



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 44 OF 2014

(An appeal from the Judgment of the Senior Principal Magistrate, Embu in CMCC No. 53 of 2011 dated 25/11/2014)

NICHOLUS NJUE NGOROI.....APPELLANT/APPLICANT

VERSUS

CHARLES IRERI NJOKA.....RESPONDENT

J U D G M E N T

1. The appellant was aggrieved by the judgment of Embu Senior Principal Magistrate in favour of the respondent for the sum of Shs.320,456/= delivered on 25/11/2015 in CMCC No. 53 of 2011. The respondent had sued the appellant claiming repair costs of his motor vehicle registration number KAQ 202 K damaged in an accident in collision with vehicle registration number KAT 98 A while being driven by the appellant's driver from the appellant's car wash without authority.

2. The grounds of appeal may be condensed as follows:-

- (a) That the learned magistrate misdirected himself on the law of vicarious liability in finding the appellant liable.
- (b) That the magistrate erred in his analysis of the evidence and therefore reached the wrong finding.
- (c) That the learned magistrate erred to finding that the plaintiff's claim had been established contrary to the law that special damages must be strictly and specifically proved.
- (d) That the magistrate misdirected himself when he entered judgment against the 1st defendant whose case had already been withdrawn.

3. The respondent's evidence was that he owned vehicle registration number KAQ 202 K which he used for taxi business. On 16/01/2011 he instructed his driver one Mr. Wachira to take the vehicle to the appellant's car wash. He was later informed that the car had been involved in an accident while being driven by the appellant's employer Dennis Mugendi.

4. As a result of the accident, the vehicle sustained damage whose repair cost was assessed at Kshs.317,956/=. The assessor declared the vehicle uneconomical to repair and assessed the cost of salvage at Shs.410,000/=. The plaintiff repaired the vehicle and sold it to someone for Shs.200,000/=. His claim is for Shs.320,456/= being repair cost and assessors fee of Shs.2,500/=. The second limb of he claim was for loss of business at the rate of Shs.1,500/= per day until settlement in full. This aim was not

allowed in the judgment.

5. He called the assessor PW2 who produced his report and fee note. PW3 the driver of the respondent testified that he took the respondent's vehicle to the car wash and left it with DW2 and later learnt that the vehicle had been involved in an accident authorizing DW2 to drive the car.

6. The appellant's evidence was he owns a car wash where he had a worker namely Dennis Mugendi DW2 who was paid on commission basis depending on how many cars he cleaned. On the material day the respondent's driver took the vehicle registration number KAQ 202 K to the car wash. He instructed DW2 to drive it to Shell BP petrol station after cleaning it.

7. On his way to the service station DW2 was involved in an accident where the vehicle was damaged. The appellant claimed that DW2 was not an employee on permanent basis but worked on commission basis. DW2 supported the case of the appellant that he was not a permanent employee. As such the appellant denied liability and argues that vicarious liability does not apply.

8. Both parties argued the appeal by way of filing written submissions. The firm of Messrs Joe Kathungu & Co. represented the appellant while that of Messrs Mugambi Njeru represented the respondent.

9. The most contentious issue in this appeal is whether PW2 was an employee of the appellant so as to render the appellant vicariously liable to his acts of negligence committed in the course of his employment.

10. Among the plaintiff's exhibits was a statement recorded by the appellant on the occurrence of the accident. It is stated in part:-

"I rushed to the scene and found the man who was driving the saloon was Dennis Mugendi and he was my employee... Dennis had not been allowed to drive because he did not have a driving licence."

11. In his defence dated 25/11/2011, the appellant did not deny that Dennis was his employee but went on to state:-

That my employees at the car wash had no authority to drive a customer's car as I had forbidden them....

The 1st defendant did not have my authority, to drive the plaintiff's car, and he did not do so as my agent. He was on a frolic of his own."

12. In his evidence, the appellant said that DW2 was his employee but worked on commission. One Harrison Ndwiga filed a witness statement in support of the appellant's case and referred to DW2 and himself as employees of the defendant. Although he did not testify, his statement is a part of the record.

13. DW2's evidence that he was instructed by the driver of the respondent to drive the vehicle seemed rehearsed and designed to absolve the appellant from liability. Before the case was filed, the appellant had recorded a statement in which he admitted that DW2 was his employee at the car wash.

14. The issue of payment of commission came much later and must be an afterthought. If it was true that DW2 worked on commission bases, this would have been included in the statement to the police and should also have been denied specifically in the defence in which the appellant's defence was based.

15. I find that the finding of the magistrate that DW2 was an employee of the appellant was supported by evidence. Being an employee of the appellant, DW2's actions in the course of his duties at the car wash are attributable to his principal in the doctrine of vicarious liability.

