



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 250 of 2004

ROY PARCELS SERVICES LIMITED.....APPELLANT

VERSUS

ESTHER W. NGURE.....RESPONDENT

(An appeal from the judgment of the Principal Magistrate at Milimani Commercial Courts, Nairobi by El Kindy (Mr) in CMCC No.3174 of 2001 delivered on 23rd March, 2004)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Magistrate's Court at Milimani by Esther Waithira Nguni, (hereinafter referred to as the respondent). She was suing in her capacity as the administrator of the estate of Anthony Weru (deceased). The respondent brought the suit against Roy Parcel Company Ltd and Leonard Lumbasi Mombi (hereinafter referred to as the appellant and 2nd defendant respectively). The respondent claimed that the deceased died as a result of injuries suffered in an accident involving motor vehicle registration No.KAH 528X (hereinafter referred to as the subject vehicle), which belonged to the appellant. The respondent contended that the accident was caused by the negligence of the 2nd defendant a servant or agent of the appellant who was driving the subject vehicle at the material time. The respondent sued for damages arising under the Fatal Accidents Act and Law Reform Act for and on behalf of the deceased's dependants and the deceased's estate.

2. A joint defence was filed on behalf of the appellant, and the 2nd defendant, by Maina Nyangena & Company Advocates. In the defence, the appellant denied that the 2nd defendant was its servant or agent authorized to drive the subject vehicle. It was also denied that the deceased was involved in an accident with the subject vehicle or that he suffered any injuries. In the alternative, it was contended that if there was an accident then the same was caused or substantially contributed to, by the deceased's negligence. Leave was subsequently granted to Maina Nyangena & Company Advocates to withdraw from acting for the 2nd defendant. The respondent's counsel apparently experienced

difficulty in serving the 2nd defendant and therefore opted to proceed with the hearing as against the appellant only.

3. The respondent and Charles Gicheha Njogu testified in support of the respondent's case. Their evidence was briefly that on the material day, Charles Gicheha Njogu who operates a Kiosk at Mukuru South B was walking to south B, when he witnessed an accident involving the deceased. The accident happened at the junction of Dar-es-salaam and Dunga Road, when a lorry which was negotiating the corner knocked the deceased who was standing off the road. The police were called and they took the deceased away. The respondent who was away in Nakuru received information about the accident from the police. She testified that she spent a sum of Kshs.90,000/= in funeral expenses. She explained that the deceased was about 23 years old and was at the material time training as a mechanic. The respondent obtained letters of administration in respect of the estate of the deceased and filed the suit.

4. The appellant testified through its Operations Officer, Peter Omulo Nyamidi. The witness stated that the 2nd defendant was employed by the appellant as a container loader. The witness explained that on 10th May, 1998, the 2nd defendant was assigned to the subject vehicle as a loader. The 2nd defendant took the keys to the vehicle and drove off the vehicle without authority. The vehicle was involved in an accident and the 2nd defendant was charged. The witness testified that the 2nd defendant had no authority to drive the vehicle nor was he holding a valid driving license.

5. In his judgment the trial magistrate found that the appellant admitted that the subject vehicle belonged to it, and that the subject vehicle was driven by the 2nd defendant who was involved in an accident. The magistrate noted that the appellant never reported the accident to the police, or the fact that the vehicle was driven by the 2nd defendant without its authority. The trial magistrate therefore found that the 2nd defendant, being an employee of the appellant, the appellant was vicariously liable. He further found that the deceased died as a result of injuries sustained in that accident. The trial magistrate adopted a multiplier of 25 years and a dependency ratio of $\frac{1}{2}$ and a salary of Kshs.8,000/= per month and awarded general damages of Kshs.200,000/=.

6. Being aggrieved by that judgment, the appellant has lodged this appeal raising 5 grounds as follows:

- (i) The learned magistrate erred in law and in fact by failing to carefully consider and/or take into account the effect of the matters raised in the pleadings filed in the suit.
- (ii) The learned magistrate erred in law and in fact in totally disregarding and/or ignoring the evidence submissions and/or binding legal authorities given by the appellant.
- (iii) The learned magistrate erred in law and fact in finding the appellant liable for the death of one Anthony Weru Ngure when there was no evidence to that effect.
- (iv) The learned magistrate erred in law and fact in awarding damages when none were payable and/or in excess in the circumstances.
- (v) The judgment/decree was against the weight of the evidence.

7. In support of the appeal Mr. Nyangena who appeared for the appellant submitted that the evidence before the trial magistrate was clear that the person who caused the accident was a loader who was not authorized to drive the subject vehicle. Mr. Nyangena pointed out that a letter of appointment and payslip in respect of that person was produced in evidence. Relying on *Civil Appeal No.50 of 1983 Mwona Ndoor t/a Ngomeni Bus Services vs Kakuzi Ltd*, Mr. Nyangena submitted that the respondent needed to prove that the person who was driving the subject vehicle was not just an employee employed by the appellant, but was driving the subject vehicle in the course of his duties assigned by the employer. Mr. Nyangena maintained that the finding of the lower court on liability was unfounded and should therefore be set aside.

8. On the issue of quantum Mr. Nyangena submitted that although the respondent pleaded in paragraph 7 of the plaint that she had obtained letters of administration before filing the suit, the grant in respect of the letters of

administration was issued on 19th June, 2003, which was nearly 3 years after the filing of the suit. Relying on **Samuel Gathii vs Josephine Mbugua Civil Appeal No.292 of 1997**, Mr. Nyangena submitted that an administrator could not bring an action before taking out letters of administration. Mr. Nyangena also relied on **Coast Bus Services Ltd vs Samuel Mbuvi Lai Civil Appeal No.8 of 1996**, where a similar holding was made. Mr. Nyangena further submitted that there was no evidence to support the award made by the trial magistrate in respect to loss of dependency under the Fatal Accidents Act. This was because there was no evidence in support of the deceased's age or the deceased's income. The court was urged to allow the appeal and set the judgment of the lower court aside.

9. Mr. Kinga who appeared for the respondent maintained that there was ample evidence that the driver of the subject vehicle at the time of the accident was an employee of the appellant. It was noted that the driver had the keys to the subject vehicle and that the appellant never reported to the police about the alleged unauthorized use of the subject vehicle. In this regard, Mr. Kinga relied on **Automobile Association of Kenya vs James Jaguga HCCA.No.92 of 1989**, where a similar issue arose and the trial judge finding that there was no evidence on record to show that the employer might have been acting outside the scope of his employment, held the employer vicariously liable.

10. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the judgment of the lower court, the memorandum of appeal and the submissions made before me. The first issue which I have noted is the competence of the respondent's suit. From a perusal of the original lower court record, the respondent filed her suit on the 9th May, 2001. She filed the suit in her capacity as the administrator of the estate of the deceased. She indicated in paragraph 7 of the plaint that she had applied for and obtained letters of administration to enable her file the suit.

11. During the hearing in the lower court, the respondent produced a copy of a limited grant of letters of administration *ad colligeda bona* issued under Section 67(1) of the Law of Succession Act. The letters of administration were issued on 19th June, 2003. Therefore, contrary to the averment in paragraph 7 of the plaint, as at 9th May, 2001, no letters of administration had been issued to the respondent. The respondent had no authority to file the suit on behalf of the estate of the deceased as no letters of administration had been issued to her. The claim under the Law Reform Act was incompetent. This was the position taken in **Civil Appeal No.292 of 1997 Samuel Gathii vs Josephine Mbugua** (supra). That is to say, that the respondent could only pursue the claim for loss of dependency under the Fatal Accidents Act Cap 32 and not the claim under the Law Reform Act.

12. The 2nd issue which arose before the trial magistrate for determination was whether the respondent had established that the deceased died as a result of injuries sustained in an accident involving the subject vehicle. The respondent called an eyewitness to the accident who claimed to have seen the lorry knock down the deceased. The respondent also produced a police abstract report which confirmed that the deceased suffered fatal injuries as a result of the accident involving the subject vehicle. The appellant's witness who testified also confirmed that the subject vehicle was involved in an accident. I find therefore that there was sufficient evidence to establish that the deceased died as a result of injuries sustained in an accident involving the subject vehicle.

13. The next issue which was really the main bone of contention in this appeal was whether the accident was caused by the negligence of the appellant's servant or agent, and if so whether the appellant is vicariously liable for such negligence. In **Khayigila vs gigi & Co. Ltd and another [1987] KLR 97**, the court of Appeal dealing with the issue of vicarious liability held that:

- (i) ***In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as its agent.***
- (ii) ***To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.***

14. While the appellant did not deny that the 2nd defendant was its employee, the appellant maintained that the 2nd defendant was employed as a loader cum turnboy and had no authority to drive the subject vehicle. It is evident that the 2nd defendant was actually in the appellant's employment, and that the 2nd defendant did drive the subject vehicle and that he caused the accident. Section 112 of the evidence Act States as follows:

“In civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

15. In this case, it having been established that the 2nd defendant was an employee of the appellant, the limitation of the relationship between the appellant and the 2nd defendant was a fact which was within the special knowledge of the appellant. Therefore, the appellant had the evidential burden to prove its allegation that the 2nd defendant had no authority to drive the subject vehicle. In this case, the appellant sought to do this by producing the 2nd defendant's letter of appointment which described the 2nd defendant as a loader cum turnboy. The police abstract report which was produced by the respondent also showed that the 2nd defendant was charged with driving without a licence. This is consistent with the appellant's contention that the 2nd defendant had no authority to drive as he could not have been authorized to drive without a licence.

16. I find that vicarious liability was not established as there was no evidence that the 2nd defendant was driving the subject vehicle on the appellant's instructions or that he was performing any task or duty delegated to him by the appellant or that he was in any way driving the subject vehicle for the appellant's benefit. The trial magistrate was therefore wrong in finding the appellant vicariously liable.

17. As regards the quantum of damages, the award in respect to loss of life expectancy under the Law Reform Act, was based on the wrong premise that the respondent was competent to pursue the claim for and on behalf of the estate of the deceased. The amounts awarded under the Fatal Accidents Act in respect to the loss of dependency, was also not based on any evidence. The monthly income of Kshs.8,000/= was based on mere speculation, while there was nothing on record to justify the adoption of the high dependency ratio of ½. Thus this court would have been justified to interfere with the assessment by the trial magistrate as the award was not based on any evidence. The upshot of the above is that the judgment of the trial magistrate 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 view of the circumstances of this suit, I do not find it appropriate to award any costs. Each party shall therefore bear their own costs.

Dated and delivered this 5th day of May, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Nyangena for the appellant

Advocate for the respondent absent

Eric - Court clerk