started overtaking another vehicle but an oncoming vehicle appeared and the driver tried to avoid it by swerving further right off the tarmac. It was too late. The other vehicle rammed into the exit door of the *matatu* and it was thrown off the tarmac where it stopped. The appellant knocked her head against the metal grille in front of her and suffered face, left leg and knee injuries for which she was treated at Thika Hospital. A doctor who later examined her (PW1), confirmed that she had soft tissue injuries on the nasal bridge, and on both legs, which he classified as harm. She healed after treatment but experienced residual pain.

4. The accident was reported to Makuyu police traffic base for investigation and the police confirmed that the owner of the *matatu* was **Michael K. Kimaru**, the respondent before us. The other vehicle involved in the accident was a Toyota Starlet Reg. No. KBA 917Q (the Starlet). PW2 produced the police abstract to confirm those details and the fact that the appellant was a passenger in the *matatu*.

5. On 21st June 2010, the appellant sued the respondent herein asserting that the driver of the *matatu* drove carelessly and recklessly thus causing the accident. She asserted that he was driving at high speed, attempted to overtake when it was not safe, drove on the wrong side of the road and failed to slow down or apply brakes to avoid the accident. She claimed both general and special damages. In his defence, the respondent denied that he was the owner of the *matatu*; that the appellant was a passenger in the *matatu*; that she was injured therein, and that the accident occurred. He put the appellant to strict proof of those assertions. In the alternative the respondent averred that it is the appellant who was negligent in that she failed to take precaution for her safety; failed to heed safety precautions and failed to heed traffic rules. In further alternative, the respondent pleaded that the accident was caused by the negligent driving of the Starlet which, *inter alia*, was driven without due care and attention; kept no lookout for other vehicles; changed lanes and collided with the *matatu* vehicle. Despite that pleading, the respondent did not enjoin the owner/driver of the Starlet in third party proceedings.

6. The appellant testified and called her doctor to confirm her injuries, and the traffic police officer from Makuyu to confirm that the accident occurred on the single road as opposed to the dual carriageway which ends at Kenol. The respondent did not testify, but he called the driver of the *matatu* (DW2) who gave a different version of the accident. According to him the accident occurred at 2.00 pm on the dual carriageway before Kenol. He blamed the driver of the Starlet, who according to him was a lady wearing a *hijab* over her head, for crossing from the other side of the dual carriageway and colliding with him. His vehicle pushed the Starlet back to the island between the dual carriageway and soon after, a *miraa* pickup rammed into it. Makuyu police officers came to the scene and took particulars. His friend (DW3) who was also a driver travelling in the *matatu* narrated the same story. He never witnessed the accident that occurred on the single road after Kenol. (DW1), who had not recorded any statement before coming to court, said he was a conductor in a different *matatu* coming from Nyeri to Nairobi which was following the Starlet on the dual carriageway. The Starlet went under a bridge and collided with the *matatu* coming from Nairobi. It was raining and the road was slippery. A *miraa* pickup then came along and rammed into the Starlet. He too confirmed that he did not witness the accident that took place between Kenol and Makuyu on the single road. He said the driver of the Starlet was a man who left his side of the road to the opposite road. DW4, a headmistress, did not witness any accident, while DW5, another traffic police officer from Makuyu at first pretended to testify that the accident was on the dual carriageway only to admit in cross-examination, after being shown the sketch maps drawn by the officers at the scene, that it was on the single road after Kenol.

7. The trial court, **B. M. Ochoi** (PM) evaluated the evidence and was persuaded that the appellant was a fare paying passenger in the *matatu* and suffered the injuries as pleaded. He assessed the credibility of the witnesses on how and where the accident occurred and was not impressed by the respondent's witnesses. He stated:-

“Clearly the defence witnesses gave contradictory evidence as to how the accident occurred and the credibility of these particular witnesses was questioned and proved doubtful because they were not initially on the list of witnesses provided by the defence counsel and both defence witness 1 and defence witness 3 admitted on cross-examination that they had never recorded statements about the accident with the police. On the other hand the plaintiff was consistent as to where and how the accident occurred. Her contention that the accident occurred between Kenol and Sagana was supported by the evidence of plaintiff witness 2, Police Constable Githinji Mwangi though he never investigated the matter, he produced a police abstract (plaintiff exhibit no. 2) confirming that the accident took place along Kenol-Sagana road. This was also corroborated by the defendant (sic) own exhibit No. 5 on the defendant list of documents which is another police abstract showing that the accident was along the Kenol/Sagana road. I therefore find that the plaintiff has proved on a balance of probability that the accident took place between Kenol and Sagana.”

8. As to the cause of the accident, the trial court found that the negligence pleaded against the appellant was not proved as she could do nothing as a passenger to prevent the accident. The court invoked the doctrine of *res ipsa loquitur* as follows:-

“This is a case where the doctrine of Res Ipsa Loquitur applies. In Mukusa vs. Singa & Others (1969) E. A 442, it was held that for the doctrine to apply there must be reasonable evidence of negligence but where the thing is shown to be under the management of defendant or his servants and the accident in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care”.

9. The trial court found that although the respondent admitted an accident and pleaded negligence against the Starlet, it did not join the driver of the Starlet in the case and therefore the respondent must bear full responsibility. It reasoned thus:-

“It is worth noting that the driver of motor vehicle registration number KBA 917Q was not a party in this suit and therefore the enumeration of the particulars of negligence by the defendant was in vain. If the defendant's driver was not negligent as suggested then the defendant ought to have instituted 3rd party proceedings against the driver of motor vehicle registration No. KBA 917Q (See Esther Michele vs. Merahia Nduta) H.C.C.C No. 303 of 1991 in Nairobi.

A perusal of the court file shows that the defendant filed some documents to initiate 3rd party proceedings but apparently abandoned the same. In the absence of such proceedings, I find the defendant 100% liable.”

The court assessed and awarded general damages at Sh. 50,000 and special damages at Sh. 3,700.

10. Aggrieved by that judgment the respondent appealed to the High Court (**Limo J.**) which allowed the appeal on the grounds, firstly, that the doctrine of *res ipsa loquitur* was not applicable because it was not pleaded and further because:

“In situations where explanation exists on how the accident occurred even if there are two different versions, the doctrine of 'res ipsa loquitur' does not apply. The doctrine applies only in situations where an accident occurs and no other explanation can be attributed to it other than inference of negligence on the part of the defendant. This was not the situation in the above accident and the same was not pleaded. The doctrine is normally used to establish a tort of negligence in the absence of a proper explanation on how the accident occurred. The doctrine applies in situations where surrounding circumstances may permit an inference or a presumption of negligence on the part of the defendant if such defendant cannot offer an explanation in rebuttal.”

11. Secondly, the court held that the appellant did not prove the case she had pleaded before the trial court. She did not prove that she was a passenger in the *matatu* by producing relevant documents; that the respondent was the owner of the *matatu* by producing a log book or official search; and finally that the accident was caused by the driver of the *matatu* by showing conclusive police investigations blaming the driver. In the assessment of the court, the appellant was asleep when the accident occurred and did not witness how the accident occurred. The court further held that the trial court's conclusion on the failure by the respondent to take out third party proceedings, was a misdirection. The court stated:

“For 3rd party proceedings to be triggered, negligence must be established and proved against the defendant who can then claim either contribution or indemnity from the 3rd party. I agree with the appellant's submissions that Section 108 of the Evidence Act places the burden of proof on a plaintiff in a given suit and that the burden is such that the suit would fail even if the defendant was to offer no evidence at all. So failure to take out 3rd party proceedings should not have been used to hold the appellant liable when no material supporting the finding was placed

before the trial court.”

12. The appeal was allowed but nothing was done to interfere with the assessment of damages on account of dismissal of the issue of liability. In passing, we say this was an erroneous approach by the High Court since there are numerous authorities enjoining trial and first appellate courts to express themselves on quantum even where liability may not be in issue.

13. This is now the second appeal which is premised on three grounds, which may be summarized, thus: The High Court erred in :-

- ***Finding that the appellant had not proved negligence on the part of the respondent's driver***
- ***Failing to appreciate that the appellant was a mere fare paying passenger and the respondent could not escape blame after failing to take out third party proceedings***
- ***Failing to appreciate that the appellant's evidence on how the evidence occurred was not controverted, since the respondent's witnesses testified on a different accident.***

Those grounds encompass the three issues of law floated in the opening paragraph of this judgment.

14. Learned counsel for the appellant, **Mr Kinyua Kiama**, submitted on ground 1 and 3 that the High Court totally misapprehended the evidence of the appellant by stating that she was asleep and never witnessed the accident, when the appellant had stated the opposite. Her evidence, asserted counsel, was not controverted since the witnesses called by the respondent testified on a different accident along the dual carriage way before Kenol, while the accident complained about was between Kenol and Makuyu. On ground 2, counsel submitted that **Order 1 Rule 15** of the **Civil Procedure Rules** enjoins a defendant to take out third party proceedings so that all issues between the parties can be heard together. The respondent never did so with the result that any allegations of negligence made against the third party came to nought. He cited the case of ***Esther Mukulu Matheka v. Merania Nduta HCCC 3039 of 1991(UR)*** where the High Court applied the doctrine of *res ipsa loquitur* stating:

“The defendant was a passenger in the GK vehicle. It collided with the defendant's motor vehicle. Vehicles do not normally collide with each other unless one of the drivers or both are negligent. If the defendant was not negligent, he should have brought 3rd party proceedings against the Attorney General. The doctrine of res ipsa loquitur applies and in the absence of any explanation as to how the accident occurred, the defendant is liable.”

