



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO. 1 OF 2017

M.O.M AMIN TRANSPORTERS LTD

MARIAM AMIN BAHI.....APPELLANTS

VERSUS

ALEXANDER NDUNG’U MBUGUA

EUNICE WAMBUI WANJIKU

MBUGUA BORO KIHUYU

(suing as the administrators of the Estate of

OBADIA KARIUKI MBUGIA (deceased).....RESPONDENTS

J U D G M E N T

1. The Appeals now before the Court and its underlying suit is linked with another suit and appeal arising from the facts of a single accident. On 10th December 2011 there was a motor vehicle collision between a Mitsubishi Canter Registration Number KBP 261 V and a Scania Semi Trailer Registration Number KAU 502V and ZD 169. The Occupants of the Canter were Obadiah Kariuki Mbugua who was the driver and Wilson Gachanga Njenga who was the turnboy/loader. Both occupants of the Canter sadly passed away and the personal representative of each, armed with letters of administration ad litem filed their own respective suits.

2. The Suit brought on behalf of the driver of the Canter (Obadiah Kariuki Mbugua) filed ***CMCC 182 of 2014*** in the SPM's Court at Voi. The outcome of that suit gave rise to ***High Court Civil Appeal No 1 of 2018***. The Defendant in each of the Suits was not the driver of the Scania Semi-Trailer nor any other person at the scene of the accident. The Representatives of the Turnboy (Wilson Gachanja Njenga filed ***Civil Suit No 183 of 2014***. In each suit the two defendants are identical. The First Defendant named is a corporate entity called M.O.M. Al Amin Transporters Limited and the Second Named Defendant is Mariam A Amin Bahi. Both suits were heard by Hon Elena G Nderitu. It is said in the Submissions for the Respondents that she heard the two matters together and adopted evidence from one into the other.

3. The Appellant's Submissions set out what they allege are the facts and the issues for determination. The Respondents in their Submissions agree those are the issues for determination. They are:

Issues for determination

- a) Whether the learned Magistrate erred in law and fact in holding the appellants 100% liable in negligence despite the evidence adduced before court.
- b) Whether the learned Magistrate erred wholly in disregarding the Appellant's submissions and the authorities submitted and proceeded to rely on her own view not backed by law.
- c) Whether the learned Magistrate erred in law in adopting the wrong principles in awarding loss of dependency under the Fatal Accidents Act and pain and suffering under the Law Reform Act.

d) Whether the learned Magistrate erred in law and fact in making an award of Kshs. 1,773,159/- (and KShs.1,843,688/=) which was manifestly excessive in the circumstances.

e) Whether the learned Magistrate erred in failing to analyze the synthesize the evidence before her and arrived at a completely erroneous and excessive finding.

4. The two Suits in the Court were filed on 25th November 2014 and not as alleged in the Appellants' Submissions in 2018 and therefore were filed within the limitation period. It is further said that "The respondent claimed at paragraph 6 of the plaint that on or about 10th December, 2011 he was a careful and lawful driver of motor vehicle registration number KBP 261V driving towards Mombasa on the Nairobi- Mombasa Highway when at a place known as Ndii area, near Voi the Defendant's, their Agents and/or servant negligently and carelessly drove and/or controlled motor vehicle registration number KAU 502V causing it to veer off its lane and hit motor vehicle registration number KBP 261V and the deceased sustained fatal injuries. It is here that the fact that the Affidavit verifying the Plaint was not signed by the Plaintiff but by someone who was not at the scene of the accident should have been addressed in the analysis of evidence.

5. The matter went to full trial and the Honourable Magistrate concluded that;

a) The Appellants and each of them was 100% vicariously liable. There was no explanation of whether that liability was joint or several or joint and several.

b) The Submissions says that there was an award of general damages in the sum of Kshs. 1,773,159/-. In fact the trial Court awarded a global figure of damages in Civil Case No 182 of KShs.1,773,159 and a global figure of damages of KShs.1,834,688/= in Civil Case No 183 of 2014.

6. The Appellants being aggrieved by the said judgment filed memorandum of appeal dated 30th January 2017 against the judgment delivered on 23rd January 2017 by the learned Honourable E.G Nderitu on the following grounds;

1. The learned Magistrate erred in law and fact in holding the Appellant 100% liable in negligence despite the evidence adduced before court.

2. The learned Magistrate erred wholly in disregarding the Appellant's submissions and the authorities submitted and proceeded to rely on her own view not backed by law.

3. The learned Magistrate erred in law in adopting the wrong principles in awarding loss of dependency under the Fatal Accidents Act and pain and suffering under the Law Reform Act.

4. The learned Magistrate erred in law and fact in making an award of Kshs. 1,773, 159/- which was manifestly excessive in the circumstances.

5. The learned Magistrate erred in failing to analyze and synthesize the evidence before her and arrived at a completely erroneous and excessive finding.

7. The Grounds in relation to Civil Case No 183 of 2014 are set out in the Memorandum. In each suit the Learned Trial Magistrate found for the Plaintiff/Respondent. In each case she found the name Defendant to be negligent. In each case she assessed damages as a global figure without stating which part related to special damages and which related to special damages. That of itself would not ground an appeal because it is an omission susceptible to correction on review. However, in the Civil Appeal No 1, the figure for general damages should have been broken down over the time line as it is alleged that the driver did not succumb to his injuries immediately. In the circumstances, the Trial Court appears to have treated the demise of both of the Deceased as instantaneous. That is a misunderstanding of the facts. In each case the Learned Trial Magistrate did not call for the Police records. Nor did she call for the inquest files. In the circumstances she made assumptions as to the time and cause of death. As to the facts contained in the Plaint, the Learned Trial Magistrate has not addressed in her Judgment the inconsistency that arises when the deponent of the Verifying Affidavit was not at the scene of the accident and therefore is only able to verify hearsay.

8. The Memorandum of Appeal sets out the Grounds thus:

"The Appellants herein appeal to the High Court of Kenya at Voi from the judgment of the Honourable Senior Principal Magistrate E.G Nderitu IN SPMCC No. 182 of 2014 Voi dated 23rd January 2017 and sets forth the following grounds of objection to the judgment appealed against namely;

1. The learned Magistrate erred in Law and in fact in holding the Appellants 100% liable in negligence despite the evidence adduced before court.

2. The learned Magistrate erred wholly in disregarding the appellant's submissions and the authorities submitted and proceeded to rely on her views not backed by law.

3. The learned Magistrate erred in law in adopting the wrong principles in awarding loss of dependency under the Fatal Accidents Act and the pain and suffering under the Law Reform Act.

4. The learned Magistrate erred in law and fact in making an award of Kshs.1, 773, 159/- which was manifestly excessive in the

circumstances.

5. The learned magistrate erred in failing to analyze the synthesize the evidence before her and arrived at a completely erroneous and excessive finding.

WHEREFORE, the Appellants pray that this appeal be allowed with costs and judgment on quantum and liability of the learned magistrate dated 23rd January 2017 be set aside and in any event strike out the award for special damages and reassess the amount of general damages awarded by the learned Magistrate and reduce the same taking into account the circumstances and evidence adduced in court.

9. The first appellate court's jurisdiction and duties are set out in that authority at paragraph as follows: "26. On our part, we have considered the written submissions filed by the parties and the authorities cited. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See Selle & another vs. Associated Motor Boat Co.Ltd. & others (1968) EA 123). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in Peters vs. Sunday Post Limited [1958] EA 424 stated as follows:

“An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

10. In each suit the Learned Trial Magistrate found and held that the Deceased was employed without hearing any evidence as to by whom they were employed, if at all. She then went on to assess on pure conjecture (1) the level of income they were earning and (2) the proportion of income they would have used on their respective families. She did so without hearing any evidence whatsoever on their employment and on their standard of living.

11. In relation to the lower court's findings in relation to how the accident occurred, the Appellants complain that the Learned Trial Magistrate erred in preferring the evidence of a single witness who did not make himself known at the time in preference to the Police evidence. The trial Court is entitled to do so provided cogent reasons are given. The complaints raised are a matter for cross-examination and submissions at trial. However, this Court takes judicial notice of the fact that the Learned Trial Magistrate was also the Head of Station in Voi and therefore it was within her power to call for the Inquest File and the Police Files in order to ensure that each side had a fair trial. She did not. In the circumstances, the trial did not comply with **Article 50 and 159** of the **CoK**.

12. In relation to the Defendants, the Learned Trial Magistrate held both Defendants liable for the acts of a third person. In doing so she firstly made a finding on vicarious liability without hearing any evidence whatsoever on that question. The Defence contains bare denials to each allegation. All that was before the Learned Trial Magistrate was that the driver was driving the vehicle. The vehicle was owned by the First Defendant jointly with the Bank that financed the purchase (Diamond Trust Bank). The evidence before the Court as to ownership came in the form of a Letter from the Bank. There was no witness from the Bank who introduced that Letter into evidence. In the circumstances, it is hearsay evidence and therefore inadmissible. The decision of the Court of Appeal in Equator Distributors Vs JOEL MURIU & 3 Others Civil Appeal 342 Of 2014 provides a salutary reminder on this aspect. At paragraph 12, their Learned Lordships said; "12. A critical issue for determination by the trial court was who between 3rd respondent and the appellant should shoulder the 70% liability for the accident caused by the driver of motor vehicle registration no. KAL 970 G. The trial court answered this question by posing who was the owner of the said motor vehicle at the time of the accident. That is a replication of the situation here. At paragraph 18, that judgment goes on to say; 18. On vicarious liability, it was submitted the trial judge erred in holding the appellant vicariously liable for negligence of the driver employed by the 3rd respondent and further erred in absolving the said respondent from liability. Counsel submitted the trial court erred in pegging liability for the accident to ownership of motor vehicle registration no. KAL 970 G. Counsel cited the decision in John Nderi Wamugi vs. Ruhesh Okumu Otiangala, Civil Appeal No. 24 of 2015 where this Court stated:

“Vicarious liability is not pegged on legal ownership (of a vehicle) but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor.”

13. Counsel further cited dicta from Anyanzwa & 2 others vs. Luigi De Casper & another [1981] eKLR 10 where it was held that vicarious liability depends not on ownership but on the delegation of tasks or duty.

14. The Appellate Court then went on to say:

In the instant matter, we are of the considered view that the trial court misapprehended the law on vicarious and tortious liability of a gratuitous agent to the principal. We re-affirm this Court's statement in John Nderi Wamugi vs. Ruhesh Okumu Otiangala & others (2015) eKLR that where it was expressed that the reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle to the total exclusion of employer/employee relationship would amount to grave injustice.

15. We are persuaded by and affirm the dicta of this Court in HCM Anyanzwa & 2 Others vs. Luigi De Casper & Another[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 second respondent who was an employee of the third respondent. It is the 3rd respondent that had supervisory power over the 2nd respondent who was its driver and not the appellant. The appellant cannot therefore be held to be vicariously liable for the negligence of the 2nd respondent. The appellant's liability, if any, is neither founded on its ownership of the motor vehicle registration no. KAL 907 G nor on the concept of vicarious liability but its liability is based on putting its motor vehicle in possession of the 3rd respondent who ended up engaging a negligent driver. The appellant owed a duty of care to other road users to ensure that whoever has possession and use of its vehicle is not negligent.

16. In relation to the Second Defendant that misapprehension was compounded. There is no evidence on the record showing the link between the Second Defendant and the accident. Nor did the Learned Trial Magistrate hear oral evidence on the issue. The Plaintiff's Bundle of documents include a CR 12 for the Defendant Company. It seems that each Plaintiff simply chose one shareholder to sue. It is trite law emanating from the 1825 decision of **Solomon v Solomon Bros Ltd** that a company is a separate entity from its shareholders and from its directors. The consequence of the finding on liability therefore was to further compound the injustice by piercing the corporate veil. The Judgment contains no reference to that process and the reasons for doing so. It is therefore clear that the Learned Trial Magistrate misunderstood the law and/or the facts relating to that issue.

17. In view of the principles set out by the Court of Appeal, the findings of the lower court in relation to vicarious liability in both judgments amounts to an injustice, the Appeal in each is therefore allowed on that ground. The suits to be returned to the Magistrate's Court to be re-heard by a different magistrate. The Suits be and are hereby consolidated to be heard as one suit. **Civil Case No 182 of 2014** to be the lead file. The Plaintiff's be and are hereby granted leave to amend their Plaint. Each Party to pay its own costs of the appeal.

18. In the circumstances of the above finding and directions, it is inappropriate for this Court to comment on the evidence that could or may be adduced in the lower court.

Order accordingly,

Farah S. M. Amin

JUDGE

Delivered signed and dated at Voi this the 27th day of June 2019

In the presence of:

Court Assistant: Josephat Mavu

Appellant: Mr Kingango holding brief for Mr Owire

Respondent: (Mr Macharia was not present in Court)

Defendant: