REPUBLIC OF KENYA

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

Civil Appeal 744 of 2007

KAHURI S. NJUGUNA……..APPELLANT

VERSUS

KAIRU NJOROGE……...RESPONDENT

(An appeal from the judgment and Decree of Hon. M. Muigai, Ag. Senior Principal Magistrate, in Kikuyu PMCC No.55 of 2006 delivered on 3rd August, 2007)

J U D G M E N T

1. This appeal originated from a suit which was filed in the Magistrate's Court at Kikuyu, by Kahuri S. Njuguna, (hereinafter referred to as the appellant). The appellant had sued Kairu Njoroge (hereinafter referred to as the respondent), seeking special damages for Kshs.202,080/= together with costs and interest.
2. The appellant's claim arose from an accident involving the appellant's motor vehicle Registration No.KAG 358H and Motor vehicle Registration No.KAL 581P belonging to the respondent. The appellant contended that the accident was caused by the negligence of the respondent or his authorized driver, servant or agent.
3. The respondent filed a defence to the appellant's claim in which he admitted ownership of motor vehicle Registration No.KAL 581P, but explained that the motor vehicle was on the night of 24th and 25th September, 2004, stolen from its parking. The respondent contended that it was the thief whom after stealing the vehicle crashed into several vehicles including the appellant's motor vehicle. The respondent denied that the driver of motor vehicle No.KAL 581P at the time of the accident was his agent or servant. The respondent further denied the particulars of negligence attributed to him and liability for the loss claimed.
4. During the hearing of the suit before the trial magistrate, the appellant testified and also called four witnesses in support of his case. The appellant stated that he lent his motor vehicle to one Geoffrey Nyaga. He later learnt from Geoffrey Nyaga that the vehicle had been involved in an accident.
5. Geoffrey Nyaga explained that on the material night he parked the vehicle at a Bar called BeerPort at Kikuyu. At about 3.00 a.m. he was called outside the Bar, where he found that the appellant's motor vehicle had been hit and damaged on the left hand side from the middle towards the boot, by a Matatu Registration No.KAL 581P. Although the Matatu was still at the scene, the driver had disappeared. The matter was reported to the police who towed motor vehicle KAL 851P to the Police station.
6. The appellant reported the accident to First Assurance Company Ltd who were his insurers. Evans Mulwa, a claims officer with the insurance company testified that the insurance company appointed Coslid Insurance Assessors who examined the vehicle and estimated the costs of repair at Kshs.172,028/=. The assessor was paid Kshs.5,684/= for the assessment. The insurance company also hired an investigator to trace the owner of motor vehicle KAL 851P. A sum of Kshs.19,228/= was paid to the investigator. The motor vehicle was subsequently repaired at a cost of Kshs.172,028/=.
7. John Gitau, a private investigator operating under the name of Defend and Detect Kenya Company, testified that on instructions of First Assurance Company Ltd, he carried out investigations and established that the owner of the motor vehicle KAL 851P was the respondent. He traced the physical location of the respondent. He produced his report which he prepared. He confirmed that he was paid a sum of Ksh.19,228/= for his services.

8. James Mwangi Karanja, a mechanical engineer, who is a motor vehicle assessor, testified that on the instructions of First Assurance Company Ltd he inspected the motor vehicle Registration No.KAG 358H . He noted that the vehicle had accident damage on several parts. He prepared a report estimating the costs of repairs at Ksh.172,028/=. He confirmed that he was paid Kshs.5,684/= for the assessment report.

9. The respondent testified and also called John Kabiru Kairu as his witness. The respondent explained that his vehicle was operating as a Matatu plying between Kikuyu and Nairobi. The vehicle was being driven by the respondent's brother John Kabiru Kairu, and driver Ngotho Kibebe. The respondent's brother John Kabiru Kairu testified that on the night of 24th and 25th September, 2004, he left the respondent's vehicle parked at Kobil Petrol Station in Kikuyu. He left the keys to the vehicle with one Murage, a petrol attendant. On the 25th of September, 2004, the respondent received a call from Ngotho Kibebe. He learnt that his motor vehicle was towed to Kikuyu Police Station. On proceeding to the Police Station he learnt that the motor vehicle was involved in an accident. The respondent explained that his vehicle was stolen on the material night. He suspected a petrol attendant who disappeared that night. He therefore denied liability.

10. Each party's counsel filed written submissions urging the court to find in favour of his client. In her judgment the trial magistrate found that there was no evidence to show how the collision between motor vehicle KAG 358H and KAL 851P occurred, as the driver of the respondent's motor vehicle fled the scene. The court therefore could not apportion blame merely by the fact of damage without evidence of who was to blame. The trial magistrate therefore, dismissed the appellant's claim.

11. Being aggrieved by that judgment, the appellant has lodged this appeal raising 6 grounds as follows:

(i) The learned trial magistrate erred in law and in fact by holding that the plaintiff had not proved his case on a balance of probabilities.

(ii) The learned trial magistrate erred both in law and in fact in failing to consider the evidence on record and hence arrived at an erroneous finding on liability.

(iii) The learned trial magistrate erred in law and fact by failing to consider the plaintiff's evidence on record though the same was uncontroverted.

(iv) That the learned trial magistrate erred in law and in fact by failing to consider the plaintiff's submissions thus arrived at an erroneous finding on liability.

(v) The learned trial magistrate erred in law and in fact by failing to find that the defendant's driver was in breach of duty of care in the way he drove the defendant's motor vehicle.

(vi) The learned trial magistrate erred both in law and in fact by considering extraneous mattes and going out of the ambit of the proceedings and evidence before him and hence arrived at an erroneous decision.

12. In support of the appeal, counsel for the respondent submitted that the trial magistrate erred in finding that the appellant had not proved his case. It was submitted that the appellant pleaded that the driver of the respondent's vehicle was an employee of the respondent, and no evidence was produced to controvert this point. It was noted that the defence witness John Kabiru Kairu admitted having left the keys with one Murage, and that there was no evidence adduced to confirm that Murage was not an agent of the respondent.

13. It was submitted that Murage was an agent delegated to do a specific task for the owner of the motor vehicle and therefore the owner of the motor vehicle was liable. The case of *Karisa & another vs Solanki & another [1969] EA 318*, which followed *Selle vs Associated Boat Co. Ltd [1968] EA 123*, was followed. It was maintained that the respondent was vicariously liable for Murage's tortuous act.

14. It was further submitted that the trial magistrate was wrong in holding that no negligence had been proved by the appellant, it being evident that the appellant had pleaded the doctrine of *res ipsa loquitor* The facts giving rise to the suit which were that the appellant's motor vehicle was hit by the respondent's motor vehicle where it was parked, and that the person who was driving the respondent's vehicle ran away from the scene, clearly confirmed that the doctrine of *res ipsa loquitor* was applicable. Relying on *Kericho HCCC No.109 of 2004, Judith Awino Ofwayo vs John Odhiambo*, the court was urged to hold the respondent 100% liable for the accident.

15. For the respondent it was submitted that it was incumbent upon the appellant to prove negligence on the part of the respondent or his driver or agent. It was maintained that the driver of the motor vehicle was neither the respondent nor a person authorized by the respondent. It was argued that the appellant had to prove that the person who was driving the vehicle had general authority to drive the vehicle, and further that there was a relationship of master and servant. It was contended that the respondent's motor vehicle having been stolen and driven without the respondent's authority, the negligent act of the thief could not be attributed to the

respondent. It was maintained that the doctrine of *res ipsa loquitor* could not replace the requirement for proof. The court was therefore urged to uphold the judgment of the lower court and dismiss the appeal.

16. I have carefully reconsidered and evaluated all the evidence which was adduced in the lower court together with the pleadings. I have also considered the submissions of counsel, both in the lower court and in this court, as well as the authorities cited. From the pleadings, it was common ground that motor vehicle KAL 581P owned by the respondent knocked into motor vehicle KAG 356H belonging to the appellant causing it damage. It was also apparent that at the time of the accident, the appellant's motor vehicle was parked. What was in issue was whether the person who was driving the respondent's motor vehicle at the material time was the respondent's servant, employee or agent, whether the accident was caused by the negligence of such person, and if so, whether the respondent can be held vicariously liable for the negligence of that person.

17. The respondent pleaded in paragraph 4, 5 and 6 that his motor vehicle was stolen from where it had been parked and that it was the thief who crushed into several vehicles including the appellant's motor vehicle. Thus, the respondent put the appellant to the task of establishing that the motor vehicle was being driven by a servant, employee or agent of the respondent. The evidence adduced in support of the appellant's case merely showed that the appellant's motor vehicle was knocked whilst it was parked outside a Bar. Geoffrey Mungai Nganga, who was the one in possession of the appellant's motor vehicle at the material time, had left the vehicle outside the bar, and was only called after the accident. He did not therefore witness the accident and could not identify the person who was driving the respondent's vehicle as the driver had disappeared by the time the witness came out of the bar. Thus, the evidence regarding the person who was driving the vehicle was only the evidence adduced by the respondent's witnesses.

18. The respondent's witness position was that the respondent's agent had parked the vehicle and left the keys with one Murage a petrol attendant. The respondent's evidence was that Murage had no authority to drive the vehicle. The respondent therefore concluded that his vehicle was stolen by the person who was driving it at the time of the accident. The respondent assumed that the person who stole the motor vehicle was Murage as he disappeared after the accident.

19. On the evidence which was before the trial magistrate there was no conclusive evidence upon which the court could determine with certainty the identity of the person who was driving the respondent's motor vehicle. Nor was there evidence upon which it could be concluded that the person who was driving the respondent's motor vehicle was a servant, agent or employee of the respondent. Even assuming that Murage was the person who drove the respondent's motor vehicle, there was no evidence that Murage was given the keys to drive the vehicle or that the motor vehicle was being driven for the respondent's benefit.

20. The appellant failed to establish that the motor vehicle was being driven by an agent, servant or employee of the respondent or that the vehicle was being driven on a mission which was for the respondent's benefit. Thus, the appellant failed to disprove the respondent's defence that the person who was driving his motor vehicle at the time of the accident did so without his authority.

21. Although there was no evidence of an eye witness to the accident, there is sufficient circumstantial evidence upon which it can be inferred that the accident was caused by the negligence of the person who was driving the respondent's motor vehicle. This is because the respondent's motor vehicle hit the appellant's vehicle which was stationary at the parking. I find that the accident was caused solely by the negligence of the person driving the respondent's motor vehicle. Nevertheless, the respondent is not vicariously liable for the negligence of that person. For the above reasons, I uphold the judgment of the trial magistrate and dismiss the appellant's suit. In the circumstances of this case, I do not deem it appropriate to award costs.

Dated and delivered this 11th day of March, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Karega H/B for Musundi for the appellant

Matu H/B for Njuguna for the respondent

Eric - Court clerk