



**Rentworks East Africa Ltd v Simon (Civil Appeal E010 of 2020)
[2023] KEHC 21400 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E010 OF 2020
MS SHARIFF, J
AUGUST 10, 2023**

BETWEEN

RENTWORKS EAST AFRICA LTD APPELLANT

AND

JENIFFER KINYA SIMON RESPONDENT

*(Being an appeal from the judgement and decree of Hon J.M Njoroge
C.M in Chuka CMCC No. 144 of 2017 delivered on 7th October, 2020)*

JUDGMENT

A. Case background

1. By an amended plaint dated 13th September, 2018, the respondent herein sued the appellant claiming damages for pain, suffering, loss of amenities and earnings emanating from a road accident involving the appellant's motor vehicle registration number GKB 485H in which the respondent was travelling in.
2. It was pleaded that the accident was caused by the appellant's own negligence.
3. The appellant denied any acts of negligence on its part or that of its driver. The appellant pleaded that the respondent's cause of action lay against her employer for not providing her with safe travelling environment. It also blamed the respondent for the occurrence of the accident.

B. Evidence

4. PW1 was Jeniffer Kanyi testified that she was injured in the accident and treated at Chogoria and Mater Hospitals. She said that they had prior to the occurrence of the accident, warned the driver of the motor vehicle not to speed. Due to the injuries sustained in the said accident, she could no longer do some chores and has to be driven around.



5. DW1 PC Francis Cheruiyot Mitei stated that he was driving the subject motor vehicle. He was ferrying the respondent and other teachers on request by Teachers Service Commission. He maintained that the accident occurred when he tried to swerve in order to avoid a head collision with an oncoming vehicle. He denied being careless.

C. Liability and Quantum

6. After hearing taking evidence, the trial court found the appellant 100% liable and awarded the Respondent general damages Kshs 3,000,000/- for pain and suffering and Kshs 2,000,000/- in loss of earnings.

D. Appeal*

7. The appellant was aggrieved by the judgment and has moved this court on appeal raising the following grounds;
 - a. The learned trial magistrate erred in proceeding to render a judgement when the trial court had no jurisdiction in light of the respondent's evidence that she was in the course of her employment duties when she was injured, hence the claim ought to have proceeded under the *Work Injury Benefits Act*.
 - b. The learned trial magistrate erred in failing to address the issue of whether or not the trial court had jurisdiction to proceed with the determination of the suit.
 - c. The learned trial magistrate erred in failing to find that the respondent had failed to prove that the appellant was the owner of motor vehicle registration number GKB 485H at the material time herein and consequently had failed to wholly prove liability against the appellant.
 - d. The learned trial magistrate erred in failing to find DW1 a police officer at the material time driving motor vehicle registration number GKB 485H was not the appellant's authorized driver, agent and or servant hence the principle of vicarious liability was not proved against the appellant.
 - e. The learned trial magistrate erred in failing to find that the motor vehicle was at the material time neither under the possession and or control of the appellant nor was it being driven for their benefit and consequently could not be held liable for the actions and or omissions of the driver.
 - f. The learned trial magistrate erred in holding the appellant 100% liable in negligence when none of the particulars of negligence pleaded were proved against their authorized driver.
 - g. The learned trial magistrate erred in awarding the respondent the sum of Kshs 5,000,000/- outside the statutory cap of Kshs 3,000,000/- for traffic accident claims.
 - h. The learned trial magistrate erred in awarding the respondent the sum of Kshs 3,000,000/- as general damages which amount was manifestly excessive in the circumstances.



- i. The learned trial magistrate erred in awarding the respondent Kshs 2,000,000/- under the heading of loss of earning capacity which amount was not only manifestly excessive but was not supported by evidence as the respondent aged 52 years at the time of the subject accident had only 8 years to reach retirement age and was continuing in her employment, earning same salary.
- j. Learned trial magistrate erred in proceeding on the basis that the respondent had lost her entire earning capacity when there was evidence the respondent was fully in control of her mental faculties and had not been dismissed from employment, demoted or redeployed hence the issue loss of earning capacity did not arise.
- k. The learned trial magistrate erred in failing to give a basis for arriving at a figure of Kshs 2,000,000/- a loss of earning capacity.
- l. The learned trial magistrate erred in failing to take into account that the Kenyan economy cannot support such hefty awards.

E. Submissions

E.1 Appellant's submissions

8. The appeal was disposed of by way of written submissions. Both parties complied.
9. The appellant consolidated the first 2 grounds of appeal and argued them on the basis of jurisdiction. On this limb, the appellant argues that the respondent was injured in the course of duty as she was not a fare paying passenger. That the driver of the vehicle was in the course of discharging his duties as a police officer and not as the appellant's employee and the principle of vicarious liability does not therefore occur.
10. That by virtue that this was a matter falling under the employer-employee relationship and the claim ought to have been adjudicated in accordance with the *Work Injury Benefits Act*.
11. On the second of argument; which consolidates grounds 3,4,5 and 6, the appellant submits that the driver of motor vehicle registration number GKB 485H was not the appellant's employee and the doctrine of vicarious liability does not apply at all. The authority in *Automobile Association of Kenya v James Jaguga-HCA 92 of 1999*.
12. On the last limb which encompasses the issue of quantum, the appellant submits that the sum of Kshs 3,000,000/- was erroneously awarded on the basis of a medical report which was irregularly produced. That there was no disability sustained by the respondent. That in the circumstances of the injuries sustained, the respondent was entitled to Kshs 800,000/- as adequate compensation. The authorities in *Ngure Edward Karega v Yusuf Doran Nassir* Nakuru HCCC 157 of 2012, *Wilham Waguru Maigua v Elbur Flora Limited*-Nakuru HCCC 248 of 2011.
13. On the limb of loss of earning capacity, it is asserted that the respondent was aged 56 years at the time of accident, therefore had 4 more years to work and the award of Kshs 2,000,000/- was without basis since the respondent did not show that she had to retire on medical grounds, there was no redeployment or reduction of salary. That this sum ought not to be awarded.



E.2. Respondent's submissions

14. On her part, the respondent submitted on the issue of jurisdiction that the appellant did not raise the issue of lack of jurisdiction in the trial court and it cannot therefore raise it at this stage. That there was no employer-employee relationship between the appellant and the respondent rather a duty of care owed by the appellant to the respondent. She cites *Kenya Cargo Handling Services Ltd v David Ugwang* [1985] eKLR.
15. On the issue of liability, she submits that the copy of records indicates that the appellant was the owner of the subject motor vehicle. She posits that the assertion that the vehicle is owned by the government of Kenya is not supported by evidence. The vehicle was being operated by DW1 at the time of accident thus the appellant is vicariously liable for the accident. That the respondent did not in any way contribute to the accident. The authority in *Titus Kamau Gachanga v Wabogo Edward & another* (2019)eKLR has been cited.
16. On quantum, the respondent supports the trial courts award as being reasonable and within limits.

F. Analysis and determination.

17. In a first appeal, the duty of the court was stated in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
18. The issues raised by this appeal encompass; jurisdiction of the trial court to adjudicate on the matter, liability for the causation of the accident and the quantum of damages to be awarded to the respondent.
19. On jurisdiction, the issue first came to the fore by dint of paragraph 4 of the statement of defence where the appellant asserted that the claim was a work injury related one. It however admitted jurisdiction of the court in the same defence. The issue also came up in the appellant's submissions.
20. The trial magistrate however did not give much attention to the issue though it could be discerned from the pleadings. The cause of action herein is discernible as arising out of a road traffic accident involving the appellant's motor vehicle driven by DW1 a police officer working for the government of Kenya. Clearly, the driver was not the appellant's agent and or employee. The respondent was not fare-paying passenger either.
21. As I understand the respondent's claim, she sought damages for loss she sustained as a result of the appellant's driver breaching his duty of care owed to the respondent being a traveler/passenger in the vehicle.
22. The ingredients to be established in an action based on negligence has been espoused in several authorities. For instance, in *Christine Kalama v Jane Wanja Njeru & another* [2021] eKLR Nyakundi J held;

It is a basic element of a cause of action in negligence that the claimant can allege that he or she has suffered loss and damage falling within the scope of a duty of care owed to her or him by the defendant. For that matter it was the duty of the appellant to show that she was



owed a duty of care on the material day of the accident. It is a nexus between the harm and negligence on the part of the respondents.

23. The learned judge gave the following factors as determinant of whether negligence has been established by a party as follows;
 - i. First that the respondents owed a duty of care to the appellant.
 - ii. Second, that the respondents breached that duty of care in the manner of their driving.
 - iii. That the breach caused the appellant to suffer personal injuries attracting recoverable damages at Law.
 - iv. That the injury suffered by the appellant was as a result of the breach and negligence which was reasonably foreseeable.
24. In this case, there is no question the respondent was travelling in the motor vehicle registered in the appellant's name. the driver owed the respondent a duty to drive in a manner that would not expose the respondent to risk of accident as it happened in this case.
25. Having said as such, I find the cause of action as pleaded by the Respondent is one based on negligence as opposed to the appellant's assertion that the same is based on work place injury. Given that the Respondent had opted not to pursue a work injury claim against her employer but had filed a claim of tortious negligence against the appellant, the trial court had the requisite jurisdiction to hear and determine the matter. Moreover the appellant had submitted to the jurisdiction of the court.
26. On the issue of liability, it is now settled that there cannot be liability without fault. The facts in the instant matter are that the accident motor vehicle was at the time being driven by DW1, a police officer attached to Chuka police station. The respondent, a school principal was ferrying examination papers at the time of the accident.
27. The motor vehicle according to the evidence on record, the motor vehicle is owned by the appellant on lease to the Kenya Police. The driver at the time was a police officer. The appellant thus contends that because the driver was not its agent, the issue of vicarious liability does not arise.
28. In his testimony before the trial court, DW1 stated that he was evading a head on collision with an oncoming vehicle when he fell into a ditch. He did not however join the driver of that vehicle to these proceedings to carry part of the blame.
29. The other contention is that the vehicle is operated by the government of Kenya and not the appellant. This is supported by the copy of record filed in that court. I do therefore find that the appellant had no control of the said vehicle wherefore vicarious liability cannot attach to him. The Respondent would have been better placed to have pursued a work injury claim against her employer instead of suing the appellant for tortious negligence.
30. Premised on the afore stated finding I do hereby allow this appeal and I set aside the judgment on both liability and quantum against the appellant.
31. Each party shall bear it's own costs.

DATED AND DELIVERED AT MERU THIS 10TH DAY OF AUGUST 2023.

MWANAISHA. S. SHARIFF



JUDGE

