REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 155 OF 2012

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION...APPELLANT

VERSUS

J.P.K GATERI.....RESPONDENT

CONSOLIDATED WITH CIVIL APPEAL NO. 135 OF 2012

E. M. SHAKO.....APPELLANT

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....RESPONDENT

J.P.K GATERI.....RESPONDENT

***(Appeal from the original judgments and decree of Ole Keiwua (SRM) in Milimani Commercial Courts, CMCC No. 4433 of 2003, delivered on 16th* March 2012)**

JUDGMENT

1. The Respondent, **J.P.K Gateri,** sued**, Industrial &Commercial Development Corporation** for material damage suffered on 3rd April 1993 when he was driving along Ngong road in Nairobi. He claimed that the appellant or his servant drove motor vehicle registration number KSW 263 so negligently that he collided with the respondents motor vehicle registration number KZX 752 causing extensive damage. When the matter came up for hearing in the trial court, where the trial Magistrate found the appellant 100% liable and awarded the respondent a sum of kshs 495,144/= for damages. The two defendants were aggrieved by the decision of the lower court and filed their respective appeals. When the matter came up for hearing before this court on 19th October 2015, the parties recorded a consent to have the appeals consolidated.

2. The Appellants, aggrieved by the Trial Court's decision filed this appeal on

the following combined grounds:

1. ***The Learned Magistrate erred in law and in fact and misdirected himself by failing to consider at all the submissions made before him by the appellant and reached an erroneous conclusion thereby occasioning miscarriage of justice ;***
2. ***The Learned Magistrate erred in law and in fact an misdirected himself by failing to follow or ignoring binding authority of the court of appeal submitted before him and in the end made a***

decision per incuriam;

3. ***The Learned Magistrate erred in law and in fact an misdirected himself by awarding the plaintiff the sum of kshs 495,144/= in total disregard to subrogation;***
4. ***The Learned Magistrate erred in law and in fact an misdirected himself by holding that that the appellant jointly owned motor vehicle registration number KWS 263 with the 1st defendant;***
5. ***The Learned Magistrate erred in law and in fact an misdirected himself by holding that the appellant was 100% vicariously liable for the accident caused by the driver of motor vehicle registration number KSW 263 on 034.04.1993;***
6. ***The Learned Magistrate erred in law and in fact and misdirected himself by failing to consider the defendant's documentary and oral evidence on record to find that the plaintiff failed to prove his case against the appellant on a balance of probabilities;***
7. ***The Learned Magistrate erred in law and in fact an misdirected himself by failing to find that the respondent by himself did not testify and/or produce any documentary evidence to show that he was the owner of motor vehicle registration number KZY 752;***
8. ***The Learned Magistrate erred in law and in fact in failing to find that the evidence by the respondent's witnesses was at variance;***
9. ***The Learned Magistrate erred in law and in fact in failing to find that the evidence by the respondent witnesses did not support his pleadings;***
10. ***The Learned Magistrate erred in law and in fact by relying on evidence of an eye witness on the part of the respondent without independent and impartial corroboration.***
11. ***The Learned Magistrate erred in law and in fact in failing to address the issue of the defective plaint by the respondent;***
12. ***The Learned Magistrate erred in law and in fact in finding the appellants negligent on particulars that were not pleaded;***
13. ***The Learned Magistrate erred in law and in fact in reflecting in his judgment the written Sale agreement which was produced in evidence with no objection from the respondent and admitted by the court at the time of production;***
14. ***The Learned Magistrate erred in law and in fact in finding the appellants vicariously liable for acts of a stranger and addressing the law relating to vicarious liability;***
15. ***The Learned Magistrate erred in law and in fact in totally rejecting the sworn evidence of the appellant in the absence of the rebuttal thereto or evidence to the contrary.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In the civil appeal case of, **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

4. During trial the respondent, called his driver **Lucas Macharia Kamau**, who testified that he was driving motor vehicle number KZY 752 from Ngong and upon arriving at the Karen round about , he encountered a saloon car Toyota that was overtaking a pick up which was on his lane, he tried to swerve but was hit at the front tyre where the front axle was damaged and he lost control whereby he landed on a ditch. He stated that they carried a search to verify the owner of the vehicle and that the accident was reported to Karen Police Station but were referred to Langata.

He averred that the driver of the other vehicle was charged with a traffic offence.

5. The respondent also called PW2, **Silas Mbogholi** , a motor vehicle assessor who testified that he examined motor vehicle KZY 752 an established that there were various parts that were damaged with an estimated damage of kshs 471,688/=. He averred that he took photographs and prepared a report, which he produced as exhibit 2.
6. The next witness to testify in favour of the respondent's case was PW3, **Daniel Odero**, a UAP provincial Insurance Legal Clerk who testified that, the respondent had insured his motor vehicle with them and after the accident they assessed damages at a cost of kshs 491,324/=. He proceeded to produce a bundle of documents in support of his case.
7. The 1st appellant in the lower court adduced his evidence, where he stated that he came to know of the accident 4 years after he had sold motor vehicle registration no. KSW 263 to **Harrison Maina Kariuki** for kshs 20,000/= as scrap. He testified that there was an agreement between the two of them only that Mr. Harrison had not effected the transfer at the Kenya Revenue Authority, Motor Vehicle Registrars office.
8. I have re-evaluated the evidence as adduced in the lower court. When the matter came before this court, the parties recorded a consent to have the matter disposed of by way of written submissions. I have considered the submissions of the parties as filed in this court.
9. The 1st appellant submitted that the Magistrate erred in accepting a defective plaint which plaint did not stipulate the particulars of negligence as required by law under Order 6 Rule 8(1) of the Civil Procedure Rules, which was detrimental to the appellant. He argued that he adduced evidence to the fact that he had sold the motor vehicle to **Harrison Maina** hence proving his case on a balance of probability. He further submitted that the driver to the subject motor vehicle was a stranger to the appellant and therefore the principle of vicarious liability could not hold.

10. The 2nd appellant in his submissions argued that the trial court failed to ascertain liability on the part of the appellants since there was a contention as to ownership of the vehicle. The 2nd appellant argued that law demands that the person whose name is registered is the owner of the vehicle unless the contrary is proved, this was done since a sale agreement was adduced as evidence to prove that the vehicle was disposed of. It argued further that the police abstract showed the owner to be **Harrison Maina** and it could not fathom why the trial court ignored that compelling evidence. It asserted that it should not have been held 100% liable and the appellant had the onus of bringing 3rd party proceedings against the owner of KSW 263. It averred further that there was no evidence linking the appellants to the driver of the suit motor vehicle to warrant their being held vicariously liable. It averred that the trial magistrate in awarding kshs 495,144/= contravened the principal of subrogation since the claim ought to have been brought by the insurance firm itself and not through the respondent who had no right to lay claim for the alleged damages after being compensated by the insurance as that would amount to unjust enrichment.

11. The respondent on the other hand submitted that, the appellants were still the registered owners of the motor vehicle at the time of hearing of the suit in 2012 though the accident occurred on 3rd April 1993. He stated that the respondents presented to the trial court a copy of records issued on 23rd December 2003, 10 years after the accident that showed the appellants were the owners of the motor vehicle. He contended that mere production of the sale agreement did not prove that the appellants were not owners of the motor vehicle. He added that the appellant did not produce the alleged transfer document in court and if indeed they had transferred the motor vehicle they should have instituted third party proceedings against **Harrison Maina,** which they didn't. He argued that under section 9(2) of the Traffic Act, the appellants were required to inform the registrar of motor vehicles of the new owner to be registered as such. He asserted that without evidence to the contrary, the trial court rightly held the appellants vicariously liable. On the issue of lack of particulars of negligence, the respondent submitted that the same should not be considered in the spirit of Article 159 of the Constitution and section 1A of the Civil Procedure Act.

12. Having set out the background of this appeal, I now wish to consider the merits or otherwise of this appeal. I will address the grounds 1,2,6,13 and 15 together since they are somewhat

interrelated. The appellant claims that the Magistrate erred in failing to consider the submissions made before him by the appellants, ignoring the binding authority of the court of appeal submitted before him, failing to consider the defendant's documentary and oral evidence on record and rejecting the sworn evidence of the appellant in the absence of the rebuttal thereto or evidence to the contrary. I have perused the lower court record including the judgement it is clear that the appellant called one witness being the 1st appellant in this case while the respondent called 3 witnesses. The Magistrate in his judgement acknowledged that he had considered the testimonies and the appellants defence. The 1st appellant in his testimony attributed liability arising from the accident to one to **Harrison Maina** whom he claims to have sold the motor vehicle registration number KSW 263 which allegedly caused the accident. He adduced in court a Sale Agreement to prove the sale but did not adduce the transfer from which he claimed he left it to Harrison to effect the transfer. According to the Sale Agreement dated 1st October 1992, the subject motor vehicle which was a Datsun make, was sold to Harrison Maina. However, the 1st appellant did not bother to follow up and ensure the records at the Registrar of Motor Vehicle office were altered in line with the new ownership. As at 23rd December 2003, when the copy of records was obtained being 10 years later, the registered owner of the motor vehicle in question was still the 1st appellant herein. The Magistrate therefore considered the oral and documentary evidence before him to come to a conclusion that the motor vehicle belonged to the appellants .

