



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYAHURURU

HCCA. NO. 44 OF 2018

(Appeal originating from Nyahururu PM's Court Civil. No. 286 of 2006 by Hon. C. K. Obara – RM)

MICHAEL MURIITHI MATHENGE.....APPELLANT

VERSUS

CHARLES MURIITHI KARIGA.....RESPONDENT

JUDGMENT

The appellant, **Michael Muriithi Mathenge** filed his appeal dated 16/8/2011 against the judgment and decree of C.K. Obara, RM in PMCC No. 286/2006.

This claim arose out of a motor vehicle accident that occurred on 21/7/2004 along Naromoru – Kiganjo Road where Lucy Wacuka Mureithi (deceased) who was a passenger in vehicle motor KKG 166 Datsun 1300 Station Wagon, sustained fatal injuries. The said vehicle is alleged to have collided with motor vehicle KAR 524 N.

The respondent **Charles Murithi Kariga**, filed this suit on 1/8/2006 as the administrator of the estate of Lucy Wacuka against Jackson Theuri Ndungu (1st Defendant) the driver of the vehicle and James Kimani (2nd Defendant) the registered owner of the vehicle.

The respondent sought special damages and general damages under both the ***Fatal Accidents Act and the Law Reform Act***, and Costs.

The trial court found the 1st Defendant and the appellant, who was the 4th third party liable for the occurrence of the accident and allowed the Respondent's claim as follows:

- 1) ***Special damages as Kshs.20,800/-;***
- 2) ***General damages with fatal Accident Act 130,000/-;***
- 3) ***General damages under Law Reform Act 590,000/-;***
- 4) ***Costs were to be filed by the 2nd Defendant 1st Defendant 1st 2nd and 3rd Third parties.***

The 1st Defendant did not enter appearance or file defence.

The fourth Interested Party was aggrieved by the judgment of the trial court and preferred this appeal citing the following grounds;

1. ***That the trial court erred in awarding judgment to the Respondent against the 4th third party contrary to the pleadings and evidence;***
2. ***That the trial court erred by not finding that the claim against the Respondent was time barred;***
3. ***That the trial Magistrate lacked territorial jurisdiction to hear and determine the matter;***
4. ***That the court erred in holding that the claim against the 2nd Defendant, 1st, 2nd and 3rd parties had failed but not against the 4th third party;***

5. That the court erred in finding that the respondent had proved his case on a balance of probability;

6. That there was no evidence to support the award made;

7. That the court erred by failing to consider the appellant's defence;

8. That the Magistrate offended the principle of *udi alteram partem* in that the appellant was completely shut out of the Respondent's case.

This being a first appeal, it is required of this court to exhaustively examine all the evidence that was adduced in the lower court, analyze it and examine it and make its own conclusions. In doing so, the court must take into account the fact that it neither saw nor heard the witnesses testify though the trial court did. I am guided by the decision of *Selle & Another vrs Associated Motor Boat Co. Ltd & Others (1968) E.A 123*

“I accept Counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An 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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances of probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

EVIDENCE:

PW 1 Charles Mureithi Kiriga is the father of the deceased Lucy Wacuka, who was a passenger in motor vehicle KKG 166 Datsun which collided with KAR 524N on 31/7/2011 and she died on the spot following the fatal injuries that she sustained. PW1 obtained a police abstract dated 31/5/2005.

The driver of the vehicle KKG 166 was Jackson Theuri Ndungu (1st Defendant) who was charged in **Nyeri CM's Court Case No. 15/2004** where he was convicted and fined as per proceedings (PEX No.8). The owner of KKG 166 Datsun was named as James Kimani who was sued as the 2nd Defendant.

The 2nd Defendant (DW2) filed a defence in which he denied being the owner of the subject motor vehicle but that he sold it to Joel Mbindyo Ndwicko on 15/10/1996. Joel Mbindyo Ndwicko was joined to these proceedings as the 1st Third party. He denied owning the motor vehicle and claimed to having sold it to Joshua Murerwa Mbogholi on 14/6/2001.

The said Joshua Murerwa Mbogholi was joined to the proceedings as the 2nd Third party. He filed a defence and denied owning the vehicle but that he had sold it to Peter Ndichu Kahura on 4/3/2003. The said Peter Ndichu was joined to the proceedings as the 3rd Third party. He denied being the owner of the vehicle, having sold it to Michael Mureithi Mathenge on 20/3/2003, the 4th Third party (appellant). The 4th Third party also denied owning the vehicle and filed a defence to that effect. The trial court after hearing the evidence, found the 4th third party to have been the owner of the vehicle as of 31/07/2004 when the accident occurred.

Appellant's Submissions

Mr. Chweya Advocate, Counsel for the appellant argued the 1st, 4th, 5th, 6th, 7th, 8th, 9th and 10th grounds as ground 1, that there was no evidence adduced to prove that the appellant was the owner of the motor vehicle KKG 166. He argued that there were contradictions in the 3rd Third party's evidence as to whether the sale agreement of the vehicle was Kshs. 50,000/= or 52,000/=.

It was also submitted that the respondent did not prove his case on a balance of probability because the 3rd Third party did not prove having sold the vehicle to the appellant; that there was no connection between the respondent and appellant's case; that all the third parties should all have been held liable and any liability apportioned; that the 2nd Defendant who was the registered owner of the vehicle failed to comply with the *Traffic Act, Section 8,9 (1) 2 and 14*. Counsel further argued that the 2nd Defendant and all the 3rd parties were liable for failing to transfer the vehicle to the buyers and the claims against them should not have been dismissed and lastly that the Court erred in finding that the appellant was the beneficial owner of the offending motor vehicle because the respondent did not produce a police abstract showing who the owner of the vehicle was that there was no evidence to prove who the insured owner was and that his submissions were not considered.

On the 2nd ground of appeal, it was argued that the Respondent's claim against the appellant was time barred, the accident having occurred on 31/7/2004 and the appellant was enjoined to the matter on 1/12/2010, after 6 years; that it offends the *Limitation of Actions Act* and leave of the Court was never sought to file the actions out of time.

On ground 3, Counsel argued that the trial court lacked jurisdiction to entertain the suit and that the appellant was not able to raise the ground because he was enjoined to the suit late.

The last ground is that the appellant was totally shut out of the Respondent's case and had no opportunity to take part in the Respondent's case at the time he was enjoined to the suit.

RESPONDENT'S SUBMISSIONS:

The Respondent's Counsel Mr.G. Chege filed submissions in reply on 24/9/2019. On ground 1,4,5,6,7,8,9 and 10, Counsel argued that the appellant had entered into a sale agreement for the purchase of the subject motor vehicle, that the agreement was produced by the 3rd Third party as Exhibit No. 1 and 2. It bore the appellant's name, signature and Identity number; that he paid Ksh.50,000/= to the 3rd Third party; that they are people who knew each other and the appellant's demeanor was questionable; that an alleged sale of plot between him and the 3rd Third party was not produced and that the 3rd Third party proved on a balance of probability that he sold the vehicle to the appellant who was the owner at the time of accident. Counsel argued that proof of ownership of the vehicle is not confined to registration and relied on the decision of **General Motors East Africa Limited Versus Eunice Alila Ndeswa and Another (2015) eKLR.**

On the issue of quantum, Counsel relied on the decision of **Mbogo vs Shah and Another (1968) E.A 93 and Kemfro Africa Limited T/A Meru Express Services (1976) &Another Vs Lubia & Another (No.2) (1985) eKLR** where the court set the Principles to be observed by an appellate court on whether or not to interfere with the award of damages made by the trial court.

He urged the Court not to interfere.

On ground 2, Counsel submitted that the suit was filed within time because the appellant was not the registered owner as of 11/8/2006 when the suit was filed; that the Court should adopt the trial Court's Judgment that the series of third party proceedings were as a result of natural consequences.

On Ground 3: It was argued that the accident occurred on Kiganjo – Naromoru Road in Laikipia County; that the case was heard by a Resident Magistrate's Court established under the **Magistrate's Court's Act CAP 10 Laws of Kenya** and under **Section 3(2)** the court's jurisdiction was the whole of Kenya. Counsel relied on **Bungoma H.C.C Application No. 13 of 2002** where Justice Ringera considered the provisions of **Section 3 of the Magistrates Court Act, Section 15(2) of Civil Procedure Act** and found that **Section 15 of Civil Procedure Act** applied to Courts lower than the Resident Magistrate's Court and hence the Court had jurisdiction.

As to the allegation that the appellant was shut out of the Respondent's case, it was argued that the appellant was accorded a fair hearing, and was allowed to testify in reply to the evidence on record.

ANALYSIS AND DETERMINATION:

I have considered the pleadings, the evidence on record and the rival submissions. Starting with the last issue, whether the appellant was shut out of the Respondent's Case. After the 4th Third party testified, Mr. Chweya, Counsel the 4th third party's advocate indicated that they had closed their case. Mr. Chweya later went on to state that they had not had a chance to cross examine the Plaintiff(Respondent) and that they were not able to establish to whom the vehicle was released to. Mr. Chege, Counsel for the Respondent then indicated that the 4th Third party had an opportunity to call the police and that the Respondent was comfortable with the evidence on record.

Mr. Chege also observed that the Respondent was cross examined by the defence Counsel and that no application had been made to recall the Respondent. To that submission, Mr. Chweya then stated ***"I do not desire to have the Plaintiff recalled"***. (See page 73 of ROA). I find that the appellant had an opportunity to recall the respondent and it was even suggested to him but his Counsel did not deem it necessary to recall the Respondent. The appellant cannot turn around at this stage to allege that the appellant was locked out of the Respondent's case. The appellant chose not to recall the respondent and can not fault the court's decision at this stage.

Whether the trial court had territorial jurisdiction to hear and determine this matter; the appellant has argued that since the fatal accident occurred on Kiganjo – Naromoru Road, it should have been filed in Nyeri or Nanyuki CM's Court or in accordance with **Sections 14 and 15 of the Civil Procedure Act**, i.e. where the defendant resides or carries on business or within the local limits where any of the defendants if many, reside or carry out business. Section 14 and 15 ground as follows:

"14. Suit for compensation for wrong to the person or movables

Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.

Illustration.—(a) A residing in Mombasa beats B in Nairobi. B may sue A either in Mombasa or Nairobi.

Illustration.—(b) A residing in Mombasa publishes at Nairobi statements defamatory of B. B may sue A either in Mombasa or Nairobi

15. Other suits to be instituted where defendant resides or cause of action arises

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction:-

a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or

the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

c) the cause of action, wholly or in part, arises.”

I have seen that in the 2nd defendant's defence, and those of the 1st to 4th third parties, jurisdiction of this court was denied. Despite the fact that the issue of jurisdiction was denied, neither the 2nd defendant nor the third parties raised it before the hearing of the case commenced. An objection to jurisdiction must be raised at the earliest time possible. In the celebrated case of Owners of the Motors Vessel 'Lilian S Versus Caltex Oil(Kenya) Limited (1989) eKLR J. Nyarangi J.A. defined jurisdiction;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before court the more it holds the opportunity that it's without jurisdiction.”

In the above decision the court drew its authority from the ruling of John Beach Craft Sanders in a Fructose in a which is no longer published headed “Words and phrases legally defined. Volume 3: 1 – at page 113 which says the following on jurisdiction.

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the standard charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court as tribunal must inquire into the existence of a particular state of facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist i.e where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given”.

Jurisdiction being a matter of law, should have been raised as a preliminary objection before the hearing proceeded. However, the parties waited till after the conclusion of the matter that they raised it. In any way having gone through the full trial and the fact that no known prejudice was suffered by any of the parties, I find no reason to interfere with the Court's Judgment on the basis of jurisdiction. The parties acquiesced to the issue of jurisdiction.

On the other hand, the trial court applied Section 3 (1) and (2) of the Magistrates Court Act which was considered by Ringera in HCC 13/2002 (Bungoma) Muhamed Sitaban Vs George Mwangi Karoki; The court held as follows;

“Section 3(2) of the Magistrate's Court Act provides that a Court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate's Court) has jurisdiction throughout Kenya. Such a court is not the subject of the local territorial jurisdiction contemplated by section 15 of the Civil Procedure Act. In my opinion, section 15 of the Civil Procedure Act applied only to courts lower than the Resident Magistrate Court. I am fortified in that view by the fact that the Magistrates Court Act, Cap 10 of the Laws of Kenya, was enacted in 1967 long after the Civil Procedure Act. The Legislature was therefore aware of the provisions of section 15 of the Civil Procedure Act and the hallowed rule of statutory construction that where two provisions in different statutes conflict, the provision in the latter statute is deemed to amend the earlier provision must be applied. Accordingly, I find that the Bungoma Court had jurisdiction to entertain the suit and the rule that a suit filed in a court without jurisdiction is a nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative Districts in which the defendant resides as the cause of action but those reasons cannot oust a statutory jurisdiction”.

I am totally in agreement with J. Ringera's findings and I find that the initial suit was properly filed before Nyahururu Court. Once the appellant was joined to the proceedings, he should have raised the objection which he did not. In addition, no prejudice was suffered the fact that no objection was taken early in the case, that ground must fail.

On the question of who was to blame for the accident; That is not in contention. The deceased was a passenger in motor vehicle KKG 166 when it collided with another. She could not have contributed to the accident in any way nor was any negligence attributed to the deceased. The 1st defendant who was the driver of the said vehicle was charged and convicted in Nyeri Court traffic case 15/2004 and fined Ksh. 77,000/=. The said Judgment was not challenged on appeal. The driver of the vehicle the 1st defendant was therefore 100% liable for the said accident.

On the question of quantum, the award of damages being a discretionary function of the trial court, the appeal court will always be reluctant to interfere with the said exercise of discretion unless it is demonstrated that the trial court failed to apply certain guiding principles which have been considered in several cases. In Kemfro Africa Limited T/A Meru Express Services (1976) & Another Vs Lubia & Another (No.2) 1985) eKLR where the court adopted the principles earlier set out in the case of Mbogo vs Shah and Another (1968) East Africa 93. The same principles were applied in East African Limited vs Eunice Alila Ndeswa and Another (2015) eKLR where the court said *“I think it is well settled principle that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has 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 account and consideration and in so doing so arrived at a wrong conclusion.”*

The question to be answered is whether there are reasons to justify the disturbing of the award, and therefore whether the trial court applied the wrong principles and arrived at an inordinately high award. It was the duty of the appellant to demonstrate that indeed the court applied wrong principles in making the award that it arrived at an inordinately high award. I have gone through the submissions of the appellant and nowhere has it been demonstrated that the award was inordinately high. The deceased was aged 33 years old, was a teacher earning Kshs.9,000/- per month. She still had about 25 more working years. An award of only Kshs.500,000/= was made. The plaintiff's counsel had suggested that an award of Ksh.720,000/= be made but the court was restrained by its monetary jurisdiction. I think that the award was on the lower side and I find no good reason to interfere with it.

The final issue for consideration is who is liable to pay the damages? From the evidence on record, the subject motor vehicle changed ownership several times without the purchasers complying with the law to have the new purchaser register it in his respective names. The 2nd defendant demonstrated that he had been the owner of the vehicle up to 15/10/1986 when he sold it to the 1st Third party, who then sold it to the 2nd Third party and the 2nd Third party sold it to the 3rd Third party. There is sufficient evidence to prove those facts. The issue arose when the 3rd Third party alleged that he sold the vehicle to the 4th Third party on 11/3/2003 and was not in possession of the subject vehicle as of the date of the accident on 31/7/2004. In his evidence, the 4th Third party alleged that there was a sale of a plot (land) between him and the 3rd Third party but not sale of a vehicle. The trial court did not believe the 4th third party. The trial court also observed that the signature of the 4th Third party on the summons requiring him to attend court, dated 10/11/2010 and which he admitted signing looked like the signature on the sale agreement that he was denying. In the end, the trial court believed the testimony of the 3rd Third party and found his testimony unchallenged. I too believe that the 3rd Third party could not just come up with such an allegation that he sold a vehicle to the 4th Third party out of the blues. They were people who knew each other before and no reason to frame the other. I am satisfied on a balance of probabilities that the 3rd Third party sold the subject vehicle to the 4th Third party (appellant).

Having come to the conclusion that the 4th Third party was the owner of the vehicle as of 31/7/2004 he therefore was vicariously liable for the acts of negligence of the 1st defendant who was convicted for causing death by careless driving. This court finds no reason to depart from the lower court's finding on liability.

Whether the suit against the Third party was time barred:

The only outstanding issue is whether the suit against the 4th Third party was time barred. The 2nd defendant transferred the vehicle to the 1st Third party; All the subsequent owners never caused the vehicle to be registered in their names. No wonder the 2nd defendant was sued as the owner which was in breach of **Section 9(1) and (2) of the Traffic Act**. The trial court condemned the 2nd defendant, 1st to 3rd Third parties to meet their own costs for failure to comply with Section 9 of the Traffic Act because these lengthy proceedings would have been avoided had they complied with that section.

The cause of action arose on 31/7/2004. This suit was filed in court on 11/8/2006. **Section 4 of the Limitation of Actions Act** requires a claim in tort to be brought within three years. The Respondent did was required of him and filed the suit after two years from the date of occurrence of the accident and hence was within the allowed time.

He cited the first defendant who was the driver of the vehicle and the 2nd defendant who was the owner of the vehicle as per the records held at the motor vehicle registry. The third party proceedings are not between the respondent and the 3rd parties but between the 2nd defendant and the 3rd parties because the issue of ownership was only within the knowledge of the 2nd defendant and the 3rd parties. Given the circumstances, there is no way the respondent would have known who the owner of the vehicle as of 31/7/2004. Besides the 1st defendant, the driver of the vehicle was served with the plaint within time but failed to file appearance or enter a defence and the 4th Third party being the employer or the one who authorized the 1st defendant to drive the said vehicle, was vicariously liable for the driver's acts of negligence. Limitation cannot arise in respect of the Respondent's claim. In the end, I find no good ground upon which to interfere with the trial court's decision.

In the end, I find no merit in the appeal. The appeal is hereby dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nyahururu this 30th Day of September, 2020.

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R.V.P. Wendoh

JUDGE

PRESENT:

Ms. Ndegwa for Respondent

Henry – Court Assistant