



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 511 OF 2006**

**JOSEPH KARANJA KANG'ARA.....APPELLANT**

**VERSUS**

**GLADYS WAMBUI NDEGWA (Suing as the administrator of the**

**estate of DANIEL NDEGWA NGOCHORIA(Deceased).....1<sup>ST</sup> RESPONDENT**

**BERNARD KIPROTICH.....2<sup>ND</sup> RESPONDENT**

**ELIZABETH W. KISILI.....3<sup>RD</sup> RESPONDENT**

(Appeal from the original judgment and decree in Milimani Commercial Courts Nairobi, CMCC No. 3535 of 2003 delivered on 30<sup>th</sup> June, 2006 by Hon. Mrs. A. N. Ongeru)

**JUDGMENT**

1. The 1<sup>st</sup> respondent sued the appellant, 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent seeking compensation following a road traffic accident that occurred on 21<sup>st</sup> May, 1997 along Mombasa Road opposite Firestone occasioning the demise of **DANIEL NDEGWA NGOCHORIA ('Deceased')**. The suit was a claim for general damages in negligence under the Fatal Accident Act (Cap 32) Laws of Kenya on account of the demise of the deceased for the benefit of the deceased's dependants. Special damages were also sought.
2. The appellant denied ownership of the vehicle and being the 2<sup>nd</sup> respondent's employer.
3. It is not disputed that the deceased was on 21<sup>st</sup> May, 1997 walking along the above said road when he was hit and fatally injured by motor vehicle Registration Number KUB 630 Isuzu Lorry. It was the 1<sup>st</sup> respondent's case that the motor vehicle was at the material time jointly owned by the appellant and the 3<sup>rd</sup> respondent and driven by the 2<sup>nd</sup> respondent who was the appellant and the 3<sup>rd</sup> respondent's employee. She claimed that the accident occurred due to the 2<sup>nd</sup> respondent's sole negligence.
4. The matter went for trial and the learned trial magistrate found the appellant, 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent 100% liable and entered judgment in the following terms:

Pain and suffering                      KShs. 10,000/=

Loss of expectation of life            KShs. 60,000/=

Loss of dependency                      KShs. 397,320/=

**Total    KShs. 467,320/=**

Special damages                      Nil

5. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:
  - a. *The learned senior principal magistrate erred in law and in fact in finding that the 2<sup>nd</sup> respondent was in the course of the appellant's employment at the time of accident.*
  - b. *The learned senior principal magistrate erred in law and in fact in finding that the appellant was the owner of the motor vehicle at the time of the accident disregarding the appellant's evidence to the contrary.*
  - c. *The learned senior principal magistrate erred in law and in fact in failing to consider the averments of the appellant in his defence which averments were not rebutted by the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent.*
  - d. *The learned senior principal magistrate erred in law and in fact by failing to consider the appellant's evidence in totality when the 3<sup>rd</sup> respondent rebutted it.*
6. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: *Peter v. Sunday Post (1958) at pg. 429*).
7. The 1<sup>st</sup> respondent brought one witness. PW1, Christopher Lumose who testified that the finding of an inquest done was that the suit motor vehicle lost control and hit pedestrians who were walking along the road. Among those pedestrians was the deceased. The sketch drawn by the investigating officer showed that the vehicle veered 20 feet off the road. He produced a police abstract (P. Exhibit 1) and police file (P. Exhibit 2) to that effect.
8. The 1<sup>st</sup> respondent did not witness the occurrence of the accident. She testified that the deceased was an employee of Steel Structures Company earning KShs. 7,092.30 and was the family's sole bread winner. She conducted a search to ascertain the ownership of the suit motor vehicle. The search revealed that the appellant and the 3<sup>rd</sup> respondent were the owners of the said vehicle. She and the deceased had six school going children at the time of the deceased's demise.
9. The appellant, DW1 testified that he gave one, Samuel Maina Kingara the suit motor vehicle to sell. The motor vehicle was sold to someone by the name Kasili.
10. The appeal was canvassed by way of written submissions. The appellant submitted that sufficient evidence was not tendered by the 1<sup>st</sup> respondent to prove liability as against him and that the 2<sup>nd</sup> respondent was his employee. That it was proper for the trial court to establish who the holder of the policy number revealed in the police abstract was considering that in his testimony that he had claimed he had sold the motor vehicle.
11. The 1<sup>st</sup> respondent relied on Section 8 of the Traffic Act (Cap 403) Laws of Kenya and submitted that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. That since the appellant failed to establish that he indeed sold the vehicle and the copy of records indicated that he was the registered owner of the vehicle, he was found to be the owner by virtue of Section 8 of the Traffic Act and was accordingly vicariously liable for the 2<sup>nd</sup> respondent's negligence.
12. On ownership, the appellant lamented that the learned trial magistrate found that he was the owner of the motor vehicle yet he had sold the vehicle. He also argued that the trial court should have established who the holder of the policy number revealed in the police abstract was to ascertain ownership.
13. The situation envisaged in Section 8 of the Traffic Act is that in Kenya, vehicles change hands so often but the records at the Registrar of motor vehicles remain unchanged for some time. It follows therefore that a certificate of search may not be conclusive proof of actual ownership of a motor vehicle. However, the same section provides that the contrary should be proved. The question that arises is which party is charged with the duty to so prove ownership? I associate

myself with Judge Warsame's (as he then was) sentiments in *Jotham Mugalo v. Telkom (Kenya) Ltd Kisumu HCCC No. 166 of 2001* where he held:

***“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant... Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the Evidence Act. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”***

14. The copy of records produced by the 1<sup>st</sup> respondent revealed that the appellant was the registered owner of the motor vehicle. It was incumbent for the appellant to rebut that evidence. In the absence of evidence in rebuttal, I find and hold that the 1<sup>st</sup> respondent proved on a balance of probability that the appellant was the owner of the motor vehicle.

15. On the issue of liability, I am satisfied that the police file produced in evidence established the negligence on the part of the 2<sup>nd</sup> respondent. It is worth noting that the defendants did not controvert the 1<sup>st</sup> respondent's evidence as to negligence. Pw2 indicated that the deceased was 20 feet off the road at the time of the accident; Had the 2<sup>nd</sup> respondent been driving diligently, he would have controlled the vehicle to avoid the occurrence of the accident. Having so found can the appellant therefore be said to be vicariously liable for the 2<sup>nd</sup> respondent's negligence? On this point I am fortified by the Court of Appeal's holding in *Kenya Bus Services Limited v. Humphrey (2003) KLR 655* where it was held:

***“In a case of the master's liability for his servant's torts, it is the existence of the relationship of master and servant which gives rise to vicarious liability. 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. This presumption is made stronger or weaker 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 of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.”***

16. There being no evidence to the contrary, I find and hold that the vehicle was driven for the benefit of the appellant, the 2<sup>nd</sup> respondent and the 3<sup>rd</sup> respondent.

17. In the circumstances, I uphold the trial court's judgment and dismiss the appeal with costs.

**Dated, Signed and Delivered in open court this 21<sup>st</sup> day of November, 2014.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....or the Appellant

.....for the 1<sup>st</sup> Respondent

