REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 15 OF 2018 AS CONSOLIDATED WITH HCCA 16 OF 2016.

COSMAS M. MUTISYA.....PLAINTIFF

VERSUS

JAP QUALITY MOTORS.....1ST DEFENDANT

F. K. WAMBUA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff COSMAS MUISU MUTISYA lodged suit on 06/02/2013 against Defendant JAP QUALITY MOTORS LTD and F.K. WAMBUA claiming General Damages, Costs and Interest.

2. Only 2nd Defendant F.K. Wambua lodged Defence on 30/07/2013 denying the claim. He listed driver of M/V subject of the accident as his witness.

3. Interlocutory Judgment was entered against the 1st Defendant.

4. The matter was heard and the trial magistrate dismissed the case against Defendant.

5. This precipitated the instant appeal against the Defendants who are now Respondents and the Plaintiff as the Appellant.

6. The Appellant appeal raises 13 grounds but same can be summarized as follows.

7. The grounds are in form of the issues;

1. Whether there was prove of the owner and beneficial owner of the motor vehicle?

2. Whether liability was proved?

3. Are 1st and 2nd Defendant or both liable for negligence of their /servant/driver/Agent under vicarious liability doctrine?

4. What is the quantum awardable?

8. The parties agreed to canvass appeal via submissions which directions were violated as parties failed to file and exchange written submissions within agreed time thus the judgments was prepared without factoring in the parties submissions .

THE DUTY OF THE 1ST TRIAL COURT

9. The duty of a first appellate Court as was held in the cases of **Mwana Sokoni –Vs- Kenya Bus Service Ltd (1985) KLR 931** and **Selle – vs- Associated Motor Boat Company Ltd (1968) EA** 123 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.

10. The Appellant/Plaintiff testified as PW1 and told that he was in M/V KBK 648T along Kathonzweni Makueni road when same started moving in a zigzag manner after losing control. It fell and he lost consciousness. He gained consciousness while at Makueni Hospital where he was admitted. He sustained particularized injuries. He was treated and referred to Machakos District Hospital. He blamed 1st Defendant for accident.

11. In cross examination he stated that the driver was over speeding. He did not know what caused the M/V to zigzag and then fall.

12. PW2 was Dr. Judith Kimuyu who produced medical report on behalf of Dr. Laiposha. Same report established the pleaded injuries that were sustained by the Appellant. The record does not show how the case moved from hearing of police officers and defence to submissions.

13. The record shows only above 2 witnesses PW1 and PW2 testified. The Defence did not testify.

14. The exhibits produced vide list of exhibits were:-

i. Treatment card - EXH 1.

ii. P3 Form - EXH 2

iii. Police Abstract - EXH 3

iv. Medical Report - EXH 4

v. Copy of Records - EXH 5

15. On ownership, the 2 documents Abstract and register of motor vehicles records showed 2nd Defendant and 1st Defendant as owners.

16. The M/V register records showed the 1st Defendant was still registered as the owner. He never shed the light by defending the suit and adducing documents to prove otherwise.

17. As for the 2nd Defendant though he filed defence to deny the claim, he never adduced evidence nor call the driver whom he listed as a witness.

18. The abstract shows 2nd Defendant was beneficial owner and had even insured the M/V with the insurance.

19. **Section 8 of Traffic Act** states that a person in whose name a vehicle is registered shall, unless the contrary is proved be deemed to be the owner of the vehicle. That gives room for other forms of ownership to be proved that may be beneficial owner and actual passion owner.

20. The copy of records produced showed 1st respondent as registered owner and police abstract shower 2nd respondent owner other that the registered owner. In the case of **MAGETO -VS- NJATHI 2013 e KLR** the court held that;

> ***"from interpretation of section 8 of the traffic Act, a person claiming ownership or asserting ownership need not necessarily produce a logbook, or certificate of registration. The courts recognize that there are various forms of ownership, i.e. actual, possessory or beneficial, all of which may be proved in other ways, including by oral, documentary evidence such as the police abstract report.."***

21. The court puts in matter herein is that the driver who drove the M/V at the material date was agent of 2nd Defendant thus the 2nd Defendant vicariously liable. In the case of **KBS LTD VS HUMPHREY 2003 KLR 665;2EA 519**,the court held that;

> ***"where it is proved that a car has caused damage, by negligence, then in absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible……"***

22. The driver need not be joined as a party where the beneficial owner is sued. The ownership was thus proved.

23. PW1 testified that the M/V was over speeding and thus zigzagged and lost control thus veering off the road causing the accident. The above piece of evidence was not rebutted or controverted in any case the driver ought to have tendered an explanation to fit in the circumstance to the doctrine of Act of God as the cause of the accident.

24. In the case of **HUGHES VERSUS LORD ADVOCATE (1963) 1AIIER 705** wherein as per the observation of Lord Reid:-

> ***"Defender is liable although the damage may be a good deal greater in extent than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable."***

25. As per the observation of Lord Morris:

> ***"There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable. It is sufficient if the accident is of the class that might well be anticipated as one of the reasonable and probable results of the wrongful acts…. In my view there was a duty owed by the defenders to safe guard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injury and the defenders are not absolved from liability because they did not envisage the precise concatenation of circumstance which led up to the accident."***

26. The case of **VIRGINIA WANJIKU KAIRU VERSUS HOSEA KIPKEMBOI SAMA ELDORET HCCC NO.R67/1999** decided by George Dulu Ag J. on the 14th day of April, 2005 wherein the defendant who was driving at 60kmph within Eldoret Town where the permitted speed limit was 50KPH, it was raining and the road was slippery veered off the road, applied brakes but hit a pedestrian off the road was found 100% liable to blame for the causation of the accident; the case of **PATRICK MUTIE KIMAU AND MOUNT BUILDERS AND MECHANICAL ENGEERING COMPANY LIMITED VERSUS JUDY WAMBUI NDURUMO NAIROBI CA 256/1996** where in the court of appeal held *inter alia* that:-

> ***"A failure on the part of any person to observe any of the provisions of the highway code… by any party to the proceedings as tendering to establish or negative any liability which is in question in those proceedings relevant."***

27. The case of **EMBU PUBLIC ROAD SERVICES LIMITED VERSUS RIIMI (1968) EA 26** wherein it was held *inter alia* that;

> ***"While the driver had to meet a sudden emergency and what was required of him was not perfect action, nevertheless on the evidence it had not been shown that the emergency was so sudden that he could not have taken that amount of corrective action which should be expected of a competent driver of a public service vehicle."***

28. The case of **KARANJA VERSUS MALELE (1983) KLR 147** wherein the court of appeal held *inter alia* that:-

> ***"there are two elements to be considered when assessing the issue of liability namely causation and blame worthiness; there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence in not seeing it before hand; and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion."***

29. There is also the case of **MSURI MUHIDDIN VERSUS NAZZOR BIN SELF ELKASSABY AND ANOTHER (1960) EA 207** wherein it was held *inter alia* that:-

> ***"where there is a plea for RES IPSA LOQUITOR the respondent could avoid liability by showing either that there was no negligence on their part which contributed to the accident or that there was a probable cause of the accident which did not connote negligence on their part or that the accident was due to the circumstances not within their control. If the immediate cause of the burst tyre was the rough surface of the road that in itself did not establish that the accident was due to circumstances within the respondent's control. The speed of the vehicle in relation to the particular road condition was of most material factor and one which normally within the control of the driver of the vehicle, and there was certainly a duty on the driver to keep a proper look out to ascertain the condition of the road and to adopt the speed of the vehicle to it."***

30. In the same cited case OF **MUSURI MUHHIDDIN VERSUS NASSER BIN SELF (SUPRA) AT PAGE 206** paragraph 1 the court quoted with approval the decision in the case of **WING VERSUS LONDON GENERAL OMNIBUS CO (1909) 2K.B.652** thus:-

> ***"Without attempting to lay down any exhaustive classification of cases in which the principle of resipsa loquitor applies, it may generally be said that the principle applies when the direct cause of accident and so much of the surrounding circumstance as was essential to its occurrence were within the sole control and management of the defendants, or their servants so that it is not unfair to attribute to them a prima facie responsibility for what happened. An accident in the case of traffic on a high way is in marked contrast to such of condition of things. Every vehicle has to adopt its own behavior to the behavior of other persons using the road and over the actions those in charge of the vehicle have control…"***

31. The case of **EMBU PUBLIC ROAD SERVICE LIMITED VERSUS RIIMI (SUPRA)** where in there is observation made at page 25 paragraph 1 thus:-

> ***"As I understand the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence from the defendant, in order to escape liability, has to show in the words of Sir AList Air Forbes, that there was a probable cause of the accident which does not connote negligence or in the words which I have previously used that the explanation for the accident was consistent only with an absence of negligence. The essential point in this case therefore is a question of fact, that is whether the explanation given by the defendant shows that the probable cause of the accident was not due to his negligence or that it was consistent only with the absence of negligence…"***

32. The case of **DEVSHI VERSUS KULDIPS TOURING CO (1969) IEA189** where in at page 192. There is observation that:-

> ***"A person relying on inevitable accident must show that something happened over which he had no control and the effect of which could not have been avoided by the greatest care and skill… 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…" In order to avoid liability must prove to the satisfaction of the court that they took all reasonable steps to ascertain that the tyre was fit for use on February 27….The mere external examination of a tyre which had run 21750 miles part of which was done on bad roads driven by drivers who had no instruction to report on un usual and heavy blow to the tyre and without any examination of its internal surface during the whole of that time seems to me to leave the defendant with the burden undisclosed of satisfying the court that they had taken all reasonable steps to avoid this accident…." The duty imposed on the owner of an omnibus must be higher than that placed on the driver of a car, never the less there is clearly a duty imposed on the latter to make at least a visual inspection of the threads and walls of the hired cars tyres.***

There is no evidence of any such inspection in the present case either before the car was hired out or before it left Dodoma on its way back to Mombasa in spite of the fact that one of the tyres had had a puncture and another a near blow out and was badly cut. There is no evidence of the state of the road at the place of the accident and in particular whether there were sharp stones on the road which could have caused a blowout…"

33. On the basis of the afore-set out reasoning the court held *inter alia* that:-

"In the absence of any evidence as to an inspection of the tyres either before the car was hired out or before it left Dodoma and in the absence of any evidence as to the state of the road as a possible cause of the puncture, the presumption of negligence had not been rebutted."

34. There is the case of **ANASTASIA KAMENE CHEGE VERSUS LAWRENCE NDUATI GIGUTA NAIROBI HCCC NO.1786 OF 1984** decided by Aganyanya J. as he then was (JARTD) on the 6th day of December,1984. There is observation that:-

"From the evidence, the accident appears to have occurred suddenly. There was a tyre burst followed by loss of control and rolling of the vehicle in question. What could then have caused a sudden burst of the tyre over speeding or un-road worthiness of the vehicle tyre in question? No evidence was adduced on these 2 aspects of the particulars of negligence alleged in the plaint…. In the current case though the plaintiff alleged over speeding as possible cause of the tyre burst, hence the accident, no defence was filed to rebut the allegation. The question of RES IPSA LOQUITOR has been raised this giving rise to presumption of defendant negligence. No evidence has been adduced to rebut this presumption…"

35. Thus in our instant case the court finds that the doctrine of **RES IPSA LOQUITOR** obtains placing burden on the driver to offer an explanation as to the happening leading to the accident which burden he failed to discharge thus he was negligent and the 2nd Defendant vicariously liable.

36. Liability is thus assessed at 100% against Defendant No. 2. On Quantum the injuries sustained were set out in the plaint paragraph 7;-

1. Blunt injury to the chest.

2. Bruises right lower limb.

3. Bruises left upper arm.

4. Soft tissue injury to the chin.

37. Same were proved vial medical report produced and treatment cards via the use of the authorities namely:-

- KAMUNYA –VS- KBC HCC NRB 1128/1993 award Kshs. 200,000/=.

- KWANJANI HARDWARE & ANOR –VS- MUTINDA MKS 16/2008 award Kshs. 150,000/=.

38. The Appellant had proposed an award of Kshs. 200,000/=.

39. The 2nd Respondent relying on the following cases:-

- S OKORO MILLS LTD –VS- NDUNGU (2006) EKLR award Kshs. 30,000/=.

- OKINDA –VS- KBS LTD NRB 1309/2002 award Kshs. 50,000/=.

The 2nd Respondent proposes Kshs. 50,000/=.

40. After going through all the said soft injuries authorities, I find it fair to award the Appellant **Kshs. 100,000/=.**

41. No Special Damages were pleaded and proved.

42. Therefore the court makes the following orders:-

1) Liability - 100%.

2) General Damages - Kshs. 100,000/=.

3) Costs and Interest.

43. As pertains to the Appellant/Plaintiff in HCCA 16/2018, I find injuries pleaded and proved were soft tissue in nature and were less severe comparing to those of Appellant in HCCA 15/2018. The Plaintiff had proposed an award of between Kshs. 150,000/= and 200,000/= relying

on 2008 and 2009 cases. On the other hand the Respondent/Defendant No 2 had proposed an award of Kshs. 40,000/= relying on a case of 2006.

44. Doing the best I can in the circumstances, I find an award of **Kshs. 80,000/= is fair in all the circumstances of the case** plus costs and interest.

45. Thus order in HCCA 16/2018:-

1) **Liability - 100%.**

2) **General Damages - Kshs. 80,000/=.**

3) **Costs and Interest.**

SIGNED, DATED AND DELIVERED THIS 30TH DAY OF MAY, 2018 IN OPEN COURT.

C. KARIUKI

JUDGE

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