16. PW3 testified that he left the car with DW2 for cleaning and left the keys with him for ease of DW2 carrying out his work. That space at the car wash was limited and a car had to be removed after cleaning

to give space for incoming ones. This was confirmed by the appellant when he said:-

The car wash was enough for two (2) vehicles at once”.

It was echoed by DW2 when he said in cross-examination:

the corridor was too small to accommodate 6 motor vehicles.

17. I take judicial notice that in most car wash places, one has to leave the ignition key for ease of moving the car after cleaning and to allow space for others.

18. PW3 explained his reason for leaving the car keys which is supported by the evidence of both the appellant and his driver DW2. It is immaterial whether the car could lock itself or not as was contested by the appellant.

19. The appellant contended that the respondent was not a truthful witness for he had stated in the original plaint that he is the one who took the care for cleaning and later amended the plaint and his witness statement to say that it was his driver.

20. My observation is that the respondent had a driver who was his agent. If he had instructed his driver to take the car to the car wash, he was responsible for the driver's actions. Secondly, a plaintiff is permitted by the law to amend his plaint any time before any final orders are made. The record shows that the application for amendment in this case was unopposed. The plaintiff in amending his plaint is not limited to what he can change or add for the reason that the defendant has the right to file an amended defence, if any.

21. I therefore disagree with the appellant's argument that the respondent was an untruthful witness in this regard. His evidence was consistent with the amended plaint dated 23/04/2012 and with his amended statement.

22. The appellant denied in his defence dated 7/06/2011 that “he owns a car wash at Embu and that he had employed Dennis (referred to as the 1st defendant)”.

23. He stated in his defence that what he owned was “an open field where everyone wishing to wash heir car can do so at a fee”. This was disapproved by his own statement paragraph 5 where he stated:-

It was about 500 metres from my car wash where I had employed 1st defendant to wash cars on commission basis.”

His statement to the police also contradicted his defence. In his testimony, the appellant said:-

The car wash was mine.

24. The appellant was not truthful to deny owning a car wash and then continually put it in writing in other documents and admit it in his own testimony.

25. DW2 testified that Wachira PW3 who was the respondent's driver was his friend and had taught him how to drive. Yet he said he could not recall PW3's name. This renders DW2's evidence untruthful. Had he interacted with PW3 to the level he explained, it was highly improbable that he could forget his name.

26. This leads me to the conclusion that the magistrate was right to reject the contradictory evidence of the appellant and his witness DW2 for its glaring incredibility.

27. The cost of repairs was supported by the assessor's report. The respondent said he repaired the vehicle using old spares and later sold the car at a cost of Shs.200,000/= He said the mechanical labour of Shs.20,000/= but produced no receipts. It was argued by the appellant that the cost of repairs was

special damages that ought to have been strictly proved.

28. The assessor testified in court and was cross-examined on his report on how he obtained the prices of spares. During cross-examination PW2 explained that his assessment was based on open market rates of different shops in Nairobi. The assessor produced his licence and the court was satisfied as to his qualifications. Being an expert and having produced his report, the expert evidence was sufficient to prove the cost of repair even without the receipt for the cost.

29. PW1 testified that he repaired the vehicle and paid the mechanic for the labour. If he decided to use old or cheaper spares, the court was right to rely on the assessors report which was credible evidence. It is not in dispute that the respondent's vehicle suffered damage to the tune of Shs.317,956/= as assessed.

30. I find that the respondent was entitled to be compensated for the loss of damage as assessed and that there was no misdirection on part of the learned magistrate.

31. As for the assessors fee, the respondent claimed Shs,2,500/= and the fee note of the same amount was produced in evidence. The figure of Shs.5,000/= given by PW2 as the charge for the report must have been an error for it was not supported by any documentary evidence.

32. The appellant raised the issue of judgment having been entered against the appellant and DW2 (who was sued initially) jointly and severally. This was wrong because the case against DW2 had been withdrawn when the respondent failed to trace him for service. He re-appeared much later as the witness of the appellant.

33. I hereby rectify the error by entering judgment of Shs.320,456/= in favour of the respondent against the appellant. The sum shall attract interest at court rates as ordered by the court below from the date of the amended plaint till payment in full.

34. As for the claim for loss of user of the vehicle, the respondent did not adduce any evidence to support his claim at the rate of Shs.1,500/= per day. The magistrate correctly dismissed the claim based on lack of evidence.

35. I find no merit in this appeal and it is hereby dismissed with costs.

36. The appellant will meet the costs of the suit in the court below as ordered by the said court.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Wambugu for Mugambi for respondent

Ms. Ndorngo for Kathungu for appellant