



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 84 OF 2011

ROBERT NYAMUHANGA.....APPELLANT

VERSUS

FRANCIS MUIRURI.....1ST RESPONDENT

LUCY WANJIRU.....2ND RESPONDENT

JOHN NJOROGE KARIUKI.....3RD RESPONDENT

(Being an Appeal from the Judgment of the Senior Resident Magistrate Honourable G. MMasi

in Eldoret CMCC No. 1053 of 2002, dated 18th March, 2002)

JUDGMENT

The suit in the lower court was by three plaintiffs, against the defendant who is the appellant herein. The first and 2nd plaintiffs were sought out of court and the suit in respect of the 3rd plaintiff went to full hearing. The Respondent's claim against the appellant was for general and special damages arising out of an accident involving a motor vehicle registration No. KAL 307P, Nissan Matatu which was allegedly owned by the appellant.

According to the evidence, the said motor vehicle was on 23rd March, 2001 operating as a matatu and was being driven by one *Paul Roki Mwita*. The respondent herein, together with his wife namely *Lucy Wanjiru* and another male known as *Francis Muiruri*, boarded the said Matatu near Central Bank, heading to Huruma. The Respondent sat in the front cabin with the driver. The vehicle was driven dangerously at high speed which prompted the respondent to occasionally complain to the said driver. The driver eventually undertook to overtake some vehicles ahead, on the wrong left side of the road, which prompted him to lose its control. It veered off the road into a trench. He was injured and was rushed to Moi Teaching and Referral hospital where he was admitted between 24th March 2001 and 8th May 2001. Left elbow, left forearm and left leg were swollen and tender, with bruises and lacerations. He also suffered a deep cut wound on the left leg about 27 cm and 18 cm long. The left leg had a depressed wound about 16 cm long and 4 cm wide, with a muscle destruction. Left tibia and fibula sustained compound fracture. Treatment at Moi Teaching and Referral Hospital costed him Ksh.214,693 and a Medical Report 2,400/= to which he produced the receipts in court.

The defendant/Appellant offered no evidence in the suit.

The court found the appellant 100% liable and was condemned to pay General damages amounting to 400,000/- and Special damages of Kshs. 214,693 of which gives a total of 217,093Kshs. Cost and interest were also granted to him.

The appeal is briefly on the grounds that vicarious liability was not pleaded and proved; and that the appellant was not proved to be the owner of the alleged motor vehicle on the balance of probabilities. Definitely these are the two issues I have got to determine in this matter.

I do start with the issue of ownership of the motor vehicle. The police abstract produced by PW-2 shows the name of the appellant as the owner of the said motor vehicle. There is no any other evidence on record to the contrary. In the case of *Joel Mugo Opija -V- EA Sea Food Ltd CA 309/210 [2013] eKLR*, in a similar situation the court held that:-

“...We agree that the best way to prove ownership would be to produce to the court a document from the 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, its content cannot later be denied”.

It therefore follows that the evidence of ownership of a motor vehicle, in a police abstract, is sufficient proof of that fact where it is not sufficiently challenged. The trial court was therefore right in finding so.

On the second issue, it is clear though the trial court did not express so, that the appellant was held vicariously liable for the negligence of his driver, who was his servant or agent. I also do agree that the issue was not made explicit in the plaint. However, evaluating the evidence of the respondent, it is clear that it is the appellant who resolved the claims of the initially 1st and 2nd plaintiffs, out of court. He had also reached out to him but were not able to agree. Given that the vehicle involved belonged to the appellant and was engaged in matatu business, in absence of the evidence to the contrary, it is logical and serves the ends of justice to presume that the driver was a servant or agent of the motor vehicle owner. Tangible evidence on the same would be privy to the motor vehicle owner and the driver, of

which is unreasonable to expect any other party, like a passenger in the said motor vehicle, to have.

Article 159 (2) (d) of the Constitution states that:-

“Justice shall be administered without undue regard to procedural technicalities;”

I find it a procedural technicality that vicarious liability was not specifically pleaded, and failure to do so did not prejudice the appellant in the suit in anyway. Substantive justice tilts the scale of justice in favour of the respondent in this appeal. I therefore find the appeal unmerited and is dismissed with costs to the Respondent.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 28th day of March, 2019

In the absence of:

The appellant

The respondent

And in the presence of Mr. Mwelem – Court assistant