REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 716 of 2002

TITUS MUTINDA KIMITI.....PLAINTIFF

VERSUS

GEDION KAMAU KARANJA.....1ST DEFENDANT

NAHASHON M. MWANGI……..……. 2ND DEFENDANT

J U D G M E N T

1. This was an appeal which was brought by Titus Mutinda Kimiti (hereinafter referred to as the appellant). He was aggrieved by the dismissal of his suit which he had filed in the Senior Resident Magistrate's Court at Nairobi against Gideon Kamau Karanja and Nahashon M. Mwangi (hereinafter referred to as the 1st and 2nd respondents). The appellant had claimed special and general damages against the respondents arising from an accident in which the appellant who was riding a bicycle was knocked down by motor vehicle KVH 409. The appellant claimed that the 2nd respondent was the registered owner of motor vehicle KVH 409 and that the accident was caused by the negligence of the 1st respondent as the authorized driver or agent of the 2nd respondent.

2. The respondents filed a joint defence to the appellants suit, denying the appellant's claim. In particular the respondents denied ownership of motor vehicle KVH 409, or that an accident occurred involving the said motor vehicle. In the alternative the respondent maintained that if there was an accident, then the same was caused by the negligence of the appellant.

3. During the hearing of the suit only the appellant testified. He explained that he was riding a bicycle on the left side of the road going towards Kayole from Kamorock, when he was hit by motor vehicle Reg. No. KVH 409. The motor vehicle which hit the appellant overtook another vehicle without having regard to other road users. The appellant produced a police abstract report as evidence of the ownership of motor vehicle KVH 409.

4. The respondents did not offer any evidence but filed written submissions, in which it was contended inter alia, that no evidence was adduced by the appellant in support of his allegation that motor vehicle KVH 409 belonged to the 2nd respondent and was at all material times being driven by the 1st respondent as authorized driver or agent of the 2nd respondent.

5. Submissions were also filed on behalf of the appellant. In the submissions no reference was made to the issue of ownership of motor vehicle KVH 409. The court was however urged to find the respondents jointly and severally liable for the accident. It was argued that since the respondent did not call any evidence, the appellant's version as to the occurrence of the accident was uncontroverted. The court was therefore urged to find the respondents fully liable for the accident. The court was urged to award the appellant general damages of Kshs.65,000/= as well as special damages of Kshs.8,280/=.

6. In her judgment the trial magistrate found that the appellant failed to prove that the 2nd respondent was the owner of motor vehicle KVH 409, she noted that while the police abstract was evidence that an accident occurred, it did not prove ownership of the motor vehicle. She therefore dismissed the appellant's suit.

7. 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 in holding that the police abstract was not sufficient proof of the respondents involvement and ownership of the accident vehicle.

(ii) The learned trial magistrate erred in law and in fact in completely failing to consider that the respondents were named in a public document produced in evidence in support of the averment that they were driver and owner respectively.

(iii) The learned trial magistrate erred in law and in fact in completely ignoring the fact that the production of the police abstract, a public document at the trial was not objected to and the contents thereof were not contested.

(iv) The learned trial magistrate erred in law and in fact in failing to appreciate that no evidence was offered by the respondents, the defence never cross-examined the appellant on his claim as to ownership of the accident vehicle by respondents and hence the appellants evidence was unchallenged.

(v) The learned trial magistrate erred in law and in fact and misdirected herself in holding that the appellant had not proved any liability against the respondents while the burden of proving the same on a balance of probability had been discharged by the appellant.

6. In her consideration of the issues before her and in her overall approach to the same the learned trial magistrate was overly biased in favour of the respondents and consequently reached a wrong finding.

During the hearing of this appeal, there was no appearance from the respondent. Hearing therefore proceeded ex-parte.

8. Mrs Maira who appeared for the appellant submitted that the trial magistrate was wrong in finding that the police abstract report was not sufficient proof of ownership of motor vehicle KVH 409. She maintained that the trial magistrate did not take into account the fact that the respondent did not object to the production of the police abstract report nor was the appellant cross-examined on the issue of ownership of the motor vehicle. Nor did the magistrate appreciate the fact that the appellants evidence was not rebutted. Counsel relied on ***HCCC No. 43 of 1994 Anthony Mwangi v/s Martin Muiruri*** in which a police abstract report was accepted as evidence of ownership of the accident vehicle.

9. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. I have also given due consideration to the grounds set out in the memorandum of appeal and the submissions made by Mrs Maira. I note that the appeal is essentially against the courts finding on liability.

10. It is clear from the pleadings that the issue of ownership of motor vehicle KVH 409 was a pertinent issue to be determined by the trial court. The issue as to whether the 1st respondent was driving motor vehicle KVH 409 at the time of the accident and if so whether he was doing so as an agent or driver of 2nd respondent were all relevant factors in determining the issue of liability.

11. Section 108 to 110 of the Evidence Act (Cap. 80) states as follows:

"***108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.***

109. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

110. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence".

12. Therefore under section 109 and 110 of the Evidence Act, the burden was entirely upon the appellant who was alleging that the 2nd respondent was the owner of motor vehicle KVH 409 to prove that fact. It was also upon the appellant to prove that 1st respondent was driving motor vehicle KVH 409 at the material time and that he was doing so as agent or driver of 2nd respondent.

13. In this case the only evidence offered by the appellant was a police abstract report which was produced by the appellant himself. While the police abstract report was evidence corroborating the appellant's evidence that an accident occurred involving KVH 409 and that the accident was reported to the police. The appellant could not rely on the information regarding the ownership of the motor vehicle contained in the police abstract report. That information was hearsay as there was no evidence as to who recorded the report and where he got the information concerning the ownership of motor vehicle KVH 409. Moreover the police abstract report did not contain any information regarding the

driver of motor vehicle KVH 409 at the time of the accident.

14. Thus there was absolutely no evidence in support of the appellant's allegation that the1st respondent was driving the vehicle or that he was doing so as the agent or servant of 2nd respondent. In this regard the circumstances of this case were completely different from ***H.C.C.C No.43 of 1994 Anthony Mwangi v/s Martin Muiruri*** in which the defendant did not deny that the accident vehicle was being driven by his driver or agent.

15. I find that the trial magistrate was right in finding the respondent not liable as the appellant failed to prove ownership of motor vehicle KVH 409 a fact which was necessary to be proved before liability of the respondents could arise. Further the appellant failed to prove that motor vehicle KVH 409 was being driven by the 1st respondent or that he was an agent or servant of 2nd respondent therefore neither the issue of negligence nor vicarious liability could arise as there was no basis for the same.

15. For the above reasons I find no merit in this appeal and do therefore dismiss it with costs.

Orders accordingly.

Dated and delivered this 25th day of June, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Miss Maira for the Appellant

Advocate for the respondent - absent

Erick Court clerk