REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 449 OF 2014

RICHARD MBEVA NGUMBI...................................APPELLANT

-V E R S U S –

THE ATTORNEY GENERAL.................................RESPONDENT

(Being an appeal from the judgement of Hon. Mrs. Chesanga Senior Resident Magistrate Milimani Commercial Courts delivered on the 15th day of July 2014 in CMCC No. 12601 of 2005))

JUDGEMENT

1) Richard Mbeva Ngumbi the appellant herein, filed a compensatory suit against the Attorney General, the respondent herein, for injuries he sustained when he was hit by a motor vehicle.

2) The appellant alleged that while walking along Jogoo Road on 3rd June, 2003 he was hit by motor vehicle registration no. GK 589A Hyundai, belonging to a Government entity. The appellant did not sue the driver of the said car in his plaint, but instead sued the Attorney general. For this reason, the learned trial magistrate M. Chesang (Mrs) Senior Resident Magistrate in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts, dismissed the plaint. He said inter alia:-

> **"..................... The said driver is a necessary party to the suit and his failure to join him in the suit is fatal to the plaintiff's cases"(now appeal case.)**

3) Aggrieved by the judgement, the appellant preferred this appeal and raised the following grounds in its memorandum:

> ***1. The learned trial magistrate erred in law and in fact in holding that the plaintiff failed to prove negligence on the respondents.***
>
> ***2. The learned trial magistrate erred in law and in fact by concluding that failure to sue the driver therefore negligence on the respondent cannot be proved.***
>
> ***3. The learned trial magistrate erred in law and in fact by dwelling on the failure to use the driver to prove negligence and an excuse to dismiss the appellant's suit.***
>
> ***4. The learned trial magistrate erred in law and in fact by being influenced by unknown issues.***
>
> ***5. The learned trial magistrate erred in law and in fact in failing to exercise her discretion judiciously.***

4) When this appeal came up for hearing, the appellant successfully proposed for the appeal to be disposed of by written submissions. I have re-evaluated the case that was before the trial court and I have also considered the appellants submissions. The respondent had not filed his submissions at the time of writing this judgement.

5) The appellant put forward 5 grounds of appeal in its memorandum, However, I think these grounds can be argued in two broad grounds:

> *i. Whether the learned magistrate erred in law and fact in dismissing the suit for the appellants failure to sue the driver of motor vehicle GK 589A that caused the accident.*
>
> *ii. Whether the learned magistrate erred in law and fact in holding that it was necessary for the driver of GK 589A to be sued for negligence to be proved.*

6) The 1st ground of appeal is whether or not the learned magistrate erred in law and fact in dismissing the suit for the appellants failure to sue the driver of motor vehicle GK 589A that caused the accident.

7) The appellant sued the AG and never went ahead to establish the driver of the accident car GK 589A that hit him, to enjoin him in the suit. The police abstract did not also include or mention the driver of the accident car.

8) The appellant submits that the respondent had conceded liability at 30% : 70% and the respondent should have gone ahead to defend himself on other issues touching the suit like quantum. Moreso that the respondent is the representative of the government of Kenya and is properly sued in his capacity as a representative of all government departments. It is argued thatthe police covered one of their own and refused to indicate the name of the driver in the police abstract intentionally. The appellant states that liability is not only based on the negligence of the driver. The appellant prayed for the said suit be reinstated to proceed.

9) PW1 stated before the trial court that he was hit by car registration GK 589A. The treatment card and discharge note from Kenyatta National Hospital P.Exh 1(a) and (b) confirms that PW1 was injured. Police abstract Pexh. 2 indicates that the said road accident to have been reported. Pex. 3, the medical report of Dr. Okere indicates the extent of injuries suffered by the appellant. There was no defence witness called neither was the driver of the accident car enjoined in the suit because he was unknown to the appellant.

10) The trial magistrate held inter alia that:

> *"... the defendant who is sued is an office and it is obvious that the plaintiff has failed to sue the driver of the motor vehicle registration no. GK 589A, who so controlled the said motor vehicle so that the plaintiff sustained injuries. The said driver is a necessary party to the suit and his failure to join him in the suit is fatal to the plaintiff's case. For these two reasons, the plaint herein is dismissed."*

11) The test for establishing whether an employer is vicariously liable for his/her servants negligence was set out by the High Court in Joseph Cosmas Khayigila –vs- Gigi & Company Ltd and another CA 119/86 as follows:

> **"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owners 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 the performance of the task of duty thereby delegated to him by the owner."**

12) After a careful re-evaluation of the evidence before this court, I am convinced that the relationship of

master and servant having not been proved between the respondent herein and the driver of the accident car. I find that the respondent is to be held vicariously liable for the acts of the un –sued driver regarding the material accident. The trial magistrate's order dismissing the appellant's suit was erroneously and must be impugned.

13) The trial Magistrate dismissed this suit on the ground that the driver of the accident car had not been enjoined in the suit. The trial Magistrate erred in law in that the driver must not be a necessary party to a suit for negligence to be proved. This was reiterated by the Court of appeal case of **Kenya Bus Services Ltd –vs-Humphrey (2003) KLR 665;(2003)2 EA 519,**where the court of appeal held inter alia that:

> **".....where it is proven 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. This presumption is made stronger 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 there mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver,"**

It is therefore inconsequential to a suit whether the driver had not been enjoined, the trial Magistrate should have gone ahead to determine the issue of quantum, liability having been settled by consent by the parties during the trial.

14) The 2nd ground of appeal is whether or not the learned magistrate erred in law and fact in holding that it was necessary for the driver of GK 589A to be sued for negligence to be proved. The law is clear that he who alleges must prove. The principle is embedded in the **Evidence Act, Cap 80 of the Laws of Kenya, which stipulates that:**

> **"107(i) whoever desires any court to give judgment as to any legal light or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

15) In the end this Appeal is allowed. The case is remitted back to the trial court for fresh hearing before another magistrate of competent jurisdiction other than Hon. Mr. Chesang.

Dated, Signed and Delivered in open court this 17th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

........................for the Respondent