



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

Civil Appeal 21 of 2007

SARAPHINA NJERI APPELLANT

VERSUS

CHARLES KARIUKI 1ST RESPONDENT

SUNVIC EXPRESS LIMITED 2ND RESPONDENT

(Appeal from CMCC No. 4379 of 2003 of the Chief Magistrate's Court

at Mombasa – Boaz Olao - CM)

JUDGMENT

This is an appeal by Saraphina Njeri, the plaintiff in the original action, from the judgment and decree of the Chief Magistrate's Court (Hon. Boaz Olao) at Mombasa whereby the Learned Chief Magistrate dismissed the appellant's suit with costs. The appellant brought the action as the widow and personal representative of the estate of her deceased husband Simon Kiarie Ndung'u (hereinafter "the deceased") against the respondents who were the defendants in the original action. The basis of the claim was pleaded in paragraphs 4, 5, 6, 7 and 8 of the amended plaint dated 5th august 2004. It was that, at all material times the 1st respondent was the registered owner of motor vehicle Registration No. KAL 863J, Nissan Pick up, while the 2nd respondent was the registered owner of motor vehicle Registration No. TZA 9506/ARG 736, Volvo Trailer, and at the material time and date the deceased was a lawful passenger in the 1st respondent's said vehicle when the same was so recklessly driven along Likoni-Diani Road by the 1st defendant, his authorized driver, servant and or agent, that it caused the same to loose control and, collide with the 2nd respondent's said motor vehicle and or in the alternative that the 2nd respondent's authorized driver, servant and or agent so negligently and or recklessly drove the said motor vehicle that it caused the same to veer off its designated lane and collide with the 1st respondent's said motor vehicle and or alternatively that the 1st respondent, and the 2nd respondent so negligently and recklessly drove the said motor vehicles causing them to violently collide and hence occasioning fatal injuries to the deceased. Particulars of negligence were pleaded and so were particulars of special damages.

In the defences filed by the respondents, ownership of the said motor vehicles was denied and so was the negligence alleged. In the alternative the respondents blamed each other.

At the trial, the appellant gave evidence and called two witnesses; a court clerk and a police officer. In her testimony, the appellant stated that the deceased was a passenger in the 1st respondent's said motor

vehicle while on his way to Kwale on business and he had died in an accident. She did not witness the accident but when she travelled to the scene, she confirmed that indeed the accident had occurred which had claimed the deceased, among others, whose body was at Msambweni mortuary. The body was transferred to Coast General Hospital where the post mortem was performed at a fee of Kshs.8,900/=. A coffin was purchased for Kshs.14,000/= and the body transported to Muranga for Kshs.38,000/= for burial.

The appellant later obtained a police abstract and instructed her advocate to apply for a Grant of Representation for which she paid a total of Kshs.4,625/=. On obtaining the said Grant of Representation, she instituted the suit before the Lower Court. She further testified that the deceased used to deal in electrical goods from which he earned an income of about Kshs.30,000/= per day. The business had however collapsed with his demise.

The appellant blamed the driver of both vehicles for the accident the basis of which was the information from the police abstract. She called, one Jessica Rwambi, a clerk at Mombasa Law Court's Civil Registry. She produced the court file for SPMCCC No. 3249 of 2003: **Anastacia Gitau**

- v – Sunvic express Limited and Charles Kariuki. Inspector Ali Ngoni of Nyali police station was also called by the appellant. He testified that he received a report of a fatal road accident on 7.11.2001 which accident involved the said motor vehicles. He then produced the police file in respect of the accident. He also produced the police abstract on the said accident.

The 1st respondent did not testify at the trial and neither did a representative of the 2nd respondent. They also did not call any witness to testify in their defence. Counsel for the parties made their submissions before the Learned Chief Magistrate who, after considering the evidence adduced before him and the said submissions, concluded that the appellant had not proved that the respondents owned the said motor vehicles. On that sole basis, he dismissed the appellant's case. He then, quite properly in my view proceeded to assess damages and held that the respondents would have been jointly liable.

The appellant has challenged the Chief Magistrate's judgment on eight (8) grounds which were argued by counsel in three clusters. All the clusters are however, inter twined. The first cluster revolves around whether the appellant proved her claim on a balance of probabilities. The second cluster revolves around whether the ownership of the said motor vehicles was established and the last cluster was on the failure of the Learned Chief Magistrate to consider the evidence of the court file in CMCCC No. 3249 of 2003 and the police file in respect of the said accident.

I have considered the record of the Learned Chief Magistrate, the grounds of appeal and the submissions made by counsel before me. Having done so I take the following view of the matter. I start with the finding by the Learned chief Magistrate that the appellant failed to prove that the respondents were the registered owners of the said motor vehicles. The Learned Chief Magistrate made that finding because the appellant had not placed before him a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the vehicles. Failing to produce the said search certificate, according to the Learned Chief Magistrate, was a fatal omission and it mattered not that the respondents had not adduced any evidence. That view was not without the support of authority. The Learned Magistrate cited with approval the case of **Thuranira Karauri – v – Agnes Ncheche C.A. No. 192 of 1996 (UR)**. The respondents have invoked the decision in that case to resist this appeal. I have carefully read the said case and have come to the conclusion that the requirement that ownership of a motor vehicle be proved by production of a search certificate signed by the Registrar of Motor Vehicles was not laid down for universal application. That finding applied to the particular facts of that case. I say so because the failure to produce a duly signed search certificate of the subject motor vehicle was not the sole basis for allowing the appeal. The respondent's suit was clearly statute barred and the respondent had alleged that she had obtained extension of time to bring the suit. Yet the purported order granting the extension was not produced at the trial of her action nor had it been served with the plaint. Further, the only evidence of ownership she adduced was that of a police accident abstract. It was also established that the respondent had been involved in a previous accident in respect of which she had lodged a claim for compensation. Those in my view were special circumstances and the finding of the Court of Appeal must

be understood in that context.

In this case the appellant pleaded that the said motor vehicles belonged to the respondents. She did not simply produce the police abstract to establish ownership of the said motor vehicles. She called Jessica Rwambi the Mombasa Court clerk who produced SPMCCC No. 3249 of 2003 between **Anastasia Nduta Gitau and the respondents**. In cross-examination, she testified that the second respondent was found liable. In the plaint filed in that case, the plaintiff blamed the drives of the same vehicles which were stated to belong to the respondents. The appellant also called Inspector Ali Ngoni of Nyali police station who produced the police abstract. He also identified the police file which had been produced in SPMCCC No. 3249 of 2003. The police abstract clearly indicated the 1st respondent was the owner of motor vehicle registration number KAL 863J.

There are other circumstances and facts which show that the ownership of the said motor vehicles was not seriously disputed by the respondents. In her oral testimony in court at the trial, the appellant sated that the motor vehicle registration number KAL 863J belonged to the 1st respondent. Counsel for the 1st respondent did not suggest to the appellant that that was not the case. When Inspector Ali Ngoni produced the police abstract which indicated that motor vehicle registration number KAL 863J belonged to the 1st respondent, he was not cross-examined on the ownership of the said motor vehicle.

There are also the averments of the 1st respondent in paragraphs 7 and 8 of his written statement of defence dated 5.11.2003 which in my view left no doubt that the said motor vehicle belonged to the 1st respondent. The said paragraphs read as follows: -

“7. The defendant denies that the deceased was a lawful passenger in motor vehicle KAL 863J and/or at all and if he was (which is denied) then it was without any knowledge and/or consent of the defendant. The defendant avers that he had only authorized (John Muchina Mukiri who died as a result of the said accident) the person driving motor vehicle KAL 863J to use the said motor vehicle to run his own personal errands at Diani and had specifically notified the said person (now deceased) not to carry or allow any passenger into the said motor vehicle.

8. The defendant avers that if the said JOHN MUCHINA MUKIRI did allow the deceased to board the motor vehicle as a passenger or carried him as a passenger then it was contrary and or without the knowledge consent, authority and/or scope of use of motor vehicle KAL 863J and the same was not within the knowledge, authority consent and/or for the benefit of the defendant.”

Besides the averments in the defence, counsel did not dispute the ownership of the said vehicle in their concluding submissions before the Learned Chief Magistrate. Indeed ownership of the said motor vehicles was not raised as an issue at all at the conclusion of the trial before the Learned Chief Magistrate. In the premises in my judgment, the appellant placed before the Learned Chief Magistrate material which established that the said motor vehicles were owned by the respondents unlike the respondent in **Thuranira Karauri – v – Agnes Ncheche (Supra)**. That evidence was not rebutted by any evidence from the respondents as neither the 1st respondent nor a representative of the 2nd respondent testified. I therefore allow grounds 2, 3, 4, 5 and 7 of the appeal.

In ground 6 of the appeal, the appellant faults the Learned Chief Magistrate for relying upon a decision not cited before him. With respect, that challenge has not been well taken and has no sound basis. Courts routinely invoke decisions, treatises and statutes not cited by litigants in their opinions and judgments. That is for the good of the litigants and the proper development of the Law. Nothing however turns on the failure of ground 6 of the Appeal.

I turn now to the issue of negligence. The Learned Chief Magistrate concluded his judgment as follows: -

“I would find the defendants both jointly liable as there was no direct evidence on who was to blame for the accident. The two defendants would therefore both equally meet the judgment herein and also equally meet the plaintiff’s costs.”

The respondents have not cross appealed against the finding of the Learned Chief Magistrate on liability. In my view the appellant had proved her case on the issue of liability. She placed before the Learned chief Magistrate the evidence that the deceased was a passenger in the 1st respondent's said motor vehicle. He could not therefore have contributed to the accident. The appellant sued both respondents no doubt because she could not tell which driver was responsible for causing the accident in which her husband died. As far as the appellant was concerned it could have been either of the drivers of the said motor vehicles or both or that one was more responsible than the other. The Learned Chief Magistrate, on the material placed before him held that both drivers were equally liable. He was perfectly entitled to make that finding and I do not feel justified to interfere.

The appellant had in any event pleaded the doctrine of *Res Ipsa Loquitur*. There is no doubt that the said motor vehicles collided. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other. It was therefore for the respondents to explain how their motor vehicles which were being driven on opposite sides of the road came to run into each other (see **Joyce Mumbi Mwangi – v – the Cooperative Bank of Kenya Limited & 2 Others [Civil appeal No. 214 of 2004] (UR)**).

In the end, I set aside the Learned Chief Magistrate's judgment dismissing the appellant's claim and substitute therefore an order that both the drivers of the 1st and 2nd respondents were equally liable for the accident and apportion liability for each of one of them on a 50% basis as did the Learned Chief Magistrate. The drivers were driving the said vehicles in the course of the business or employment of the respondents who are vicariously liable. I enter judgment for the appellant for the sums awarded by the Learned Chief Magistrate. With regard to interest the same will accrue at court rates and shall be applied as follows on: -

1. **Kshs.10,000/= for pain and suffering,**
2. **Kshs.100,000/=for loss of expectation of life**
3. **Kshs.50,000/= for loss of consortium**
4. **Kshs.1,920,000/= for loss of dependency,**

from the date of the judgment of the Chief Magistrate. Interest on special damages shall be applied from the date of filing suit in the Chief Magistrate's Court.

The appellant shall have the costs of the suit in the Lower Court and the costs of this appeal. Interest on costs shall be at court rates and shall be applied from the date of taxation or agreement on the same.

Those shall be the orders in this appeal.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of: -

Gathuku for Mungai for the appellant and Obura for the 1st respondent.

F. AZANGALALA

JUDGE

26.8.2009