REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI
Civil Appeal 206 of 2002

RICHARD KANYANGO

EXPRESS KENYA LIMITED

PETER KANYANGO……...……APPELLANTS

AND

DAVID MUKII MEREKA…….……..RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi

(Osiemo, J) dated 6th February, 2001

in

H.C.C.C. NO. 78 OF 2000)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court of Kenya at Nairobi, Osiemo J, given on 6th February, 2001 by which the learned Judge held the appellants wholly liable, in negligence for the accident which occasioned grave injuries to and subsequent death of Mukii Mereka, the deceased.

2. The respondent in this appeal is the father of the deceased. He was the plaintiff in the superior court and is also the Administrator of the estate of the deceased.

3. The 1st appellant was driving motor vehicle registration number KAD 211 R in which the deceased was travelling during the fateful morning. The 2nd and 3rd appellants are its owners.

4. The following facts underpinning the suit are not in dispute. During the early morning of 15th February, 1998 the deceased, a student then aged 18 years, was a passenger in the said motor vehicle. It was being driven by the 1st appellant, also a young man, probably an age mate of the deceased. They were travelling along Ngong Road within the City of Nairobi. Near Lenana School, along the same road, the 1st appellant lost control of the motor vehicle as a result of which it veered off the road and rammed into a tree. The deceased was thrown out of the car and he suffered serious injuries. He was rushed to

Nairobi Hospital by good Samaritans. On admission, he was unconscious, gasping and was profusely bleeding from the nose, the mouth and the ears. The diagnosis revealed an impression of severe head injury with a fractured skull. The deceased succumbed to his injuries about a week later.

5. The respondent's testimony before the trial court was very brief. He rehashed, more less, all that was averred in the plaint. Obviously, he was not an eye witness to the accident. But, he was the sole witness for his case.

6. The appellants offered no evidence during the trial. However, in their written statement of defence they admitted that an accident did occur, but, they averred that it was inevitable and that despite the exercise of all due care, skill and attention it could not have been avoided. They further contended that the deceased should be held liable for contributory negligence as he entered a vehicle being driven by an inexperienced driver whom he knew was fatigued and had consumed alcohol.

7. The learned Judge in a brief but reserved judgment held:-

"On the issue of liability I feel no doubt at all that the defendants were negligent. The plaintiff submits that in the ordinary course of things vehicles do not leave the road and ram into trees off the road. The plaintiff submits that this case comes within the principles of res ipsa loquitur, and I entirely agree. The classic formation of that doctrine was made in SCOTT VS. LONDON F ST KATHERINE DOCKS CO. (1865) 3 H & C 596 where it was said:-

"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things, it 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."

In the instant case the vehicle left the road and rammed into a tree off the road. In the circumstances, the onus lies on the defendants to disaprove negligence. But the defendants did not offer any evidence to explain that the accident took place without negligence. In paragraph 3 of the defence, the Defendants admits (sic) that the accident occurred but deny all the allegations of facts and particulars of negligence pleaded in paragraph 4 of the plaint.

But they led no evidences how the accident happened or could have happened without fault on their part. Accordingly as said, the defendants were in breach of their common law duty of care to Mukii and were liable for his injuries and subsequent death."

8. The learned Judge then concluded his judgment by awarding the respondent the sum of Shs.4,440,014/85 in both special and general damages of which the appellants are not challenging in their appeal now before us.

9. The appellants are only aggrieved by the learned Judge's decision on liability and challenge it on two grounds whose summary is, firstly; the learned Judge erred in holding that negligence against the 1st appellant had been proved; secondly, that the learned Judge was in error in finding that the doctrine of res ipsa loquitur was applicable in the circumstances.

10. In a persuasive and eloquent submission Mr. Majanja for the appellants urged and stressed that the most significant aspect of the respondent's testimony is that he was not at the scene of the accident and he could not therefore provide the most basic facts constituting negligence. He contended that as the evidence by the respondent was woefully insufficient to establish negligence the learned Judge was wrong to infer negligence. Mr. Majanja contended that although there were several allegations of negligence in the pleadings, not one of them was proved by the evidence tendered by the respondent save to fall back on the well-known doctrine of res ipsa loquitur under which a prima facie case has first to be established or made out before the burden could be shifted to the appellants.

11. Mr. Ochieng Oduol for the respondent supported the learned Judge's decision and submitted that

as the appellants had admitted the facts and pleaded contributory negligence there was no obligation to burden the trial court with further proof of negligence. He argued that as the evidence disclosed that the accident was blamable on the appellants at that juncture, the burden of proof was then shifted on to the appellants to explain and demonstrate that the accident was not due to their fault.

12. Mr. Ochieng Oduol further submitted that the Notice of Appeal incorporated in the record of appeal is defective in that it shows that what was intended to be appealed against was the finding of negligence by the learned Judge but somehow that was omitted in the notice. We have looked at the said notice and we find nothing wrong with it. Consequently, we reject any attack on it over its validity or otherwise.

13. The appellants are entitled to expect from us that we will, on a first appeal as this one, to subject the evidence on record to fresh evaluation and reach our own conclusions thereon. See SELLE & ANOTHER V ASSOCIATED MOTOR BOAT COMPANY LTD & OTHERS [1968] EA 123. Also, in the exercise of that jurisdiction, however, we must bear in mind the caution made by the predecessor of this Court in PETER V SUNDAY POST LTD [1958] EA 424 and also to be mindful of the further caution, and allow for it, that the trial court had the advantage of hearing and seeing the witnesses and is generally a better judge of their demeanour.

14. The appellants admitted that an accident occurred on 15th February, 1998 involving their motor vehicle and that the 1st appellant was driving at the time. They admitted that the 1st appellant was an inexperienced driver who had spent a whole night in a night club in which he had consumed alcohol and was fatigued and impaired at the time he was driving. They pleaded contributory negligence.

15. The learned Judge, in our view, correctly held following these admissions that in the circumstances the onus lay on the appellants to disprove negligence.

16. We think that once the learned Judge made a finding, as he clearly did, it was upon the appellants to explain and demonstrate that the accident was not due to any fault of theirs: COLE V DE TRAFFORD [1918] 2 KB 523. That is not to say that the appellants had to prove how and why the accident happened. It would however suffice if they were able to show that the 1st appellant was personally not negligent even if the accident remained inexplicable – WOODS V DUNCAN [1946] AC 401, OGOL V MURITHI [1985] KLR 359, SCOT V LONDON F. St. CATHERINE DOCKS [1861-73] ALL ER 246.

17. In our view, the appellants did not discharge the onus which lay on them to show on the balance of probabilities that the accident was not due to the fault of the 1st appellant, and having failed to do so the learned trial Judge cannot be faulted in holding the 1st appellant liable in negligence. In the circumstances, the application of the doctrine of res ipsa loquitur was proper and the finding of negligence on the part of the 1st appellant was inevitable.

18. In the result, we find no merit in this appeal which we hereby dismiss with costs to the respondent.

DATED and DELIVERED at NAIROBI this 9th day of November, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR