



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 224 of 2007

BONIFACE MASILA.....APPELLANT

VERSUS

RICHARD M. MASWII.....1ST RESPONDENT

THOMAS MBUI MUTISO.....2ND RESPONDENT

*(An appeal from the judgment delivered on 14th March, 2007
by the Hon. Mrs. Toigat, Resident Magistrate,
in Milimani Civil Suit No. 2261 of 2003)*

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court by Thomas Mbuy Mutiso, (hereinafter referred to as the 2nd respondent). He had sued Richard M. Maswii, (hereinafter referred to as the 1st respondent). The 2nd respondent's claim against the 1st respondent was for general and special damages arising from personal injuries suffered by the 2nd respondent in a road traffic accident. The accident involved the 1st respondent's motor vehicle Registration No.KAL 657T, (hereinafter referred to as the Matatu), in which the 2nd respondent was lawfully travelling as a passenger. The 2nd respondent claimed that the accident was caused by the negligence of the 1st respondent or his driver or agent.
2. The 1st respondent admitted that on the material day an accident occurred involving the Matatu and motor vehicle registration No.KAK 176B, (hereinafter referred to as the Pickup), but denied that the 2nd respondent was a passenger in the Matatu or that the accident was caused or contributed to by the negligence of the 1st respondent or his driver or agent. The 1st respondent maintained that the accident was caused by the gross negligence of the owner and or driver of the Pickup. The 1st respondent served a third party notice upon Boniface Masila, the owner of the Pickup claiming indemnity and or contribution.
3. Boniface Masila, (hereinafter referred to as the appellant), filed a defence to the 1st respondent's 3rd party notice admitting that an accident occurred involving the two motor vehicles, but contending that the accident was caused by the negligence of the 1st respondent's driver, servant or agent. The appellant denied all allegations of negligence attributed to him, and maintained that the 1st respondent was not entitled to be indemnified by him. The appellant further averred that the 1st respondent's claim for indemnity and contribution was an abuse of the court process.

4. During the trial in the lower court, 3 witnesses testified in support of the 2nd respondent's case. These were Dr. Peter Maina Kariuki, P.C. Charles Ibutu and the 2nd respondent. Briefly their evidence was as follows: On the material day, the 2nd respondent was travelling from Nairobi to Kitengela. He was travelling in the Matatu. As the Matatu was travelling towards Athi River, the Matatu which was speeding, braked and collided with the Pickup, and overturned on its left. The 2nd respondent who was injured on his left shoulder and right knee, went home but the next day proceeded to Kenyatta National Hospital where he was treated.
5. The 2nd respondent was later examined by Dr. Peter Maina Kariuki who prepared a medical report showing that the 2nd respondent suffered a cut on the left shoulder, blunt injuries on the right knee, bruises on the right shin and blunt injuries on the right wrist, which left him with a scar on the left shoulder. The 2nd respondent reported the accident at Athi River Police Station where he was issued with a P3 form as well as a police abstract. He later obtained a copy of records from the Registrar of Motor Vehicles which showed that the Matatu belonged to the 1st respondent.
6. Charles Ibutu, a police constable attached to Athi River Police Station, produced a police abstract report of the accident which showed that the accident which involved the Matatu and the Pickup was reported to the police station and that the 2nd respondent was one of those injured in the accident.
7. The 1st respondent called two witnesses. These were Leonidus Musyoki Maswili and Anthony Mwatu Musinga. Leonidus was the conductor of the Matatu. He explained that the Matatu was travelling along Namanga road when the Pickup turned into the main road at the Athi River junction and hit the Matatu. Leonidus testified that he was seated on the front in the extreme left next to the door. He saw the Pickup get into the main road at a high speed. The driver of the Matatu tried to swerve but was unable to avoid the Pickup which was travelling at a speed of more than 100 kph. Leonidus produced an inspection report in respect of the Matatu which showed that the Matatu did not have any pre-accident defects.
8. Anthony Mwatu Masinga testified that at the material time, he was at the Athi River Shell Petrol Station. He claimed that he heard a motor vehicle moving very fast. Out of curiosity he went to look at it. He noted that it was a pickup travelling towards the main road which was Namanga road. Anthony saw the Pickup get into the main road and hit a vehicle which was travelling on the main road. He identified the vehicle which was hit as the Matatu. He explained that the Matatu overturned. He blamed the driver of the Pickup for having failed to give way to the Matatu.
9. The appellant and police constable Richard Chenjoi testified in proof on the appellant's defence. The appellant explained that on the material day he was driving his vehicle when he noticed a vehicle from his rear view mirror coming towards him very fast. He decided to give way. The vehicle did not however pass him and he was forced to stop. The vehicle then hit the Pickup blocking its way. The appellant tried to get out of his Pickup but did not do so, as he saw someone who had alighted from the other vehicle pointing a gun at him. He was pushed out of the driver's seat to the passenger seat. Two people got into the pickup, one through the passenger door and one through the rear. The Pickup was then reversed and driven towards Namanga road.
10. At the junction, the vehicle did not stop but entered the junction hitting into an oncoming Matatu. It was then that the appellant realized that the man with the gun had moved out of the pickup and the 3rd man who was driving the Pickup was thrown on the road by the impact. Later, some of the robbers who had carjacked the appellant were charged with robbery with violence and the appellant was called as a witness. One of the men was convicted of the offence and sentenced to hang. The appellant maintained that he was not driving the Pickup at the time it knocked the Matatu nor did Joseph Kamau, the man who was driving the pickup have his

authority to do so.

11. PC Richard Chenjoi an officer attached to Athi River Police Station stated that on the material night a report was received at the Station regarding the carjacking of a motor vehicle registration No.KAP 355E. Police Officers rushed to the scene and found that the carjackers had abandoned motor vehicle KAP 355E and carjacked a Pickup which was involved in an accident with the Matatu. One of the person injured in the accident was Joseph Kamau Kareri who was identified as one of the carjackers. He was arrested and later charged in Criminal Case No.442/19/03 in Machakos.
12. Counsel for each of the parties each filed written submissions urging the court to find in favour of his client. In her judgment, the trial magistrate found that there was an accident involving the Matatu and the Pickup, and that the 2nd respondent who was a passenger in the Matatu was injured in the accident. The trial magistrate further found that the driver of the 1st respondent was driving at a high speed, while the driver of the Pickup also approached the junction at a high speed and failed to give way. The trial magistrate therefore apportioned liability at 25% on the part of 1st respondent and 75% on the part of the appellant. The court rejected the appellant's defence that his vehicle was being driven by a carjacker holding that no concrete evidence was adduced to show who the carjackers were. The trial court awarded the 2nd respondent general damages of Kshs.100,000/= to the 2nd respondent.
13. Being aggrieved by that judgment, the appellant has lodged this appeal, raising 8 grounds as follows:
 - (i) The learned Magistrate erred in fact and in law in failing to make a finding that the appellant/third party was not driving motor vehicle registration number KAK 176B at all material times.
 - (ii) The learned Magistrate erred in fact and in law in failing to make a finding that at all material times motor vehicle registration number KAK 176B was being driven by a carjacker.
 - (iii) The learned Magistrate erred in fact and in law in failing to make a finding that the 2nd respondent/defendant had failed to prove any fault against the appellant/third party as alleged in the 2nd respondent/defendant's defence.
 - (iv) The learned Magistrate erred in fact and in law in failing to find that the 2nd respondent/defendant did not prove any agency between the driver of motor vehicle registration number KAK 176B and the appellant/third party.
 - (v) The learned Magistrate erred in fact and in law in failing to find that a registered owner of a motor vehicle could not be held vicariously liable for the acts of a robber.
 - (vi) The learned Magistrate erred in fact and in law in finding that she could not attribute fault to a person who was not a party to the suit.
 - (vii) The learned Magistrate erred in fact and in law in holding the appellant/third party liable merely because the person at fault was not a party to the suit.
 - (viii) The learned Magistrate erred in fact and in failing to appreciate that he who alleges must prove and that the defendant and plaintiff/respondent on a balance of probabilities had not proved any fault on the part of appellant/third party.

14.

In support of the appeal, counsel for the appellant noted that the facts before the court were clear that the appellant was a fare paying passenger in the Matatu which was involved in a collision with the Pickup, and that the Matatu was travelling in the main road (Namanga Highway) while the Pickup was approaching the main road from a side road when the accident occurred. Counsel for the

appellant further noted that at the time of the accident the Pickup had been carjacked and was in control of the armed robbers one of whom was arrested, charged and convicted.

15.

Counsel for the appellant pointed out that the appellant testified that he was carjacked, and that the vehicle was being commandeered by the robbers. The evidence of the appellant was confirmed by a police officer from Athi River Police Station who had received the report of the carjacking. The police officer produced the covering report from the police file, the investigation diary and an extract from the occurrence book regarding the report. Counsel submitted that in the light of the above evidence, the trial magistrate was wrong in holding that there was no concrete evidence as to who the carjackers were.

16.

Counsel further submitted that the driver of the Pickup was not the appellant but a carjacker in respect of whom no vicarious liability could arise. It was noted that there was no evidence at all that the carjacker who was driving the Pickup was the appellant's agent or servant or that he was acting within the scope of his authority. In support of his submissions, counsel for the appellant relied on the following cases: -

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Bachu vs Wainaina & Another [1976-1985] EA 29

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Jivandas & Company Ltd vs Nicadama [1972] EA 489

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Anyanzwa vs Gasparis Civil Appeal No.31 of 1981.

Counsel for the appellant maintained that the trial magistrate erred in finding the appellant liable, as the respondents did not prove their case against the appellant. Counsel therefore urged the court to allow the appeal.

17.

In his submissions, counsel for the 1st respondent noted that the trial magistrate found that the driver of the Pickup was to blame for the accident and that although the appellant claimed that the vehicle was being driven by a carjacker, no concrete evidence was produced. Counsel for the 1st respondent submitted that even though allegations were made that the Pickup was being driven by carjackers these allegations were not proved as the police officers were not called.

18.

Counsel for the 1st respondent noted that there was contradiction between the evidence of police officer Richard Chenjoi and police officer Charles Ibutu, regarding the person who was arrested at the scene, and that, that person was actually charged for a different carjacking incident. Counsel submitted that the evidence of the appellant was completely at variance with all the other witnesses. Counsel submitted that the appellant was not a truthful witness as Joseph Kamau was not charged with any offence relating to the appellant's Pickup nor is there any evidence that he was in the appellant's Pickup. Counsel for the 1st respondent maintained that the appellant was the one to blame for the accident.

19.

The 2nd respondent fully adopted the submissions which were made on behalf of the 1st respondent and urged the court to dismiss the appeal and uphold the judgment of the lower court.

20.

In a reply to the submissions made by the respondents, counsel for the appellant reiterated that there was sufficient evidence that Joseph Kamau was arrested as he tried to run away from the Pickup. Counsel noted that even if there was doubt regarding the identity of Joseph Kamau as one of the robbers that doubt did not affect the fact that the appellant was in fact not the one driving the Pickup at the time of the accident. Counsel further noted that there was no evidence that the appellant was liable for the actions of the robbers either directly or indirectly. He therefore urged the court to allow the appeal.

21.

I have carefully reconsidered and evaluated all the evidence which was adduced before the trial court. I have also considered the judgment of the lower court, the grounds of appeal and the written submissions which were filed. I do note from the evidence which was adduced before the lower court, that it was common ground that the Matatu and the Pickup collided at the junction joining Namanga Highway, and that the 2nd respondent who was a passenger in the Matatu was injured in the accident. Secondly, it was also common ground that the Matatu was travelling on the highway, and the Pickup joined the main road from a side road without giving way. It was also in evidence that the Matatu was travelling at a high speed. The trial court's finding that the accident although contributed to by the driver of the Matatu, was mainly caused by the negligence of the driver of the Pickup cannot be faulted.

22.

This appeal is essentially against the trial court's finding on liability. Specifically, the issue is whether the appellant who was the owner of the Pickup was the one driving the Pickup, and therefore liable for his negligence, or whether the Pickup was being driven by an agent, servant or driver of the appellant for whose negligence the appellant is vicariously liable. The appellant maintained that he was not driving the Pickup at the material time as the Pickup had been carjacked and was under the control of the carjackers at the time of the accident. The appellant's evidence was consistent with the evidence of PC Richard Chenjoi who confirmed that a report of the carjacking was made to Athi River Police Station and that some carjackers were arrested and charged.

23.

In her judgment, the trial magistrate appears to have rejected the appellant's defence merely on the ground that "***no concrete evidence of who the carjackers was was adduced.***" It is apparent that the trial magistrate did not properly direct herself, or analyze the evidence which was before her. The appellant's defence was that the Pickup was under the control and management of someone other than the appellant, and for whose negligence the appellant was not responsible. The identity of the carjackers was not material. All that was required was sufficient evidence to show on a balance of probability that the Pickup was under the control and management of carjackers. The evidence which was before the trial magistrate was sufficient to discharge this burden. It is clear from the appellant's evidence, that the carjackers forcefully took control of the Pickup. They were not the appellant's agents or servants, nor did they have the authority of the appellant to drive the Pickup, nor were they driving the Pickup on a mission which was for the appellant's benefit.

24.

In the case of ***Bachu vs Wainaina & another*** (supra), the court of appeal held that:

"Whether a person owns a vehicle which is being driven by another person even with the permission of the owner, that owner will not be vicariously liable in tort for the negligence of the driver unless it is established that the driver was acting as the servant or agent of the

owner or was using the vehicle for the benefit of the owner or for something in which the owner had an interest either alone or jointly with the driver.”

In this case the 1st respondent did not call any evidence at all to show that the Pickup was being driven by the appellant or a servant or agent of the appellant or that the Pickup was being used for the appellant's benefit.

25.

No vicarious liability could attach against the appellant. The trial magistrate was therefore wrong in finding the appellant liable, and the apportionment of liability cannot stand. The 1st respondent's 3rd party notice against the appellant, therefore failed and the 1st respondent had to bear full responsibility for the injuries suffered by the 2nd respondent. Accordingly, I set aside the judgment of the lower court with regard to apportionment of liability and substitute thereof judgment against the 1st respondent in favour of the 2nd respondent on full liability. In view of the circumstances of this case, I do not find it appropriate to award any party costs of the appeal. Each party shall therefore bear its own costs.

Dated and delivered this 17th day of February, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Njiru H/B for McCourt for the appellant

Mwangi for the 2nd respondent

Advocate for the 1st respondent absent

Eric - Court clerk