



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 6 OF 2019

GEDION MUTHOKA MUASYA.....APPELLANT

VERSUS

URBANUS MULELE MUSYOKI.....1ST RESPONDENT

VERONICA MBITHE MUSYOKI (suing as the legal representatives of the estate of)

JOHN MUSYOKI MULELE.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. J.N Mwaniki (SPM) in the Senior Principal Magistrate's Court at Makueni Civil Case No.168 of 2015, delivered on 11th October 2018)

JUDGMENT

1. The Respondents filed a suit in the lower court seeking general damages under the Law Reform Act (*LRA*) and the Fatal Accidents Act (*FAA*) on behalf of the Estate of *John Musyoki culele* pursuant to a fatal road accident on 19/08/2014 (*material day*) along the Wote-Makindu earth road. They also prayed for special damages, costs of the suit and interest.

2. The Appellant and his co defendant filed a joint statement of defence denying the claim. The matter proceeded for hearing and judgment was delivered in favour of the Respondent. The learned trial magistrate found the defendants 100% liable and awarded the Respondent Kshs.600,500/= which is made up as follows;

Loss of expectation of life.....Kshs.100,000/=

Loss of dependency.....Kshs.500,000/=

Special damages.....Kshs. 500/=

Total.....Kshs. 600,500/=

3. Aggrieved by the award, the Appellant filed this appeal and listed 5 grounds stating that the learned trial magistrate erred in law and fact by;

a) *Holding the Appellant liable in regard to an accident which occurred on 19th August 2014 in respect to motor vehicle registration number KBC 873G.*

b) *Failing to find that the Appellant has never owned motor vehicle registration No. KBC 873G.*

c) *Failing to find that the evidence on record did not link the Appellant to the ownership of motor vehicle registration No. KBC 873G.*

d) *Failing to find that the Appellant was neither a beneficial owner and/or the registered owner of motor vehicle registration No. KBC 873G.*

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

Appellant's submissions

5. The Appellant submits that the owner of motor vehicle registration No. KBC 873G (*the vehicle*), as per the search certificate (*exhibit 5*), is Jihan Freighters Ltd. Accordingly, he contends that the learned trial magistrate should have left him out of the judgment. He also faults the trial court for entering the judgment '*jointly and severally*' yet the Respondent did not pray for such.

6. To further buttress his submission on liability, he has cited section 8 of the Traffic Act, cap 403 which states that; "***the person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle.***" He contends that the mention of his name in the police abstract was overshadowed by the motor vehicle search certificate. He relies on **Nyeri Civil Appeal No. 192 of 1996: Thurairra Karauri –vs- Agnes Ncheche** where the Court of Appeal stated;

"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the registrar of motor vehicles showing the registered owner of the lorry. Mr. Kimathi for the plaintiff submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."

7. He also submits that the evidence of the police officer (*PW1*) and deceased's widow (*PW3*) did not establish that he was vicariously liable as it did not show that the vehicle was being driven by his duly authorized driver. He relies on **Nrb Civil Appeal No. 31 of 1981; Anyanzwa –vs- Gasperis** where the Court of Appeal held as follows;

a) For one to establish vicarious liability, it must be shown that the agent at the material time was acting on the owner's behalf and for the owner's benefit. Mere knowledge or permission of the owner is not enough to establish vicarious liability.

b) The owners were not vicariously liable for the driver's negligence because the driver was not driving the vehicle at their request or as their servant and they had neither delegated any task/duty to him nor had they any interest, concern or control over it or the driver at the material time. Furthermore, the vehicle was not at the material time driven for their benefit.

8. The Appellant has also relied on section 107 of the Evidence Act to submit that, he who alleges a fact must tender evidence to prove it.

Respondents' submissions

9. The Respondents' submit that when execution commenced, the Appellant applied for stay and in a ruling delivered on 06/02/2019, the Appellant was ordered to, firstly, file the appeal within 7days and, secondly, deposit the decretal amount in an interest earning account within 30 days from the date of the ruling failure to which the appeal would stand dismissed. They contend that the Appellant was under an obligation to prove compliance with the 2nd condition which he has failed to do and as such, the court should proceed on the assumption that he ignored the orders.

10. On whether the case against the Appellant was proved, the Respondents submit that the Appellant did not testify and no witness was called on his behalf. It's therefore their contention that the statement of defence was a mere denial. They rely *inter alia* on **Chrispine Otieno Caleb –vs- Attorney General (2014) eKLR** where it was held that;

"The case of Janet Kaphiphe Ouma & Anor –vs- Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga –vs- Nathaniel D. Schulter Civil Appeal No. 23 of 1997 said:

"In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence."

11. The Respondents also submit that there are various forms of ownership and rely on **Nancy Ayemba Ngaira –vs- Abdi Ali (2010) eKLR** where it was held that;

*"There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the **de facto** owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: **actual ownership; beneficial ownership; possessory ownership**. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the **matatu** in question."*

12. They also submit that the Appellant cannot deny ownership at the appeal stage because he did not raise the issue in the trial court.

13. Further, the Respondents submit that the decision on liability cannot be varied because the 2nd defendant (*Jihan Freighters Ltd*) was not enjoined in this appeal yet the orders sought will obviously affect it. They rely on the case of **Pastor Anthony Makena Chege –vs- Nancy**

Wamaitha Magak & Anor (2015) eKLR where it was held that;

“[5] The Applicant emphasized on the fact that consent only binds parties who were present or whose counsel was present when the order was made but does not bind persons who were neither present nor parties in the suit.

The Applicant was not a party in the suit and did not consent to the consent order. On that basis, the Applicant is not bound by the said consent order and it cannot also be imposed upon and/or enforced against the Applicant whatsoever. It should, therefore, be set aside as it substantially affects its rights and interests.....

[7] As the law demands, all relevant and necessary parties were not enjoined in this suit at the time of the consent. The omission or deliberate refusal and/or failure to enjoin the Applicant as a necessary party to a suit contravenes the public policy of the court established under Order 1 of the Civil Procedure Rules, 2010.”

14. It is also their submission that the learned trial magistrate was right to find the defendants collectively liable and that a plaintiff does not need to plead that defendants be held jointly and severally liable. They contend that Courts have liberty to decide the extent of defendants' liability. They rely on Order 1 Rules 4,7 and 24 of the Civil Procedure Rules, 2010 (CPR) and have also cited the following paragraphs from the case of **Africa Planning & Design Consultants –vs- Sololo Outlets Ltd (In Receivership) & Anor (2018) eKLR**;

“17. The concept of joint and several liability is defined in Blacks law Dictionary 10th Edition as follows:

“liability that may be apportioned among two or more parties or to only one or a few select members of the group at the adversary's discretion. Thus, each liable party is individually responsible for the entire obligation, but a paying party may have a right of contribution and indemnity from non-paying parties”

18. In the persuasive case of **Republic v PS charge of Internal Security ex parte Joshua Mutua Paul [2013] eKLR**, the court held as follows:

“Clearly, therefore where you have joint liability all the tortfeasors are and each one of them is liable to settle the full liability, each tortfeasor is only liable to settle the sum due to the tune of his liability. Where, however, the liability is joint and/or several, the Plaintiff has the option of either directing his claim against any one of the tortfeasors or making his claim against each one of the torfeasor according to their individual liability... Either he cannot recover more than the total sum decreed. However, the Defendants are entitled to reimbursement from the co-defendants in the event that the Plaintiff only opts to recover from one of them”

19. In the case of **Kenya Airways Limited v Mwaniki Gachohi** it was stated thus;

“...The concept of joint and several liability comprehends one judgment and decree against two or more persons who are liable collectively and individually to the full extent of such decree...”

15. It is also their submission that during the trial, the defendants did not lead any evidence to suggest that there should be individual liability and the Appellant cannot complain now.

16. This is a first appellate court and it has a duty 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 & Anor –vs- Associated Motor Boat Co. Ltd & others (1968) E.A 123**

17. Having considered the grounds of appeal, the rival submissions and entire record, I find the only issue falling for determination to be whether the decision on liability should be interfered with.

18. It is not in dispute that the deceased was fatally injured by the vehicle on the material day. The vehicle must have been driven and controlled by a human being in the name of a driver. The Appellant was sued as the 1st defendant and Jihan Freighters was the 2nd defendant. Paragraph 4 of the plaint is worded as follows;

“At all material times relevant to this suit, the 1st defendant was the driver and /or owner of motor vehicle registration number KBC 873G while the 2nd defendant was the registered owner thereof.”

19. In their joint statement of defence, the defendants denied the averment in *toto* and called for strict proof. They however closed their case without calling any witness and just like it has been held in numerous judicial authorities including the **Chrispine Otieno case (supra)**, failure to adduce evidence reduced their statement of defence to mere denials. The averment that the Appellant was the driver was therefore not controverted.

20. I agree with the Respondent that indeed there are other recognized forms of ownership and in this particular case, being the driver of the motor vehicle made the Appellant the owner in possession at the time of the accident just as indicated in the police abstract.

21. The search certificate (*exhibit 5A*) indicates that indeed Jihan Freighters was the registered owner and the fact that it has not appealed makes that fact undisputed. Jihan Freighters is a legal person and could therefore not have been the one in physical control of the motor

vehicle at the time of the accident.

22. There was obviously a driver who has been identified as the Appellant. Both the Appellant and Jihan Freighters filed a joint statement of defence and instructed one firm to represent them. If there was no relationship between them, they could not have done that.

23. Further, I have noted from the proceedings of 18/01/2017 that the defendants' counsel sought leave to file the driver's statement. Having been served with the plaint and even responded to it, the counsel was aware that the Appellant had been sued in his capacity as the driver. Even though the statement was never filed, I find that his sentiments were in reference to the Appellant's statement.

24. The Appellant should have advanced a separate case right from the beginning of the trial if indeed he wanted to distance himself from the motor vehicle otherwise, from the evidence on record, I find that the Respondents proved, on a balance of probabilities that, the Appellant was the driver.

25. On the question of holding the defendants 'jointly and severally' liable, I agree with the Respondents that indeed no specific pleading is required as that is a preserve for the trial court after considering the pleadings and analyzing the evidence. In this case, the learned trial Magistrate found the Appellant and Jihan Freighters to be jointly and severally liable. I agree with this finding.

26. The upshot is that the appeal has no merit and is dismissed with costs.

Delivered, signed & dated this 21st day of November 2019, in open court at Makueni.

.....

Hon. H. I. Ong'udi

Judge