



IN THE HIGH COURT OF KENYA

AT KIAMBU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 171 OF 2018

BETWEEN

NAFTALI NDUATI MWANGI.....APPELLANT

AND

KUBU KIMUNYI KUBU.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. N. M. Kyanya-Nyamori, RM

dated 19th November 2018 at Thika Magistrates Court in Civil Case No. 64 of 2010)

JUDGMENT

1. The appellant is dissatisfied that the judgment of the trial court awarding the respondent Kshs. 1,560,464.00 as special damages being repair charges and loss of use of his vehicle which was involved in an accident. For ease of reference I shall refer to the parties in the respective capacities before the trial court. The appellant was the defendant before the trial court while the respondent was the plaintiff.

2. The plaintiff was the owner of the motor vehicle registration number KAU 137S while the defendant was the owner of motor vehicle registration number KBG 169L. Both vehicles were involved in an accident on 27th September 2009 along the Sagana-Kenol road.

3. In the plaint dated 5th January 2010, the plaintiff alleged that the defendant and/or his driver was negligent in causing the accident and that as a result the plaintiff suffered loss and damage. He claimed Kshs. 1,655,327.00 made up as follows:

Police Abstract	Kshs.	100.00
Repair Charges	Kshs.	955,127.00
Assessors fee	Kshs.	5,000.00
Loss of use	Kshs.	695,000.00

4. In his defence dated 30th June 2010, the defendant denied the particulars of negligence or that the vehicle was driven by his servant, driver and or agent. In particular, the defendant stated that, “[H]is motor vehicle was stolen and any person and/or driver driving, controlling and/or managing the same was not authorised by him or at all and the defendant is not liable to any accident, loss and/or damage caused by him/her.”

5. In the memorandum of appeal dated 17th December 2018, the appellant contested that judgment on the following grounds:

1. *The learned Magistrate erred in law and in fact in failing to find that the suit was not proved (sic).*

2. *The learned magistrate erred in fact and in law to find that under the circumstances of this case, the pleading and evidence, the appellant was not liable for the accident.*

3. *The Honourable magistrate misapprehended and misapplied the rule of pleading in considering the matters that were not pleaded hence arriving at the wrong judgment and/or finding.*

4. *The learned Magistrate erred in law and in fact in formulating and considering extraneous matters in finding the claim proved.*

6. At the hearing the plaintiff called 6 witnesses. George Mwaura (PW 1) was the loss assessor, Michael Muchemi (PW 2) was driving another motor vehicle which was involved in the accident. Richard Kehiu Njaro (PW 3) testified that he witnessed the collision between the two vehicles. Kubu Kimunyi Kubu (PW 4) confirmed that he was the owner of the vehicle. Peter Waturu Muyogo (PW 5), an auditor, produced evidence to support the plaintiff's claim for loss of use. PC Amos Msafiri (PW 6), was the traffic officer who gave particulars of the accident. The defendant testified and called Corporal James Gitu (DW 2).

7. Counsel for both parties made brief oral submission to support their respective cases and the issue that emerged on liability was whether the defendant was vicariously liable. Whether the defendant was vicariously liable is a question of fact and since this is a first appeal, I am alive to the principle that the first appellate court is required to re-appraise the evidence, evaluate it and draw its own conclusions making an allowance for the fact that it neither heard nor saw the witnesses testify (see ***Selle v Associated Motor Boat Company Ltd [1968] E.A. 123, 126***).

8. The fact that an accident took place involving both vehicles was proved on the balance of probabilities by the testimony of PW 2, PW 3 and PW 6 who witnessed the accident and confirmed that it took place. The defendant did not call any witnesses to rebut this evidence. In particular, he did not plead any contributory negligence hence the driver of the defendant's vehicle was fully liable for the damage caused to the plaintiff's vehicle. The question for consideration in the subordinate court and in this court is whether the appellant was vicariously liable. Since he was asserting an affirmative defence, the defendant had the burden of proving that he was not liable on the balance of probabilities.

9. The defendant admitted that he was the owner of motor vehicle registration number KBG 169L. He recalled that on Sunday, 27th September 2009, he woke up to find his son, Francis Muiruri had driven off with the vehicle. He proceeded to Makuyu Police Station at about 7.50am to report that his son had stolen the vehicle. While at the station, he was informed that the vehicle had been involved in an accident with the plaintiff's vehicle and that his son had died in the accident. He stated that his son did not have permission to drive the accident. When cross-examined, DW 1 told the court that his son was 20 years old and was a student in high school. DW 2 produced an extract of the occurrence book showing that DW 1 reported the incident on 29th September 2009 at 7.50am as entry no. 13/27/9/09.

10. In the judgment, the trial magistrate held that DW 1 had not consented to the deceased driving his motor vehicle but because the defendant had failed to take out a third party insurance cover under **section 4(1) of the Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)** resulted in damages incurred by the plaintiff thus he was liable.

11. I agree with counsel for the appellant that the finding that the defendant was liable because he failed to take out third party insurance cover was a misdirection as the matter was not pleaded. The importance of pleadings in civil cases cannot be gainsaid. In ***Galaxy Paints Company Limited v Falcon Guards Limited [2000] EA 885***, the Court of Appeal noting the importance of pleadings observed that:

[I]ssues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination.

12. The issue relating to the third party insurance was not pleaded as a ground for negligence hence the defendant could not be found liable. Further, whether or not the defendant takes out insurance of whatever nature has no bearing on the manner in which the defendant or his agent drove and controlled the motor vehicle to enable the court fix liability on him.

13. 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. He further contended that the evidence was clear that there was no master and servant relationship established. Counsel relied on several cases; ***PNM and Another (representatives of the Estate of LMM) v Telkom Kenya, Dritoo v West Nile District Administration [1968] EA 428*** and ***Tabitha Nduhi Kinyua v Francis Mutua Mburi and Another CA Civil Appeal No. 186 of 2009 [2014] eKLR***.

14. Counsel for the respondent submitted that the defendant was liable because the motor vehicle belonged to him and that it was being driven by his son who caused the accident and was therefore liable.

15. The issue of vicarious liability has been subject of various decisions of our superior courts. The general principle regarding vicarious liability was summarized in ***Pritoo v West Nile District Administration [1968] EA 428***, 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.

16. In ***Selle and another v Associated Motor Boat Co Ltd (Supra)*** the Court (*per* Sir Clement de Lestang, VP, at p 128) held as follows:

Where, however, a person delegates a task or duty to another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be.

17. In ***Anyanzwa v Gasperis NRB CA Civil Appeal No. 31 of 1981 [1981]eKLR***, the Court of Appeal cited with approval the case of ***Morgans v Launchbury and Others [1972] 2 All ER 606*** where the House of Lords held as follows:

In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was the owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner...

18. 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 authorised to drive the vehicle as such he was not liable.

19. In dealing with the issue of quantum of damages, the applicable principle is that this court will not ordinarily interfere with the findings of a trial court on an award of damages unless it can be shown that the court proceeded on wrong principles, or misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low (see **Butt v Khan [1981] KLR 349**).

20. The gravamen of appellant's complaint is that the plaintiff did not prove its claim to the required standard. In his submissions, counsel for the appelland contended that the trial magistrate relied on inadmissible evidence of persons who were not qualified to testify.

21. PW 1 testified that he was the assessor and he compiled the assessment report which he produced as Exhibit No. 1. The plaintiff, PW 4, testified to how much he was making from the matatu daily. He identified an audit report prepared by Maranga and Associates to support his claim for loss of use for 29 days. PW 5, an accountant at Mariga and Mwaura Accountants produced the reports in support of the claim as Exhibits 5A, 5B and 5C. He was cross-examined by counsel for the defendant on the same. Since documents were produced without any objection by the defendant's counsel, I do not find any merit in the complaint that the evidence was inadmissible because either PW 1 and PW 4 were not qualified to produced those documents or that they did not prepare the reports.

22. In view of my finding on the issue of liability, I allow the appeal, set aside the judgment of the subordinate court and substitute the same with an order dismissing the claim. The appelland shall have the costs of the case in the subordinate court and half the costs of this appeal.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 29th day of JANUARY 2020.

J. N. ONYIEGO

JUDGE

Mr Njiraini instructed by R. M. Njiraini and Company Advocates for the appelland.

Mr Muiruri instructed by Muturi Njoroge and Company Advocates for the respondent.