REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 57 OF 2018

JULIUS MURIITHI AND 11 OTHERS.....APPELLANTS

VERSUS

STEPHEN MUSYOKA IVAI.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Honourable B. M. Ochoi, Principal Magistrate in Mukuruweini PMCC No. 12 of 2012 as consolidated with PMCC Nos. 11-22 of 2012 delivered on 18th September, 2018.

2. The cause of action arose from a traffic accident that occurred on 5th November, 2011 along Ichmara-Thangathi Road involving motor vehicle registration number KBL 538P.

3. The facts of the case are that the appellants were travelling in motor vehicle registration number KBL 538P when the vehicle they were travelling in was involved in an accident and the accident was reported at Mukuruweini Police Station.

4. The appellants instituted various suits against the respondent seeking compensation for the injuries they suffered as a result of the accident; these various suits were consolidated and PMCC No. 12 of 2012 was selected as the test suit; at trial; the appellants called the Investigating Officer from the police station who confirmed the occurrence of the accident and that the appellants were indeed involved therein; the Police Officer produced the various police abstracts reports; the doctor who filled out the P3 Forms also testified on behalf of the appellants and produced the forms as exhibits; thereafter, two (2) of the appellants testified as follows:-

(i) **Adelide Wairimu Wachira** – she testified that on the fateful day, they were travelling back to Nairobi when they were involved in an accident; she only realized that the motor vehicle had fallen; as a result of the accident she suffered injuries to her right shoulder and hand; she was treated and later examined by Dr. Muleshe; under cross-examination she stated that the motor vehicle was not speeding.

(ii) **Joseph Irungu Kariuki** – his evidence corroborated that of Adelide but was however more detailed; he testified that the vehicle lost control and hit the wall of the road and rolled and he lost consciousness thereafter; he too stated that the driver was not speeding; he suffered injuries to his right side – right shoulder, ribs and chest and was treated and later examined by Dr. Muleshe.

5. According to the proceedings in the Record of Appeal, no other witnesses testified for the appellants' case and the same was closed.

6. As for the respondent he called two witnesses, an executive assistant from Nyeri Law Courts and an Inspector from the Insurance Regulatory Authority; the first witness produced the proceedings in a criminal matter wherein the Doctor who filled out the appellants' treatment cards was charged with forgery but was subsequently acquitted; the other witness confirmed that it received a complaint from Directline Assurance on possible fraud leading to investigations being carried out; the witness confirmed that the accused in the matter was acquitted; the respondent did not call any other witnesses.

7. The parties then filed their respective submissions and the trial court delivered its judgment in the matter and dismissed the test suit.

8. Being dissatisfied with the trial court's decision the appellants have filed this instant appeal and listed five (5) grounds of appeal in the Memorandum of Appeal; the grounds of appeal are as summarized hereunder;

(i) The trial court erred in finding that failure to produce the treatment notes was not fatal to the appellant's case; whereas such injuries had been admitted in evidence of the defence;

(ii) The trial court erred in failing to contextualize the evidence as a whole instead of piecemeal;

(iii) The trial court erred in finding that the doctrine of '***res ipsa loquitur***' must be pleaded;

(iv) The trial court erred in law by failing to assess the quantum of damages he would have awarded in the event the claim had succeeded;

(v) The trial court erred in finding that the appellants had not proved their case on a balance of probabilities.

9. The parties herein were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the parties rival submissions;

APPELLANTS' CASE;

10. The appellants have submitted that the trial court erred in reframing the issues for consideration thereby misdirecting itself on the analysis of the evidence; they contend that the failure to produce the treatment notes was not fatal to their case; and that the learned magistrate should have taken into consideration the documents in the defendant and plaintiff's list of documents; to support their submissions, the appellants cited two authorities wherein the court found that it was not necessary to produce initial treatment notes as evidence of injuries suffered.

11. The appellants further contend that the P3 Forms and the oral evidence of the appellants was sufficient evidence; that there is evidence of the fact that the clinical officer was acquitted of fraud charge and the treatment notes were found not to be fraudulent; it follows therefore that there was evidence of the injuries suffered by the appellants; that the doctor who filled out the P3 forms did so in the accepted mode and therefore the said forms should have been acceptable.

12. The appellants submitted that the trial court erred in finding that they ought to have pleaded the doctrine of ***res ipsa loquitur***; the fact that the appellants were found by the trial court to have been passengers who could not have contributed to the accident meant that they had discharged their burden of proof;

13. Lastly, they submitted that the trial court failed to give an assessment of damages it would have awarded.

14. The appellants pray that the appeal be allowed and the trial court's judgment be set aside and appropriate orders be made in substitution thereof.

RESPONDENT'S CASE

15. In response the respondent prayed that the appeal be dismissed and the trial court's judgment be upheld; the respondent submitted that the appellants never discharged their burden of proof when it came to the injuries they sustained and attributed this to the failure by Dr. Muleshe to produce the treatment notes or the Medical Reports; he concurred with the finding of the trial court whereby it disregarded the evidence of the P3 Forms as the Doctor who filled the Forms did not examine the appellants but rather relied on treatment notes brought to him by an Advocate and police officer; the respondent cited several authorities that underscore the assertion that the appellants should have produced documentary evidence in support of their injuries.

16. The respondent submitted that the appellants also failed to prove negligence against him; and that the appellants also did not adduce evidence to disprove his claim for fraud; this failure coupled with the P3 forms filled in by a doctor who did not examine the appellants is proof of fraud;

17. On quantum the respondent prayed that the appellants be awarded damages between the sum of Kshs.50,000/- to 80,000/-.

18. In conclusion, the respondent prayed that the appeal be dismissed.

ISSUES FOR DETERMINATION

19. Upon perusal of the Memorandum of Appeal filed and upon reading the submissions filed by the various parties, this court has framed the following issues for determination:-

(i) Whether the appellants discharged their burden of proof in proving negligence as against the respondent;

(ii) Whether the appellants discharged their burden of proof in proving the injuries suffered;

(iii) Whether there was fraud on the part of the appellants;

(iv) Whether the trial Court erred in failing to make a determination on the general damages it would have awarded;

ANALYSIS

20. In considering these issues, this court is guided by the Court of Appeal case of **Selle & Another vs Associated Motor Boat Co. Ltd &Another (1968) EA 123**; where the court held that the duty of an appellate court is to evaluate and re-examine the evidence adduced in the trial court in order to reach an independent finding, taking into account the fact that the court had no opportunity of hearing or seeing the

parties as they testified and therefore, make an allowance in that respect; and in addition, the court will normally as an appellate court, not normally interfere with a lower court's judgment on a finding of fact unless the same is founded on wrong principles of fact and or law; the Court of Appeal also held that:

> ***"A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."* (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).**

Whether the appellants discharged their burden of proof in proving negligence as against the respondent?

21. One of the witnesses who gave evidence on liability was the Investigating Officer; he testified that the investigations were still pending as at the date he was testifying; he confirmed that no charges had been preferred against the driver; as for the appellants they testified that the accident happened when the vehicle lost control but that the driver was not over-speeding.

22. The upshot is that there is no evidence as to what could have caused the vehicle to lose control; the evidence adduced only proves that an accident occurred; therefore, the circumstances of this accident qualify for the application of '***res ipsa loquitur***'.

23. The Court of Appeal in the case of **Margaret Waithera Maina v Michael K. Kimaru [2017] eKLR**, explained ***res ipsa loquitur*** as follows:-

> "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".;*** 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 phase '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. There are legions of authorities that have held that '***res ipsa loquitur***' does not have to be pleaded; whereas the trial court erroneously held that it ought to have been pleaded; refer to the case of ***Nandwa vs. Kenya Kazi Ltd, Civil Appeal No. 91/1987*** which held that evidence is not to be pleaded; and also in the case of ***Bennet v Chemical Construction (GB) Ltd 3 All ER 822*** the Court emphasized that :

> ***"It is not necessary to plead the doctrine; it is enough to prove the facts which make it applicable"***

26. In this case, if the respondent's driver was carrying out his duty with care, the accident would likely not have happened; the fact that it did infers negligence on the said driver; with no evidence to the contrary, this court is satisfied that the appellants proved their case on a balance of probabilities against the respondent and finds that the respondent's driver was 100% liable for the accident.

27. The appellants did not need have to plead ***res ipsa loquitur*** for the trial magistrate to apply it to the circumstances.

28. This court is satisfied that the appellants discharged their burden of proof in proving negligence as against the respondent; and finds that there is good reason to interfere with the trial court's finding on liability;

29. This ground of appeal is found to have merit and is hereby allowed.

Whether there was fraud on the part of the appellants;

30. Fraud has a stricter and higher burden of proof; higher than on a balance of probabilities but lower than beyond reasonable doubt; the respondent did not discharge this burden; the witnesses he called confirmed that there was an investigation into fraud which led to criminal proceeding; these criminal court proceedings were produced and demonstrate that the accused was eventually acquitted

31. This court finds that the respondent did not prove fraud as against the appellants;

Whether the appellants discharged their burden of proof in proving the injuries sustained;

32. As a result of the accident, the appellants testified that they suffered injuries; it is noted from the record that there were treatment cards and Medical Reports that were marked for identification but not produced; and that the only document produced were the P3 Forms.

33. The doctor that filled out the P3 forms in his testimony indicated that he did not examine the patients and relied on treatment cards brought to him by a police officer and an Advocate; for this reason this court is inclined to concur with the findings of the trial magistrate that the fact that the doctor did not examine the patients discounts his evidence.

34. The appellants submitted that the treatment card was not the only evidence of injury tendered and that their story was supported by their oral evidence on the injuries they had sustained; however this court opines that this evidence needed to be corroborated by the production of either the treatment card, P3 forms, treatment notes or a Medical Report; it is not clear from the record why the Medical Reports were not produced by the appellants nor why they failed to call or avail the clinical officer or the medical doctor who had actually examined them and prepared the documents;

35. The appellants have submitted that the trial court ought to have referred to the documents filed as The Plaintiff's List of Documents; that this list had the treatment notes and Medical Report; however the filing of a list of documents only discloses to the other party the nature of one's case; these documents still need to be produced as exhibits either by consent or through normal evidentiary rules such as identification of the document and its production; this was not done at the trial in the lower court; it is not sufficient to refer to a document, the actual document needed to be properly placed before court by a medical expert;

36. In the absence of any corroborating evidence of injury, this court finds no reason to interfere with the trial court's findings that the appellants did not discharge their burden of proof as encapsulated by Section 107 of the Evidence Act, Chapter 80 Laws of Kenya which provides:-

> **'107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'**

37. As it stands the documents were only marked for identification and were never produced as exhibits to corroborate the appellants' evidence in proof of their injuries; this court finds no good reason to interfere with the trial court's finding that the appellants failed to discharge their burden of proof in proving the injuries they suffered;

38. This ground of appeal is found lacking in merit and is hereby disallowed.

Whether the trial Court erred in failing to give a determination on the general damages it would have awarded

39. The trial Court did not give an award on damages because it found that there was no basis on deciding on the same; but the position in law is that the above notwithstanding it behoves the trial court to make an intended award on damages; and indeed it erred in failing to make a determination on the general damages it would have given;

40. From the pleadings, the appellants pleaded the injuries they suffered and all appear to have been soft tissue injuries; it is this court's considered opinion that the trial magistrate ought to have used the pleadings as a guide; and had the appellants proved their injuries as pleaded this court would have made an award of Kshs.100,000/=;

41. This ground of appeal has merit and it is hereby allowed;

FINDINGS AND DETERMINATION

42. For the forgoing reasons this court makes the following findings and determinations;

(i) This court finds that the appellants did not have to plead ***res ipsa loquitur*** for the trial magistrate to apply it to the circumstances;

(ii) This court finds that the appellants discharged their burden of proof in proving negligence as against the respondent;

(iii) The appeal on liability is found to have merit and it is hereby allowed;

(iv) The judgment on liability is hereby set aside; and substituted with a judgment in favour of the appellants on liability; the respondent's driver is found to be 100% liable;

(v) This court finds that the appellants failed to discharge their burden of proof in proving the injuries suffered;

(vi) The appeal on quantum is found lacking in merit and is hereby dismissed; the trial court's finding that the appellants failed to prove that they sustained injuries from the accident is hereby upheld;

(vii) This court finds that the trial court erred in failing to make a determination on the general damages it would have given;

(viii) Each party shall bear his/their own costs on appeal.

It is so Ordered.

Dated, Signed and Delivered at Nyeri this 25th day of June, 2020.

HON.A.MSHILA

JUDGE