REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 137 OF 2011

(CORAM: F. GIKONYO J)

ELIAS NJERU …….....……. 1ST APPELLANT

MICHAEL MURITHI NDWIGA..... 2ND APPELLANT

Versus

MEDRINIGO KIMWIRA ……. RESPONDENT

(Appeal from the judgment of Hon. S.M. Githinji Snr Principal Magistrate, in NKUBUSPMCC NO. 72 of 2009 delivered on 18th November 2011)

JUDGMENT

Appeal

[1] This appeal emanates from the judgment of Hon. S.M. Githinji Senior Principal Magistrate, in NKUBU SPMCC NO. 72 of 2009 delivered on 18th November 2011. In the judgment, the trial magistrate found the Appellants to be 10% liable and awarded the Respondent a sum of Kshs 230,000 and Kshs 12,531as General Damages and Special Damages respectively. The Appellants were aggrieved by the said judgment and filed this appeal. In the Memorandum of Appeal, they set out the following grounds of Appeal:

> ***1. THAT the Learned Magistrate erred in both law and fact by failing to find that the respondent had not proved her case on a balance of probabilities.***
>
> ***2. THAT the Learned Magistrate erred in both law and fact in by considering other extraneous matters in his judgment.***
>
> ***3. THAT the Learned Magistrate erred in both law and fact by finding the Appellants a 100% liable.***
>
> ***4. THAT the Learned Magistrate erred in both law and fact by relying on the evidence that was not adduced during the hearing.***
>
> ***5. THAT the Learned Magistrate erred in both law and in fact by finding that the 2nd defendant was negligent while the motor vehicle had been stolen by a tout.***
>
> ***6. THAT the Learned Magistrate erred in both law and in fact by finding that the 1st defendant***

was vicariously liable to the actions of a person who was not his employee.

7. THAT the Learned Magistrate erred in both law and in fact by disregarding the respondent's evidence that she jumped out of the moving vehicle injuring herself.

8. THAT the Learned, Magistrate erred in both law and in fact by disregarding the Appellant's evidence and submissions without any proper cause.

[2] On 3rd March 2016, upon consent of the parties, this court gave directions that this appeal shall be disposed of by way of written submissions. Parties accordingly filed submissions which I shall consider.

[3] The Appellants submitted that the Learned Trial Magistrate apportioned liability against the defendants erroneously. They gave two reasons for this position. First, it was manifestly clear that the defendants were not in control of the motor vehicle; because, at the time of the accident the 2nd Appellant was not the one driving the said motor vehicle. According to the Appellants, the Respondent had also stated this fact in her evidence. Second, a police officer had testified that the Respondent had jumped from the moving vehicle.Consequently, the Appellants argued that the Trial Magistrate took into account irrelevant factors in apportioning liability and left out the account of PW3's and the Appellants evidence in his findings.

[4] On the other hand it was submitted for the Respondent that the Appellant's Appeal lacked merit and that the trial magistrate properly found that the 2nd Appellant's action of leaving the subject motor vehicle at a public place unattended with its engine running and doors open was negligent. It was further submitted that the trial magistrate properly evaluated the evidence of all the witnesses in arriving at the decision to the effect that the Appellants' driver was wholly liable for the occurrence of the accident in issue. Consequently the Respondent urged that the Appeal had no merit and asked the court to dismiss it.

DETERMINATION

[5] This being a first appeal the court is obligated to analyse and reassess the evidence on record and reach its own conclusions except bearing in mind that it neither saw nor heard the witnesses when they gave their testimonies. See **SELLEvs. ASSOCIATED MOTOR BOAT COMPANY (1968) EA 123.**

[6] I have carefully considered the evidence and the rival submissions by the parties. I am prepared to summarize and cluster the grounds of appeal as follows:-

(1) That the Respondent did not prove her case on balance of probabilities. Under this ground, I will also consider other grounds which are inextricable, notably; that the trial magistrate erred in finding that the Appellants were 100% to blame yet he disregarded evidence that the Respondent jumped out of the vehicle, thus, injuring herself; and that the vehicle had been stolen by a tout who was not an employee of the 1st Appellant. The question of vicarious liability will invariably be discussed and determined here;

(2) That the trial magistrate relied on extraneous matters in his judgment. Here, the ground that the trial magistrate relied on evidence which had not been adduced to determine the case will be discussed; and

(3) The trial magistrate disregarded the evidence and submissions of the Appellants in making his decision.

[7] Two matters are not in dispute; that indeed an accident occurred on 2nd November 2008 in which the Respondent sustained injuries. But the controversy is on;

(1) Whether the Appellants are liable for the accident; and

(2) Whether the Respondent is entitled to damages, and if so, quantum thereof.

The Respondent testified that on the material day she sat on the front cabin near the diver. At the time, there were other passengers sitting behind her. They then set off for the journey. But, when they reached near Nkubu hospital, the vehicle was being driven at 140 to 160 KPH. She looked back but she could not see the other passengers on board. She, then, enquired from the driver why he was driving at such a high speed but her query did not elicit any response. She subsequently asked the driver to drive slowly or allow her to alight butthe driver said that he was escaping from the police. The driver immediately diverted at high speed into a rough road to Nkongo. All along the Respondent said thatshe did not see any police vehicle in chase. At the point of diversion into the rough road and at high speed caused the front door swung open and the belt released, and she fell out of the vehicle and got injured. She said she had sut the door tightly. In cross examination the Respondent repeated this testimony.

[8] PW2 testified on the injuries sustained by the Respondent. PW 3 on the other hand testified that the 2nd Appellant had left the vehicle unattended with engine running before an unknown tout drove the vehicle and that the Respondent jumped from the vehicle. He testified that the Respondent in her statement stated that she had been pushed out by the driver. The 1st Appellant corroborated PW3's evidence that indeed the 2nd Appellant had left the vehicle unattended whereupon a tout came and drove the vehicle.

[9] The Appellants called two witnesses. DW1 the owner of the vehicle registration No KAY 817U only reported what he had been told by DW2- his driver. Most notable thing is that his driver had told him that on 2/11/2008, while at Nkubu Stage, the driver had left the vehicle with its engine running to answer a short call. Then a tout drove it away and caused thee accident. DW2 confirmed that he had packed the vehicle to answer to a call of nature only to be called by his co-driver a Mr Munene that an unknown person had driven thee vehicle away.

Liability

[10] From the evidence, although DW2 testified that he had left his co-driver a Mr Munene, to be in charge of the vehicle, there is no doubt that the 2nd Appellant had left the motor vehicle herein unattended to and with engine running and doors open. DW2 was even charged with a traffic offence in criminal case NO 614 of 2008,and was convicted on his own plea of guilty for leaving a motor vehicle unattended to with engine running. The said Mr Munene was not called as a witness. Upon careful consideration of the evidence by DW2, whereas I may not wish to read too much from it, but it leaves too much to be desired especially on the way the events unfolded. That notwithstanding, it is possible that the motor vehicle in question was driven by a person other than the 2nd Appellant. Again, it is clear; at the material time, the vehicle was being driven at very high speed as result of which an accident occurred and the Respondent was injured. However, the evidence by the Respondent that the front door swung open, the belt released and she fell off the vehicle was highly disputed especially by PW3 who testified that the Respondent jumped out of a moving vehicle and was injured as a result. PW3 also testified that the Respondent in her statement had stated that she was pushed out of the vehicle by the driver. This mix was appreciated by and was properly evaluated by the trial magistrate in his decision. Below is his evaluation of the peculiar circumstances of this case:

> ***"From the available facts it is not clear whether the plaintiff jumped out of the said vehicle, was pushed out by the driver or accidentally fell out. I do consider that she is a woman, who was alone with a strange man in the vehicle. The vehicle was driven at a high speed and her pleas to the driver to slow down fell on deaf ears. What the driver eventually said was that he was running away from the police, and the plaintiff saw no police in pursuit. A person running away from the police is generally a criminal. The vehicle also left main road to a feeder road. The plaintiff could not tell the driver's intention with her. If she decided to jump out, given the circumstances, her action is reasonable and justifiable. Whichever of the three situations was the case she was not responsible for it and can't be apportioned liability. The defendants are therefore jointly and severally liable for the damages incurred by the plaintiff at 100%."***

[11] In these circumstances, it would be unjust to attribute any liability to the Respondent who was responding to the situation she found herself. I agree with the trial magistrate that despite the mix of things in this case, jumping out of such vehicle which being driven by a stranger would be reasonable and justifiable action for which a person cannot be held liable for contributory negligence. Accordingly, apportionment of liability does not arise. This will be clearer when I will be discussing vicarious liability below. I wish to state that the case of **BERKLEY STEWARD vs. WAIYAKI**which was cited by the Appellants is not exactly on similar facts as the ones before me and is clearly distinguishable.Again, I have scanned through the entire proceedings and judgment of the trial court with scrupulous care, but I do not see any extraneous matter that the trial magistrate took into account in his overall impression of the facts of the case as were presented before him.

Of vicarious liability

[12] From the evidence before the court, the 2nd Appellant was an employee of the 1st Respondent as the driver of motor vehicle registration number KAY 817U who inter alia bore the duty and obligation to secure the said motor vehicle at all times it is in his custody and use. On the material day, the 2nd Appellant left the said motor vehicle unattended to, with its engine running and doors open. Such vehicle could have been driven by any person as it happened here. Therefore, failure to secure the vehicle and leaving it unattended with the doors open and the engine running is an act of negligence on the part of the 2nd Appellant. And that negligent act by the 2nd Appellant invited this unfortunate accident. Accordingly, and I stated this earlier, the circumstances of this case were quite peculiar and apportionment of liability between the Respondent and the Appellants does not, therefore, arise. Perhaps, apportionment of liability would arise between the Appellants and the third party who they say was driving the vehicle; but was possible had they sought for contribution or indemnity from the said third party. However, that is not the case here and I will say no more on that possibility. The question now is: Whether the 1st Appellant vicariously liable for the tortious acts of the 2nd Appellant? Here I am guided by the law that vicarious liability arises only when the following two things co-exist, namely:

> **(1)** ***There was a relationship of master and servant between the Respondent and the person who committed the wrong complained of; and***
>
> ***(2) The servant committed the wrong in the course of his employment.***

As I have already stated, at the material time, the 2nd Appellant was employed by the 1st Appellant as the driver of motor vehicle registration NO KAY 817U. There was therefore, a master-servant relationship between the 1st Appellant and the 2nd Appellant; the latter is the person who committed the wrong being complained of herein. Again, the 2nd Appellant committed the said wrong in the course of his employment with the 1st Appellant. Invariably, the 2nd Appellant as the driver was under a duty to secure the employer's vehicle at all times. Accordingly, the ingredients for vicarious liability exist in this case. As such, I find that the 1st Appellant is vicariously liable for this tort committed by the 2nd Appellant. On this basis, I do not find anything on which to fault the Learned Trial Magistrate for finding the 1st Appellant vicariously liable for the acts of the 2nd Appellant. I have considered the following rendition by the trial magistrate said in finding the 1st Appellant vicariously liable for the acts of the 2nd Appellant, that:

> ***"It's foreseeable to a prudent person that a vehicle left unattended, with its engine running, and doors open can be driven by anyone. Such driver, whether qualified or not, can cause damage. The 2nd defendant action of leaving the motor vehicle at a public place unattended, with its engine running, and doors open, was negligent. It was foreseeable to him that such action could cause damages as it did in this case. He can't therefore escape liability. He had not left the vehicle attended to by the conductor. If that was the case the conductor would not have allowed the tout in the vehicle to drive it, and the 2nd defendant would not have pleaded guilty to the traffic offence, of leaving a vehicle with its engine running unattended. There's no dispute in this case that the 2nd defendant at the time was an employee or agent, in this cause of his or her***

employment binds the employer or master vicariously. The 1st defendant is therefore held vicariously liable."

And I say to the learned trial magistrate (now a judge) as WakiJ.Adid in **P AOKELLO AND ANOTHER T/A KABURUOKELLO AND PARTNERS vs. STELLA KARIMIKOBI AND 2 OTHERS CIVIL APPEAL NO. 183 OF 2003**that:

"***In assigning vicarious liability, the learned judge [read trial magistrate] appreciated correctly that it arises when tortuous act is done in the scope or during the course of his employment."[Addition mine]***

Contrary to the submission by the Appellants, the trial magistrate considered all the evidence and evaluated it accordingly. He came to correct conclusion that the Appellants were 100% to blame for the accident. Consequently nothing turns on the grounds on liability. Those grounds fail and are hereby rejected.

Quantum

[13] I now turn to quantum of damages. Although there was no particular ground on quantum of damages, I note the parties addressed the issue of quantum of damages in their submissions, thus, it is matter before me for determination. Similarly, the general arguments presented and the core of the appeal makes the question of quantum of damages a corollary matter. Accordingly, I will determine the question of quantum of damages. The Learned Trial magistrate awarded the Respondent Kshs 230,000 as general damages and Kshs 12, 531 as special damages. I do not want to reinvent the wheel. Quantum of damages is a matter of the discretion of the trial court. Accordingly, the appellate court will only interfere with the exercise of discretion on quantum of damages only in circumstances set out in the case of **KENYA BUS SERVICES LIMITED vs. JANE KARAMBUGITUMA CIVIL APPEAL CASE NO 241 OF 2000** by the Court of Appeal when it stated thus:

"…in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

[14] Applying this test, the Appellants simply argued that the trial magistrate based the award of damages on an erroneous finding on liability and it should, therefore, be overturned. Now that I have found that the Appellants were 100% liable for the damage suffered by the Respondent, I would say that the said argument does not hold sway any more. The medical report produced in court shows that the Respondent sustsined; whiplash injury of the neck; bruise on the right hip; 2 bruises on the face; and bruises on the right shoulder, right elbow and right forearm. The doctor opined that the Respondent sustained a spinal injury and sift tissue injuries which, although have healed have left her with post-traumatic spondylosis of the cervical spine. Thus, the neck pain was expected to persist. These injuries are serious as they carry post-traumatic spondylosis with a possibility of perpetual neck Pains. The trial magistrate captured the injuries sustained and the post effects. He also considered inflation and awarded a sum of Kshs. 230,000 as general damages which I am satisfied is fair compensation for these injuries. There is nothing that the Appellants presents which*show that the award of damages was inordinately high or low so as to represent an entirely erroneous estimate or damages or that the magistrate proceeded on wrong principles*(as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach)*or that he misapprehended evidence so as to arrive at a wrong figure. Consequently I will not disturb the award by the Learned Trial Magistrate.The special damages were proved and I also award them as prayed in the plaint. Taking into account that totality of the circumstances in this case, I find this appeal to be without merit and I accordingly dismiss it with costs to the Respondent. It is so ordered.*

Dated, signed and delivered in open court at Meru this 21st July 2016

F. GIKONYO

JUDGE

In the presence of :

Mr. Gitonga advocate for respondent

Mr. Ithiga advocate for appellants - absent

F. GIKONYO

JUDGE