THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 35 OF 2020

ABSON MOTORS LIMITED.....APPELLANT

VERSUS

ROSE KAKII MULATYA & MWASHUNGU ABDULLAH JUMA

(Suing on their own behalf and as the legal representative of the estate of

JUMA ABDULLAH MWASSERAH (Deceased).....RESPONDENT

(Being an appeal from the Judgment delivered on the 17th day of June 2019 and Ruling

dated 3rd June 2019 by Hon. S. D. Sitati, Resident Magistrate at Kilifi Law Court

in the SPMCC Case No. 325 of 2018 at Kilifi)

Coram: Hon. Justice R. Nyakundi

J. Katisya Advocates for the appellant

Mwadumbo Advocates for the respondents

JUDGMENT

Absson Motors Ltd, the appellant through its advocates **Katisya & Co. Advocates** asks this Court to allow the appeal arising out of the Judgment of the trial Court dated 17.6.2019. In that Judgment, the Learned trial Magistrate made definitive findings on liability against the appellant and went further to assess damages in the following scheme:

(a). Damages for pain and suffering Kshs.10,000/=.

(b). Loss of expectation of life Kshs.100,000/=.

(c). Special damages Kshs.20,550/=.

(d). Loss of dependency Kshs.3,663,913.20/=.

(e). Together with costs and interest at Court rates.

Aggrieved with the Judgment on liability the appellant preferred this appeal premised on the following grounds:

1. The Honourable Learned trial Magistrate erred in fact and in Law by failing to allow the 2nd defendant an opportunity to provide evidence and witnesses to prove its defence.

2. The Honourable Learned trial Magistrate erred in fact and in Law by failing to make findings in the interest of justice.

3. The Honourable Learned trial Magistrate erred in fact and Law by failing to allow and take to account evidence placed before him.

4. The Honourable Learned trial Magistrate erred in fact and Law by penalizing the appellant for the Advocate's demeanor against the interest of justice.

5. The Honourable Learned trial Magistrate erred in fact and Law by finding that the appellant is the owner of motorcycle of Registration number KMDD 270L.

6. The Learned trial Judge erred in Law by ignoring the provisions of the Law and strictly relying on facts to apportion liability on the facts of the plaintiff's case.

7. The Learned trial Judge erred in Law in finding the appellant vicariously liable.

Litigation history

First of all, we must call as many relevant facts as we can from the record and set them out in chronological order or else there will be no background to the conclusions reached. In a plaint dated 15.8.2018 **Rose Mulatya** and **Mashungu Abdallah Juma** as administrators to the **Estate of Juma Abdullah Mwasserah** filed suit against the appellant and **E. Coach Company Ltd** seeking damages in tort under the Fatal Accidents Act and Law Reform Miscellaneous Act. The central facts constituting the claim were that on or about 25.4.2016 the deceased was lawfully travelling in motor vehicle registration number KBV 809F in Mbogolo area, in a vehicle owned by the E-Coach Co. Ltd and being driven by their authorized driver, agent or servant, when he collided with motor cycle registration number KMDD 270L owned by the 2nd defendant herein, the appellant. As a result of the collision, the deceased sustained fatal injuries. The plaintiffs averred that the proximate cause of the accident was due to the negligence of the two respective drivers as pleaded in paragraph (9) of the Plaint.

At the trial, the respondents to this appeal adduced material evidence from **(PW1) – Mwashungu Juma.** In his testimony, he alleged that the deceased is his biological father who died on 24.11.2016 through a road traffic accident. He produced the police abstract as evidence on the occurrence of the accident as **exhibit 2**, copy of records for the bus owned by the 1st defendant in the lower Court as exhibit 3 and the motor cycle. It was his evidence that the deceased was a teacher by profession and during his life, he supported the family in all spheres of life. In particular, **(PW1)** decided to the fact of dependency in his respect on fees and other incidentals paid by the deceased to support his educative needs with that the parties elected to file written submissions on the stated issues as pleaded in the pleadings.

Submissions on Appeal

Learned counsel appearing on behalf of the appellant submitted at the hearing on these issues; first that this was a case of mistaken identity as the appellant is not the registered owner of the subject motor cycle. Right from the start, Learned counsel contended that the appellant is in the business of selling motor cycles and it's through that process, the motor vehicle in question was sold to a bonafide purchaser **Kazungu Charo Mwaro**. That the purchaser took physical possession of the said motor cycle on 4.9.2013 prior to the occurrence of the accident on 25.4.2016.

Further, the appellant argued and submitted that the issue arose within the trial of the suit but the Learned trial Magistrate failed to address it fully. In contestation of Learned counsel is the fact that the Learned trial Magistrate proceeded to make definite findings in absence of their input hence arriving at an erroneous decision.

Learned counsel urged the Court to exercise jurisdiction over the matter in terms of Article 165 (6) and (7) of the Constitution to rectify the illegality and impropriety of the proceedings which gave rise to the prejudice suffered by the appellant. In support of the issue on ownership of the motor cycle, Learned counsel submitted that the sale of the motor vehicle took effect upon full payment of the purchase price.

In these circumstances, Learned counsel submits that documentary evidence of delivery notes and tax invoice attest to the rightful owner of the motor cycle to absolve the appellant of any interest in the offending motor cycle. Incidentally the documents referred to by Learned counsel are in contrast with the Log book produced and admitted before the trial Court on proof of ownership of the motor cycle.

The respondent counsel in opposition to the appeal submitted on all the issues raised by the appellant on jurisdiction to hear and determine the appeal, on whether there was a misdirection on the part of the trial Magistrate with regard to appreciation of the evidence and finally whether dilatory evidence of legal counsel for the appellant should be used to vitiate the proceedings and subsequent Judgment. Learned counsel cited and ruled on the following authorities to buttress the legal proposition for the Court to disallow the appeal.

Determination

As required of this Court, I have considered the evidence and subsequent Judgment visa viz, the grounds of appeal. From the seven grounds in the Memorandum of Appeal, the appellant intended other issues being a prelude to the final Judgment of the Court.

As the duty of the Court is as well in the case of **Peter v Sunday Post Ltd {1958} EA 424:**

It must not be forgotten that this being a first appeal to this Court, I am entitled, indeed duty bound to review the evidence to determine whether the conclusions of the Learned Magistrate should stand, though I must bear in mind that I have neither seen nor heard the witnesses

as did the trial Magistrate. When I consider the appeal in its entirety what stands out as a point of departure from the Judgment on the part of the appellant is a misdirection by the Learned trial Magistrate on wrong application of the principles to proof ownership of the motor cycle.

The appellant seems to think the Learned trial Magistrate acted in haste soon after deciding the ruling raising the contentious issues on the defence issues contemplated by the appellant.

To this Court, this is a question of fact to be found having regard to all the evidence presented at the trial Court. As a matter of fact in the case being adjudicated by the Learned trial Magistrate, two key issues stood out for determination:

(1). That an accident occurred between the motor vehicle registration number KBV 809F and motor cycle KMDD 270L.

(2). That the driver of motor vehicle registration number KBV 809F was employed by the 1st defendant as the registered owner.

(3). That the owner was driving the vehicle under the employer's instructions at the time as the registered owner.

(4). That the driver was ailing in the course of his employment.

(5). That in driving the motor vehicle, he did so negligently and in breach of duty of care.

In the case of the motor cycle, proof of the above elements on the facts of this case runs in part material. It is of great importance to note that a party may only escape liability on leading evidence on rebuttable presumption that the motor vehicle ownership was vested in another third party or the servant and driver was not acting in the course of his employment or employed by the registered owner. This presumption may be rebutted by the registered owners of these motor vehicle subject matter of the accident displacing the primafacie case against them as adduced satisfactory before the Learned trial Magistrate.

It is trite that the Court must be satisfied as to the credibility of the evidence adduced in order for the prescription to be rebutted. In the case at bar, there is credible evidence of the motor cycle in question having been registered in the name and style of **Absons Ltd.** The appellant had all the time and opportunity to discharge that aspect of registration by merely putting forward evidence of transfer of the motor cycle to **Kazungu**. That the use of the motor cycle at the material time or otherwise was legally and beneficiary in the control and possession of **Kazungu Charo** and not the appellant. This is a burden on the registered owner, and if that onus is not discharged, the primafacie case remains and the person alleging, the agency succeeds. The Logbook exhibited from the National Transport Authority was highly material in deciding whether the appellant could be heed vicariously held liable in negligence.

In the Learned Magistrate findings, there was no evidence to rebut that primafacie evidence on the particulars in the Logbook. As indicated the documentary evidence tendered led to a presumption that the driver of the motorcycle was a servant or agent to the appellant was there on collision with the first defendant's motor vehicle on 25.4.2016 in which the deceased sustained fatal injuries. That question relying on the trial Court record can be answered in the affidavit. The witness statement from the respondent's side **(PW1)** on oath and cross-examination produced a series of documentary evidence to proof the registered owners of the offending motor vehicles.

In the words of **Salmond & Heuston on the Law of thought 19th Edition {1982} pg 510** conditions required on the application of the doctrine of vicarious liability to apply constitutes the following elements:

"The relationship of master and servant must exist between the defendant and the person committing the wrong complained of. The servant must in committing the wrong have been acting in the course of his employment. Vicarious liability is legal responsibility imposed on an employer, although he is himself free from blame, for a tort committed by his employee in the course of his employment. Fleming observed that this formula represented "a compromise between two conflicting policies: on the one end, the social interest in furnishing an innocent victim with recourse against a financially responsible defendant; on the other, a hesitation to foist any undue burden on business enterprise." The Law of Torts, 9th ed (1988), pp 409-410. (per Lord Steyn, Lister v Hesley v Hall (2002) 1 A.C. 215 at paragraph 14.") "The expression vicarious liability signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is that A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship. The commonest instance of this in modern law is that liability of a master for the torts of his servants done in the course of their employment. The relationship required is the specific one of master and servant and the tort must be referable to that relationship in the sense that it must have been committed by the servant in the course of his employment."

This appeal, is essentially on the registered owner of the motor cycle as at the time when the accident occurred and by itself became a source of tracing the acts of negligence and breach of duty of care. Thus, at the heart of discussion is to answer the question whether the Learned trial Magistrate properly exercised discretion on facts and the Law in this specific issue of vicarious liability.

I have reflected on the specific admitted evidence and a numerous cases cited has proof of this contentious matter. These remarks in these cases are important to put the appeal in perspective. In the case of **Securicor Kenya Ltd v Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O'Kubasu' Deverell JJ. A):**

"Our holding finds support in the decision in Osapil vs Kaddy [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only primafacie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had,

indeed, proved otherwise." In addition in Joel Muga Opinja v East Africa Sea Food Ltd [2013] eKLR: " we agree that the best way to prove ownership would be to produce to the Court a document from Registrar of motor vehicles showing who the registered owner is but when the abstract is not challenged and is produced in Court without any objection, the contents cannot later be denied." All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of Francis Nzioka Ngao vs Silas Thiani Nkunga, Civil Appeal No. 92 of 1998, whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case…"

Applying these principles in the present case, our Law longer struggles with the concept of vicarious liability providing the connected acts of negligence authored by the agent, a servant or driver of the master. In view of these decisions, the intents focus on other grounds of appeal, could be generally subsumed when taking a broad approach with the context of vicarious liability and tortious conduct of the agents, servant or drivers of the motor vehicles subject to that accident.

In the instant case, the appellant argues that the Learned trial Magistrate erred in failing to allow and take evidence placed before him. Therefore, in absence of evidence in rebuttal by the appellant the motor cycle on the material day remained to be duly registered and was no evidence to the contrary to have been transferred to **Kazungu Charo**. That case concerned the Law of Agency in traditional sense following a close relationship between the parties. Given the state of affairs quite clearly the other issues in the Memorandum of Appeal were comprehensively dealt with by the Learned trial Magistrate. It is well settled; the Court has no jurisdiction to decide an issue not raised before him within the four corners of the pleadings. The Court of Appeal in **Charles C. Sande v Kenya Cooperative Creameries Ltd Civil Appeal No. 154 of 1992** observed as follows:

"The only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position….. We would endorse the well-established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallise the issues which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are…."

From the record, the Learned trial Magistrate ventured and determined all the issues adverted to by the appellant. This Court has nothing useful to add on that score. There is one other point which the appellant raised in submissions to the effect that the Ruling delivered on 3rd day of June, 2019 was in breach of Article 50 of the Constitution on the right to a fair hearing. The circumstances of this case are such that the rights of justice required the appellant to fully participate in both pretrial conference under Order 11 of the Civil Procedure Rules and at the hearing of the main suit.

So it is necessary to look at the facts that precede the Ruling and those that arose after it and consider at best the available evidence portray the relative merit of either party. The attempt by the appellant to reopen the case is entirely without sufficient cause. It is manifest that in the first place the orders of the trial Court on case management were never followed to the later. It is not enough for the appellant to simply state he was never given an opportunity to ventilate his defence. The position is quite different when the Court subjects the record in the scrutiny on evaluation. It is common for parties to a suit or their legal representatives to conduct the business of the Court in dilatory manner.

Supposedly, in exercising of discretionary power on jurisdiction it will be competent for the Court to lock out or strike out an indolent party or one who disobeys Court orders or directions. In the case of **Canadian Metal Company Ltd v Canadian Broadcasting Corporation (No. 2) {1975} 48 DLR (3rd) 641, 669:**

"To allow Court orders to be disobeyed would be to tread the road towards anarchy. If orders of the Court can be treated with disrespect, the whole administration of justice is brought into scorn…. If the remedies that the Courts grant to correct…. Wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of confidence in the Courts will quickly result in the destruction of our society."

In truth conduct may be treated as a contempt of Court as tending to interfere with the course of justice in particular legal proceedings regardless of the intent to do so. The duties imposed upon the advocates of the High Court are normally exercised under the authority of that Court. They must answer for anything that is done under the authority and proceedings expected and competently presided over by the session Judges and Magistrates as mandated under Article 50 (1) of the Constitution.

In answer to the grievance raised by the appellant on the requirement of natural justice the **House of Lords in the case of Lloyd v McMahon {1987} AC 625 at 702** in a speech by **Lord Bridge** observed as follows**:**

"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

This was a matter within the discretion of the trial Magistrate unless I feel he went completely overboard, I will not interfere with the decision as agitated by the appellant. I find solace in the case of **Mbogo & Another v Shah {1968} E. A. 93 Sir Clement de Lestang V. P.**

said at page 94:

> **"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it had acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the Judge was wrong and this, in my view, it has failed to do." Sir Charles Newbold, P.. pg 96: "For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."**

For those reasons, I find it hard to escape the conclusion that the appeal is devoid of true merit and is hitherto dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 6TH DAY OF AUGUST, 2021

.....

R. NYAKUNDI

JUDGE

(mwadumboadvocates@gmail.com info@jkadvocate.com)