15. There was no response to those submissions since the advocates on record for the respondent did not show up in court despite service of hearing notice. Nevertheless, our duty to consider with care the issues of law raised remains undiminished.

16. As this is a second appeal, we are enjoined by dint of **Section 72** of the **Civil Procedure Act**, to consider matters of law only. In ***Kenya Breweries Ltd vs. Odongo – Civil Appeal No. 127 of 2007***, Onyango Otieno, J.A held:

“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.”

17. There was no concurrence of findings of fact by the two courts below. It is a point of law therefore to consider whether in its re-evaluation of the evidence, the High Court failed to consider matters it ought to have considered or considered matters it ought not to have considered, and whether, on the whole, the decision is perverse. We must also examine whether the High Court properly interfered with the exercise

of the trial court's assessment of credibility of the witnesses who appeared before it.

18. We have examined the record of appeal and we are not in doubt that the High Court erred in making the following findings:- firstly, the finding that ownership of the offending *matatu* by the respondent was not proved because there was no production of a log book or official search from the registrar of motor vehicles. The court cited no authority for that finding but it has been stated before in *obiter dicta* in the case of **Thuranira Karauri vs. Agnes Ngeche – [Civil Appeal No. 192 of 1996] (UR)**. But that case has since been re-examined by this Court in the case of **Joel Muga Opija v East African Sea Food Limited [2013] eKLR** where the Court stated thus:

“It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

See also **Superform Ltd & Anor. vs Gladys Nchororo Mbero (2014) eKLR** and **Wellington Nganga Muthiora vs Akamba Public Road Services & Anor. (2010) eKLR**.

19. In this case, a police abstract report was produced in evidence by both PW2 and DW5 indicating that the respondent was the owner of the *matatu* vehicle and there was no challenge to that evidence. The High Court therefore erred in law in failing to consider that evidence and in reversing the trial court. We so find.

20. Secondly, the High Court found that there was no proof that the appellant was a passenger in the *matatu*. Once again, there was no challenge to the police abstract report that indicated that the appellant was a passenger. The notion that only documentary evidence would be acceptable for strict proof of all facts has been decried before by this Court and we echo the case of **Jacob Ayiga Maruja & Another v. Simeon Obayo Civil Appeal No. 167/02(UR)**, thus;

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

The High Court was again in error and we so find.

21. Thirdly, on how the accident occurred, the High Court reversed the finding of the trial court, which was based on credibility of the witnesses, that the respondent's witnesses were not truthful and preferred the appellant's evidence. As was stated in the case of **Hahn Vs Singh [1985] KLR 716** at page 721:

“On appeal, of course, before coming to a different conclusion on the typed evidence this court should be satisfied that the advantages enjoyed by the trial judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion: Lord Thankerton in Watt or Thomas vs. Thomas [1974] AC 484; especially if it is based on a straight conflict of primary fact between witnesses, where credibility is crucial, for then an appeal court can hardly ever interfere. Lord Bridge in Whitehouse vs. Jordan, [1981] 1 WLR 246, 269.”

22. We hold the view that the High Court had no firm basis for interfering with the trial court's finding on conflicting evidence based on credibility of witnesses, as there was sound basis for the trial court to so find. Two of the witnesses had not recorded their evidence before and contradicted each other on the material fact of the scene of the accident and the driver of the other offending vehicle. One of the witnesses supported the appellant's evidence on the location of the accident and thus lent weight to her evidence. The finding by the High Court that the appellant was asleep during the accident was an erroneous construction of her verbatim evidence. After narrating what she saw, and how the accident happened, it was put to her in cross examination that she was asleep, and she responded:

“I was not asleep when the accident occurred but occasionally I was sleeping and waking up.”

The appellant, in our view, was only being truthful and was believed by the trial court. She was seated behind the driver's seat and had seen the *matatu* driver trying to overtake when it was not safe to do so; she saw the driver on the wrong side of the road; and swore that he was speeding. We find no basis for rejecting her evidence, which in the light of the unbelievable evidence of the respondent's witnesses, remained unchallenged.

23. Those findings should be sufficient to dispose of this appeal. But the High Court reversed the trial court on the application of the doctrine of *res ipsa loquitur* and we may briefly comment on it. 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 **Charlesworth & 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 v. Plymouth & Tobay HA 1998 PIQR 170:**

“.....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.”

25. 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. 91/1987** for the reason that evidence is not to be pleaded. Also see **Bennet v 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”

Whether it be referred to as a maxim, doctrine, principle or merely a rule of evidence affecting the onus of proof, it is our conclusion, in view of the learning cited above, that it was unnecessary to apply it in this matter since the negligence of the respondent's driver was proved on a balance of probability.

26. The upshot is that this appeal succeeds and is allowed with the result that the judgment of the High Court is set aside and that of the trial court reaffirmed. The appellant shall have costs of the appeal, both here and in the court below.

Orders accordingly.

Dated and delivered at Nyeri this 28th day of October, 2015.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR