



**Karua v Gatimu (Civil Appeal 62 of 2016)  
[2022] KEHC 10151 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 10151 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL 62 OF 2016  
LM NJUGUNA, J  
APRIL 28, 2022**

**BETWEEN**

**JOHN NJAGI KARUA ..... APPELLANT**

**AND**

**NJIRU GATIMU ..... RESPONDENT**

**JUDGMENT**

1. The appeal herein arises from the judgment of Hon. M. N. Gicheru, Chief Magistrate (as he then was) dated the 24<sup>th</sup> October, 2016 delivered in Chief Magistrate’s Civil Case No. 82 of 2005.
2. The respondent who was the plaintiff in the said case filed a plaint dated 10<sup>th</sup> March, 2005 as the administrator of the estate of Jane Njuki Mwaniki (deceased) against the appellant and Angelo Njeru t/a Njuki-Imwe Hardware who were sued as the 1<sup>st</sup> and 2<sup>nd</sup> defendants and described as the driver and owner of motor vehicle KXQ O59 respectively.
3. The respondent averred that on the 22<sup>nd</sup> November 2002, the deceased was lawfully walking along Embu – Kiritiri road near Ndumari, when the appellant herein being the driver, servant, employee and/or agent of Angelo Njeru t/a Njuki-Imwe Hardware, negligently drove, managed and controlled motor vehicle registration No. KXQ 059 that he caused it to knock down the deceased as a result of which the deceased suffered serious body injuries from which she succumbed.
4. The respondent set out the particulars of negligence in paragraph 5 of the plaint and those of loss and damage in paragraph 6. He prayed for judgment against the appellant and the said Angelo Njeru, jointly and severally.
5. The appellant and his co-defendant (Angelo Njeru) filed a joint statement of defence dated the 25/05/2005 which was later amended on the 2<sup>nd</sup> September 2008, in which his co-defendant denied ever owning motor vehicle KXQ 059. The particulars of negligence, loss and damage were also denied



and the respondent was put to strict proof thereof. Further, the co-defendant admitted his name and description but denied carrying on trade under the name and style of Njuki-Imwe Hardware.

6. At the hearing, the respondent testified and called one witness in support of his case while the appellant testified on his own behalf and that of his co-defendant. Upon considering the evidence on record, the learned magistrate (as he then was), found the appellant and his co-defendant liable for the accident and awarded damages totaling to Kshs. 2,827,300/= plus costs and interest.
7. The learned magistrate found that the respondent had proved vicarious liability on the part of the appellant and the co-defendant at 100% liable jointly and severally.
8. The appellant being dissatisfied with the judgment, filed memorandum of appeal dated the 7<sup>th</sup> day of November, 2016 wherein he set out five grounds of appeal as follows;
  1. The learned chief magistrate erred in law and fact by finding that the 1<sup>st</sup> defendant, Angelo Njeru T/A Njuki-Imwe Hardware was the owner of the motor vehicle registration No. KXQ 059; but erred by further finding that the appellant, who was the 1<sup>st</sup> defendant's agent and authorized driver, was jointly and severally liable on 100% basis in negligence to the respondent.
  2. The learned chief magistrate erred in law and fact when he directed, concluded and found that the 1<sup>st</sup> defendant was vicariously liable for the negligence of the appellant but thereafter erred by misapplying the principle of "vicarious liability" by finding that the appellant was 100% liable jointly and severally with the 1<sup>st</sup> defendant.
  3. The learned chief magistrate erred in law and fact by relying and basing the issue of negligence and liability of the appellant upon the extraneous fact of the lack of maintenance of the steering wheel column of the motor vehicle registration KXQ 059 – which fact was not pleaded and proved by the plaintiff as by law required.
  4. The learned chief magistrate erred in law and fact in failing to dismiss the suit with costs to the appellant and find that the appellant, being the driver, agent and/or servant of the 1<sup>st</sup> defendant, was not strictly liable to the respondent in respect of the cause of action as pleaded in the original suit.
9. The appeal was disposed of by way of written submissions. On the part of the appellant, it was submitted that the trial court erred in applying the principle of "vicarious liability". He averred that where the tort of negligence is occasioned by the authorized agent then liability falls upon the principal where negligence has been proved against the authorized agent. That in the present case, the trial court having found that negligence had been established and proven against the appellant, who at the material time was the driver, agent and/or servant of one Angelo Njeru who was the owner of motor vehicle registration number KXQ 059, the trial court ought to have found Njuki Imwe liable and not the appellant.
10. It was submitted that in finding the appellant liable to compensate the respondent, jointly with the owner of the motor vehicle, the court misdirected itself and grossly erred in Law. That though the appellant may have been negligent in the manner in which he handled the vehicle at the time of the accident, this negligence does not attract strict liability.



11. In his submissions, the respondent urged the court to affirm the judgment of the trial court and averred that, in his evidence he stated that Njuki-Imwe Hardware was owned by three brothers and that Angelo Njeru was one of them. That the trial court was right in finding that the police abstract was sufficient proof of ownership. Reliance was had on the case of *Joel Muga Opija Vs East African Sea Food Limited* [2013] eKLR in which the court held that though the best way to prove ownership of a motor vehicle was by production to the court of a document from the registrar of motor vehicles showing the registered owner, when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.
12. On the issue of the learned magistrate having found the defendants jointly and severally liable, it was submitted that the deceased was walking off the road when she was hit by motor vehicle KXQ 059 after the driver lost control and it veered off the road. That there was no evidence placed before the court to establish contributory negligence on the part of the deceased and that the plaintiff proved that the defendants had failed to service the accident motor vehicle since the inspection report indicated that the motor vehicle was defective prior to the accident.
13. On the issue of vicarious liability, the respondent submitted that the learned magistrate applied the principle correctly by finding the appellant's co-defendant vicariously liable for the negligence on the part of the appellant in that, at the time of the accident, the appellant was employed by Njuki Imwe Hardware and that the 1<sup>st</sup> defendant was one of the owners. That this, therefore, made the appellant his employee, agent or servant and hence vicariously liable for the actions of his employee. Further that, even if it was not the appellant's duty to maintain the steering column of the accident vehicle, he was under the obligation to report the defects of the motor vehicle to the owner and that he was not supposed to drive the vehicle if he knew it to be defective.
14. The court has carefully considered the submissions and the grounds of appeal. The cause of action the subject of this appeal was based on the tort of negligence. The respondent sued as the legal representative of the estate of Jane Njoki (deceased) who died in the accident. In his evidence he stated that he sued Angelo Njeru t/a Njuki-Imwe Hardware as the owner of the motor vehicle KXQ 059 at the material time of the accident and the same was being driven by the appellant. He produced a copy of the police abstract as an exhibit which shows the owner of the vehicle as "Njukii-Ini Hardware".
15. In his defence, the 1<sup>st</sup> defendant denied ever owning the subject motor vehicle. Among the documents that he produced is a copy of records for the aforesaid vehicle which shows the owner as one Leonard Kuia Mwathi. The court has perused the copy of the record and I note that the same shows ownership of the vehicle as at 9<sup>th</sup> May 2008 which was six years after the accident. The relevant period was 22<sup>nd</sup> November, 2002 as ownership could have changed anytime thereafter.
16. In my considered view, the said document does not assist the appellant in any way in regards to the ownership of the subject vehicle. As the court stated in the case of *Joel Muga Opija Vs East African Seafood Limited (supra)* ownership of a motor vehicle can be proved by way of a police abstract and especially when the production of the same was not challenged.
17. I find that the respondent proved the ownership of the vehicle on a balance of probability.
18. On the issue of vicariously liability the appellant did not deny that he was driving the vehicle at the material time. He admitted that he was employed by Njuki-Imwe which was owned by three brothers and the 1<sup>st</sup> defendant was one of them. It was his evidence that the vehicle had a problem with the steering system and he lost control of the same. The appellant contends that it was not his duty to maintain the steering column of the vehicle and therefore, he ought to have been exempted from civil culpability in respect of negligence which was based on defect of the motor vehicle.



19. In this regard, the court has considered the evidence on record as well as the pleadings that were filed in the lower court. In the plaint, the respondent set out the particulars of negligence of the 2<sup>nd</sup> defendant as the driver of motor vehicle KXQ 059. In her evidence P.W.1 (Hellen Wangai Mwaniki) stated that on the material day, she was in the company of the deceased and they were walking off the road from Majimbo to Embu market. That the vehicle veered off the road to where they were and hit the deceased who died on the spot.
20. In his evidence the appellant admitted to have been driving the vehicle at the time the accident occurred. He also admitted that he lost control of the vehicle, after which it veered of the road and went on the other side and hit the deceased. According to him, the vehicle had a problem with the steering system and that is what caused the accident. The appellant and the co-defendant filed a joint statement of defence which was later amended. Though the particulars of negligence are denied, they did not plead as to the cause of the accident being due to the mechanical defect of the vehicle. It is trite law that parties are bound by their pleadings as expounded in the case of *Galaxy Paints Company Limited vs Falcon Guards Limited* (2000) 2 EA 385 where the court stated;

“It is trite law, and the provisions of order XIV of the Civil Procedure rules are clear issues that for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court by dint of the provisions of order XX rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court’s determination.”
21. Even assuming that the issue was pleaded, but which is not the case, the court has perused the ruling in Traffic case number 306 of 2003 in which the appellant was charged with driving a defective motor vehicle. . In the ruling, the trial court found that the motor vehicle Inspection report in itself is not sufficient to proof that the vehicle was defective as the alleged steering jack was not produced as an exhibit. The learned magistrate went ahead to state that considering the vehicle was inspected after the accident it was possible that the impact could have caused the damage to the drag link which in essence meant that the court was not satisfied that the vehicle was defective. That being the case and going by the finding in the traffic case, the inspection report did not help his case in the circumstances. In my considered view, the evidence adduced in support of the respondent’s case and more particularly the evidence of P.W.1, Hellen Wangai Mwaniki who was an eye witness was more credible. I am persuaded that the respondent was able to prove negligence on the part of the appellant. Even in his own evidence, the appellant admitted that he veered off the road and hit the deceased who was walking off the road.
22. Be that as it may, and after re-evaluating the evidence, I find that the learned magistrate did not err in finding liability against the defendants jointly and severally as there was sufficient evidence that was adduced to prove the negligence of the appellant as the driver of the motor vehicle and an authorized agent of the owner.
23. In view of the foregoing, I find that the appeal has no merit and I hereby dismiss the same. Each party to bear its own costs of the appeal.
24. It is so ordered.

**Delivered, dated and signed at Embu this 28th day of April 2022.**

**L. NJUGUNA**

**JUDGE**



.....for the Appellant

.....for the Respondent

