



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 366 OF 2011

NJUCA CONSOLIDATED CO. LTD.....APPELLANT

- V E R S U S -

JOSEPHINE WAYUA KULUMBA.....RESPONDENT

(Being an appeal against the judgment of Hon. Ole Keiuwa, SRM delivered in Nairobi CMCC No. 2084 of 2010 on the 15th day of July 2011)

JUDGEMENT

1) Josephine Wayua Kulumba the Respondent herein by way of plaint sued Njuca Consolidated Company Ltd the appellant herein in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts Civil Case No. 2084 of 2010 for general damages, cost of the suit and interest for injuries she sustained when she was hit by motor vehicle registration no. KWB 111.

2) The learned Senior Resident Magistrate, D. Ole Keiwua held the driver of the motor vehicle negligent in knocking the Respondent outside the road. The appellant as a registered owner was held vicariously liable 100%.

3) On quantum of damages payable to the Respondent Dr.Mwaura's medical report confirmed the following injuries to have been sustained by the Respondent following the accident; bruises on the chest, blunt chest trauma, bruises on both knees and blunt trauma of both knees. The learned Magistrate was guided by High Court decisions on soft tissue injuries award. He awarded a sum of ksh.100,000/= as general damages to the Respondent. Judgement was entered in favour of the respondent and against the appellant for a total sum of ksh.112,200/= plus costs of suit and interest, on the 15th day of July 2011. The appellant being aggrieved preferred this appeal.

4) On appeal, the appellant put forward the following grounds in its memorandum:

1. The learned magistrate erred in law and in fact in holding that the appellant was the registered owner of motor vehicle registration no. KWB 111 when there was no documentary evidence in support of this finding.

2. The learned magistrate erred in law and in fact in failing to appreciate or to take into consideration the appellant's submissions on the issue of ownership of motor vehicle registration no. KWB 111 or at all.

3. The learned magistrate erred in law and in fact in holding that the appellant was vicariously liable for the negligence of the driver of motor vehicle registration no. KWB 111 where there was

no evidence showing that the said driver was a servant, agent and/or authorised person within the scope of his/her employment, agency or authority of the appellant.

5) When this appeal came up for hearing, learned counsels appearing in the matter recorded a consent to have the appeal disposed of by written submissions.

Though the appellant put forward 3 grounds of appeal, the same revolve around the following questions;

i. Whether the learned magistrate erred in law and fact in holding that the appellant was the registered owner of motor vehicle registration no. KWB 111 when there was no documentary evidence in support of this finding and at the same time failing to appreciate or take into consideration the appellant's submission on the issue of ownership of the said motor vehicle.

ii. Whether the learned magistrate erred in law and in fact in holding that the appellant was vicariously liable for the negligence of the driver of motor vehicle registration no. KWB 111 when there was no evidence showing that the said driver was a servant, agent and/or authorised person within the scope of his/her employment, agency or authority of the appellant.

6) It is apparent from the evidence on record that, the respondent was injured in an accident on 3rd April 2009 involving motor vehicle KWB 111 as she carried out her business somewhere along Mathare North road in Nairobi. The respondent was taken by the owner of the car (driver at the time of the accident) to Guru Nanak Hospital for first aid and then on her own went to Kenyatta National Hospital for treatment. In her evidence at the trial, the respondent did not name the owner of the vehicle, which hit her. She produced the police abstract form as P1 Exh 2 which does not show that the appellant herein, **Njuca Consolidated Limited**, to have been the owner of the said vehicle but one Daniel Mbugua Mukima, whom the respondent neither sued nor mentioned in her evidence. The respondent did not produce any document showing that the appellant was either the registered owner of the said motor vehicle registration number KWB 111, and the police abstract produced was to the effect that the said motor vehicle was involved in the subject accident.

7) The respondent in her submission about ownership of the said motor vehicle highlighted various definitions of ownership and was guided by the case of **Nancy Ayemba Ngara –vs- Abdi Ali Civil Appeal No. 107/2008** where it was clearly stated that

“A person who enjoys any such categories of ownership may for practical reasons and purposes be much more relevant than the person whose name appears on a certificate of registration.”

As such the appellant was the beneficial owner of the said motor vehicle and enjoyed ownership as such and as much.

8) The appellant on this same issue submitted that the plaintiff did not prove that the vehicle which was involved in the accident was owned by the plaintiff. As the defendant denied ownership, it was incumbent on the plaintiff to place before the trial Magistrate, a certificate of search signed by the registrar of motor vehicles showing the registered owner of the lorry. Although counsel for the respondent submitted that the information in the police abstract produced in court showed that the lorry belonged to the appellant was sufficient proof of ownership, that cannot be a serious submission and thus this court should reject it.

9) The appellant went ahead to state that although the courts in subsequent cases have held that a police abstract can be considered sufficient proof of ownership, the one the respondent produced did not prove that the appellant owned the said motor vehicle at the material time as she alleged. It is apparent that the trial magistrate concluded that the appellant was the owner of the motor vehicle because it did not adduce any evidence to the contrary. This in view of the appellant clearly shows that, the trial magistrate did not appreciate or take into consideration the appellant's submission on the issue of ownership.

10) It's the appellant's submission that the respondent was under an obligation to prove ownership, especially because it was denied in the defence as to, whether the appellant called any evidence or not.

11) The second ground which was ably argued is to the effect that the trial magistrate erred in law and in fact in holding that the appellant was vicariously liable for the negligence of the driver of motor vehicle registration no. KWB 111, when there was no evidence showing that the said driver was a servant, agent and/or authorised person within the scope of his/her employment, agency or authority of the appellant.

12) On this ground, the respondent submits that, the Appellant's particulars of drivers negligence as per the plaint justifies the connection between the appellant company and its driver who is held liable as the driver of the appellant company.

13) The appellant on the other hand submits that the trial magistrate erred in law and in fact in finding the appellant 100% vicariously liable without any supporting evidence. The trial magistrate needed evidence to support the fact that the driver of the vehicle was the servant and/or agent of the defendant before he could hold the defendant vicariously liable for the driver's negligence. The appellant relied on the case of **Tabitha Nduhi Kinyua – vs – Francis Mutua Mbuvi & Another (2014) eKLR** where it was held that:

“In order to fix liability on the owner of a car for negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty delegated to him by the owner.”

14) Having re-evaluated the case that was before the trial court and having considered the rival written submissions, I have come to the conclusion that the decision of the trial magistrate should not be disturbed. There was sufficient evidence to enable the court make an inference that the person who drove motor vehicle registration no. KWB 111 was either the servant, agent and or under his authority to do so. Consequently, I find no merit in this appeal. It is dismissed in its entirety with costs to the respondent.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent