REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

APPEAL NO. 13 OF 2016

DIKA HATACHE GUTU & ASHA DIKA (suing as the legal reps of **CHACHA**

DUKA CHACHIE – deceased)**.....APPELANT**

VERSUS

THE COUNTY GOVERNMENT OF MARSABIT.....RESPONDENT

JUDGMENT

1. The Appeal before me is against the decision of the Marsabit Principal Magistrate Hon. Boaz Ombewa delivered on 7th November 2016. The appellants were aggrieved and/or satisfied with the judgment and decree of the language trial magistrate and appealed against this judgment on five grounds which were:

1. That the language trial magistrate are both in law and in fact in dismissing the plaintiff's case against the weight of evidence.

2. That the trial magistrate erred both in law and in fact in failing to appreciate that the appellants had proved the case to the required standard of proof, i.e. beyond reasonable doubt.

3. That learned trial magistrate erred both in law and in fact in failing to take into account the appellant's evidence was not controverted by the respondent.

4. That the learned trial magistrate erred both in law and in fact in not considering the submissions and authorities presented before him by the appellants.

5. That the learned trial magistrate erred in law in ignoring the principles applicable in deciding whether or not the appellant's case was proved in thus coming to a wrong decision.

The appeal arose out a suit that the plaintiff had filed in the Marsabit Court on 29th February 2016 seeking damages inclusive of special damages under the Fatal Accidents Act and the Law Reform Act. The suit sought to recover damages for the death of the son of the Appellants. The claim was heard by the Magistrate who delivered a judgment dismissing the claim provoking this appeal.

2. He held in his judgment that there was no evidence to find a basis to blame the Respondent. He held that for a tortuous claim based on negligence to succeed it must be proved that there existed a duty of care between the parties, that there was breach of by one party and that damages are payable. He held that the Appellants did not prove that there was a breach of that duty of care stating that in our legal system, we are yet to adopt a no fault scheme where the mere occurrence of the accident is enough for claim to be paid. He held that the appellants did not witness the accident and that it was not clear whether the police investigated this accident and blamed anybody. He assessed the damages he would have awarded had the claim been proved but dismissed the suit with costs to the Respondent.

3. The appeal was set for hearing before me by my predecessor Ongaya J. in the presence of the advocates for the parties. At the date for the hearing of the appeal only to advocate for the appellants appeared. He submitted that he wished to have the appeal determined on the basis of submissions which were already on record. In their submissions, the Appellants submitted the deceased died while in the course of his employment with the Respondent and on the basis of the doctrine of *Res Ipsa Loquitur,* the Respondent was clearly in breach of its duty of care to the deceased. They submitted that it implied the place where the deceased was working was dangerous and the Respondent should not have allowed the deceased work there. The Appellants posed the question 'how else can one explain the person dying from injuries location by falling soil if the place was safe? They submitted that clearly there was no proper supervision, no warning of the danger involved in the work of digging marram and there were no steps were taken by the Respondent to prevent the accident from occurring. The Appellants submitted the guiding principles in deciding liability in such cases were enunciated by Nyamweya J. in the case **of Nickson Muthoka**

Mutavi *v* Kenya Agricultural Research Institute [2016] eKLR where the judge stated that '….Even if the Respondent was not responsible for the place of work it was a duty of care to give advice, instructions or orders about the hazards that it posed and were likely to be encountered by its employees and specifically the place where the Appellant was performing his duties. The Respondent did not bring any evidence of any safety precautions and instructions provided to the Appellant in this regard. There was therefore a breach of its duty to provide a safe place of work and system of working, it is thus my holding that the trial Magistrate's finding that the Respondent was not negligent or in breach of its statutory duty, and that the Appellant was solely to blame for the accident was erroneous.

The Respondent claimed that the Appellant was also negligent however did not bring any evidence of the same. I am of the view that any contributory negligence by the Appellant would be minimal. This is for the reason that the Appellant would have not been injured if he had not been sent work at the location of accident by the Respondent, whom this court found failed in its primary responsibility to provide a safe place and system. The Appellants submitted that when there is no evidence adduced/tendered by the defendant controverting that tendered by the plaintiff, the defendant must be held 100% liable. The Appellants relied on the case of **Stephen Wanderi Kamau & Another *v* Gladys Wanjiku Kung'u [2006] eKLR** the Appellant therefore submitted the Respondent should be held 100% liable and stated that on the issue of quantum of damages the Appellants were satisfied with the trial court computation and urged this court to award the said figures. The Appellants sought the costs of this appeal as well as the costs of the cause in the trial court. There was no set of submissions for the Respondent.

4. The Respondent was the employer of the deceased, the son of the Appellants. They took the course of suing the Respondent for the death of their son and after a trial before the learned Magistrate, the case against the Respondent was dismissed. The reasons for the dismissal are contained in the judgment. The death was alleged to have been caused by the want of care on the part of the Respondent. The Appellants were dissatisfied with the finding that the Respondent was not liable. The doctrine of *res ipsa loquitur* was called in aid by the Appellants. The doctrine of *res ipsa loquitur* is a doctrine under the law of torts. The doctrine will be said to apply where the incident does not normally occur unless someone has acted negligently (want of care); secondly, that the incidence in respect of which there is an allegation of negligence falls within the respondent's duty of care owed to the claimant, and lastly; the evidence would of necessity have to rule out the possibility that the injury was caused by the claimant or a third party.

5. The record before me indicates that the learned trial Magistrate considered the evidence tendered. Though the evidence was not challenged, he directed his mind to the elements the Appellants were required to prove to the court regarding the negligence. At page 2 of the judgment at the middle of the page, the court opined that "*The Plaintiffs did not witness the accident. It is not clear whether the Police investigated this accident and blamed anybody."* The Plaintiffs had a burden to demonstrate that the Respondent breached the duty of care owed to the deceased and that the negligence was not caused by the deceased. The fact that no police report or abstract was produced made it impossible for the court to apply the doctrine of *res ipsa loquitur* as there was no clarity as to who was to blame for the accident and whether the blame could be placed at the Respondent's door. I would therefore uphold the decision of the learned Magistrate as the reasoning was sound. The decisions cited by the Appellants do not derogate from the burden the Appellants had to prove their case on a balance of probabilities. I thus dismiss this appeal but order that the parties bear their own costs in this appeal and in the court below.

It so ordered.

Dated and delivered at Nyeri this 9th day of April 2018

Nzioki wa Makau

JUDGE