



**IN THE COURT OF APPEAL
AT NAKURU
(CORAM: BOSIRE, WAKI & AGANYANYA, J.J.A.)
CIVIL APPEAL NO. 83 OF 2004**

BETWEEN

**GEOFFREY MUREITHI JUMA APPELLANT
AND
1. ROBERT KARIUKI
2. PETER MAINA KARIUKI
3. MBURU GICHUKI
4. JOHN KAROKI NYOIKE
5. STEPHEN KARANJA T/A WAMBE TRANSPORTERS
6. GEOFFREY K. GICHUKIRESPONDENTS**

*(An appeal from the judgment and decree of the High Court of Kenya at Nakuru (Rimita, J.) dated
30th March, 2001*

in

H.C.C.C. No. 112 of 1998)

JUDGMENT OF THE COURT

On 9th February, 1997 the appellant, *Geoffrey Mureithi Juma*, was travelling as a fare paying passenger in bus registration number KAG 323H from Njoro to Mau Narok. The bus was involved in a road traffic accident near Ndeffo Farm with other motor vehicles given as registration numbers KZP 763 and KAB 053L. The impact of the accident threw the appellant from his seat to the floor and he became unconscious. He suffered injuries all over the body and was taken to Nakuru Provincial General Hospital where he remained under treatment for two weeks and on discharge he attended clinics as an out-patient for some time. The injuries are specified in the medical report prepared by *Dr. Vilembwa* and produced at the trial as exhibit 2.

When the matter was reported to the police, an abstract report was issued which showed that the accident involved motor vehicle registration numbers KAG 323H and KZP 763. There was no mention of motor vehicle registration number KAB 053L. The appellant filed a suit by plaint dated 30th March, 1998 and claimed from the owners and drivers of the bus and the two other vehicles mentioned above, both general and special damages for the injuries he sustained as a result of the accident. They are the respondents in this appeal. According to the pleadings the 1st respondent was the proprietor and operator of motor vehicle number KZP 763 Mitsubishi lorry while the 2nd respondent was his authorized driver; servant or agent. The 3rd respondent was the proprietor and operator of motor vehicle number KAG 323H Isuzu bus otherwise known as “*Explainer*”, and the 4th respondent was his authorized driver, servant or

agent; while the 5th respondent was the proprietor and operator of motor vehicle registration number KAB 053L and the 6th respondent was his driver; agent or servant.

All the defendants/respondents filed appearances and defences in which they denied liability arising from the accident. The case was heard on 5th March, 2001 wherein only the plaintiff/appellant testified. The defence did not tender any evidence.

In the plaintiff/appellant's evidence he testified as to how he entered bus registration number 923H (it was actually KAG 323H) at Njoro to go to Mau Narok on 9th February 1997 at about 8.00 p.m. While on the way the bus stopped to drop some passengers but immediately it pulled out of the parking, there was a bang. The appellant was thrown off the seat to the floor and he became unconscious and did not know how the accident occurred. The respondents offered no evidence in defence, and counsel for the parties agreed to put in written submissions on both liability and damages and on this basis, the learned Judge (Rimita, J.) wrote and delivered his judgment on 30th March, 2002. He dismissed the suit with costs. In his judgment, the learned Judge rendered himself, *inter alia* as follows:

“The plaintiff had a duty of proving negligence against the defendants or any of them. He was unable to do so. Consequently he did not prove his case on the required standard. His case must fail.”

It is against this decision that this appeal arises.

It is true the appellant did not know how the accident occurred. He only heard a bang and was thrown from his seat in the vehicle to the floor and he became unconscious. It would appear he later came to learn that the bus he was travelling in was involved in a road traffic accident with two other motor vehicles one of which was lorry registration number KZP 763. The police abstract report (exh. 1) showed that the accident involved two motor vehicles, namely Isuzu bus registration number KAG 323H and Mitsubishi lorry registration number KZP 763. The appellant stated that he was travelling in the bus. He was supported in his evidence by the abstract report which named him as one of the casualties of the accident.

The 3rd respondent admitted being the proprietor of the bus while the 4th respondent admitted driving it at the time of the accident but blamed the negligence on 5th and 6th respondents for the accident. He did not mention motor vehicle registration number KAB 053L. Both offered no evidence to show how the accident occurred. And in a claim and indemnity notice which is part of the record the 1st and 2nd respondents claimed contribution from 3rd, 4th, 5 and 6th respondents arising from the accident.

Under **section 107** of the Evidence Act he who alleges the existence of a fact must prove it. This places the burden in the case subject to this appeal on the appellant to prove how the accident in which he was injured occurred. He told the High Court he did not know how it occurred.

But in paragraph 11(c) of the plaint it was averred on his behalf as follows:-

“And the plaintiff shall at the hearing rely on the doctrine of res ipsa loquitur to establish the defendant's negligence.”

In *Winfield and Jolowicz on Tort 11th Edition S & M, 1979* at page 99 it is stated as follows:-

“In order to discharge the burden of proof placed upon him, it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which qualify as negligent conduct. Sometimes, however, the circumstances are such that the court will be prepared to draw an inference of negligence against the defendant without hearing detailed evidence of what he did or did not do.”

In the case of an accident where the plaintiff was hit while on a “zebra crossing” this Court in the case of ***J.F.A. Ogol v Wilson Murumbu Murithi [1982] – 88 I KAR 859*** had this to say:

Per Nyarangi, J.A.

“It is nevertheless clear from the reference to the principle of res ipsa loquitur in paragraph 4 of the plaint that the appellant intended to rely on the circumstances of the accident so as to shift the burden ... Once it was proved that the appellant was hit while on the pedestrian crossing, an accident blameable on the respondent was disclosed. The burden of proof was then on the respondent to explain and demonstrate that the accident was not due to any fault of his ... That is not to say that the respondent had to prove how and why the accident happened. It would suffice if he was able to show that he personally was not negligent even if the accident remained inexplicable.”

The doctrine of *res ipsa loquitur* cast upon the defendant a burden to show absence of negligence on his part was also propounded in ***Embu Public Road Services Ltd v. Riimi* [1968] E.A. 22** at p 25, where the precursor of this Court said as follows:-

“Where circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show, in the words of Alistair Forbes in *Msuri Muhiddin v Nazzor Bin Seif El Kassaby And Another*[1960] E.A. 201 “that there was a probable cause of the accident which does not connote negligence” or in the words which I have previously used ‘that the explanation for the accident was consistent only with the absence of negligence.’”

In the case of ***Barkway v South Wales Transport Company* [1948] 2 All ER 460** – at p 471 which was quoted with approval in the case of ***Msuzi Muhidin’s Case*** above, Asquith L. J., said:

“The position as to onus of proof in this case seems to me to be fully summarized in the following short propositions. (i) If the defendants omnibus leaves the road and falls down an embankment and this, without more, is proved, then res ipsa loquitur, there is a presumption that the event is caused by negligence on the part of the defendants and the plaintiff succeeds unless the defendants can rebut this presumption (ii) it is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre burst, since a tyre burst per se is a neutral event consistent and equally inconsistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie v Reglan Building Co. Ltd.* where not a tyre burst but a skid was involved. (iii) To displace the presumption the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) the burst itself was due to a specific cause which does not connote negligence on them but the burst itself points to its absence as more probable; or (b) if they can point to no such specific cause that they used all reasonable care in or about the management of tyres.”

In that case there was evidence that there was a tyre burst which caused the 2nd defendant’s motor vehicle to collide with another motor vehicle and where the fact of collision gave rise to the inference of negligence on the part of the 2nd defendant. However, the 2nd defendant adduced evidence to show that the tyre was new and that his motor vehicle had no pre-accident defects which could have contributed to the accident. Thus the defendants succeeded in showing that there was no negligence on their part.

However, in the case giving rise to this appeal, the 3rd respondent the proprietor of the bus and the 4th respondent, his driver, did not testify and so did not discharge the onus cast upon them by the act of the collision with another or other motor vehicles. The bus was driven from a parking lot where a passenger had been dropped and it was upon the 4th respondent to explain and show absence of negligence on his part when he rammed or collided with motor vehicles driven by the 2nd and 6th respondents as averred in paragraphs 5 of their defence.

In the circumstances, we are of the view that the learned Judge fell into error when he concluded that the appellant failed to prove his case to the required standard. In all probability the driver of the bus failed to keep any or a proper look out for oncoming or overtaking vehicles to avoid pulling out of the parking lot suddenly and thus colliding with motor vehicles registration numbers KZP 763 and KAB

053L. By failing to offer any evidence the proprietor and driver of bus registration number KAG 323H failed to discharge the onus placed on them to explain the absence of negligence on their part.

In this case the appellant established that he was in the 3rd respondent's bus which was being driven by the 4th respondent. He just heard a bang and he was thrown off the seat, fell on the floor of the bus, and became unconscious due to the impact. He said he did not know how the bang occurred. The 2nd respondent in his defence blamed the 4th and 6th respondents for the accident. He was truthful. This then raises a presumption of negligence upon the said 4th respondent to require him to explain and show that he was not negligent. The 3rd respondent, his employer would also be vicariously liable. Similarly the proprietor and driver of motor vehicle registration number KZP 763 (1st and 2nd respondent) who have been blamed by the 2nd respondent as having been involved in this accident were placed at the scene of the accident and the presumption of negligence was on them to require them to offer an explanation to show its absence on their part. None of them offered such an explanation because they elected not to testify.

However, **Mr. Kagucia**, learned counsel for the 5th and 6th respondents stated in his written submissions and in this Court that motor vehicle registration number KAB 053L was neither mentioned in the plaint nor in the police abstract. We find that to be so and in the circumstances, it is not clear to us how the proprietor and/or driver of that motor vehicle came to be involved in this case. In our view therefore, the case against the 5th and 6th respondents was properly dismissed by the learned Judge. But in regard to the 1st, 2nd, 3rd and 4th respondents, the doctrine of *res ipsa loquitur* should have been applied to raise a rebuttable presumption of negligence against them and since they failed to rebut that presumption by failing to adduce evidence in defence, they should have been held liable for injuries the appellant sustained the accident.

The learned Judge of the High Court stated that if he had found for the appellant, which we have done, he would have assessed both general and special damages, at Kshs.353,350/=. We do not disturb that finding and assessment as we have no proper basis for doing so.

In the circumstances, we allow the appeal as against the 1st, 2nd, 3rd and 4th respondents jointly and severally and award the appellant **Kshs.353,350/=** as assessed by the learned Judge. Costs of this appeal and the High Court case shall be paid to the appellant by the 1st, 2nd, 3rd and 4th respondents. It is so ordered.

Dated and delivered at Nakuru this 23rd day of February, 2011

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR