



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 11 OF 2014

JACKSON MUSAU KALEMBE.....APPELLANT

VERSUS

PRIME BANK LIMITED.....1<sup>ST</sup> RESPONDENT

R. K. SANGHANI.....2<sup>ND</sup> RESPONDENT

(Being an appeal from the Judgment of Senior (sic) Resident Magistrate

Honourable E.M. Kadima (RM) delivered on 11<sup>th</sup> August 2014 in Voi

Senior Resident (sic) Magistrate's Court Civil Suit No 55 of 2012)

VOI PMCC (sic) 55 OF 2012

JACKSON MUSAU KALEMBE.....PLAINTIFF

VERSUS

PRIME BANK LIMITED.....1<sup>ST</sup> DEFENDANT

R. K. SANGHANI.....2<sup>ND</sup> DEFENDANT

### JUDGMENT

#### INTRODUCTION

1. In his judgment delivered on 24<sup>th</sup> November 2014, Hon E.M. Kadima, Resident Magistrate at Voi Law Courts dismissed the Appellant's suit and ordered that each party bear its own costs.

2. Being dissatisfied with the Judgment of the said Learned Trial Magistrate, the Appellant filed his Memorandum of Appeal dated 4<sup>th</sup> September 2014 on 10<sup>th</sup> September 2014. The grounds of appeal were as follows:-

1. **THAT the Honourable Magistrate erred in law and in fact by finding that the appellant was the driver of Motor Vehicle Registration number KBZ 008Z.**
2. **THAT the honourable magistrate erred in law and in fact by failing to consider that the judgment in default of appearance entered against the 1<sup>st</sup> defendant(sic).**
3. **THAT the honourable magistrate erred in law by failing to assess the quantum of damages payable to the plaintiff.**
4. **THAT the honourable magistrate erred in law and in fact by failing to consider the documentary evidence provided by the plaintiff in support of his claim as against the defendants.**

5. **THAT the honourable magistrate erred in law in wrongly applying the doctrines of equity-**

i. - **he who comes into equity must come with clean hands.**

ii. – **he who seeks equity must do equity.**

6. **The honourable magistrate erred in law and in fact by failing to find that the appellant had proved his case as against the respondents on a balance of probability.**

3. The Appellant's Record of Appeal was dated 4<sup>th</sup> September 2014 and filed on 25<sup>th</sup> May 2016. His Supplementary Record of Appeal was filed on 30<sup>th</sup> May 2016 and filed on 30<sup>th</sup> June 2016. His Written Submissions were dated and filed on 15<sup>th</sup> September 2016. The Respondents' Written Submissions and List of Authorities were both dated 29<sup>th</sup> September 2016 and filed on 3<sup>rd</sup> September 2016.

4. When the parties appeared before the court on 31<sup>st</sup> October 2016, they requested for a Judgment date herein having relied entirely on their respective Written Submissions. This Judgment was therefore based on the said Written Submissions.

### **LEGAL ANALYSIS**

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

6. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

**“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”**

7. Having the aforesaid holding in mind and having looked at the Appellant's grounds of appeal and the parties' respective Written Submissions, it was clear to the court that the issues for consideration and determination were ideally the following:-

a. **Who was liable for the accident herein and to what extent?**

b. **Was the Appellant entitled to any general damages?**

8. The said issues were therefore dealt with under the distinct heads shown hereinbelow.

### **I. LIABILITY**

#### **A. WHO WAS THE DRIVER OF THE MOTOR VEHICLE REGISTRATION NUMBER KBK 008 Z**

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9. The Appellant testified that on 24<sup>th</sup> January 2011, he was a passenger in Motor Vehicle Registration Number KBK 008Z that was being driven along Mombasa- Nairobi when it was hit by Motor Vehicle Registration Number KAX 341M at Ndii Area near Voi.

10. He blamed the driver of Motor Vehicle Registration Number KAX 341M for having caused the said accident because he said the said driver carelessly drove and entered the tarmac road without being thoughtful of other road users.

11. He was adamant that he was not the driver of Motor Vehicle Registration Number KBK 008Z at the material time of the accident. During his Cross-examination, he stated that he could not remember whether the driver of the Motor Vehicle he was travelling in was a Kenyan or Ugandan national. He tendered in evidence a Police Abstract Report that was dated 9<sup>th</sup> June 2011 in support of his case.

12. No 81871 PC Josphat Tanui (hereinafter referred to as “PW 2”) informed the Trial Court that he was not the Investigating Officer in the matter herein. He stated that “they” did not have the official position of who was to blame for the said accident but the vehicle, which he did not specify, was on the edge of the road.

13. On his part, Kassim Odongo Owegi (hereinafter referred to as ‘DW 1’) stated that he was driving the 2<sup>nd</sup> Respondent's Motor Vehicle Registration Number KAX 341M to Ndii along Mombasa – Nairobi Road when it stalled. He parked the said Motor Vehicle on the left side of the road and put life saver signs a hundred (100) metres away. He testified that his Supervisor Joseph Ndima Mutuandei (hereinafter referred to as “DW 2”) then came to his assistance.

14. It was his testimony that as they were trying to fix the said Motor Vehicle, they had a loud bang. They checked and found that the said Motor Vehicle had been hit by Motor Vehicle Registration Number KBK 008Z, which was badly damaged on the passenger side.

15. He said that a person came out of the windscreen of the said Motor Vehicle Registration Number KBK 008Z. He said that he also saw a person who was barely conscious "clinging bent" (sic) beneath the said Motor Vehicle. It was his evidence that this person died at the passenger seat. He stated that he entered the said Motor Vehicle from the driver's side and found the driver's foot trapped on the clutch. However, as the driver's door had jammed, they removed the driver through the Motor Vehicle's windscreen and rushed him to Hospital. He was emphatic that the Appellant herein was the driver of the said Motor Vehicle at the material time.

16. DW 2 was an Operations Manager at Wanjalla Mining. He confirmed that he had gone to DW 1's assistance when his Motor Vehicle stalled. He stated that while there, he heard a loud bang and saw a person come out the windscreen of the Motor Vehicle that had hit them. He reiterated DW 1's evidence that they removed the driver of the said Motor Vehicle through the windscreen.

17. It was his evidence that the driver of Motor Vehicle Registration Number KBK 008Z was to blame for the accident as he hit the 2<sup>nd</sup> Respondent's Motor Vehicle Registration Number KAX 341M while it was off the road. In their evidence, the Respondents tendered in evidence an Investigation Report dated 18<sup>th</sup> February 2011 which blamed the Appellant herein for having caused the said accident herein and emphasised that he was the driver of the Motor Vehicle Motor Vehicle Registration Number KBK 008Z at the material time.

18. Evidently, there were no photographs of the aforesaid two (2) Motor Vehicles at the scene of the accident. There were also no sketch plans by the police essentially making this case one of one person's word against the other. This necessitated this court to fall back on the documents that had been furnished to the Trial Court by the parties herein to try and establish if it could unravel what transpired on that material date.

19. The Police Abstract that the Appellant relied upon showed that he was a passenger at the material time. In that Police Abstract Report, the drivers were shown to have been Isa Mustafa and Silaji. Silaji's second name was illegible. However, in the Investigation Report it was indicated as "Mbiru". The said Police Abstract Report showed that the matter was pending under investigations (PUJ).

20. The second Police Abstract Report dated 17<sup>th</sup> February 2011 was annexed to the aforesaid Investigation Report. It indicated that the Appellant was a passenger with an emphasis that he was a turnboy. Isa Mustafa was now shown to have been a passenger while Silaji's status remained that of a driver. Similarly, it also showed that the matter was pending under investigations.

21. There was no doubt in the mind of this court that the Appellant herein was evasive in disclosing the capacity under which he was travelling in Motor Vehicle Registration Number KBK 008Z. In his testimony, he merely stated that he was "travelling in the said Motor Vehicle." It was only at the conclusion of his testimony and during Cross-examination that he said that he was a passenger. In his Complaint dated 5<sup>th</sup> December 2011 and filed on 24<sup>th</sup> May 2012, he also said that he was "travelling aboard the said Motor Vehicle."

22. It was apparent to this court that the Learned Trial Magistrate's Judgment accepted DW 1's and DW 2's evidence that the Appellant was the driver of Motor Vehicle Registration Number KBK 008Z because the said Appellant could not explain how he was found trapped in the clutch of said Motor Vehicle.

23. Having heard the evidence of the witnesses in the Trial Court and having observed their demeanour, he was perfectly entitled to arrive at the conclusion that he did. He was also perfectly entitled to rely on the doctrines of equity to assist him in making a decision relating to the Appellant's contentions of the capacity he was travelling in the said Motor Vehicle.

24. Be that as it may, bearing in mind the discrepancies between the Appellant's and DW 1's and DW 2's evidence vis-à-vis the documentary evidence of the two (2) Police Abstract Reports, this court found that it was much safer to rely on the said Police Abstract Reports as they had both specifically indicated that the Appellant herein was a passenger at the material time.

25. For the reason that there was no other evidence contrary to the Police Abstract Reports that had been issued by the police, this court came to the firm conclusion that the Appellant herein was a passenger and not a driver as the Respondents had contended or as the Learned Trial Magistrate had found in his decision.

## **B. INTERLOCUTORY JUDGMENT AGAINST THE 1<sup>ST</sup> RESPONDENT**

26. The Appellant argued that the Learned Trial Magistrate ought to have assessed damages in his favour as against the 1<sup>st</sup> Respondent herein because interlocutory judgment had been entered against it in accordance with Order 10 Rule 7 of the Civil Procedure Rules, 2010. He therefore urged this court to set aside the Learned Trial Magistrate's finding as regards the 1<sup>st</sup> Respondent's liability and award him damages.

27. The Respondents submitted that the 1<sup>st</sup> Respondent was the 2<sup>nd</sup> Respondent's financier for the purchase of Motor Vehicle Registration Number KAX 341M and it could not therefore have been found liable in negligence. It referred this court to the cases of **Ali Lali Khalifa & 8 Others vs Pollman's Tours & Safaris [2003] eKLR** and **Equity Bank Limited vs Naftal**

**Anyumba Onyango & 2 Others [2014] eKLR** in which it was held that a financier could not be found liable in negligence as its name merely appeared in the Copy of Records to protect its interests after advancing a loan.

28. This court fully associated itself with the holdings in the aforesaid two (2) cases to the effect that the 1<sup>st</sup> Respondent could not be held vicariously liable for the actions of the 2<sup>nd</sup> Respondent's driver because first, it was merely a financier who was perfectly entitled to have its name in the Copy of Records to safeguard its interests and secondly, the said driver was not its employee.

29. Indeed, vicarious liability can only be invoked against an employer where a third party suffers loss, damage or injury due to negligent actions of such employer's employee while that employee is in the ordinary course of his employment. DW 1 was not the 1<sup>st</sup> Respondent's employee. In fact, at the material time, he was in the ordinary course of the 2<sup>nd</sup> Respondent's employment.

30. Consequently, without belabouring this point, this court thus concurred with the Respondents' submissions that no liability could attach against the 1<sup>st</sup> Respondent and for that reason, no damages could be awarded against it.

31. Going further, Order 10 Rule 4 (1) of the Civil Procedure Rules, 2010 under which interlocutory judgment in default of appearance and defence can be entered against a defendant in a claim, clearly stipulates as follows:-

**“4. (1) Where the plaintiff makes a liquidated demand only (emphasis court) and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit (emphasis court), at such rate as the court thinks reasonable, to the date of the judgment, and costs.”**

32. Evidently, entry of interlocutory judgment where there is no liquidated demand is clearly irregular and would require to be set aside. This very court had the occasion of dealing with the issue of irregular entry of interlocutory judgment in the case of **Ezekiel Kamau vs Muchoki Mwai Wilson [2015]** and held that no interlocutory judgment could be entered against a defendant who had not entered appearance where there was no claim and/or demand for a liquidated sum.

33. The Court of Appeal also rendered its opinion on this issue in the case of **Mint Holdings Ltd & Another vs Trust Bank Ltd [2000] eKLR** where it stated as follows:-

**“The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgment in any event. As pointed out there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such interlocutory judgment was irregular as Order IXA (now Order 10) of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof.”**

34. As has been seen hereinabove, no interlocutory judgment could be entered against the 1<sup>st</sup> Respondent herein even if it failed to enter appearance and/or file a defence because the Appellant had not claimed any liquidated sums in his claim. Notably, in his Plaint, he had prayed for the following reliefs:-

- a. **General damages**
- b. **Costs of this suit**
- c. **Interest on (a) and (b) above at Court rates till payment in full.**

35. For the foregoing reasons, entry of interlocutory judgment against the 1<sup>st</sup> Respondent had no legal basis. It was irregular and a nullity *ab initio*. Accordingly, the same is hereby set aside.

### **C. APPORTIONMENT OF LIABILITY**

36. Having found that the 1<sup>st</sup> Respondent could not be held liable in the circumstances of this case, this court was therefore left to determine who between the drivers of the two (2) Motor Vehicles was to blame for the accident and the extent thereof.

37. DW 1 said that he had placed the life saver sign a hundred (100) metres from where he had parked his Motor Vehicle Registration Number KAX 341M. On his part, the Appellant contended that the said Motor Vehicle hit Motor Vehicle Registration Number KBK 008Z, in which he was a passenger, as it was entering the tarmac. He denied having seen any sign to indicate that the said Motor Vehicle Registration Number KAX 341M had broken down.

38. As both Police Abstract Reports that were relied upon by the parties had clearly stated that the accident was pending under investigations, it was practically impossible for this court to make a determination who between the two (2) drivers of the said Motor Vehicle was to blame for the accident herein.

39. The Investigation Report was also prepared at the 2<sup>nd</sup> Respondent's instance and may not be objective. Indeed, PW 2 did

state during Cross-examination that the police were not involved in its preparation.

40. The matters were not made any easier by the Appellant who only sued the 2<sup>nd</sup> Respondent for the injuries that he sustained. If he was indeed a passenger in Motor Vehicle Registration Number KBK 008Z, then at least he ought to have filed suit against the 2<sup>nd</sup> Respondent which owed him a duty of care while he was being driven in the ordinary course of his employment.

41. Failure to file suit against his employer led this court to make a negative inference and entertain the possibility that the Appellant might actually have been the driver of Motor Vehicle Registration Number KBK 008Z at the material time and was not authorised to drive as had been observed by the Learned Trial Magistrate, which this court only rejected because there were Police Abstract Reports showing that he was a passenger therein.

42. Indeed, his evidence as to what transpired was scanty and did not correspond to the damage that was caused to Motor Vehicle Registration Number KAX 341M. If as he had stated Motor Vehicle Registration Number KAX 341M emerged from the side of the road and entered into the tarmac without due regard to other road users, it would then been expected that the impact of damage to the Motor Vehicle Registration Number KAX 341M would have been on the driver's side.

43. However, the photographs annexed to the Investigation Report clearly showed that Motor Vehicle Registration Number KAX 341M was hit on the rear right side implying several scenarios which cannot all be set out in the Judgment herein. One of the scenarios could have been that the said Motor Vehicle was parked on the road with part of its body jutting into the main road.

44. This could have explained why the police had been indicated in the said Investigation Report to have opined that if there was any one who was to be charged for having caused the accident herein, then it could only been DW 1 who could have been charged with the offence of causing death by obstruction.

45. Another possible scenario could have been that the driver of Motor Vehicle Registration Number KBK 008Z negligently controlled, drove and/or managed which veered off the road and hit Motor Vehicle Registration Number KAX 341M thus occasioning it the said damage.

46. This court formed an opinion that the Appellant was being economical with the truth during the trial as he purported not even to remember whether the driver of Motor Vehicle Registration Number KBK 008Z was a Kenyan or Ugandan national and more particularly, he was very vague of the capacity in which he was travelling in the said Motor Vehicle. Indeed, his scanty evidence of how the said accident occurred was insufficient for this court to have attempted to construct what really could have transpired on that material date.

47. As an appellate court must at all times have at the back of its mind that a trial court had the advantage of hearing the evidence of witnesses first hand and formed an opinion about their demeanour, it must exercise restraint and/or caution when considering to interfere with a trial court's observations in this regard.

48. The Learned Trial Magistrate observed the demeanour of DW 1 and DW 2 and found their evidence to have been unshaken or uncontroverted during the hearing. As there was no conclusive finding by the police or any concrete evidence as to which of the two (2) drivers of the aforementioned Motor Vehicles was to blame for the said accident, this court was of the considered view that it would be engaging itself in speculation if it attempted to apportion liability between the said drivers. It would actually be plucking figures from the air and attaching some degree of liability against the same to the 2<sup>nd</sup> Respondent when it was not even certain who was to blame for the accident herein.

49. For the foregoing reasons, this court found itself in agreement with the Respondents' submissions that liability was never proven to the required standard. In other words, the Appellant had failed to prove his case on a balance of probability. Based on the evidence that was before him, the Learned Trial Magistrate's acted correctly when he arrived at the conclusion that he did. There was therefore no legal basis for this court to interfere with his decision in the matter herein.

## **CONCLUSION**

50. Accordingly having considered the Appellant's Memorandum of Appeal, his Written Submissions and those of the Respondents, this court came to the firm conclusion that for the reason that the Appellant did not prove his case on a balance of probability, this court was unable to assess damages that would have been payable to him. Indeed, assessing damages without knowing how to apportion the same would have been an exercise on futility.

51. If he Appellant had at least enjoined the 2<sup>nd</sup> Respondent as a party to this suit, there could have been a possibility of him having been awarded some damages for the injuries that he would have sustained while in the course of the said employment because the 2<sup>nd</sup> Respondent owed him a duty of care while he was being driven in the ordinary course of employment.

## **DISPOSITION**

52. For the foregoing reasons, the upshot of this court's Judgement was that the Appellant's Appeal that was dated on 4<sup>th</sup> September 2014 and lodged in court on 10<sup>th</sup> September 2014 was not successful and the same is hereby dismissed.

53. Bearing in mind that the Appellant had told the Trial Court that he was a watchman, his economic status would not match

that of the 2<sup>nd</sup> Respondent which was engaged in lucrative commercial business. In the premises foregoing, this court hereby directs that each party will bear its own costs of this appeal.

54. It is so ordered.

**DATED** and **DELIVERED** at **VOI** this **29<sup>TH</sup>** day of **NOVEMBER** 2016

**J. KAMAU**

**JUDGE**