Nicholas v Otieno & another (Civil Appeal 402 of 2012) [2023] KEHC 1290 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1290 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 402 OF 2012

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

OWUOR NICHOLAS .... APPELLANT

AND

NICHOLAS OTIENO .... 1ST RESPONDENT

HALULE HAMZA HASSAN .... 2ND RESPONDENT

(Being an appeal against the judgment decree of Hon. T. W. C. Wamae (Mrs.) Chief Magistrate, dated and delivered on 13th July 2012 in Milimani CMCC No. 4952 of 2009)

JUDGMENT

1. At the onset, the 1st respondent herein instituted a suit before the Chief Magistrate's Court by way of an amended plaint dated October 31, 2009 pursuant to a road accident on November 25, 2015 along General Waruinge Street and sought for reliefs against the appellants in the nature of general and special damages plus costs of the suit and interest thereon.
2. The respondent pleaded in his plaint that he was a passenger in a car with the registration number KBB 234B that the second respondent was driving recklessly down General Waruinge Street on the October 24, 2008. As a result, the car collided head-on with a car with the registration number KBA 485M, resulting in an accident.
3. The appellant filed his statement of defence denying the entire claim. The matter proceeded for hearing and judgment was eventually delivered in favour of the respondent in the sum of Kshs 305,710/=.
4. The appellants being aggrieved preferred this appeal and put forward the following grounds:

i. The learned magistrate erred in law and fact in finding that the appellant was liable for the negligent acts of the 2nd defendant (2nd respondent in this appeal) when there was no evidence at all that the said 2nd respondent was driving motor vehicle registration number KBB 334B as the agent of or with the authority of the appellant.

ii. The learned trial magistrate erred in law and fact in disregarding the documentary evidence tendered before her, by way of abstract from police records dated October 22, 2008, issued by Kitui Police Station which showed clearly that the appellant's motor vehicle registration number KBB 334B had been stolen on October 22, 2008 which evidence was corroborated by the appellant's testimony that as at the date of the suit accident, his said vehicle had been stolen and was in the hands of persons unknown to him.

iii. The learned trial magistrate erred in law and fact in shifting the burden of proof to the appellant.

iv. The learned trial magistrate erred in law and fact in basing her finding that the appellant was liable upon irrelevant considerations, inter alia, the appellant's alleged failure to produce records of his driver.

v. The learned trial magistrate erred in law and fact in failing to properly deal with the real issue which she ought to have dealt with, namely, whether in the circumstances of the case before her the appellant could be held vicariously liable for the suit accident in the face of the pleadings filed by the parties and the evidence tendered before her. Had she properly framed and dealt with the real issue and properly evaluated the evidence before her, she would have come the conclusion that the appellant could not be vicariously liable for the acts of the 2nd respondent who was neither an agent nor driver of the appellant.

5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions. I have considered the same and observed that the only issue for determination to be whether the appellant was vicariously liable for the accident.

6. The appellant submitted that the finding of the trial magistrate that there was no evidence that the accident motor vehicle had been stolen was wrong as the trial magistrate ignored Dexh1 which was the police Abstract issued by Kitui Police Station and which clearly confirmed that the appellant had reported the theft of the said motor vehicle.

7. It is the appellant's submissions that the trial magistrate erred by finding and holding that the appellant's evidence that his vehicle had been stolen on October 22, 2008 was hearsay because the appellant produced direct documentary evidence confirming the theft by way of the Police abstract.

8. The appellant contends that it was the 1st respondent who had alleged that the vehicle in question was being driven by the 2nd respondent as the driver or agent of the appellant as it was the responsibility of the 1st respondent to prove that the 2nd respondent was indeed driving the said vehicle as the driver or agent of the appellant at the material time to the suit but failed to do so.

9. The appellant submits that on his part, he went as far as demonstrating that his vehicle had been stolen on October 22, 2008 at Kitui Town where he lived and carried on his business as he could have not authorized the 2nd respondent to drive the vehicle during the period it was in the wrong hands.

