



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
(CIVIL APPEALS DIVISION)
CIVIL APPEAL NO 583 OF 2016

POPATLAL MADHVJI & BROTHERS.....APPELLANT

AND

JOHN MUKULYA MANTHI.....1ST RESPONDENT

JOSEPH MWANZIA MUSAU.....2ND RESPONDENT

JOEL KYALO MWEI.....RD RESPONDENT

**(Being an appeal from the Judgment of the Chief Magistrate's Court Milimani Commercial Courts,
Nairobi (Hon L.A. Arika Senior Principal Magistrate) dated 16th August 2016)**

IN

JOHN MUKULYA MANTHI.....PLAINTIFF

VERSUS

POPATLAL MADHVJI & BROTHERS

T/A WATERWAYS AFRICA.....1ST DEFENDANT

JOSEPH MWANZIA MUSAU.....2ND DEFENDANT

JOEL KYALO MWEI.....RD DEFENDANT

JUDGMENT

INTRODUCTION

1. In her decision that was delivered on 16th August 2016, Hon L. A. Arika, Senior Principal Magistrate found the 2nd Defendant to have been wholly liable for the injuries the 1st Respondent sustained and the

Appellant herein as vicariously liable for the actions of the 2nd Respondent herein. She entered judgment in favour of the 1st Respondent herein against the Appellant and the 2nd respondent herein for the sum of Kshs 1,460,150/= made up as follows:-

General damages	Kshs 1,150,000/=
Future treatment	Kshs 300,000/=
Special damages	<u>Kshs 10,150/=</u>
	Kshs 1,460,150/=

together with interest at court rates on the general and special damages and costs.

2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant herein filed its Memorandum of Appeal dated 9th September 2016 on 13th September 2016. It relied on eight (8) grounds of appeal.

3. The Appellant's Written Submissions were dated 13th May 2019 and filed on 20th May 2019 while those of the 1st Respondent were dated and filed on 19th June 2019.

4. The parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. The Appellant submitted that M/S Waterways Limited once owned Motor Vehicle Registration Number KXS 035 (hereinafter referred to as "the subject motor vehicle"). It was one of the assets that were taken over by M/S Waterways Africa and upon its dissolution, it was sold to one Geoffrey Karanja Gitau pursuant to Agreement for Sale dated 23rd February 2007.

6. It added that it furnished him with all the necessary documentation to facilitate the transfer of the subject motor vehicle in his name and also cancelled the insurance. It pointed out that it had always been insured by M/S Occidental Insurance Company Limited and not M/S Blue Shield Insurance Company Limited, who according to the Police Abstract Report was said to have been the insurer of the subject motor vehicle. It stated that it was issued with a credit note of the unutilized premiums in the sum of Kshs 18,081/= by its M/S Universal Insurance Brokers Limited.

7. It was its submission that it was not the owner of the said subject motor vehicle in which the 1st Respondent was travelling in on 2nd April 2008 when the accident occurred and he sustained injuries. It was categorical that the 2nd Respondent was never in its employ at the material time and it could not therefore have been vicariously liable for his negligence.

8. It therefore urged this court to allow its Appeal.

THE 1ST RESPONDENT'S CASE

9. The 1st Respondent submitted that he sustained injuries while he was a passenger in Motor Vehicle Registration Number KAZ 910Z (hereinafter referred to as the "third party motor vehicle") and the subject motor vehicle. He pointed out that the 2nd Respondent who was the driver of the subject motor vehicle was found liable and convicted for the offence of careless driving at the Makadara Law Courts and was fined Kshs 5,000/= or in default, he was to serve three (3) months imprisonment.

10. He was emphatic that at the material time of the accident, M/S Waterways Limited was the registered

owner of the subject motor vehicle as per the Motor Vehicle Search Certificate and that M/S Waterways Limited having been voluntarily wound up after selling all its business to M/S Waterways Africa, a trade name for Popatlal Madhvaji & Brothers Limited, the Appellant was liable for the injuries that he sustained.

LEGAL ANALYSIS

11. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

12. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

13. Having looked at the parties' Written Submissions, it appeared to this court that the only issue that was before this court was whether or not the Learned Trial Magistrate erred when he found the Appellant liable for the injuries that were sustained by the 1st Respondent and thus awarded him the general damages in the sum of Kshs 1,150,000/= and Kshs 300,000/= special damages plus interest at court rates and costs. This court therefore considered all the grounds of appeal together as they were related.

14. Before analysing the evidence that was adduced during trial, this court determined that it was necessary to interrogate the competency of the 1st Respondent's claim in the lower court. According to the Police Abstract Report that was submitted in evidence by the 1st Respondent, the accident occurred on 2nd April 2008 along Kangundo Road.

15. It was correct as the 1st Respondent pointed out that the 2nd Respondent herein was convicted as aforesaid. It was evident from the Appellant's Written Submissions and the said Police Abstract Report that the insurer of the subject motor vehicle was M/S Blue Shield Insurance Company Limited. The Plaint dated 16th March 2010 was filed on 18th March 2010. Upto this point all was well.

16. The Amended Plaint dated 14th June 2012 was filed on 21st June 2012. Subsequent documents were filed thereafter. Notably, interlocutory judgment was entered against the 2nd Respondent on 3rd May 2012 in favour of the 1st Respondent herein. On 15th August 2014, the Appellant obtained default judgment against Geoffrey Karanja Gitau after he failed to enter appearance after being served with a Third Party Notice that was advertised in the print media. The hearing commenced before the Learned Trial Magistrate on 22nd October 2015 and continued on subsequent days culminating into her judgment that was delivered on 16th August 2016. Herein lay the problem.

17. It is instructive to note that on 16th September 2011, the Commissioner of Insurance placed M/S Blue Shield Insurance Company Limited under statutory management. As at 5th October 2017, the said M/S Blue Shield Insurance Company Limited had had two (2) Statutory Managers namely, Eliud Muriithi and John Michael Sifa Keya- **See Ruling of F. Tuiyott J of 5th October 2017 In the matter of Liquidation of Blue Shield Insurance Co Limited.**

18. It was evident from that cause that the moratorium on M/S Blue Shield Insurance Company Limited has never been lifted from 2011 and has continued to be extended on subsequent days. Placing of a company under moratorium has certain consequences.

19. Section 67C (10) of the Insurance Act Cap 487 (Laws of Kenya) provides that:-

“For the purpose of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policy holders and other creditors and the declaration of a moratorium shall –

(a) Be applied equally to all cases of policy holders and creditors, subject to such exceptions in respect of any class of insurance as the manager may , by notice in the gazette, specify;

(b) Suspend the running of time for the purposes of any law of limitation in respect of any claim by any policy holder or creditor of the insurer;

(c) Cease to apply upon the termination of the manager’s appointment whereupon the rights and obligations of the insurer, its policy holders and creditors shall, save to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of this subsection.”

20. As the 1st Respondent cannot approbate and reprobate on the issue of ownership of the subject motor vehicle, it therefore follows that if the 1st Respondent wished to proceed on the fact that the Appellant was the owner of the subject motor vehicle, then the proceedings in the lower court from the time the moratorium was placed on M/S Blue Shield Insurance Company Limited were null and void *ab initio*. They were irregular and ought to be set aside.

21. It was irrespective that the 2nd Respondent was in the Appellant’s employ as had been contended by the 1st Respondent herein. The 1st Respondent could still not have pursued the Appellant herein for vicarious liability while M/S Blue Shield Insurance Company Limited was still under moratorium. The best recourse therefore would be to remit this matter back to the lower court for determination at the appropriate time as this is a power that the High Court has at the time of hearing and determining an appeal as provided in Section 78(1) of the Civil Procedure Act Cap 21 (Laws of Kenya).

22. The said Section 78(1) of the Civil Procedure Act stipulates that:-

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

a. to determine a case finally;

b. to remand a case;

c. to frame issues and refer them for trial;

d. to take additional evidence or to require the evidence to be taken;

e. to order a new trial.”

w. Having said so, this court noted that the Appellant adduced documentary evidence to show that it had sold the subject motor vehicle to one Geoffrey Karanja Gitau vide an Agreement for Sale dated 23rd February 2007. It even produced in evidence a copy of his Identity Card.

x. It was erroneous for the Learned Trial Magistrate not to have addressed the said Agreement in her decision. She seemed to have concentrated on the issue of service of summons upon the 2nd Respondent from which she connected him to the Appellant as an employee.

y. This court was much alive to the fact that the Learned Trial Magistrate was in a better place to observe the demeanour of all the witnesses who testified and in particular to the demeanour of the Process Server, Elijah Kipkorir Chepkwony (hereinafter referred to as “PW 4”) who she said was firm consistent even under pressure while being cross-examined. However, the fact that he was firm while testifying did not still mean that he was telling the truth or that his evidence had to be taken to be truthful hook, line and sinker.

z. In his evidence, PW 4 did not state how he identified the 2nd Respondent at Kenya Comfort Hotel. He did not tell the Trial Court that they were personally known to each other for him to have identified him without assistance of anyone else who knew the 2nd Respondent. He merely stated as follows:-

“For the 2nd defendant, I traced him at the 1st defendant’s premises, Kenya Comfort Hotel. There was a vehicle being washed. He was sitting there with other drivers. He was a driver with Waterways (shown his affidavit of service filed on 5th April 2012)...”

27. Further, he stated as follows:-

“...The other drivers told me that the 2nd defendant’s nickname was Musau of Waterways.”

28. Indeed, M/S Waterways Limited may still have been the registered owner of the subject motor vehicle. However, that did not mean that the 2nd Respondent was in its employ. The fact that the identification of the 2nd Respondent was questionable caused this court to entertain doubts as to the veracity of PW 4’s evidence regarding the relationship between the 2nd Respondent and the Appellant.

29. In view of the gaps in identification of the 2nd Respondent by PW 4, this court found and held that the Appellant could not be held to have been vicariously liable for the actions of a driver who had not been proven to have been its employee and was at the material time in the course of duty on its behalf.

30. This court noted that it was a case of one party’s word against the other. The duty to prove a fact, however, lies on the person who asserts that fact and that the burden of proof lies on the person whose claim would fail if no evidence was given by either side.

31. Indeed, Section 107 of the Evidence Act provides as follows:-

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

32. Further, Section 108 of the Evidence Act states that:-

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

33. The burden of proof was on the 1st Respondent to have presented a cogent case. In the absence of proof, this court determined that he had failed to prove his case on a balance of probability and that the Learned Trial Magistrate arrived at an erroneous conclusion.

34. Accordingly, having determined that the 1st Respondent’s suit against the insured of the subject motor vehicle could not have proceeded due to the moratorium, it would have been best that the matter be remitted to the lower court for it to be heard during the appropriate time after the lifting of the moratorium, if at all.

35. However, as this court also considered the Appeal on merit, it would be punitive to put the Appellant through the same process of proving that it was not the owner of the subject motor vehicle when this court could determine the same and that no employer-employee relationship between it and the 2nd Respondent was demonstrated by the 1st Respondent for this court to have been satisfied that the Appellant was vicariously liable for the actions of the 2nd Respondent.

DISPOSITION

36. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal dated 3rd November 2016 and filed on 4th November 2016 was merited and the same is hereby allowed. The effect of this decision is that the judgment of the Learned Trial Magistrate in which she awarded the 1st Respondent 1,150,000/= being general damages, Kshs 300,000/= for future medical expenses and Kshs 10,150/= being special damages together with interest at court rates on the general and special damages and costs is hereby set aside and/or vacated.

37. In its place, it is replaced with an order that the 1st Respondent's suit against the Appellant herein be and is hereby dismissed with costs to the Appellant. The 1st Respondent will also meet the Appellant's costs of this Appeal.

38. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of July 2020

J. KAMAU

JUDGE