



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 56 OF 2011

JOHNSTONE MUTUKU KILANGO..... APPELLANT

VERSUS

ELIJAH WAMBUA RESPONDENT

(An appeal from the Judgment of Hon. Aminga, in Kwale Senior Resident Magistrate's Court Civil Case No. 211 of 2010 delivered on 19th March, 2011)

1. The appellant Johnstone Mutuku Kilango being dissatisfied with the judgment delivered on 29th March, 2011 by Honourable Aminga SRM in Kwale SRMCC No. 211 of 2010, filed a Memorandum of appeal on 18th April, 2011, raising the following grounds of appeal:-

- (i) That the Learned magistrate erred in both law and fact by failing to find that the respondent was liable for an accident which occurred on 24th March, 2010;
- (ii) That the Learned magistrate erred in both law and fact in dealing with the issue of liability yet there was already interlocutory Judgment (sic) against the defendant and the issue of liability was foreclosed;
- (iii) That the learned magistrate erred in both law and fact by failing to appreciate that the defendant did not tender any evidence;
- (iv) That the Learned magistrate erred in both law and fact by failing to appreciate that interlocutory judgment had been entered against the 1st defendant and the case was for assessment of damages;
- (v) The Learned Magistrate erred in both law and fact in applying the wrong principle of law on the issue of vicarious liability;
- (vi) The Learned magistrate erred in both law and fact in finding that the Defendant's authorized driver ought to have been joined as a party in the proceedings for the suit to succeed; and
- (vii) That the Learned magistrate erred in both law and fact by failing to consider the appellant's written submissions.

2. When the appeal came up for highlighting of submissions, the respondent did not attend court. Counsel for the appellant informed the court that she was relying on her written submissions filed on 14th

September, 2012. The highlights of the same are that an interlocutory Judgment having been entered, the issue of liability was foreclosed and the court's jurisdiction was on the issue of assessment of damages and not on revisiting the issue of liability. Counsel cited the case of **Martha Shighadai vs Kenya Power and Lighting Company Limited & Paulo Okombo**, HCC No. 55 of 1986 (Mombasa) to support the foregoing argument. Ms. Osino also indicated in her submissions that the learned magistrate erred by holding that the respondent was not liable in negligence since the driver had not been joined as a party to the proceedings. She enumerated the following cases to support her assertion;

- (i) Samuel Gikuru Ndungu vs Coast Bus Company Ltd, Civil Appeal No. 177 of 1999 (Nairobi);
- (ii) Geoffrey Chege Nuthu vs Ms Anverali & Brothers, Civil Appeal No. 68 of 1997 (Nakuru)
- (iii) Vyas Industries vs Diocese of Meru, Civil Appeal No. 23 of 1976 (Nairobi); and
- (iv) Nzole Mwachiti Lugo vs Mrima Hamisi Pole, HCCC No. 57 of 2011 (Mombasa).

ANALYSIS AND DETERMINATION

The issues for consideration and determination are if:-

- (i) The respondent is vicariously liable for the acts or omissions of his Driver; and
- (ii) If the appellant is entitled to general and special damages.

3. The duty of the first appellate court is to re-evaluate and analyze the evidence adduced before the trial court and reach its own independent decision. It was however held in **Peters vs Sunday Post Limited** [1958] EA 424 that this jurisdiction has to be exercised with caution. The court stated thus:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand. This jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

4. Interlocutory Judgment was entered on 28th July, 2010 after the defendant failed to enter appearance and to file a defence. The learned trial magistrate then proceeded to formal proof. The appellant, Johnstone Mutuku Kilingo, adduced evidence as PW1. He stated that he had sued the respondent who was the owner of motor vehicle registration No. KBA 264K. His evidence was that he was travelling from Msabweni to Kikoneni aboard the said vehicle when an accident occurred at Kivuleni area. He had paid Kshs. 100/= fare. The appellant stated that the vehicle which was being driven at a high speed suddenly veered off the road and started swaying before landing in a ditch where it overturned. He was injured on the legs, waist, the right hand and at the back. He was taken to Kikoneni Health Centre before being transferred to Msabweni District Hospital, where he was treated and discharged. He produced his treatment records from both facilities as p exhibit 1(a) and (b). He continued attending hospital for two weeks. As at the time of the formal proof, he had not fully recovered. The appellant produced a P3 form and a police abstract report as p exhibit 2 and 3 respectively. He informed the court that his lawyer referred him to Dr. Ndegwa who examined him and prepared a medical report for which he paid Kshs. 2,000/=. The appellant produced the report as p exhibit 4 and the receipt for the same as p exhibit 5. He also produced a demand letter sent to the defendant before the appellant filed suit which he produced as p exhibit 6. The appellant blamed the defendant for the accident and injury as the driver was over speeding and he was not careful. He sought compensation for the injuries as well as costs.

5. The evidence of the appellant that he was injured whilst travelling aboard the respondent's motor vehicle was not controverted as the respondent failed to enter appearance and file a defence leading to an interlocutory judgment being entered against him. Although the appellant when giving evidence at formal proof did not give the date when the accident occurred, it is discernible from the police abstract

report that the accident happened on 24th May, 2010. The P3 form and medical report shows that the appellant sustained injuries as a result of the said accident. The medical report dated 26th May, 2010 that was produced as p exhibit 4, shows that the appellant sustained a blunt trauma on the right knee, blunt trauma on the right ankle, 3x4 cm bruises on the right shin just below the knee, blunt trauma on the right hip and blunt trauma on the lower back. The Doctor concluded his report by stating that the appellant received soft tissue injuries and full healing was expected with no permanent disability.

6. In his judgment, the learned trial magistrate held that since the Driver was undisclosed in the plaint and was not joined as a party to the suit, the owner of the motor vehicle could not be held liable thus the case had not been proved on a balance of probabilities.

7. Order 1 rule 3 of the Civil Procedure Rules provides as follows:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

8. It is apparent from the foregoing provisions of law that the appellant did not err when he opted to sue the owner of the motor vehicle instead of suing the owner and the driver jointly. It is therefore the finding of this court that failure of the appellant to join the respondent's driver to this suit is not fatal to the appellant's case. The court of appeal when considering a similar issue in the case of **Mwonia vs Kakuza Limited** (1982 – 88) 1 KR 525 had the following to say:-

“From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in the damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings, and of the claim. Vicarious liability of the employer is not pegged on the employee's liability but to his negligence.”

9. In the case of **Ormod vs Crossville Motor Service** [1973] 2 ALL ER at page 753, Lord Denning (as he then was) summed up the liability of an owner of a motor vehicle for the negligence of his driver thus:-

“it has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is with the owner's consent, driving the car on the owner's business or for the owner's purposes.”

10. In the case of **Kenya Bus Services Limited vs Humphrey** [2003] KLR 665, the Court of Appeal held that:-

“... 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. The 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 the mere fact of lending does not itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.”

11. The appellant's evidence was that he was a fare paying passenger aboard the respondent's motor vehicle when the accident happened. The only presumption that can be drawn from the foregoing, in the absence of evidence to the contrary, is that the person who was driving the respondent's motor vehicle was so driving with the consent of the respondent. The appellant sustained injuries as a result of the accident due to the carelessness on the part of the driver. For the said reasons, the respondent is vicariously liable for the actions of his driver.

12. On the issue of general damages, the medical report shows that the appellant suffered soft tissue injuries. The Court of Appeal in the case of **Purity Wambui Muriithi vs Highlands Mineral Water Co. Ltd.** [2015] eKLR upheld the decision of Judge Wakiaga in Nyeri HCC Appeal No. 12 of 2012 where he awarded Kshs. 150,000/= for soft tissue injuries. In the case of **Francis Ochieng & Another vs Alice Kjimba** [2015] eKLR, Civil Appeal No. 23 of 2015, Judge Majanja made an award of Kshs. 280,000/= for multiple soft tissue injuries after considering inflationary trends.

13. In the present case, the learned trial Magistrate misdirected himself when he held that the respondent was not vicariously liable. I therefore set aside the Judgment of the lower court and allow the appeal. Taking a cue from the Judgment of Judge Majanja delivered in the year 2015, I am of the view that a sum of Kshs. 250,000/=, which I hereby award, is adequate compensation for the soft tissue injuries sustained by the appellant. This figure takes into account the inflationary trends since the date of the accident in the year 2010. Special damages of Kshs. 2,000/= for the medical report were proved. The same is awarded. Costs are also awarded to the appellant. Having taken into account inflationary trends from the year 2010, interest will run from the date of this Judgment.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of October, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Oyier holding brief for Ms. Osino for the appellant

No appearance for the respondent

Mr. Oliver Musundi Court Assistant