



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Appeal No.448 Of 2005

(An Appeal arising from Judgment by Hon. T.W.C Wamae (Mrs.) –

SENIOR RESIDENT MAGISTRATE – MILIMANI COMMERCIAL NAIROBI CM. Civil Case No.
8965 of 2003

Delivered on 16th June 2005)

Samuel Munyi Njagi.....1st Appellant

William Raphael Olwande.....2nd Appellant

Versus

Harrison Munyi Njagi.....RESPONDENT

JUDGMENT

INTRODUCTION

Facts

On 4th February, 2003 along Thika Road, the defendant, Samuel Munyi Njagi drove motor vehicle Reg. KAD 785 Toyota saloon and was involved in an accident with the Plaintiff, Harrison Maina. The plaintiff suffered injuries.

PLEADINGS ORAL EVIDENCE SUBMISSIONS

PLEADINGS

The plaintiff filed a plaint on 29/08/2003 and on 22/10/2003 filed an amended Plaint and sued the defendant; Samuel Munyi Njagi driver of motor vehicle KAD 785L TOYOTA Saloon. He also sued the 2nd defendant William Raphael Olwande the lawful owner of motor vehicle Reg. KAD 785L. The 1st defendant was the driver, servant or agent of the 2nd defendant. The Plaintiff pleaded that the 1st defendant drove the vehicle negligently and hit him occasioning him serious bodily injuries. The particulars of negligence are outlined in paragraph 4 of the Plaint. The plaintiff seeks, general and special damages interest and cost of the suit and any other relief the court may deem fit.

The 2nd defendant filed defence on 19th November 2003 and pleaded that he was the owner of motor

vehicle Reg. KAD 785 TOYOTA Saloon and in 1998 sold the car to one CHRIS ONYANGO and there denied and was a stranger to the content of paragraph 4 OF THE Complaint and particulars of negligence.

ORAL EVIDENCE

PW1 Dr. Moses Kinuthia examined the Plaintiff on 10/9/2003, he suffered fracture of the right humerus, head injury with a fracture of right frontal bone, loss of consciousness and speech for a long time. He had been admitted in KNH for 3 weeks. He had a deformed right arm with palpable bone deformed that was now shorter. He suffered grievous harm and permanent incapacity at 25%. He was likely to suffer epilepsy. The doctor charged Ksh.1,500/= for preparing report and Ksh.3,000/- for court attendance.

PW2 Harisson Maina was travelling from Kariobangi to Zimmerman, he alighted from a motor vehicle at Kenol Petrol Station near Allsopps. Before he crossed the road, motor vehicle Reg. KAD 785L. He was hit on the right leg, right arm and head and fracture on the head and right arm and was admitted in KNH; he had lost consciousness.

He produced the following documents;

X-ray P3 form – Exhibit 3	KNH-	Exhibit	2
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Police Abstract- Exhibit 4

KNH receipt for Ksh.10, 700/-- Exhibit 5

Medicine purchased receipt Ksh.2,081/- Exhibit 6

Doctor's Examination Fees Receipt Ksh.1,000/-- Exhibit 7

Search Fees receipt for Ksh.500/- Exhibit 8

The Defendant; DW1 WILLIAM RAPHAEL OLONDE received summons in 2003, in relation to motor vehicle Reg. KAD 285L which he sold to one Chris Onyango in 1998 for Kshs.280,000/- and he gave possession to the buyer. At the time of the accident, the said vehicle was not in his possession and control. He produced the Sale Agreement as *D.Exhibit 1*. He looked for the buyer, prepared 3rd Party Notice which was served on him. He changed ownership in late 2003 when the sale was complete. He stated at the time of the accident, the motor vehicle was in his name.

DW2 Olpha Okoth, wife to Chrispin Onyango testified the motor vehicle Reg. KAD 285 L was sold to her husband in 1998 and he took possession in April, 1998. She and her husband used the vehicle up to 2000 when they separated. The motor vehicle was bought at Kshs.280,000/- and paid in installments. The motor vehicle was not transferred to them as they had not paid up all installments for the purchase of the vehicle.

SUBMISSIONS

The Plaintiff submitted through Counsel, that the Plaintiff was injured by the negligent driving of the 1st defendant and the vehicle owned by 2nd defendant. The plaintiff proved extent of bodily injuries through doctor's evidence (PW1). The plaintiff's version of the accident was not controverted by the defence and liability was to be 100% against the defendants. On quantum; general damages on current cases with similar injuries was KSH. 500,000/- The special damages pleaded and proved at Ksh.18,881/-

The 2nd defendant submitted through Counsel that vicarious liability should be visited on the buyer of motor vehicle Reg. KAD 785L one Chris Onyango. He sold him the vehicle but did not transfer until full payment was made as confirmed by the defense witness; DW 2. The plaintiff ought to have sought the insurer of the vehicle.

JUDGMENT

The Trial Court considered the evidence of Plaintiff that he alighted from the vehicle and the defendant hit him on the road. He sustained injuries. The 2nd defendant applied for 3rd party notice but the buyer was never legally joined to the suit.

Liability at 100% in favor of the Plaintiff against the defendant and special damages 13,231 /- with interest and costs.

APPEAL

The Memorandum of appeal was filed on 27th June 2005 and amended memorandum filed on 1st December 2008.

The appeal was heard before Hon. Khaminwa J on 24th February 2011, the parties filed and highlighted salient facts on written submissions. Judgment was set down for 17th June 2011. The Honorable Judge was indisposed.

This matter was listed for hearing of the appeal during the High Court Civil Service week. The parties were served through the Deputy Registrar's Office. On 25th July 2014 none of the parties were present.

They were served again through Deputy Registrar for hearing on 30th July 2014. On the date, the Respondent was represented by Mr. Kipng'eno and explained that he came on 25th July 2014 but did not find the right Court where the hearing was scheduled to take place. The Respondent informed he Court of intention to proceed; the Court that the appellant be served by the Respondent and to proceed the following day at 2.30pm before the Court vacation commenced.

On 31st July 2014, The Appellant was duly served as evidenced by the affidavit of service filed dated 31st July 2014. The Court proceeded under **Order 42 Rule 20 Civil Procedure Rules**. Although the appellant was absent despite service the respondent was present and therefore the Court could not dismiss the appeal.

GROUND

The amended memorandum of appeal had the following grounds;

1. The Trial court erred and awarded Ksh.514,731.00/- as general damages for pain suffering and loss of amenities.
2. The Trial Court's award was excessive and not proportional to injuries purportedly suffered by the Plaintiff
3. The Trial court failed to appropriately address the question of ownership despite the evidence tendered
4. The weight of the evidence does not support the Court's finding
5. The Trial Court Failed to evaluate and analyze the evidence in support of the appellant's case.
6. The Trial court erred in failing to consider the issue of the 1st defendant; the driver of motor vehicle Reg. KAD 758 at the time of the accident.

ORAL & WRITTEN SUBMISSIONS

1. The appellant submitted through Counsel Ashiruma & Company advocates that in Ground 1&2 of the appeal, the injuries listed in the Respondent's amended Plaintiff were grossly exaggerated and no evidence was furnished by the respondent to prove the same. The evidence of the Plaintiff/respondent and the examining Doctor (PW1) was at variance.

The respondent did not plead special damages in the amended Plaintiff and therefore the Trial Court erred in awarding the same.

2. In Ground 3 the question of ownership of the motor-vehicle KAD 785L was not appropriately addressed. The Appellant sold the car in 1998 to Chris Onyango , produced Agreement (*D.Exhibit 1*) and wife to the buyer (D2) testified they bought the car, paid in installments but separated from her husband and did not know where he was.
3. Ground 4&5 the evidence on record did not meet the required threshold of proof on a balance of probability. The evidence was riddled with inconsistencies which the Trial Court failed to consider while delivering judgment. The plaintiff did not demonstrate negligence. There is failure to consider the 1st defendant, whom the Police abstract (*P.Exhibit 4*) states was the driver of the motor-vehicle that was involved in the ill-fated accident. The 1st defendant was a total stranger to the 2nd defendant/ appellant and therefore the respondent could not establish vicarious liability against the appellant.

The Respondent submitted that the Plaintiff/Respondent testified that he was standing at a bus stop off Thika Road and the appellant's motor vehicle hit him. The Appellant obtained copy of records from Registrar of Motor Vehicles with the appellant as the registered owner.

4. The appellant produced a sale agreement showing he sold the motor vehicle to Chris Onyango in 1998. However, the agreement was not sufficient to displace statutory presumption in **Section 8** of the **Traffic Act**. The appellant did not give notice to Registrar of motor vehicles as required by **Section 9** of the **Traffic Act** that he had sold the car and the same was on the road for more than 14 days before a transfer was effected. The appellant stated he kept the logbook and did not transfer the motor vehicle until the full purchase price was paid in 2004. The Appellant obtained 3rd Party Notice and did not serve the buyer of the vehicle. The wife of the buyer testified that she knew of her husband buying the vehicle at Ksh. 280,000/- which was paid in installments. The respondent objected to her testimony as contrary to **Section 130** of the **Evidence Act**.
5. On the issue of withdrawal of suit against the 1st Defendant, the same was done with consent of appellant's Counsel.
6. With regard to general damages; the injuries were pleaded in the amended Plaintiff of 22/10/2003 in detail (Pg.5 of the record of appeal) and the testimony of the Doctor (PW1) who produced the medical report.
7. With regard to special damages claim the Respondent outlined the claims as pleaded in the amended Plaintiff and the Trial Court determined those that were proved and awarded them

ISSUES

1. Re-evaluation of evidence to arrive at an independent decision.
2. The standard and burden of proof
3. Whether injuries sustained by respondent from the accident exaggerated
4. Whether the assessment and award of general damages was excessive
5. Whether special damages pleaded and proved
6. Whether ownership of the vehicle established vicarious liability between the Defendant/Appellant and Plaintiff/Respondent.

APPLICATION /EVALUATION OF EVIDENCE;

Ground 1& 2 of the appeal is based on the claim is that the Trial Court awarded excessive damages and the injuries outlined in the amended Plaintiff were grossly exaggerated and no evidence was furnished to prove the same.

The Plaintiff paragraph 5 outlines injuries as;

1. Head injury with fracture of frontal bone
2. Fracture left frontal parietal region of the skull
3. Contusion hemorrhage of the skull
4. Fracture of the right humerus
5. Bruises on temporal region

The Plaintiff (PW2) produced the Kenyatta National Hospital Case Summary (*P.Exhibit 2*) which outlined the injuries as;

1. Head injury and the humerus
2. Bruise on the temporal region
3. Upper arm swollen and crepitation on the shoulder
4. Left frontal parietal region of the skull and contusion hemorrhage
5. Loss of consciousness and speech

The Court finds the injuries pleaded in the amended Plaintiff, outlined in KNH case summary and doctor's report (*P.Exhibit 1*) similar and consistent. With respect the Court finds no variance on the evidence adduced with regard to the injuries sustained by the plaintiff/ respondent.

The second limb of the ground of appeal was that the damages as assessed were excessive.

In BUTT vs KHAN [1977] KLR C.A.E.A.; The court observed;

The principles that guide an appellate court in handling a complaint on award of damages are clear and well settled;

“an appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was inordinately high or low.”

The appellant cited the case of;

BONIFACE WAITI & ANOTHER vs MICHAEL KARIUKI KAMAU HCCA 705 OF 2003 (NAMBUYE.J) on the established principles in assessment of damages;

1. **Award of damages is meant to compensate but not enrich the victim**
2. **Award should be commensurate to the injuries**
3. **Awards in decided cases are mere guides each case should be treated on its own facts and merit Awards in decided cases taken into consideration , the issue of own element of inflation has to be taken into consideration.**
4. **Awards should not be inordinately too high or too low.**

In the instant case, the Trial Court assessed the Plaintiff's submission on general damages at Ksh.800,000/- and cited relevant authorities relied on and the Appellant/Defendant's submissions that alluded to dismissal of the suit against the 2nd defendant. With the above – mentioned injuries, the time in form of admission in hospital, visits to hospital and monetary expense, the injuries were serious and the assessment and award of general damages was commensurate to the injuries sustained, pain and suffering. The Court upholds the Trial Court's finding and award of general damages.

With regard to special damages; it is settled law that these should be specifically pleaded and proved. The amended plaintiff in the Court record outlines the special damages to include;

“Paragraph 5

Particulars of Loss

1. *Medical expenses* - Ksh.1,378/-
2. *Medical report* - Ksh.1,500/-
3. *Police abstract* - Ksh. 100/-

(Particulars whereof to be proved at the hearing hereof)

1. *Doctor's attendance* - Ksh.3,000/-
2. *Search* - Ksh. 500/-

REASONS WHEREFORE

Special damages - Ksh.18, 881/-”

The amendments were made by the Trial Court through an oral application by Counsel for the Plaintiff in the presence of Counsel for the defendant. The Court approved special damages of Ksh.13,231/- that was proved. I uphold the award of the Trial Court.

Grounds 3, 4, 5 & 6 combined on the Trial Court's determination of liability against both defendants. Yet the 2nd defendant had on record pleaded that he was a stranger to the claim by the Plaintiff.

He owned the motor vehicle KAD 785L and in 1998 sold it to Chris Onyango. He produced the Sale Agreement (*D.Exhibit 1*) and called the buyer's estranged wife who testified they bought and used the car before she separated from her husband in 2000.

The 2nd defendant explained to the Court, he remained the registered owner of the vehicle and did not transfer title as part of the purchase price was not paid. He did not know the 1st defendant, the driver of the vehicle and at the time the vehicle was not in his possession.

