REPUBLIC OF KENYA

High Court at Kakamega

Civil Appeal 38 of 2010

RUTH CHIMASE MAKEYA …….....….. APPELLANT

VERSUS

WEST KENYA SUGAR CO. LTD. ……..…. 1ST RESPONDENT

MOSES AMALEMBA BUSUKU …… 2ND RESPONDENT

(An Appeal from the Judgment and decree of Hon. H. Ong'udi, CM delivered on 10th March, 2010 in Kakamega CMCC No. 366 of 2008)

JUDGMENT

The appellant, RUTH CHIMASI MAKEYA had sued the respondents WEST KENYA SUGAR COMPANY LTD. and MOSES AMALEMBA BUSUKU in her capacity as the legal representative of the estate of her late husband NIXON RICHARD ETAKWA.

The deceased passed away on 6.2.08 after sustaining fatal injuries while he was a pedal cyclist along the Kakamega-Malava road and was knocked down by motor vehicle registration No. **KAU 273G** - Hauling a trailer registration No. **2C 3187**. The appellants blamed the accident on what was termed as the negligent manner in which the 2nd respondent who was the driver of the 1st respondent drove the motor vehicle.

The respondents denied the appellant's claim. It was denied by the 1st respondent that they were the employees of the 2nd respondent. Negligence was also denied. The trial magistrate found the 2nd respondent drove the motor vehicle negligently and caused the accident. Relying on the case of **THURANIRA KARAURI VS AGNES NCHECHE CA. 192 O1996**, the trial court found that liability had not been proved and that it was also not proved that the 2nd respondent was an employee of the 1st respondent and the 1st respondent could not be said to be vicariously liable.

The appellant's case against the 1st respondent was dismissed with costs. Judgment was entered against the 2nd respondent for general damages of Kshs.510,000/=, Kshs.65,000/- special damages plus costs and interest.

The appellant was dissatisfied with the judgment of the lower court and appealed to this court on the following grounds:-

"1. That the decision of the learned trial magistrate was based on

the wrong premises and failed to take into account appellant's evidence on ownership of motor vehicle registration number KAU 273 G hauling a trailer registration number ZC 3187.

2. That the learned trial magistrate erred by failing to hold that appellant had proved her case against the 1st respondent on a balance of probability.

3. That the learned trial magistrate erred in law and fact in holding that appellant had not proved ownership of motor vehicle KAU 273 G hauling a trailer registration number ZC 3187 despite of the overwhelming evidence by the appellant.

4. That the learned trial magistrate erred in law and fact in holding that the 1st respondent was not vicariously liable for the acts and/or omission of the 2nd respondent.

5. That the learned trial magistrate erred in law and fact and failed to consider the whole of the appellant's evidence.

6. That the learned trial magistrate having held the 2nd respondent 100% liable for the accident, failed to hold that 1st respondent is vicariously liable for the acts and/or omission of the 2nd respondent.

7. That the learned trial magistrate erred in law and in fact for failing to appreciate fully and ignoring the submission put

before her by the appellant.

8. That the learned trial magistrate misconceived the evidence on record as well as all the issues for determination.

9. That the learned trial magistrate erred in law and in fact for basing her decision on irrelevant consideration."

The appellant urged the court to allow the appeal against the 1st and 2nd respondents jointly and severally.

Mr. Mwebi advocate appeared for the appellant while Mr. Menezes appeared for the respondents. Mr. Mwebi for the appellant submitted that no evidence was adduced by the respondents. That the trial magistrate was wrong in dismissing the appellant's case on the grounds that a Police abstract cannot be relied upon to prove the ownership of a motor vehicle. It was further contended that the case of **THURANIRA KARAURI** which the trial magistrate relied on has severally been overruled and overturned as bad law.

The appellant's counsel referred the court to the following authorities:-

- **PETER SHIBANDA ANGAMIA vs ELDORET EXPRESS LTD. & ANO. KSU KCCA. 15/07.**

- **LAKE FLOWERS VS CILA FRANKLYN ONYANGO NGONGA & ANO. – NKU CA. NO. 210 OF 2006.**

For the respondents, it was submitted that the trial magistrate did not error on the issue of ownership nor on the issue of vicarious liability.

The court was referred to the following authorities:-

- **WELLINGTON NGANGA MUTHIORA VS AKAMBA PUBLIC ROAD SERVICE LTD.**

& ANO. – KERICHO HCCA NO. 78/2003.

- **CHRISTOPHER MARUBE KAIRE VS DOMICIANO MONARI INANI – KISII HCCA. 198 OF 2008.**

The appeal therefore boils down to the issue of ownership of the subject motor vehicle and the issue of vicarious liability. Both issues were addressed by a five judge bench of the Court of Appeal in the LAKE FLOWERS case where it was ruled as follows:-

"From the authorities (Selle & another v Associated Motor Boat Company Limited & Others [1968] EA 123 (ibid) and Mwonia v Kakuzi [1982]46 (CAK) it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee's liability but to his negligence."

The above authority is on all tours with the case at hand. The respondents did not call any evidence to counter the police abstract.

The Plaint and the Police abstract reflected that the 1st respondent was the owner and the 2nd respondent the driver of the motor vehicle in question.

The trial magistrate erred in holding that it was not proved that the 2nd respondent was an employee of the 1st respondent.

In the LAKE FLOWERS case, the Court of Appeal stated as follows:-

"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"

The persuasive authorities cited by the respondents are of no value in view of the Court of Appeal decision in the LAKE FLOWERS case. The Lake Flowers case is a year 2008 decision whereas the THURANIRA KARAURI case is a year 1996 case. The Lake Flowers case is therefore the most recent.

From the memorandum of appeal, there was no issue raised regarding the quantum of damages awarded.

The appeal has merit and is allowed. The decision of the trial magistrate dismissing the case against the 1st respondent is set aside. Judgment is entered against the 1st and 2nd respondents jointly and severally for the sum of Kshs.575,000/= plus interest. Costs to the appellant.

Delivered, dated and signed at Kakamega this 18th day of December, 2012

B. THURANIRA JADEN
J U D G E