13. On the issue of lack of consideration of the submissions as filed in the lower court, I am not sure why the appellants feel that their submissions were not taken into consideration by the Magistrate. I can only infer that may be it is because he did not categorically state that he had considered the submissions. A closer look at the submissions by the appellants that they are apprehensive that the Court of Appeal decision was not taken into consideration, they have referred to several decisions and they have not pointed out which decision they feel was not considered. I will not therefore consider this ground. I am of the view that the Trial Magistrate considered the oral and documentary evidence presented by the appellants contrary to their averments that he did not. He stated in his judgement on page two that he had considered the testimonies as well as the defence and addressed the sale agreement produced in court and generally captured the evidence in terms of testimonies as adduced by both the appellants and the respondent. I am therefore persuaded that he considered the evidence before him and addressed himself on the issues as presented before the court.

14. I wish now to consider grounds 7,8,9 and 10 of the appeal. The appellants claim that the Magistrate erred in failing to find that the respondent by himself did not testify and/or produce any documentary evidence to show that he was the owner of motor vehicle registration number KZY 752; in failing to find that the evidence by the respondent's witnesses was at variance; in failing to find that the evidence by the respondent's witnesses did not support his pleadings and by relying on evidence of an eye witness on the part of the respondent without independent and impartial corroboration. According to the court record, the respondent did indeed call his driver who was driving the motor vehicle at the time of the accident to testify. He was the best person to give evidence since he was present when the accident occurred. His evidence was uncontroverted by the appellants given that they did not call any witnesses to cast doubt on his evidence. The appellants cannot now claim that there was no corroboration at this time, since his evidence was convincing.

15. The appellants did not cast doubt on the ownership of motor vehicle KZY 752 in the lower court. They have not adduced any evidence that implies the ownership of the motor vehicle is suspicious. I therefore find it misleading and inappropriate to raise the issue of ownership at this juncture. Had they have raised the issue in the trial court, the matter would have been dealt with at that point, this particular ground cannot therefore be entertained on appeal unless a proper ground is laid to adduce additional evidence. On the question raised of the witnesses evidence being at variance, I note that the appellants have not shed light on the purported inconsistencies of the testimonies other than the allegations that PW1 referred the motor vehicle as Toyota saloon car at one point and a Subaru car Datsun at another, I have looked at the evidence of PW1 and he referred to the

car as a Toyota saloon and a car of Datsun make. The witness (PW1) cannot be said to be a motor vehicle expert to give a concrete distinction on the makes of motor vehicles. I therefore find the evidence adduced by the witnesses to be incontrovertible and in support of the pleadings.

16. The appellants further claim that the evidence of the eye witness was not corroborated, as I have stated earlier that is not the case, if there was another side of what transpired, then the appellants should have shed more light by calling witnesses to controvert the evidence adduced by PW1 whose evidence I find convincing without even calling witnesses to corroborate accounts of events as they happened.

17. The appellants have also under grounds 4,5 and 14 argued that the Magistrate erred by holding that that the appellants jointly owned motor vehicle registration number KSW 263, by holding that the appellant was 100% vicariously liable for the accident, in finding the appellants vicariously liable for acts of a stranger and failing to properly address the law relating to vicarious liability. Looking at the material placed before the court, there was a copy of records obtained from the registrar of the Motor Vehicles which shows that the subject motor vehicle was owned by the 1st and 2nd appellants, hence rightly sued as joint owners of the motor vehicle. There is also a police abstract that indicates, a **Mr. Harrison Maina** as the owner and a **Mr. Gerald Wachira** as the driver of the motor vehicle. The police abstract also indicates that other interested parties in connection with the accident include the two appellants in this case. Other material include, the sale agreement that shows that the motor vehicle was sold by the 1st appellant to **Mr. Harrison Maina**. Having considered the evidence before the court as a whole, it is imperative to consider the provisions of section 8 of the Traffic Act that provides that the persons whose name a vehicle is recorded and registered shall be considered as the owner of the motor vehicle unless the contrary is proved. The copy of records that emanates from the registrar of the motor vehicles is normally considered as prima facie evidence that the person named therein is the owner of the vehicle unless proof to the contrary is adduced. In this particular case, the appellants are presumed to be owners of the motor vehicle KSW 263 since their names are in still on record. The appellants claim that by adducing the sale agreement they have proved that they transferred the motor vehicle, I don't think that is enough proof of transfer of ownership. The appellants upon disposing the motor vehicle, if at all they did, should have adduced concrete proof to prove their case. Therefore, having failed to take the necessary legal steps to avoid being in the position they are in at the moment, it would have been prudent for the appellants to exercise their right as provided under Order 1 rule 15 of the Civil Procedure Rules to issue a third party notice, here being **Harrison Maina** and enjoin him in the proceedings to shed more light on whether he indeed was a beneficial owner of the motor vehicle.

18. I take note of the fact that each party expected the other to institute the third party proceedings against Harrison, as submitted in their respective submissions. However, from the wording of Order 1 rule 15 of the Civil Procedure Rules, the defendant, in this case the appellants were supposed to be the ones who instituted the third party proceedings since they claim to have sold the motor vehicle to Harrison, which motor vehicle they claim was no longer in their possession. They were better placed to locate Harrison and to comfortably enjoin him in the suit. Failure to do so, rendered them liable. Furthermore, the appellants did not adduce evidence to show that the respondent or his agent in any way contributed to the accident and I find the Magistrate rightly held them wholly liable.

19. The Court of Appeal in the case of **Kenya Bus Services Ltd v Dina Kawira Humphrey Civil Appeal NO. 295 OF 2000 [2003] eKLR,** the Court observed thus:

> ***"According to the pleadings, we are concerned here with the master's liability for his servants' torts. In such a case, it is the existence of the relationship of the master and servant which gives rise to vicarious liability – see Dritoo v West Nile District Administration [1968] EA 428 at page 435 paragraphs E-F). In Karisa v Solanki [1969] EA 318 the Predecessor of this Court said at page 322 paragraph 9 G. "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 v Sully (1931) 47 TLR 557)."***

The court is addressing Vicarious liability in the above case opined that where it is proved that a car caused damage as in this case, then where there is no evidence to the contrary there is a presumption that it was driven by a person for whose negligence the owner is responsible. As I stated earlier, the appellants did not prove that they had sold the motor vehicle. They further failed to enjoin the person that they claimed to have sold the motor vehicle to. In the absence of this enjoinder which as I said would have shed light on who should bear liability, I find that the appellants were correctly held liable for the actions of the driver of motor vehicle KSW 263 who they failed to prove was not working for them.

20. On the issue of subrogation, the appellant claim that the Learned Magistrate erred by awarding the plaintiff the sum of kshs 495,144/= in total disregard to subrogation. The appellants contention is that the respondent should not have brought this case in person but the claim should have been brought by the insurance firm since he had no right laying claim for the alleged damages after being compensated by the insurance. I have perused the court record, I cannot comprehend why the appellants are convinced that the plaintiff personally instituted the claim in this matter. The Insurance, UAP Provincial Insurance, through their legal clerk testified that they were claiming Kshs 495,144/= under subrogation rights. I therefore find that the suit was properly before the court and the respondent was not seeking unjust enrichment as claimed by the appellants.

21. Finally, the appellant has raised the issue of defective plaint for lack of particulars under grounds 11 and 12 of the Memorandum of Appeal. I have looked at the plaint dated 3rd April 1996 which plaint indeed lacks particulars of negligence. The respondent has dismissed the same as a technicality and pleaded Article 159 of the Constitution that justice shall be delivered without undue regard to procedural technicalities. He further referred to section 1A of the Civil Procedure Act which provides for the overriding objective of the Act. The appellants on the other hand claim that the plaint was defective since no particulars were pleaded as required under Order 6 Rule 8 (1) of the Civil Procedure Rules. While relying on Article 159 of the Constitution is imperative, the same is not supposed to be used to defeat justice for parties in a case where procedure is paramount. Parties are required to observe procedure and follow it to the later. The Supreme Court in the case of **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR,** stated that**:**

> " Kiage, JA in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR** stated: **"… I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost- effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…"**

22. I therefore don't think that is enough a reason for this court to allow the respondent to flout the rules, nonetheless, upon perusing the court record, I have established that the appellants only raised this point in the lower court in their submissions, they did not raise at the hearing of the suit. I agree that it is prudent to plead particulars of negligence but where these are not pleaded, the other party is at liberty to ask for the particulars and if the same are not forthcoming, then he can apply for the dismissal of the suit. The appellants in this case did not do so and only waited until the suit was heard to its conclusion only to raise that point during their submissions. I have

further looked at the plaint, it refers to the Defendant or his driver as havingnegligently managed or controlled motor vehicle registration number KSW 263 that it collided into the plaintiffs motor vehicle registration number KZX 752. This is in my view, is sufficient pleading to support the claim. I therefore find that, it is in the interest of justice to consider the plaint as it is and not dismiss the suit on this ground.

23. In the end, I find no merit in the appeal it is dismissed with costs to the respondent.

Dated and delivered in open court this 18th day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

……..……. for the Appellant

……..…….for the Respondent