



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**CIVIL APPEAL NO. 34 OF 2019**

**CLIFFORD OMONDI OTIENO.....APPELLANT**

**-VERSUS-**

**GEOFFREY MUTHIANI MUTISO.....1<sup>ST</sup> RESPONDENT**

**EMMANUEL MILAMA MASETE.....2<sup>ND</sup> RESPONDENT**

*(Appeal from the Judgment of Hon. J.D Karani (RM) in the Senior Principal Magistrate’s Court at Makindu, Civil Case No.270 of 2017, delivered on 28<sup>th</sup> March 2019)*

**JUDGMENT**

1. The 1<sup>st</sup> Respondent filed a suit in the lower Court seeking general damages for personal injuries sustained from a road accident on 15/10/2016 (*material day*) at Makindu, along the Nairobi-Mombasa highway. He also prayed for special damages, costs of the suit and interest.

2. The Appellant and the 2<sup>nd</sup> Respondent were the defendants in the trial court. The Appellant filed his statement of defence whereby he denied all the allegations in the plaint and called for strict proof. He particularly denied being the owner or driver of motor vehicle registration No. KCJ 698J (*the vehicle*) at the material time. There is nothing on record to indicate that the 2<sup>nd</sup> Respondent entered appearance and filed a statement of defence. The judgment is also quiet on this aspect. After the preliminaries, the matter proceeded for hearing and judgment was delivered.

3. The trial Magistrate held the Appellant vicariously liable and apportioned 100% liability, jointly and severally, to the Appellant and 2<sup>nd</sup> Respondent. Damages were assessed as follows;

General damages.....	kshs 2,500,000/=
Special damages.....	<u>45,681/=</u>
<b>Total.....</b>	<b>kshs 2,545,681/=</b>

4. Aggrieved by the decision, the Appellant filed this appeal through Mutunga & Muindi advocates as follows;

- a) **That**, the learned Magistrate erred in law and fact in failing to appreciate and take into account the Appellant’s submissions and evidence presented before court.
- b) **That**, the learned Magistrate erred in law in shifting the burden of proof to the 1<sup>st</sup> defendant in establishing vicarious liability.
- c) **That**, the learned Magistrate erred in law and fact and misdirected herself regarding the level of control the 1<sup>st</sup> defendant had over the 2<sup>nd</sup> defendant.
- d) **That**, the learned Magistrate erred in law and fact in failing to appreciate that the 2<sup>nd</sup> defendant was delivering the motor vehicle as part of his employment duties with SBT Japan (K) Ltd.

e) **That**, the learned Magistrate erred in law and fact in failing to take into account the fact that the plaintiff never served the 2<sup>nd</sup> defendant with summons and all other pleadings in this matter despite his major role in the alleged accident.

f) **That**, the learned Magistrate erred in law and fact in failing to take into account the plaintiff's contribution of the alleged accident.

g) **That**, the learned Magistrate erred in law in failing to take into consideration that the motor vehicle was insured by oxidet insurance paid for by Mr. Mulama, an agent of SBT Kenya.

h) **That**, the learned Magistrate misconceived, misapprehended and/or misconstrued the totality of the evidence rendered by the applicant and thereby erred in law and fact in holding both defendants 100 percent liable, jointly and severally.

i) **That**, the learned Magistrate erred by apportioning the 1<sup>st</sup> defendant the entire judgment amount.

j) **That**, the learned Magistrate failed to cumulatively evaluate and/or analyze the totality of the submissions tendered on behalf of the Appellant and consequently arrived at an erroneous conclusion, contrary to the weight of the evidence on record and the law applicable.

k) **That**, the learned Magistrate misconceived, misapprehended and/or misconstrued the totality of the evidence rendered by the Appellant thereby failed to take into account the fact that the 1<sup>st</sup> defendant never took responsibility of the accident as held by the honorable court.

l) **That**, the learned Magistrate erred in law and fact in awarding the plaintiff Kshs.2,500,000/= as general damages as the same is without any foundation and is unreasonably high.

m) **That**, the learned Magistrate failed to take into account the 2<sup>nd</sup> defence witness evidence in calculating the quantum of damages.

5. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

### **The Appellant's Submissions**

6. On liability, the Appellant submits that he entered into an agreement to purchase a new motor vehicle from SBT Japan (K) Ltd (*the company*) and they agreed that the vehicle would be delivered by the company to his premises. According to him, his submissions before the trial Court were directed to the question whether he could be held liable yet the vehicle was being driven by a driver employed by the company. He contends that the evidence highlighting this aspect was not considered at all and no damages were found against the driver.

7. He submits that for vicarious liability to arise, it has to be proved conclusively that the motor vehicle belonged to him whether beneficially or otherwise and that the 2<sup>nd</sup> Respondent was his driver, servant or agent at the time of the accident. He cites the **Black's Law Dictionary 9<sup>th</sup> Edn, pg 998** which defines vicarious liability as follows;

*“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”*

8. He has also relied on **Kaburu Okelo & Partners –vs- Stella Karimi Kobia & 2 Others (2012) eKLR** where the Court of Appeal held that;

*“Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority.”*

9. He submits that it was the company that had supervisory power over the 2<sup>nd</sup> Respondent and that at the time of the accident, he was neither the owner nor in possession of the vehicle. He submits that the Respondents had the legal burden of proving an agency relationship between him and the 2<sup>nd</sup> Respondent and relies on the case of **Morgan –vs- Launchbury (1972) ALL ER 606** where it was held that;

*“To establish agency relationship, it is necessary to show that the driver was using the car at the owner's request express or implies or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”*

10. It is also his submission that vicarious liability is not founded on ownership but on the company's act of putting the motor vehicle in possession of the 2<sup>nd</sup> Respondent who was a negligent driver. He relies on **HCM Anyanza & 2 Others –vs- Luigi De Casper & Anor (1981) KLR 10** where it was held that;

*“Vicarious liability depends not on ownership but on the delegation of tasks or duty. In this matter, the learned judge misdirected herself when she addressed herself to the issue of legal ownership of the motor vehicle KAL 970G in determining whether the Appellant was vicariously liable for the tort of negligence committed by the 2<sup>nd</sup> Respondent who was an employee of the third Respondent.”*

11. He submits that the motor vehicle search adduced in evidence showed the registered owner as at 06/04/2017 instead of ownership as at the time of the accident. He contends that the evidence adduced did not prove that he was the owner at the material time.

12. It is also his submission that the trial Magistrate erred by absolving the 2<sup>nd</sup> Respondent from liability. He also submits that the 1<sup>st</sup> Respondent should have applied for extension of summons against the 2<sup>nd</sup> Respondent instead of faulting a technicality to his (Appellant's) detriment. He contends that there is no order of dismissal against the 2<sup>nd</sup> Respondent hence the suit is still alive and should be determined judiciously.

13. The Appellant also submits that the 1<sup>st</sup> Respondent contributed to the accident by standing in the middle of the road. He contends that being on duty did not exclude the 1<sup>st</sup> Respondent from exercising care. It is also his submission that the officer who allegedly had the duty of flagging down motorists was not called as a witness hence the said allegation is an assumption as it is based on hearsay.

14. The Appellant submits that the trial Magistrate failed to appreciate that the vehicle was insured by Occidental insurance which had been paid for by an employee of the company. Relying on section 76 of the Insurance Act, he submits that he had no ownership or possession of the vehicle at the time of the accident.

15. On quantum, he submits that it is clear from his submission on liability that the trial Magistrate proceeded on wrong principles and misapprehended the evidence in material respect.

### **The 1<sup>st</sup> Respondent's Submissions**

16. On liability, the 1<sup>st</sup> Respondent submits that the Appellant admitted the following facts in his evidence.

a) That he was the owner of the vehicle.

b) That he was importing the vehicle from Japan and his clearing and forwarding agents were SBT Japan (K) Ltd and who were the employers of Emmanuel Milama Masete.

c) That the Appellant was in Nairobi and the vehicle driver was to ensure that the vehicle was delivered safely to him as the owner.

d) Immediately after the accident, he was called by Emmanuel Milama Masete, the driver of the vehicle.

e) That he paid for the vehicle through SBT Japan (K) Ltd and took out a third party insurance cover for it.

f) That he immediately travelled to Makindu after being informed of the accident and organized for an ambulance to transport the victim to Agakhan Hospital in Nairobi.

g) That the driver was charged for reckless driving, convicted and fined Kshs.10,000/= and no appeal was filed.

17. He submits that based on the above, the appeal should be dismissed with costs. It is also his submission that he made a request for interlocutory judgment against the 2<sup>nd</sup> Respondent and the matter proceeded with the belief that interlocutory judgment had been entered.

18. He submits that by the time he realized that interlocutory judgment had not been entered, the suit against the 2<sup>nd</sup> Respondent had abated owing to that technicality. He however contends that the suit against the Appellant remained intact and was heard and rightly determined.

19. With regard to quantum, he submits that the seriousness of his injuries were confirmed by Dr. Kavuli and Dr. Wambugu. He submits that the injuries have a residual effect and the fractures to the back (spinal cord) posed a permanent restriction of the movements of the back and he was condemned to use of pain killers due to the chronic pain and physiotherapy.

20. He submits that the trial court had the opportunity to see him and even noted in its judgment, that he had to testify while seated. He submits that apart from the authorities cited by the parties, the trial court did its own research, looked at comparable cases and arrived at a reasonable amount.

### **Analysis and determination**

21. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach its own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Selle and Another –vs- Associated Motor Boat Co. Ltd (1968) E.A 123**.

22. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the following issues arise for determination;

a) Was the Appellant vicariously liable for the acts of the 2<sup>nd</sup> Respondent? If yes, should the apportionment of liability be disturbed?

b) Should the quantum of damages be disturbed?

## Liability

23. The 1<sup>st</sup> Respondent, a police officer, testified as **Pw1** and adopted his statement as evidence in chief. He stated that on the material day he was manning a road block along the Nairobi-Mombasa road near Makindu Motors at Makindu. At around 7.25 pm, a petrol tanker broke down near the road block and they placed life savers to warn other motorists.

24. His colleague, P.C King'ori, stood at the rear of the stalled lorry with a torch to warn other motorists. While in the process of trying to remove the tanker from the road, motor vehicle KCJ 698P came from Mombasa at a very high speed and ignored all the warning signs and instructions to stop. In its attempt to overtake the stalled lorry, it crushed into PW1 who was at the lorry driver's door discussing with the driver. He was not expecting a motor vehicle there as they had blocked the road.

25. Further, he testified that the vehicle's driver, Emmanuel Masila, was charged, pleaded guilty and was fined Kshs.10,000/=. He obtained a police abstract and conducted a search for the vehicle. He testified that the owner is Clifford Omondi Otieno.

26. On cross-examination, he said that the stalled tanker remained on the road and he was at the driver's door at the centre of the road. He was manning the road with P.C King'ori and Cpl Kigunda. He said that the police do not flash direct light to the eyes of the driver. That they had placed the stop sign from the Mombasa direction. He was speaking to the driver of the stalled tanker and was sure that vehicles would be driven at a slow speed as P.C King'ori was manning the same.

27. **Dw1** was the Appellant. He testified that he is a tax consultant and the owner of the vehicle. On the material day, he was in his house in Nairobi when he was called by the 2<sup>nd</sup> Respondent and informed about the accident. The 2<sup>nd</sup> Respondent is a KY account manager at SBT Kenya limited. He got to know the 2<sup>nd</sup> Respondent through SBT Kenya.

28. He travelled to Makindu by bus and arrived at 1.00am. He liaised with the base commander and organized for an ambulance to take the 1<sup>st</sup> Respondent to Agakhan hospital. He said that the accident was out of his control and was caused by the 2<sup>nd</sup> Respondent.

29. On cross examination, he said that the KCJ 6985 belonged to SBT Kenya Ltd. That he paid them for the vehicle and took a 3<sup>rd</sup> party insurance cover that the 2<sup>nd</sup> Respondent was not his agent and was taking the vehicle to him as the KY account manager to SBT. The vehicle was insured by Oxidet Insurance which was paid by the 2<sup>nd</sup> Respondent. He denied having paid for the delivery of the vehicle. The 2<sup>nd</sup> Respondent assured him that the vehicle would be delivered to Nairobi. He agreed that he made a personal call and travelled to Makindu after the accident.

30. It is not in dispute that an accident involving motor vehicle registration No. KCJ 698J and the 1<sup>st</sup> Respondent occurred on the material day.

31. The Appellant did not specifically raise the issue of ownership in the grounds of appeal but he brought it up in the submissions. According to him, the evidence adduced did not prove that he was the owner at the material time. Indeed, the copy of records (P.Ex 5a) shows ownership as at 06/04/2017 yet the accident happened on 15/10/2016. However, his evidence was that he paid SBT Kenya Ltd for the vehicle and took a 3<sup>rd</sup> party Insurance cover.

32. His submissions before this court are that he entered into an agreement to purchase a new motor vehicle from SBT Japan (K) Ltd and they agreed that the vehicle would be delivered by the company to his premises. Accordingly, it is evident that there was a contract for the sale of the motor vehicle between the Appellant and SBT Japan (K) Ltd. Section **3(1)** of the **Sale of Goods Act** (SGA) defines a contract of sale of goods as "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

33. Transfer of property is governed by **section 19** of the SGA which provides as follows;

*19. Property in specific or ascertained goods passes when intended to pass*

*(1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.*

*(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case."*

34. In the instant case, the subject of the agreement between the parties was for specific and ascertained goods but the agreement was not availed hence the court has to resort to **section 20** of the SGA which provides as follows;

*20. Rules for ascertaining intention as to time when property passes Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—*

*(a) where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed; (emphasis mine).*

*(b) where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the*

*purpose of putting them into a deliverable state, the property does not pass until that thing be done, and the buyer has notice thereof;*

(c).....

(d).....

(e).....

35. Consequently, the property in the vehicle passed to the Appellant when he entered into a contract with SBT Japan (K) Ltd and it is immaterial that delivery had not been achieved. Further, it is trite that risk *prima facie* passes with property as per the provisions of **section 22** which states that;

*“Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer’s risk whether delivery has been made or not”*

36. From the foregoing, it is clear that the risk had already passed to the Appellant and it is immaterial that he may not have been the registered owner at the material time. The evidence on record shows that for all intents and purposes, the Appellant was the beneficial owner and even his conduct after the accident is consistent with such ownership.

37. As to whether the Appellant was vicariously liable for the acts of the 2<sup>nd</sup> Respondent, the Appellant’s argument is that it was SBT Japan (K) Ltd that had supervisory power over the 2<sup>nd</sup> Respondent. In **Tabitha Nduhi Kinyua -vs- Francis Mutua Mbuvi & Another [2014] e KLR** the Court of Appeal held that :

*“ In order to fix liability on the owner of a car for negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that 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 was 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 performance of the task or duty thereby delegated to him by the owner. ”*

38. The Appellant bought the vehicle from SBT Japan (K) Ltd and they agreed that the vehicle would be delivered by the company to his premises. The Appellant being the beneficial owner had therefore allowed the company to perform the task of delivering the vehicle to his premises. There was therefore an agency relationship between the Appellant and the company.

39. Now, since the company is an artificial person, it is obvious that the company would engage a natural person to perform the task hence an extension of agency. In fact, the Appellant testified that he got to know the 2<sup>nd</sup> Respondent through the company and he even received a call from the 2<sup>nd</sup> Respondent on the night of the accident.

40. Accordingly, it is my considered view that the trial Magistrate correctly found that the Appellant was vicariously liable for the negligence of the 2<sup>nd</sup> Respondent.

#### **Apportionment of liability**

41. It is not in dispute that the 1<sup>st</sup> Respondent was performing his police duties at the time of the accident. The Appellant pleaded that the 1<sup>st</sup> Respondent was negligent for *inter alia*, failing to keep a proper look out, being reckless and standing in the middle of a busy road without regard to oncoming traffic.

42. The 1<sup>st</sup> Respondent testified that the vehicle crashed into him while trying to overtake the stalled lorry. Since the vehicle was from the Mombasa direction, it means that the lorry stalled while from the Mombasa direction. In my view, this was by all means a precarious situation because the lorry was obviously an obstruction for traffic from the Mombasa direction and the 1<sup>st</sup> Respondent should have known better than to stand on the driver’s side in the middle of a highway. This is despite his evidence that there was another officer at the lorry’s rear trying to warn motorists.

43. The court was not even told whether the 1<sup>st</sup> Respondent had a reflector jacket so as to be visible to motorists. I believe that whatever discussion he was having with the lorry driver could still be done on the passenger side of the lorry. In fact, that would have been the prudent thing to do. Accordingly, I agree with the Appellant that being on duty did not exclude the 1<sup>st</sup> Respondent from exercising care. It is therefore my view that he should carry 10% liability.

#### **Quantum**

44. The injuries sustained were pleaded as follows;

a) *Right anteroinferior temporal lobe hemorrhagic contusion*

b) *Soft tissue injuries on the left front region. Left Knee and left shoulder*

c) *Fracture of left 7<sup>th</sup> -8<sup>th</sup> rib*

d) *Bi-lamina and base of spinous process fracture (T1, T2, T3 & T7) undisciplined fractures.*

e) *Unstable compression of L2*

45. The 1<sup>st</sup> Respondent produced a medical report by Dr. Dorcas Kavuli (P.Ex 4a) and it indicated the injuries as above.

46. The Appellant called Dr. Anthony Wandugu (Dw2) who testified that he examined the 1<sup>st</sup> Respondent on 02/11/2018 and prepared a medical report which he produced as D.ExB1. He testified that the 1<sup>st</sup> Respondent had generally recovered but had a permanent disability of 5%. He said that the further medical expenses are not necessary. On cross examination, he said that he classified the injuries as grievous harm but stated that the ones on the back will heal.

47. Dw2's medical report indicated the injuries sustained as follows;

a) *Head injuries as evidenced by;*

ü *Loss of consciousness*

ü *Bleeding inside the brain*

ü *Bruises to the face*

b) *Spinal injuries as evidenced by compressed, displaced, unstable and burst fractures of L1, L2, T1 & T2.*

c) *Trauma to the (L) arm as evidenced by*

ü *Fractures of the humerus*

ü *Bruises on the shoulder joint*

ü *Pain*

d) *Trauma to the (L) leg as evidenced by bruises on the knee joint.*

e) *Trauma to the chest as evidenced by fracture of the 7<sup>th</sup> and 8<sup>th</sup> ribs of the (L) side accompanied with pain.*

f) *Trauma to the lower back accompanied with pain.*

g) *Blood loss.*

48. As correctly observed by the trial Magistrate, there was no dispute about the injuries sustained by the 1<sup>st</sup> Respondent. The point of departure was the degree of incapacity as Dr. Dorcas Kavuli awarded him 20%.

49. In the trial court, the 1<sup>st</sup> Respondent relied on the following cases to back his proposal of Kshs.4,500,000/=.

a) **Bernard Mutisya Wambua –vs- Swaloh Hashil (2017) eKLR** where Kshs.6,500,000/= was awarded to a plaintiff who suffered 80% paralysis of his right limb among other injuries.

b) **Charlene Njeri Kuria –vs- Gitu Geoffrey & Anor (2016) eKLR** where Kshs.5,000,000/= was awarded to a plaintiff who suffered 60% disability with partial paralysis of the lower limbs.

c) **Emmanuel Kombe Nzai –vs- Basari Co. Ltd & Anor (2017) eKLR** where the plaintiff suffered 80% disability with paralysis of the lower limbs and was awarded Kshs.6,000,000/=.

50. On the other hand, the Appellant relied on the **case of Ngure Edward Karega –vs- Yusuf Doran Nassir (2014) eKLR** where the plaintiff was awarded Kshs 5,000,000/= as general damages for pain and suffering. Actually, the Appellant's submissions erroneously indicate that the award in that case was Kshs 5,000/=. As a matter of fact, the plaintiff therein sustained a very serious incapacitating spinal injury that reduced him to a paraplegic. His disability was assessed at 100% and his net award was Kshs 22,795,000/=. The Appellant proceeded to urge the court to be guided by the authority. It looks like the Appellant was intentionally misleading the court because he did not even attach a copy of the authority for the court's benefit.

51. Looking at the degree of disability in all the cases cited by the parties, it is quite evident that the injuries therein were much more severe than those sustained by the 1<sup>st</sup> Respondent.

52. The 1<sup>st</sup> Respondent sustained multiple fractures and soft tissue injuries. He was admitted at the Agakhan University Hospital for approximately 18 days and the medical reports show that his treatment included fixation of screws. With this in mind and fully aware that no

two cases can be completely similar, I embarked on a mission to look for comparable authorities.

a) In **Jesca Kaari Mutwiri Mwangi –vs- Fara Said Hassan and Another (2009) eKLR** the plaintiff suffered fractures of the right and left femur, deep cut wounds on the face, fracture of the mandible, left femoral neck and soft tissue injuries on the right foot heel and was awarded Kshs 1,500,000/= in 2009.

b) In **Boniface Njiru –vs- Tohel Agencies and Another (2011) eKLR**, the plaintiff sustained a blunt head injury with loss of consciousness for 24 hours, loss of four upper incisor teeth, fracture of the shaft of the right femur and a compound fracture of the right tibia with soft tissue injuries and was awarded Kshs. 1,000,000/- in 2011.

c) **Zachary Kariithi –vs- Jashon Otieno Ochola (2016) eKLR**, the plaintiff sustained chest pains, injuries to the waist, compound fracture of the right tibia/fibula, compound fracture of the left femur bone mid shaft, fracture of the right femur bone, fracture of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> ribs of the right side, injuries to the forehead, hip joint and big left toe. He was awarded Kshs. 1,500,000/- as general damages in 2016.

53. Considering that the first two authorities were decided a while back and the fact that the 1<sup>st</sup> Respondent herein was assigned a degree of incapacity, the award of Kshs.2,500,000/= cannot be said to be inordinately high. The special damages of Kshs 45,681/= were not contested and I have confirmed that they were specifically pleaded and proved as required.

54. The award should therefore work out as follows;

General damages.....	Kshs 2, 500,000/=
Special damages.....	<u>Kshs 45,681/=</u>
Total.....	Kshs 2,545,68.1/=
Less 10% liability .....	<u>Kshs 254,568.1</u>
<b>Net award.....</b>	<b>Kshs 2,291,112/90</b>

55. The result is that the appeal succeeds to the extent stated at paragraph 54 of this judgment. The judgment of the lower court is set aside and substituted with one for Kshs.2, 291,112/90 plus costs in favour of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent gets half of the costs for the appeal

**Delivered, signed & dated this 13<sup>th</sup> day of November 2020, in open court at Makueni.**

**H. I. Ong’udi**

**Judge**