**Chokwe v Railways Corporation**

**Division:** High Court of Kenya at Mombasa

**Date of judgment:** 27 February 1973

**Case Number:** 22/1969 (109/74)

**Before:** Sir Dermot Sheridan J

**Sourced by:** LawAfrica

*[1] Negligence – Res ipsa loquitur – Railway passenger thrown out of berth – Negligence not shown.*

*[2] Damages – Personal injuries – Quantum – Injury to hand – Shs.* 35,000*/-.*

**JUDGMENT**

**Sir Dermot Sheridan J:** The plaintiff claims damages for negligence arising out of an accident which occurred in the early morning of 1 February 1968 when he was a first-class passenger in the defendant’s No. 2 Down Train from Nairobi to Mombasa. The relevant allegations are: “4. At or about 3.00 a.m. on 1 February 1968 at a point between Mtito Andei and Mombasa in breach of his said undertaking and/or duty in the premises the defendant his servants and agents so negligently and unskilfully managed and controlled the said railway train that while the plaintiff was about to alight from the top bunk of the compartment in the said railway train the said train jerked violently and as a result of this violent jerk the plaintiff was flung from the said bunk on to the wall of the said compartment and his left arm smashed against the light on the said wall and thereby the plaintiff sustained severe injury on his left arm and he fell on the floor of the said compartment. 5. T he plaintiff avers that the said injuries were received by him as a result of negligence and/or breach of duty on the part of the defendant, his servants and or agents. Particulars of negligence and/or breach of duty on the part of the defendant his servants and or agents ( *a*) D riving the said railway train at a speed which was excessive in the circumstances thereby causing the same to jerk violently; ( *b*) F ailing to drive the said railway train at a reasonable speed to prevent the said railway train from jerking violently; ( *c*) A pplying brakes of the said railway train violently; ( *d*) F ailing to provide and maintain proper and adequate means to enable the plaintiff to descend from the top bunk.” The amended statement of defence attributes the accident to the negligence or contributory negligence of the plaintiff with the following particulars: “(*a*) He failed to make use or proper use of the safety devices in the Cabin, placed at his disposal. (*b*) Having had prior knowledge of the train being in motion, he did not take any or proper care in descending from the upper bunk. (*c*) The plaintiff was, at the time of accident, under the influence of drink.” The plaintiff gave evidence that he shared a cabin with Mohamed Jahazi M.P., an Assistant Minister in the Government of Kenya, on the train which left Nairobi for Mombasa at 6.30 p.m. on 31 January 1968. After dinner he went to bed at 9.30 p.m. He reached his upper bunk by climbing the ladder which was held in a bracket by the door opposite and then he jumped on to the bunk. He did not appreciate that the ladder was portable and should have been affixed to hooks on the bunk by the window before he climbed up it on to the bunk. He hooked up both ends of the safety belt which was designed to prevent him from falling out of the bunk. His head rested by the window. There was evidence that the train, which was delayed at Mtito Andei, left Voi at 4.10 a.m. Before it reached Ndara, the next station, 12 miles away, the accident happened. Elzabean Ziromenya, the ticket examiner, in his report, gave 4.25 a.m. as the time of the accident. This means that the driver had negotiated the two curves leaving Voi – this takes 6 minutes – and was on the straight travelling not beyond the permitted maximum speed of 45 m.p.h. This was confirmed by the Hazzler speed recorder, which was produced by James Philipson, the defendant’s mechanical engineer at Mombasa, and which did not record any unusual jerk as would be caused by an emergency application of the brakes in such cases as animals on the line, loose couplings or a burst water pipe. Between Voi and Ndara the plaintiff woke up, wanting to go to the toilet. He unfastened the end of the safety belt by the door, intending to descend as he had ascended and then, for some reason which he did not explain, was unfastening the end by the window in a recumbent position when there was a sudden big jerk and he was thrown on the floor cutting his left arm on the glass of the wall light above the mirror as he fell. He was uncertain whether he switched on the reading light in the bunk before he tried to get down. He and Jahazi attempted to staunch the bleeding. The latter fetched Zirimenya who in turn alerted a Dr. Vogel who was a passenger on the train. Unfortunately Dr. Vogel was not available to give evidence. He treated the plaintiff. At Mombasa the plaintiff was removed to the Aga Khan Hospital in an ambulance. Jahazi in the bottom bunk had his head by the door. He heard the plaintiff moving as if he was trying to wake up. The train jerking as it tried to travel faster. He heard the plaintiff fall and the crash of glass. He caught the plaintiff, with one of his legs on the bottom bunk and the other somehow on the ladder. The plaintiff didn’t completely fall on the floor. He was suspended holding on to something. These two versions suggest that the plaintiff is not really certain how he came to fall. When Zirimenya was called to the cabin, he noticed that the safety belt was unfastened only at the end near the window which could have meant that the plaintiff intended to climb down by stepping on top of the wash basin near the window. Whichever way he intended to climb down, there would have been no reason for him to unfasten both ends of the safety belt. Chana Singh, the carriage inspector, found all the fittings in the cabin to be in good condition except for the broken light. It is inadvisable to use the ladder, which is obviously portable with hooks facing out, while it is an appreciable gap. The bedding attendant is there to help if there is any difficulty with the ladder. Bhan Singh took over the driving of the train from Mtito Andei. He is an experienced driver. The state of the line was good and there was just the usual sway of the train. There was no record of any jerks. Finally there were no complaints from the other 40 first-class passengers, 92 second-class passengers or 30 third-class passengers, nor were there any breakages in the dining car. Mr. Magan for the plaintiff, relies on the doctrine of res ipsa loquitur, which comes into operation: (1) on proof of the happening of an unexplained occurrence: (2) when the occurrence is one which would not have happened in the ordinary course of things without negligence on part of somebody other than the plaintiff; and (3) the circumstances point to the negligence in question being that of the defendant rather than that of any person (*Charlesworth on Negligence*, 4th Edn., p. 43). In support of the third requirement the instrument causing the damage, namely, the train was in the management and control of the defendant at the time of the occurrence. In *Angus v. London Tilbury and Southend Railway* (1906), 22 T.L.R. 222, it was held that the mere happening of an accident is evidence of negligence against a railway company where the train stops suddenly and with a jerk and flings the passenger across the carriage. But here I am satisfied on evidence that there was no abnormal jerk and the question arises what happens where a passenger falls and is injured as a result of the normal jerking or swaying of a railway carriage? The defendant’s liability for injury to passengers is set out in the East African Railways Corporation Act 1967, s. 31 (1) which provides: “31(1) The Corporation shall not be liable for the loss of life of, or personal injury to, any passenger except where the loss of life of, or personal injury is caused by the want of ordinary care, diligence or skill on the part of the Corporation or of any employee.” This imposes the ordinary standard of care on the defendant. In *Readhead v. Midland Railway Co*. (1868 – 9), L.R. 4 Q.B. 379 it was held that the contract made by a general carrier of goods for hire with a passenger, is to take due care (including in that term the use of skill and foresight), to carry the passenger safely; and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose; that is to say, free from all defects likely to cause peril although these defects were such that no skill, care or foresight could have detected their existence. “The railway company is bound to take reasonable care to use the best precautions in known practical use for securing the safety of their passengers.” per Earle, C.J. in *Ford v. London and South Western Railway Co*. 2 F. and F. 730 at p. 732. Here the defendant has called evidence of the following steps taken to negative negligence or default on its part: (1) the provision of safety belt to protect a passenger occupying an upper bunk against the hazards caused by the normal and unavoidable swaying and jerking of the carriage. The defendant cannot be blamed if the plaintiff misused these devices; (2) the absence of any defect in the coach; (3) the 45 m.p.h. speed limit which was not exceeded; (4) the driving of the train by an experienced driver. There was no negligence on his part. Some defect must be attributed to the defendant before the doctrine of res ipsa loquitur arises. Here the defendant has proved affirmatively that it has done everything which skill and care can provide. It had the best known apparatus, kept in good order and worked without negligence by the servants it employs: *Newberry v. Bristol Tramways and Carriage Co*., [1911 – 13] All E.R. Rep. 747. Although there was no evidence that the plaintiff was, at the time of the accident, under the influence of drink as is alleged in para. (*c*) of the particulars of his negligence in para. 7 of the amended statement of defence, the defendant has discharged the onus of proving paras. (*a*) and (*b*). The plaintiff must be regarded as the author of his own misfortune. Even if there had been a violent jerk the question of his contributory negligence would have come into play. It might have been as high as 50 per cent. The plaintiff fails on the question of liability. In case of a successful appeal I will try and assess damages. Mr. Jewell, F.R.C.S. examined the plaintiff on different occasions and produced his report. On 1 February 1968, he assisted in the operation on the plaintiff’s left forearm. He had received a deep wound of the forearm which had divided most of the structures of the forearm. By February 1970, there was good flexion and extension movement of the fingers but wastage of the small muscle of the palm of the hand and of the thumb. He can lift objects but his grip is weak and he lacks the finer sensations to enable him to know what he is picking up. From a practical point of view, he has lost about 50 per cent of the use of his left hand. The plaintiff is a businessman aged 47. He can no longer use a typewriter and can only drive a car short distances. In *Anderson v. W. J. Brooker Ltd*. (1960), C.A. No. 219 which is summarised in the *Quantum of Damages*, Kemp and Kemp, 3rd Edn., p. 475 the plaintiff received similar but more severe injuries and he was awarded £4,500 general damages, but this sum included loss of earning capacity and the Court of Appeal, while not interfering with the award, thought it was on the high side. In *Kimothia v. Bhamra Tyre Retreaders*, [1971] E. A. 81 it was pointed out that awards of damages made by foreign courts are only a guide and the differing conditions in Kenya must be taken into account. There the appellant, a workman earning Shs. 195/- per month, was awarded Shs. 20,000/- for the loss of three fingers of his right hand. Here the plaintiff must be in a considerably higher income bracket. I would have awarded him Shs. 35,000/- general damages. As it is the suit is dismissed with costs. *Order accordingly*.

For the plaintiff:

*Magan*

For the defendant:

*JM Khaminwa*