The plaintiff conducted a search and obtained a copy of records from Kenya Revenue Authority, Motor vehicle Department. The search indicated the 2nd defendant as the legal owner of the said motor vehicle. Although the registered owner of the motor vehicle is the 2nd defendant; he had no knowledge, connection or relationship with the 1st defendant, the driver of the said motor vehicle. Therefore, they did and could not engage in an agency or employment relationship and vicarious relationship would not arise as they did not know or deal with each other.

This Court is guided by the following cases on the principle of vicarious liability.

1. **JANE WAIRIMU TURANTA vs GITHAE JOHN VICKERY & EQUITY BANK LTD & MUNENE DON 2013 eKLR (R. OUGOJ)** observed;

“The respondent raised the issue of vicarious liability since the logbook was jointly owned by the bank and Munene Don. The doctrine of vicarious liability was expounded in the case of Morgan vs Launchbury (1972) 2 All E R 606 which stated that to establish agency relationship it was necessary that the driver was using the car at the owners request, express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner. Moreover, the fact that the appellant was the owner of the vehicle by way of the logbook being in its name, such ownership was not sufficient to create vicarious liability for the negligence of anyone who happened to drive it.”

2. In the case of **HCM Anyanzwa & 2 Others vs Lugi De Casper & Another [1981] KLR 10** it was observed;

“vicarious liability depends not on ownership but on delegation of tasks or duty”

These cases illustrate that the principle of vicarious liability applies to persons in a legal relationship, principal and agent, master and servant etc. In the instant case, the evidence on record confirms that the 2nd defendant did not know 1st defendant, the driver of motor vehicle KAD 285L. The motor vehicle was not in his possession and he had no control over it. Therefore he never met or interacted with the 1st defendant. In the absence of contact or legal relationship vicarious liability cannot lie and be the basis of liability. The plaintiff did not prove content of paragraph 3 of the amended plaint;

The **“2nd Defendant is vicariously liable for the sins of the 1st defendant.”**

The 2nd issue is with regard to the fact, 2nd defendant was the registered owner of the motor vehicle KAD 285 L. The following cases elaborate on the import of **Section 8** of the **Traffic Act**.

3. **SECURICOR KENYA LIMITED VS KYUMBA HOLDINGS LTD**
[2005]1KLR(TUNOI,OKUBASU & DEVERELL .JJA)

The appellant appealed against judgment against him for the Plaintiff, being the registered owner of the motor vehicle, although the vehicle was sold.

The Court on appeal held;

“In view of the finding regarding the apparent sale and transfer of possession of the motor vehicle to a 3rd party, under Section 8 of the Traffic Act; the person under whose name the vehicle is registered shall be deemed to be the owner of the vehicle unless the contrary is proved”.

The appellant by evidence proved on a balance of probability that it was not the owner of the motor-vehicle at the time of the accident.

The motor vehicle was not driven by the appellant’s driver or its employee on an occasion in which the appellant had any interest. There is no relationship in agency or whatsoever and the doctrine of vicarious liability was not applicable in this case.

If the appellant was still the owner of the vehicle by way of logbook being in its name, such ownership was not sufficient to create liability for negligence of everyone who happened to drive it.

4. **NANCY AYEMBA NGAIRA vs. ABDI ALI 2010 eKLR (OJWANG J)** the Court observed;

“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the traffic Act is fully cognizant of the fact that a different person, or different other persons, maybe de facto owners of the motor vehicle- and so the Act has an opening for any evidence in proof of such differing ownership to be given; and in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial; possessory ownership. Any person who enjoys any of such other categories of ownership, may for practical purposes, be more relevant than the person whose name appears in the certificate of registration.”

The above cited cases interpret **Section 8** of **The Traffic Act**; the fact that one is registered as the owner of the vehicle it is not sufficient where there evidence to prove otherwise.

The Court is satisfied the 2nd Defendant sold his car to Chris Onyango as evidenced by sale

agreement and evidence of his ex-wife.

The Plaintiff ought to have pursued the 1st defendant, Samuel Mwangi Nyagah, the driver, Chris Onyango, the buyer, through the Insurance Company as indicated in the Police Abstract and file a declaratory suit.

The appeal is upheld and varied as follows;

Grounds 1&2 upheld the assessment and award of damages was legal and reasonable in the circumstances.

Grounds 3, 4, 5, 6, of the appeal, the court finds liability was not proved on a balance of probability against the 2nd defendant. He was not vicariously liable or at all.

The appeal is partly allowed with Costs to the appellant. The 2nd defendant is not liable for the accident caused by the driver, 1st defendant. Judgment of the Magistrates Court is upheld only against the 1st defendant Samuel Munyi Njagi.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2014

MARGARET MUIGAI

JUDGE

In the presence of:

Counsel for the Appellant.....

Counsel for the Respondent.....

