



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**HCCA NO. 11 OF 2017**

**(FORMERLY ELDORET HCCA NO. 81 OF 2013)**

**DAVID MULE NDANIA.....APPELLANT**

**=VERSUS=**

**MARGARET NYANGARA MWANCHA.....1<sup>ST</sup> RESPONDENT**

**JACKLINE NGINA GICHUKI.....2<sup>ND</sup> RESPONDENT**

**ACTROSE VARSANI MERCHANTS LTD.....3<sup>RD</sup> RESPONDENT**

**[Being an appeal from the Judgment of the Ag Senior Principal Magistrate's Court at Eldama Ravine PMCC. No. 29 of 2011 delivered on the 4<sup>th</sup> day of June, 2013 by Hon. M. Kasera, Ag. SPM]**

**JUDGMENT**

**The law**

1. The role of the appellate court is settled since *Selle & Another v. Associated Motor Boat Company Ltd.* (1968) EA 123 that -

*“An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.”*

2. Similarly, in *Peters v. Sunday Post Ltd.* (1958) EA 424, the Court of appeal had held-

*“Whilst an appellate has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is to be exercised with caution; if there is no evidence to support a particular conclusion or if it is shown that the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide. Watt v. Thomas (1947) 1 ALL ER 582, (1947) AC 484, applied.”*

**The evidence**

3. In pleading the accident, the plaintiff averred as to the facts supporting his claim in paragraphs his of Plaint dated 23/5/2011 as follows:

*“5. At all material times relevant to this suit the 1<sup>st</sup> defendant was the registered owner of motor vehicle registration number KBH 653Z TOYOTA PICK-UP, the 2<sup>nd</sup> defendant its actual owner and still its lawful driver*

*6. At all material times relevant to this suit, the 3<sup>rd</sup> defendant was the registered owner of motor vehicle registration number KAZ 830X MERCEDES BENZ TRAILER, which was being driven by its authorized agent and/or driver.*

*7. On or about 17<sup>th</sup> November 2009, the plaintiff was lawfully travelling in motor vehicle registration number KBH 653Z TOYOTA PICK-UP DOUBLE CABIN along ELDORET NAKURU Road near Equator Centre when the 2<sup>nd</sup> defendant and the driver of motor vehicle registration number KAZ 830X MERCEDES BENZ TRAILER so negligently drove, managed and/or controlled the said motor vehicles registration numbers KBH 653Z TOYOTA PICK-UP DOUBLE CABIN & KAZ 830X MARCEDES BENZ TRAILER that they permitted the same motor vehicles to loose control and cause an accident and thereby occasioning the plaintiff serious*

*injuries for which the plaintiff holds the defendants vicariously liable.”*

4. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants specifically denied the fact of ownership of the accident vehicles as follows:

**2<sup>nd</sup> Defendant’s Defence dated 20/7/2011**

*“5. Of paragraph 7 of the Plaintiff, the Second Defendant denies that on or about the 18<sup>th</sup> of November, 2009, the Plaintiff was lawfully travelling in motor vehicle registration number KBH 653Z TOYOTA PICK-UP DOUBLE CABIN along ELDORET – NAKURU road near Equator Centre or that she negligently drove, managed or controlled the said motor vehicle registration number KBH 653Z TOYOTA PICK-UP DOUBLE CABIN or that she permitted the said motor vehicle to lose control or cause an accident or that she thereby occasioned the Plaintiff serious injuries, or that she is vicariously liable, or at all, and the Plaintiff is put to strict proof in that behalf.”*

**3<sup>rd</sup> Defendant’s Defence dated 6/7/2011**

*3. The 3<sup>rd</sup> defendant does not admit ownership of motor vehicle registration number KAZ 830X.”*

5. The plaintiff gave evidence before the court as follows:

*“PW1 – adult sworn state Kiswahili male Christian I am David Mule Daniel, I live in Embu Mbeere district. On 17/18/11/2009. We left Nairobi for Eldoret. We do not reach our destination. We left Nairobi at 5:00 pm. Had supper in Nakuru at 7:00 p.m. At equator we were involved in an accident. I was with three other people. Stephen Mutual, Wanjohi and Joel. I sat behind the driver. We met a trail that hit a motor vehicle it fell on the rail line. We were at the railway bridge. I was taken to Moi Referral. I was there for four days then I was referred to Nairobi West Hospital.*