10. The appellant on this relied on the case of *Naftali Nduati Mwangi v Kubu Kimunya Kubu* (2020) eKLR ,this court (Majanja, J) held as follows in a similar case:-

> " As I stated earlier, the evidence is clear that the person driving the defendant's vehicle was negligent but could his culpability be fixed on the defendant under the doctrine of vicarious liability? The defendant case was that he had not authorised his adult son to drive the motor vehicle and since he was an unauthorised driver, the defendant was not liable...........
>
> The authorities in my view establish that whether to impose vicarious liability is dependent on the relationship between the driver and owner of the vehicle, the level of control exercised by one party over the other and the surrounding circumstances. This was not a scenario where there was an employer-employee relationship or where the driver had been assigned a specific task to drive the vehicle. The driver of the motor vehicle was the defendant's son who had no authority to driver the vehicle. DW 1's testimony to that effect was buttressed by the fact that he reported that his son had stolen the vehicle. I would also point out that I have not found or seen any general principle that makes a parent liable for the acts of his or her adult children. In the circumstances and having evaluated evidence in light of the principles governing vicarious liability, I find and hold that the defendant established that the driver of the vehicle was not authorized to drive the vehicle as such he was not liable."

11. The appellant went further and relied on the case *Kahuri S Njuguna v Kairu Njoroge* (2010) eKLR this court (Okwengu J) as she then was also held as follows in a similar case:-

> " The respondent pleaded in paragraph 4, 5 and 6 that his motor vehicle was stolen from where it had been parked and that it was the thief who crushed into several vehicles including the appellant's motor vehicle. Thus, the respondent put the appellant to the task of establishing that the motor vehicle was being driven by a servant, employee or agent of the respondent........
>
> The appellant failed to establish that the motor vehicle was being driven by an agent, servant or employee of the respondent or that the vehicle was being driven on a mission which was for the respondent's benefit. Thus, the appellant failed to disprove the respondent's defence that the person who was driving his motor vehicle at the time of the accident did so without his authority."

12. In response, the respondent submitted it is undeniable that the appellant was the registered and beneficial owner of the aforementioned car, and the appellant has not offered any proof that the vehicle was stolen or that the person driving it did not have permission to do so.

13. The respondent submitted that if it was true that the motor vehicle had been stolen, the 2nd respondent had not been charged in any criminal court for the theft of the motor vehicle, and the appellant had not presented any evidence that the 2nd respondent was not authorized to operate the subject motor vehicle, neither he nor his alleged driver "Mzee" reported the alleged motor theft to the police station.

14. The respondent contends that the appellant's driver negligence was proved on a balance of probabilities as he was said to have driving the motor vehicle KBB 334B on the wrong lane when the accident occurred and caused it to collide with Motor Vehicle KBA 485M.

15. It is the respondent's submissions that given that the 1st respondent was a passenger and did not cause the accident, the appellant might still be held accountable even in the absence of the driver, provided that the driver's negligence was established.

16. The respondent on this argument relied on the case of *Kenya Bus Services Ltd v Dina Kawira Humphery*(2003) eKLR it was held:

> Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary ,a presumption arises that it was driven by a person whose negligence the owner is responsible.

17. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See S*elle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in *Peters v Sunday Post Limited* [1958] EA 424 stated as follows:

> " An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

18. DW1 the appellant, Nicholas Owuor Ooko, confirmed that he was the KBB 334B's registered owner and that it was being used to transport commodities. He claimed that he did not know Anderson Owuor or the second respondent, and that his driver was a mzee.

19. According to the appellant, on October 22, 2008, his driver informed him that the car had been stolen. On October 28, 2008, he received a second report saying that the car had been seen at Pangani Police Station. He then reported the incident to Kitui Police Station and received a police abstract.

20. The appellant said that the 'Mzee' had told him that the motor vehicle had been stolen on October 22, 2008 and that the said mzee was not called as a witness and no explanation was offered by the appellant for that omission.

21. Given that the appellant told the court what he was told by "Mzee," which was hearsay and inadmissible, it is obvious that there was no evidence that the accident car had been stolen. The appellant was obligated to have records on his driver, but he failed to do so.

22. In the premises, I am of the view that the learned trial magistrate acted correctly in deciding that the appellant was vicariously liable for the accident. I see no reason to interfere with the finding on liability.

23. The upshot therefore is that the appeal lacks merit. It is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

....

JK SERGON

JUDGE

In the presence of:

...............................or the Appellant

.... for the 1st Respondent

.... for the 2nd Respondent