REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 439 OF 2010

JOHANNES OBEGI ..... APPELLANT

VERSUS

CHRISTOPHER NGETICH ..... 1ST RESPONDENT

VICTORIA COMMERCIAL BANK ..... 2ND RESPONDENT

(Being an appeal from the judgement of the Senior Principal Magistrate's Court At Milimani Commercial Court by the Hon. Okato dated/delivered on 25th September 2010 in Milimani Chief Magistrate's Court Civil Suit No. 5324 of 1999)

JUDGEMENT

1. On 27th July 1998, Johannnes Obegi the Appellant herein was hit by lorry registration no. KZZ 351 while walking along Waiyaki Way towards Westlands. The Appellant was taken to MP Shah Hospital and was later transferred to Kenyatta National Hospital to further treatment. The Appellant blamed the driver of the aforesaid lorry for the accident. The Appellant filed compensatory suit against Charles K. Ngetich the registered owner of the lorry and Victoria Commercial Bank, the 2nd Respondent and financiers of the 1st Respondent in purchasing the lorry. The Appellant's case was opposed by the 1st Respondent though he did not tender evidence at the hearing of the case. The 2nd Respondent on the other opposed the suit and it tendered the evidence of its legal officer to oppose the Appellant's. After considering evidence tendered in support and against the Appellants suit, Mr. S. A. Okato, learned Principal Magistrate, proceeded to dismiss the suit on the basis that the Appellant had failed to prove his case on a balance of probabilities. The Appellant was dissatisfied hence this appeal.

2. On appeal, the Appellant put forward the following grounds of appeal.

1. ***The learned magistrate erred in law and fact in dismissing the suit in entirety even as against the 1st defendant therein who had not tendered any evidence to contradict or dislodge the plaintiff's case.***
2. ***The learned magistrate erred in law and fact in entering judgment in favour of the defendants against the plaintiff in spite of the 1st defendant's miserable failure to establish his case on a balance of probability.***

3. ***The learned magistrate erred in law and fact in failing to appreciate the impeccable evidence of the plaintiff and thereby arriving at a wrong and erroneous conclusion in dismissing the plaintiff suit.***
4. ***The learned magistrate erred in law and fact in dismissing the plaintiff's suit against the 1st defendant without any legal and or evidential justification as the plaintiff had proved the 1st defendant/respondent 100% liable.***
5. ***The learned magistrate erred in law and fact in failing to appreciate as follows:***

i. ***That the evidence adduced in support of the plaintiff's case was cogent and plaintiff's case proved on a balance of probability***
ii. ***That the Plaintiff's pleadings and the evidence tendered in support thereof was capable of sustaining an award of damages at least as against the 1st defendant and as per submissions filed by the appellant.***

6. ***The learned magistrate erred in law and fact in entering judgment against the plaintiff in total disregard of the plausible evidence adduced by the plaintiff in support of the case.***

1. When the appeal came up for hearing, learned counsels appearing in the appeal recorded a consent to have the appeal determined by written submissions.

2. I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. It is apparent from the submissions that the parties to this appeal basically addressed two main grounds vizly:

i. **Whether or not the trial magistrate erred to dismiss the suit for failure to plead vicarious liability?**
ii. **Whether or not the trial magistrate erred by entering judgement in favour of the Respondents despite their failure to establish a case on a balance of possibilities.**

3. On the first issue, the Appellant has argued that he sued the Respondents as the owners of lorry registration No. KZZ 351 and invited the trial magistrate to find the Respondents vicariously liable for the negligence of their driver since the ownership of the aforesaid lorry was not in dispute. It is also the argument of the Appellant that the 1st Respondent and or driver was in control and possession of the aforesaid lorry while both Respondents were joint registered owners. The Appellant pointed out that it was therefore not available to the trial magistrate to absolve the 1st Respondent on account of vicarious liability at all. The Appellant further faulted the holding by the trial magistrate that the Appellant had not pleaded vicarious liability yet the plaint was plaint that the issue was pleaded.

4. The 1st Respondent urged this court not to interfere with the decision of the trial court. It is argued that the 1st Respondent was the owner of the lorry by way of a logbook, such ownership was not sufficient to create vicarious for the negligence of anyone who happened to drive it. The 1st Respondent went ahead to argue that the Appellant did not make the initiative to prove that the driver of the lorry was operating under the instructions of the 1st Respondent. It is said that Appellant had failed to tender evidence to create a link between the driver and the Respondents. The 2nd Respondent on the other hand argued that the negligence of a driver who is not a party to the suit cannot be attributed to the Respondents. It also argued that the Appellant did not lead evidence to link the driver to the 2nd Respondent or the two Respondents whose motor vehicle was registered. I have carefully examined the record of appeal. The learned Principal Magistrate clearly stated in his judgement that since the 1st and 2nd Respondents were never the drivers of the aforesaid motor vehicle on the material day hence they cannot be held liable because the particulars of negligence stated cannot be attributed to them. The learned Principal Magistrate further stated that both Respondents owned the aforesaid lorry but there was no averment in the plaint that they he held vicariously liable.

5. After a critical examination of the plaint it is clear to me that in paragraph 5 of the plaint that the Appellant had actually pleaded vicarious liability against the 1st and 2nd Respondent.

6. Paragraph 5 of the plaint is reproduced in part as follows:

"5. That on or about 27th day of July 1998, while the plaintiff was lawfully and carefully walking along Waiyaki way at about 7.45 am, the 1st and 2nd defendants driver agent and or employee so negligently, recklessly and or carelessly drove, managed and or controlled motor vehicle registration no. KZZ 351 causing the same to hit and graviously injure plaintiff."

7. It was therefore erroneous for the learned Principal Magistrate to hold that the plaint did not contain an averment in the plaint that the Respondents be held vicariously liable. In my humble view the averment in paragraph 5 of the plaint was sufficient for the court to infer that the doctrine of vicarious liability had been indirectly pleaded.

8. Having come to the above conclusion i now examine whether or not the Appellant had established that the Respondents were vicarious liable. There is no dispute that lorry registration no. KZZ 351 was at the material time registered in the joint names of the Respondents. The Appellant tendered evidence showing that he was lawfully walking besides Waiyaki Way on 27th July 1998 when the aforesaid lorry reared off the road into the pedestrian path and hit him. The Appellant blamed the driver of the lorry. The Respondents did not tender any evidence to controvert the evidence of the Appellant. I am satisfied that the lorry was driven along Waiyaki Way in a reckless manner that it hit the Appellant.

9. In the absence of evidence from the Respondents to prove otherwise the court was entitled to infer that whoever drove the aforesaid lorry on the material date had authority to do so. In my view, there was credible evidence to hold the 1st Respondent vicariously liable for the negligence of whoever was controlling or driving the lorry registration no. KZZ 351. The learned Principal Magistrate therefore fell into error when he dismissed the Appellant's sit yet there was sufficient evidence which established the Appellant's case on a balance of probabilities.

10. The question of vicarious liability was restated by the **Eastern African Court of Appeal in Karisa Vs Solanki (1969) E.A 318 at page 322** as follows:

"Where it is proved that a car has caused damage by negligence, then in absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car as lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and driver."

11. The end result of the appeal is that the Appellant is found to have proved liability against the 1st Respondent.

12. The 2nd Respondent was merely the financier of the purchase of the lorry. There is no evidence to show that it was in control and possession on the same. It will therefore be unfair to assign the 2nd Respondent liability.

13. However, the Appellant cannot also be condemned for making the 2nd Respondent a party to the suit. It is out of abundant caution that it was necessary to ensure that since the 2nd Respondent was a co-registered owner with the 1st Respondent of the lorry that it be a party to the suit.

14. In the end, this appeal is allowed. The order dismissing the Appellant's suit is set aside and is substituted with an order entering judgement in favour of the Appellant and as against the d1st

Respondent with costs of the suit and the appeal. The suit as against the 2nd Respondent is dismissed but with no order as to costs.

15. The learned Principal Magistrate erred when he failed to assess quantum of damages.

16. Consequently, the suit is remitted back to the trial court to assess damages. The trial court's file to be placed for assessment of damages before another magistrate of competent jurisdiction other than the magistrate who first heard and determined the suit.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

……. for the Appellant

…….for the Respondent