



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCA. NO. 119 OF 2004

KIGANYA KARANJA KIGANYA.....APPELLANT

-VERSUS-

JAMES NYOIKE KARIUKI & ANOTHER.....RESPONDENT

(Formerly PMCC Civil Case 356 of 1998 Milimani Commercial Courts, Nairobi).

JUDGEMENT

INTRODUCTION

1. By a plaint amended and dated 18/11/2002, Appellant pleaded that on or about 25/10/1996, Bernard Kariuki Kiganya deceased was walking along Thika-Nairobi Highway when he was knocked down by motor vehicle KAD 999F when 2nd Defendant/Respondent negligently drove, managed and controlled same that it violently knocked deceased thereby occasioning him fatal injuries.
2. Defendant/Respondent filed defense dated 22/06/1999 and denied occurrence of the accident and in alternative pleaded that if accident occurred, deceased was solely or substantially to blame.
3. Matter proceeded for hearing and the trial court dismissed the whole suit.
4. Being aggrieved by the above decision, the Appellant lodged instant appeal and set out seven (7) grounds of appeal.
5. Parties agreed to canvass appeal via submissions which were to be filed and exchanged.
6. The Appellant filed same but Respondent has not filed submissions as agreed.

APPELLANT'S SUBMISSIONS

7. Appellant submit that Blue Shield Insurance Company Limited (the vehicle insurer) produced as PEX 6 (page 88 of the Record of Appeal) stated in the 2nd paragraph that:-

“Kindly note that our insured (James Nyoike Kariuki) has never reported the above accident to us and probably does not wish to involve us.”

8. Thus he submits that for one to insure a motor vehicle he has to have insurable interest in the motor vehicle, it is only logical that the 1st Respondent insured motor vehicle registration number KAD 999F in his capacity as the owner of the said motor vehicle.
9. As such a letter from the Blue Shield Insurance sufficiently proves that the 1st Respondent was the owner of motor vehicle registration number KAD 999F.
10. It is further submitted that Police Abstract PEX 1 (page 82 of the Record of Appeal) indicated that the 1st Respondent was the owner of motor vehicle registration number KAD 999F and no evidence was led by the 1st Respondent to challenge the evidence of the Appellant proving that the 1st Respondent was the owner of motor vehicle registration number KAD 999F.
11. As such, the trial court misdirected itself in finding that the Appellant had not proved ownership of the said motor vehicle as required by the law.

12. The Appellant's evidence was not rebutted by the 1st Respondent. Courts have held that a Police Abstract can be used to prove ownership and where such evidence is not rebutted then it stands as proof.

13. See the case of GENERAL MOTOR EAST AFRICA LIMITED –VS- EUNICE ALILA NDESWA while quoting from JOEL MUGA OPIJA –VS- EAST AFRICAN SEA FOOD LIMITED CIVIL APPEAL NO. 309 of 2010 (2013) eKLR. observed that:-

“.....They 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 contents cannot be later denied.”

14. Section 8 of the traffic Act Cap 403 of the Laws of Kenya provides that:-

“The person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be the owner of the motor vehicle.”

15. This only means that where a motor vehicle is registered in the name of a person evidence can be led to prove that the motor vehicle is owned by another person and not the one registered as the owner.

16. See the case of GENERAL MOTOR EAST AFRICA LIMITED –VS- EUNICE ALILA NDESWA while quoting from NANCY AYEMBA NGAIRA –VS- ABDI ALI CIVIL APPEAL 107 OF 2008 (2010) eKLR, Ojwang, J (as he then was) observed 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; and possessory ownership. A person who enjoys any 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”.

17. In the foregoing, it is Appellant submissions that the Appellant successfully proved that the 1st Respondent was the owner of motor vehicle registration number KAD 999F and the trial court erred in holding that ownership of the said motor vehicle was not proved.

18. It is further submitted that, the 2nd Respondent was sued as the driver of motor vehicle registration number KAD 999F at the material time that fact was proved in evidence. That evidence was not contravened by the Respondents at all.

19. It is contended that the magistrate in her judgment found as a fact that the deceased was hit by motor vehicle registration number KAD 999F while crossing the road and that he could not hold the deceased (who was a minor) a child of tender years guilty of any contributory negligence in light of the decision in BUTT –VS- KHAN (1988) KLR 399 cited to her by the Appellant in his submissions the magistrate also rightly found that;

“The defendant did not establish that the deceased knew or ought to have known that he should have crossed the road the way he did.”

20. The evidence of PW2 established negligence against 2nd Respondent.

21. The trial magistrate's judgment is however totally silent on the outcome of the Plaintiff's claim against the 2nd Defendant.

22. Primary liability for an accident lies with the driver (in this case the 2nd Respondent) the owner only comes in vicariously therefore irrespective of whether or not it found the 1st Respondent vicariously liable, the trial magistrate was under an obligation to pronounce herself as regards the Appellant's case against the 2nd Respondent. They submit that she erred in failing to do so.

23. No evidence was led by the 2nd Respondent to rebut the allegation and the evidence led in favor of the Appellant's case at the trial court.

24. Section 109 of the Evidence Act provides that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe it.”

25. The 2nd Respondent had the onus of proving that he was not negligent in the manner in which he was driving motor vehicle registration number KAD 999F on the fateful day of the accident, a mere filing of statement of defense was not enough to prove that the driver of the said motor vehicle was not negligent as was stated by **Justice Kasongo** in the case of **OBED MUTUA KINYILI –VS- WELLS FARGO & CHRISTIAN CLAUS MICHAEL WALTER HCCA NO. 48 OF 1999** while quoting from the case of **C. J SCOTT –VS-LONDON & ST. KATHERINE DOCK CO** stated that:-

“There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care”.

26. As a matter of law and fact therefore liability was established against 2nd Defendant irrespective of the vehicles ownership thus court urged to find as much.

27. The evidence adduced in the trial court sufficiently proved that the 1st Respondent was the owner of motor vehicle registration number KAD 999F and that the 2nd Respondent drove the said motor vehicle in a negligent manner as such causing the accident and leading to the fatal injuries to the deceased, courts have held that where negligence leads to an accident, a presumption arises that it was being driven by a person for whose negligence the owner is responsible unless proved otherwise as it was held in the case of **KENYA BUS SERVICE LTD – VS- HUMPHREY** where the court of appeal cited **KANSA –VS- SOLANKI (1969) EA 318** that:-

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard –Vs- Sully (1931) 47 TLK 557.

This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.”

28. No evidence was led by the 1st Respondent to disputing that he was vicariously liable and as such the trial court was bound to find the 1st Respondent vicariously liable for the accident.

29. They submit that the court should find that the trial court erred in law and in fact in failing to hold the 1st Respondent vicariously liable.

30. It is their submission that the evidence by the Appellant in the trial court was sufficient and proved his case on a balance of probability as required by law as such the trial court erred in dismissing the Appellant’s case.

31. Judgment be entered in favor of the Appellant against the Respondents jointly and severally in the sum of Kshs.465,000/= as assessed by the learned magistrate together with costs both at the lower court and this Honourable court and interest at court rates from 9th June 2003.

DUTY OF COURT OF FIRST APPELLATE COURT

32. As a first Appellate Court, this Court’s duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in **Selle & another –Vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123.**

ON EVIDENCE ADDUCED

33. PW1 testified that whilst crossing the Thika-Nairobi road an accident took place at Ruiru sides. The vehicle came fast as they were crossing road and Bernard was hit by the vehicle. The vehicle registration number KAD 999F. He was taken to the hospital. After five days they learned that Bernard died in hospital.

34. On cross-examination, PW1 said, they were crossing the road when the accident took place. There was some little darkness but they could see. They had not seen the vehicle which was coming from Nairobi going to Thika. They saw the vehicle after PW1 had crossed. PW1 was in the middle of the road when he saw the vehicle come.

