



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 856 of 2001

MOSES KINYANJUI KANGETHE.....APPELLANT

VERSUS

LUCY NYAKERU NJAU.....1ST RESPONDENT

SABINA WANGUI.....2ND RESPONDENT

(Appeal from the judgment and decree of the Hon. Mrs. Mugo Chief Magistrate dated 13th November, 2001 in the Chief Magistrate's Court at Thika Civil Suit No.774 of 1996.)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Thika, by Lucy Nyakeru Njau and Sabina Wangui, (hereinafter referred to as the respondents). The two had brought the suit jointly in their capacity as the administrators of the estate of the late Nicholas Mwaura Muhungi, (hereinafter referred to as the deceased). The suit was brought against Moses Kinyanjui Kangethe (hereinafter referred to as the appellant).

2. The suit arose from an accident in which the appellant's motor vehicle registration No.KXX 341 (hereinafter referred to as the subject vehicle), allegedly knocked down the deceased, causing him to suffer fatal injuries. The respondents maintained that the accident was caused by the negligence of the appellant. As a result, the respondents brought the suit against the appellant, on behalf of the deceased's dependants and the deceased's estate. The suit was for recovery of loss and damage under the Fatal Accidents Act and the Law Reform Act.

3. The appellant filed a defence in which he admitted ownership of the subject vehicle, but denied that the vehicle was involved in any accident or that the vehicle was being driven by the appellant, his servant or agent. The appellant also denied the particulars of negligence attributed to him. The appellant pleaded without prejudice, that if an accident occurred, then the same was caused by the negligence of the deceased.

4. During the hearing of the suit, four witnesses testified for the respondent. These were; the 1st respondent who is the deceased's wife, the 2nd respondent who is a sister to the deceased, John Kamau (Kamau) and Lawrence Kihara Mbuthia (Mbuthia). Briefly their evidence was as follows: On the 8th of August, 1994, Kamau, Mbuthia and one Peter Kamau Ngugi, were walking along Thika/Kandara road. A vehicle suddenly passed them at a high speed. Just after passing the three men, the vehicle stopped and the men realized that the vehicle had hit an object. The men heard the cry of a human being but when they approached where the vehicle had stopped, the vehicle was driven away very fast. However, the rear lights of the vehicle were on, and there was moonlight. The three men who also had torches identified the vehicle as a Toyota Hilux Pickup cream or white in colour, whose owner was known to them. When the three men arrived where the vehicle had stopped, they found a body of a man lying on the right side of the road. They identified the body as that of the deceased who was also known to them.

5. While the three were still at the scene, Kandara District Magistrate passed by in his vehicle and he was informed of the accident. A report was also made to the police who visited the scene. The three men also informed

the deceased's wife, of the accident. The next day, the 1st and 2nd respondent proceeded to Kandara Police Station. They later went to Murang'a Mortuary where they identified the body of the deceased. The 1st respondent testified that the deceased was the breadwinner of the family, which comprised of the 1st respondent and her four children aged between 10 years and 1 year. The 1st respondent testified that her husband used to sell clothes and was making on average a monthly income of Kshs.4,000/=. As a result of the accident, the respondents spent Kshs.5,000/= in buying a coffin, Kshs.10,000/= for preserving the body at the mortuary, Kshs.16,000/= for transportation and Kshs.3,629/= for buying clothes for the funeral.

6. Three witnesses testified in support of the defence. These were; John Juma Mwangi (Mwangi), Jason Charles Kangethe (Kangethe) and the appellant. Briefly their evidence was as follows: The appellant owned a Toyota Hilux vehicle registration No.KXX 431. He bought the vehicle in the year 1993. He used the vehicle to ferry avocados from Kandara to Nairobi between May 1993 and April, 1994. From May, 1994, the appellant started using the vehicle to ferry vegetables from Karatina to Nairobi. The appellant had employed Mwangi as a driver, though on weekends he would still drive the vehicle by himself.

7. On 6th August, 1994, the appellant's wife and Mwangi went to Karatina to pick cabbages which they brought to Nairobi. The following day, the appellant and his cousin went to Rigari in Ngong to sell the cabbages. They also proceeded to Donholm where they sold more cabbages. At about 6.00 p.m. they took the vehicle to the garage and then went home at about 7.00 p.m. after the vehicle was checked. On 8th August, 1994, the appellant's wife and the driver went to sell the cabbages in AthiRiver. On 9th August, 1994, the appellant's wife and Mwangi went to Jericho market where they sold the remaining cabbages.

8. On 19th September, 1994, the appellant went to Karatina to collect cabbages. He then parked the vehicle at the Shopping Centre, and parted company with his driver. At about 1.00 a.m. the appellant was woken up by police officers who were in the company of his driver. The police officers informed the appellant that the driver was under arrest because the subject vehicle had been involved in an accident on 8th August, 1994. The appellant maintained that on 8th August, 1994 the subject vehicle was not in Karatina, but was in Nairobi and Thika, where the appellant's driver and the appellant's wife went to sell cabbages. The appellant also maintained that the subject vehicle was not cream in colour but had always been blue in colour as indicated in the logbook which he produced in evidence. The appellant maintained that the subject vehicle was never involved in any accident at Githumu along Thika Road. Written submissions were filed by each party's counsel, each urging the trial court to find in favour of his client.

9. In her judgment, the trial magistrate found that there was no dispute that the deceased died out of a traffic accident. She noted that what was in issue was whether the subject vehicle was involved in the accident and whether the appellant was liable. The trial magistrate found that the two eye-witnesses, Kamau and Mbutia both identified the vehicle involved in the accident as the subject vehicle through its registration number KXX 341, a vehicle with which they were familiar. The trial magistrate noted that there was a dispute concerning the colour of the vehicle which the two witnesses stated was cream/white.

10. The trial magistrate rejected the evidence of the appellant's witnesses i.e. the appellant's driver and nephew, whom she found were not independent witnesses. The trial magistrate further found that although the logbook of the subject vehicle showed that the vehicle was blue in color, it was possible that that was the original colour but by the time the appellant bought the vehicle the colour had been changed to cream/white. The trial magistrate further noted that the behavior of the driver of the vehicle after causing the accident, indicated that the colour could be changed to fit the logbook. The trial magistrate therefore entered judgment for the respondents awarding them general damages of Kshs.300,000/= and special damages of Kshs.20,050/=.

11. Being aggrieved by that judgment, the appellant has lodged this appeal raising 7 grounds as follows:

- (i) That the learned trial magistrate erred in law and in fact in failing to consider that there was no evidence of negligence against the defendant's agent and therefore the defendant cannot be vicariously liable.
- (ii) That the learned trial magistrate erred in law and in fact in failing to find that the witnesses of the plaintiff gave facts that were contradictory in their evidence.
- (iii) That the learned trial magistrate erred in law and in fact in making findings that were not supported by the evidence on record.
- (iv) That the learned trial magistrate erred in law and in fact by failing to give any justification for her conclusion that the defendants changed the colour of his motor vehicle after and as a result of the accident.
- (v) That the learned trial magistrate erred in law and in fact by failing to consider the evidence produced by the defendants through exhibiting the motor vehicle's log book, that the motor vehicle had always been light blue in colour.
- (vi) That the learned trial magistrate erred in law and in fact by not considering the evidence of the second defence witness who testified that he never drove the motor vehicle near the scene of the accident on the material day.
- (vii) That the learned trial magistrate erred in law and in fact because she gave no reason why she completely disregarded the testimonies of all the defence witnesses.

12. During the hearing of the appeal, Mr. Mwenda who appeared for the appellant submitted that there was no evidence showing how the deceased was knocked down, as none of the respondents' witnesses actually saw the collision. Mr. Mwenda pointed out that there was no evidence on record, confirming that the deceased died as a result of a road traffic accident. Mr. Mwenda further submitted that there was a dispute as to whether the subject vehicle was at the scene of the accident, as the respondent's witnesses claimed that the vehicle at the accident was white, while the appellant's witness claimed that the subject vehicle had always been blue. Mr. Mwenda submitted that there was no evidence in support of the trial magistrate's finding that the vehicle was cream/white when the appellant bought it.

13. Mr. Mwenda pointed out that the evidence of the respondents' eye witnesses were contradictory with regard to whether the witnesses were walking or driving, or whether the vehicle which passed them was being driven very fast or at a moderate speed. Further it was submitted that the trial magistrate misdirected herself in finding that the appellant did not call any independent witness. It was maintained that the trial magistrate had no good reason for rejecting the appellant's evidence since the appellant's witnesses were also related to the deceased. Finally, it was maintained that special damages were not strictly proved.

14. Mr. Kimani who appeared for the respondents urged the court to find that special damages were clearly proved through the production of appropriate receipts. Mr. Kimani argued that the evidence of the eyewitness showed that although they did not actually see the accident, they heard the sound of the accident, moved closer and saw the motor vehicle involved in the accident which they easily recognized as they were well acquainted with it. Mr. Kimani maintained that the evidence of the two eyewitnesses was not contradictory. He submitted that the defence of alibi put forward by the appellant was rightly rejected as it was not supported by any evidence.

15. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the submissions made before the trial magistrate and before me. The main issue before the trial magistrate was whether the subject vehicle was the one which knocked down the deceased, and if so, whether the accident was caused by negligence on the part of the appellant or his driver or agent. In this regard, the trial magistrate relied on the evidence of the two eyewitnesses Kamau and Mbuthia. It is not disputed that the accident happened at night. The two witnesses however maintained that they were able to see and note the registration number of the vehicle which passed them through moonlight and torches which they had. The only thing which casts doubt on the

evidence of these witnesses is the fact that the subject vehicle whose registration numbers the witnesses identified was blue in colour and not cream/white as alleged by the witnesses. This was a material contradiction.

16. In her judgment, the trial magistrate played down this contradiction and the evidence regarding the logbook for the subject vehicle produced by the appellant as follows:

“Although the logbook showed that the motor vehicle was blue in colour. It is possible and this is because it so happens that by the time the defendant bought the vehicle it was cream/white.”

17. There was no evidence before the trial magistrate regarding the colour of the subject vehicle at the time it was bought by the appellant other than the appellant’s evidence. The appellant maintained that the subject vehicle was blue in colour, and the logbook supported his evidence. There was therefore no evidence before the trial magistrate that the subject vehicle was cream/white by the time the appellant bought it. The trial magistrate had no reason to reject the appellant’s evidence in this regard. Further, although the trial magistrate had the advantage of seeing and assessing the demeanour of the witnesses, the trial magistrate did not take into account that the accident happened at night, and that the two eyewitnesses only developed an interest in the vehicle after it had already passed them, when they heard the sound of an accident. Under these circumstances, It was possible that the witnesses made a genuine mistake in the registration numbers because the vehicle was at a distance and it was at night. I find that the evidence adduced did not establish on a balance of probability that the appellant’s vehicle was the one which knocked down the deceased.

18. Further, even assuming that the subject vehicle was the one which knocked the deceased, there was no clear evidence regarding how the accident occurred. Thus, none of the particulars of negligence pleaded against the appellant were established. I find that the trial magistrate erred in finding the appellant liable and her judgment cannot stand. Accordingly I allow this appeal, set aside the judgment of the trial magistrate, and substitute thereof an order dismissing the respondent’s claim. In the circumstances of this suit, I do not find it appropriate to award any costs.

Dated and delivered this 29th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mwenda for the appellant

Nyagah H/B for the respondent

Eric - Court clerk