*Discharge for Moi Teaching and Referral Hospital MFI 1. I was taken to Nairobi West Hospital.*

*Receipts for Nairobi West Hospital. 16.12/2009. – MFI 2 (a), (b) and (c) report for haemogram. I went to police station I was given a police abstract MFI 4 Now exhibit 4.*

*Notice of intention to sue to the insurance cap 405. British insurance MFI 5 now exhibit 5. Insurance notice – Kenindia Insurance MFI – 6 now exhibit 6. David notice to MFI 7 now 7. Demand notice varsani merchandise MFI 8. I was injured on my backbone which was dislocated kidneys retained urine so I began to have problems. Hands were injured and my head. I still attend clinic, I still have problems with my backbone and kidneys. I play sex but I am weak as the seat injured me. I pray for special damages and general damages.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

*Cross-examination by Mr. Mugweru – accident was at 11:00 pm. We were at the scene less than 30 minutes. I was taken to Eldoret by a Good Samaritan. I was in the motor vehicle until it hit the railway. I untied my belt. I went to the road found my people. Our machines were on the road. I told them our motor vehicle was on the ditch. After that I lost consciousness. I was put in a lorry and taken to hospital. I did not make report to police that day. Our driver was keen on the road. We were going up the hill. Trailer was coming down the slope. Our machines are light. They are metals for boosters. Our motor-vehicle was not speeding. Our driver was on the left side of the road. Lorry driver came to the left side of the road. Our motor vehicle was thrown into the tunnel. Our driver could not have anything to avoid the accident. Driver of the trailer stopped after the accident. Trailer driver was going down the slope. It is the driver side that was hit by the trailer. It is the container of the trailer that hit our motor vehicle. Driver died on the spot. Our driver could not have wanted to put our lives on danger but Jackline Ngima was the owner of the motor vehicle, Toyota with her husband Wanjohi who died. I was living in Nairobi. I was taken to Eldoret by a matatu driver. Accident was on 17<sup>th</sup> but when I reached the hospital was 18<sup>th</sup>. Exhibit 4 referred. Doctor from Moi Teaching and Referral hospital did not indicate that I had dislocation on my backbone P3 form referred they were no head injuries. My bosses took me from Moi and Teaching and Referral Hospital to Nairobi West Hospital. Eutius Gitau driver of the lorry was to be blamed. I still go for clinic I have no document to that effect.*

**M. KASERA**

**PRINCIPAL MAGISTRATE**

*Re-examination Nyagaka - Exhibit 4.*

*Police abstract owner of motor vehicle is Jackline Ngima.*

*Gichuhi. KAZ 830Z C owner fazan merchant limited. I got police abstract at police station. Accident was at 11:00 p.m. police came after midnight. I did not check the watch.*

**M. KASERA**

**PRINCIPAL MAGISTRATE”**

6. The first defendant did not enter appearance to the suit and file a defence.
7. The second defendant did not give any evidence.
8. The 3<sup>rd</sup> defendant called as witness the executive officer of the Court to produce the court file on criminal trial against the driver of the 3<sup>rd</sup> Defendant in which the said driver was acquitted for no case to answer under section 210 of the Criminal procedure Code.

**Issues for determination**

9. The issue for determination are as follows:-

- a) ***Proof of accident and injury to the plaintiff***
- b) ***Whether Negligence was proved***
- c) ***Ownership of the motor vehicles involved in the accident to support vicariously liability for the drivers.***

**Determination**

10. Section 107 and 108 of the Evidence Act imposes the burden of proof on the plaintiff as follows:

***“107. Burden of proof***

***(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.*

***108. Incidence of Burden***

*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.”*

11. By the testimony of the plaintiff PW1 and from the proceedings of the criminal trial against the driver of one of the motor vehicles involved in the accident it is proved that the motor traffic accident involving a collision between Motor Vehicle registered KBH 653Z and KAZ 830X on the 18/11/2009 in which the plaintiff suffered injury and another person suffered fatal injuries.

12. The evidence of the plaintiff set out above is clear that the accident arose as a result of the negligence of the driver of the motor vehicle.

13. The plaintiff did not sue the driver of Motor vehicle and there was no evidence that the driver of motor vehicle was acting in the employment of the 3<sup>rd</sup> defendant as to make him liable in law by the doctrine of vicarious liability. In addition, the plaintiff did not show that the 3<sup>rd</sup> defendant was the owner of the said motor vehicle.

14. The same case applied for the registered and *actual* owner of motor vehicle sued as the 1<sup>st</sup> and 2<sup>nd</sup> defendant. The plaintiff relied on the entries on a police abstract of the accident showing the insured persons for the respective vehicles. However, when ownership of a motor vehicle is specifically denied as here by the respective defences of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the plaintiff is under a duty under section 107 of the Evidence Act to prove ownership. Had the driver of the motor vehicle KAZ 830X been sued, the court could on a balance of probability test notwithstanding acquittal in the criminal trial find him liable in the suit for negligence. But to impose duty to compensate the injured on the 3<sup>rd</sup> defendant would require proof of relation between the driver and the 3<sup>rd</sup> defendant as employee acting the course of his employment with the owner of the motor vehicle. Such was not proved in this case, and the court has no legal basis for imposing liability on the 3<sup>rd</sup> defendant.

15. For the 2<sup>nd</sup> defendant, ownership of the vehicle was not proved, but no liability would attach because her driver, if that were the case, was not shown to have been negligent in any way as to warrant a finding of contributory negligence.

16. As regards the quantum of damages, this court would not interfere with the award in accordance with principle of appellate interference with an award of damages set out in ***Bhutt v. Khan*** (1981) KLR, 249, 356 per Law, JA. that:-

*“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”*

See also ***Butler v. Butler*** (1984) KLR 225 and ***Shabani v. Nairobi City Council***, (1985) KLR 516.

17. The court affirms the finding of the trial court on the evidence as follows:

**“JUDGMENT**

Considering the evidence on record it is not in dispute that the plaintiff was a passenger in motor vehicle registration No. KBH 653Z. It is also not in dispute the alleged accident took place and that the two motor vehicles involved bear registration number KBH 653Z and KAZ 830X. However from the evidence it is clear that motor vehicle registration No. KAZ 830X left its lane and collided with motor vehicle registration No. KBH 653Z and occasioned the said accident.

Looking at the evidence presented in Court the answer to question 1 is evidently to the positive the witnesses did confirm that the accident did occur on the date alluded be in the plaint.

The evidence on record is clear that motor vehicle registration No. KBH 653Z was on its rightful lane when motor vehicle registration No. KAZ 830X encroached to its lane and occasioned a collision which resulted to fatal injuries to the deceased herein. The circumstances herein are better illustrated in EMBU PUBLIC ROAD SERVICES LIMITED VS- RIIMI (1968) E.A. 22 where it was held that:

“Where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence.”

The plaintiff has discharged his mandate on balance of probability when he established that motor vehicle reg. no. KAZ 830X encroached to the other motor vehicles lane. It was incumbent upon the owner of motor vehicle registration KAZ 830X to demonstrate before the Court that the accident occurred without negligence on his part. There being no evidence pointing towards negligence on the part of motor vehicle reg. KBH 653Z, I find that driver was not negligent. In the foregoing the driver of motor vehicle reg. no. KAZ 830X is 100% liable.

The burden of proof is upon the plaintiff to establish the 3<sup>rd</sup> question. I am guided by Karauri –vs- Ncheche Nyeri CACA Number 192 of 1996 unreported the Court of Appeal held;

“As the defendant denied ownership, it was incumbent upon the plaintiff to place before a judge a certificate of search, signed by the registrar of motor vehicles showing the registered owner of the lorry”

I note that the plaintiff in his evidence did not tender a certificate of search from the registrar of motor vehicles to establish ownership of the alleged accident motor vehicles. In view of the same I am unable to attach liability to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein. However given that the 1<sup>st</sup> defendant did not enter appearance nor defence even after service of pleadings by the plaintiff the issue of ownership of motor vehicle reg. KBH 563Z by the 1<sup>st</sup> defendant stand uncontroverted.”

**Orders**

18. Accordingly, for the reasons set out above, the court finds no merit in the appeal and the same is dismissed.

19. The appellant’s counsel did not lead evidence on the question of ownership of the motor vehicles and the relationship of the drivers with the owners of the motor vehicles to support a finding of vicarious liability, and the dismissal of the suit is the function of their less than diligent prosecution of the case on behalf of the appellant.

20. There shall be an order that the costs of the appeal shall be paid by the Counsel for the appellant personally.

Order accordingly.

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2019**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

M/S Mburu Okara & Co. Advocates for the Appellant.

M/S Nyairo & Co. Advocates for the 3<sup>rd</sup> Respondent.