35. PW1 ran and crossed over. Bernard was behind him thus he was hit before he crossed the road. He was still on the road when he was hit. The vehicle was about 30 meters when PW1 saw it. This forced PW1 to run. His colleagues couldn’t run as fast.

36. The vehicle was in speed. It could be 50 km per hour. This was on a highway. There was another vehicle behind it. PW1 didn’t know the speed limit of the said highway. They suddenly ran to cross quickly.

37. The PW1 produced receipts for specials which the trial court made a finding and same is not is not contested.

38. PW1 produced PEX 1 police abstract and the production was not opposed. PW1 also produced Blue Shield Insurance Company Limited (the vehicle insurer) letter marked as PEX 6.

ISSUES, ANALYSIS AND DETERMINATION

39. After going through the pleadings, evidence on record and the submissions, I find the issues are:-

- 1) *Whether the Appellant proved the ownership of the motor vehicle subject of suit?*
- 2) *If above answer is in affirmative, what was the ratio of liability?*
- 3) *What is the quantum?*
- 4) *What is the order as to costs?*

40. The core issue in the instant appeal was whether the trial court erred in holding that;

“In defense filed the defendant denies being the owner of the motor vehicle in issue. It is noted that the plaintiff never proved the alleged ownership or the insurable interest ...”

41. This was contrary to the evidence on record. A letter from Blue Shield Insurance Company Limited Pexbh 6 of page 88 of the record of appeal stated that the insurer of the motor vehicle was James Nyoike Kariuki. Police abstract Pexh 1 on page 82 of the record of appeal indicated that the same James Nyoike Kariuki was the owner of motor vehicle KAD 999F.

42. No evidence was led by the said 1st Respondent to challenge aforesaid evidence on ownership. In the case of **GENERAL MOTOR E. A LTD VS EUNICE ALILO NDESWA CITING OPIJA VS E.A SEA FOOD LTD APPEAL 309/2010 (2013) EKRL** held that police abstract can be used to prove ownership and where the evidence is not rebutted the same stands as proved.

43. The court therefore holds that the Appellant proved ownership on balance of probability and 1st Respondent did not rebut the same.

44. On liability the court rightly held that there was no liability to attach on deceased minor as defendant did not establish the deceased being a child of tender age (13 years) knew or ought to know that he should not have crossed road as he did. See also the decision of **BUTT –VS- KHAN** supra, which enjoined the trial court not to hold the deceased minor guilty of any contributory negligence.

45. The same issue is not contested. Thus the 2nd Respondent is 100% to blame for the occurrence of the accident. The evidence adduced in the Trial Court sufficiently proved that the 1st Respondent was the owner of motor vehicle registration number KAD 999F and that the 2nd Respondent drove the said motor vehicle in a negligent manner as such causing the accident and leading to the fatal injuries to the deceased.

46. The courts have held that where negligence leads to an accident, a presumption arises that it was being driven by a person for whose negligence the owner is responsible unless proved otherwise as it was held in the case of **KENYA BUS SERVICE LTD –VS- HUMPHREY** where the court of appeal cited **KANSA –VS- SOLANKI (1969) EA 318**.

47. On quantum, the trial court proposed an award of;

- a) **Loss of dependency Kshs.120,000/= and**
- b) **Global award of Kshs.100,000/=.**
- c) **Total Kshs.220,000/=.**

48. The Appellant talks of Kshs.465,000/= without any support and claims it was assessment by Trial Magistrate.

49. The Trial Magistrate vide page 23 of the record of appeal proposed Kshs.220,000/= plus special damages and interest. However due to time lapse and inflationary trend of Kenya shilling, the court finds that the Appellant proposed award is within reasonable range in the circumstances and thus court adjusts same to Kshs. 400,000/= as global award.

50. Thus, the court makes the following orders.

1) The Appeal is allowed on the following terms:-

- a) **Liability 100%**
- b) **Global Award Kshs. 400,000/=**
- c) **Special damages Kshs.23,900/= pleaded and proved.**
- d) **Total Kshs.423, 900/=.**

e) Plus cost and interest at court rates from dates herein.

SIGNED, DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE