



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 464 OF 2010

GENERAL MOTORS (K) LIMITED.....APPELLANT

- V E R S U S -

BASHIR ALI MOHAMMED..... 1ST RESPONDENT

DAVID MUSOKA MUTAAVI..... 2ND RESPONDENT

BASHIR ALI MIOHAMMED3RD RESPONDENT

(An appeal from the judgment of SRM Hon. S. A. Okato PM dated and delivered at Milimani Nairobi on the 28th day of October 2010 in CMCC NO. 3414 OF 2006)

JUDGEMENT

1. Basher Ali Mohammed, the 1st respondent therein filed a compensatory suit before the chief magistrate's court against David Musyoka, Kenya Bus Service Ltd and General Motors (K) Ltd the appellant, 2nd and 3rd respondents respectively for the injuries he sustained when he was ran over by motor vehicle registration no. KAN 821Z. It was the evidence of the 2nd respondent that on 15.9.2014 he was at the bus station in the city of Nairobi when at 11.00am while standing behind motor vehicle registration no. KAN 821Z, which was stationary, the driver (2nd respondent) reversed without hooting or warning ran over his left foot and fractured the 2nd toe and injured his knee. The 1st respondent alleged that the appellant and the 3rd respondent were the legal registered owners of the aforesaid motor vehicle. The appellant filed a statement of defence indicating that it was not jointly registered with the 3rd respondent as the owners of motor vehicle registration no. KAN 821Z on the basis that the same had been transferred to the 3rd respondent and that its name was merely on the register for purposes of securing the purchase price that was yet to be fully paid by the 3rd respondent . In the end Hon. S. A. Okato, learned principal magistrate found the case in favour of the 1st respondent and against the appellant, the 2nd and 3rd respondents jointly and severally. The appellant was aggrieved and was prompted to file this appeal.

2. On appeal, the appellant put forward the following grounds in its memorandum:

1. The learned magistrate erred in law in entering judgment in favour of the first respondent against the appellant without having due regard to the pleadings and the evidence before the court.

2. The learned magistrate erred in law in apportioning full liability upon the appellant contrary to the evidence led at the trial.

3. The learned magistrate erred in law in apportioning full liability upon the appellant when the first respondent had admitted at the trial that the accident had occurred as a result of his own negligence.

4. The learned magistrate erred in fact in holding that the motor vehicle registration number KAN 821Z was under the control and management of the appellant.

5. The learned magistrate erred in law in finding that the appellant was vicariously liable for the actions of the second and third respondents.

6. The learned magistrate erred in holding that there existed an agency relationship and/or a master servant relationship as between the appellant and the second respondent.

7. The learned magistrate erred in failing to recognize that the appellants interest in the motor vehicle registration number KAN 821Z was in the nature of a mere financier.

8. The learned magistrate erred in failing to hold that the third defendant as a beneficial owner for a consideration was at all material times in control of the motor vehicle registration number KAN 821Z and therefore solely liable if any.

9. The learned magistrate erred in not paying due regard to the notice of claim dated 12th March 2007.

10. The learned magistrate erred in law in awarding costs to the first respondent.

3. When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

4. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. Though the appellant put forward a total of 10 grounds of appeal, the same were ably summarised to three main grounds namely

1. Whether the court failed to take into account the relevant facts and evidence presented before it.

2. Whether the appellant was liable as alleged or at all

3. Which party should bear costs.

5. On the first issue as to whether or not the court failed to take into account relevant facts and evidence presented to it, the appellant submits in the affirmative. The appellant argued that it presented evidence showing that bus registration no. KAN 821Z was in the control and possession of the 3rd respondent at the time of the accident and that the 2nd respondent was the 3rd respondent's agent. It is argued that despite this evidence being uncontroverted the trial court did not capture it in its judgment. It is also argued that the appellant presented in evidence the decision in **Kenya Bus Services Ltd =vs= A. G and others, H.C.C no. 163 of 2005 (Unreported)** to prove the relationship between the appellant and the 3rd respondent and to show that the appellant had in fact been barred from repossessing the aforesaid bus. The 1st respondent was of the view that he presented evidence showing that the appellant and the 3rd respondent were the registered owners of the aforesaid bus and that the same was driven by the 2nd respondent as their agent servant and or driver. The 1st respondent further argued that the appellant failed to prove that it had financed the purchase of the bus. The 3rd respondent on the other hand also opposed the ground of appeal arguing that the appellant had a financial interest due to the operation of the bus by the agent and that this created agency relationship between the appellant and the 2nd appellant making the appellant vicariously liable for the acts of the 2nd respondent. It is also argued that the appellant had

presented no sale agreement or hire purchase agreement to prove that it had financed the purchase of bus registration no. KAN 821Z. After a careful consideration of the rival submissions, I am convinced by the appellant's argument that the learned principal magistrate failed to take into account very vital evidence which came out clearly vide **Nairobi H.C Misc. Civil application no. 413 of 2005 Kenya Bus Services Ltd & 2 others =vs= A.G & Another and 221 interested parties** showing that the appellant was the financier of the purchase of the aforesaid bus. It is also apparent that the aforesaid bus was in the possession of the 3rd respondent and that the 2nd respondent was its employee and or servant. In the circumstances it was therefore wrong for the trial court to hold the appellant vicariously liable.

6. The question as to whether or not the appellant was liable has been answered in the negative. A financier had no control nor possession of the subject vehicle. Its name is put in the log book to take care of its financial interest. That in itself cannot create an agency relationship.

7. On the question as to who should meet costs, it is trite law that costs follows the event. The losing party must meet the same.

8. In the end, this appeal is found to be meritorious. It is allowed. Consequently the judgment and consequent decree made against General Motors (K) Ltd, the appellant herein is set aside and is substituted with an order dismissing the suit as against the 3rd defendant (now appellant). Costs of the suit against the appellant to be met by **David Musyoka Mutari** (Now 2nd respondent) and **Kenya Bus Service Ltd** (now 3rd respondent)

9. Costs of the appeal to be paid by **Bashir Ali Mohammed** (1st respondent), **David Musyoka Mutavi**(2nd respondent) and **Kenya Bus Services Ltd** (3rd Respondent).

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent