REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 298 of 2004

BAMBURI SPECIAL PRODUCTS LTD…….APPELLANT

VERSUS

BENARD MUTHINJI KAMAU.……RESPONDENT

J U D G M E N T

Bernard Muthinji Kamau (hereinafter referred to as the respondent), was the plaintiff in the lower court. He brought a suit against Bamburi Special Products Limited (hereinafter referred to as the appellant) by way of a plaint dated 8th February, 2001.

It was the respondent's case that motor vehicle KAL 148A a Mazda pickup, (hereinafter referred to as the motor vehicle), was owned by the appellant. That on the 26th of August, 2000, the motor vehicle was being driven by the appellant's authorized driver and that the respondent was lawfully traveling as a passenger in the same vehicle. The respondent maintained that the motor vehicle was involved in an accident which was caused by the negligence of the appellant's authorized driver. As a result of the accident the respondent suffered personal injuries for which he claimed general and special damages.

In the defence dated 5th March, 2001, the appellant denied owning the motor vehicle. The appellant further denied that the respondent was a lawful passenger in the motor vehicle or that the accident was caused by the appellant's negligence. In the alternative, the appellant maintained that the appellant's driver acted outside the scope of his authority and the appellant was not therefore liable for his actions.

During the hearing of the suit the respondent testified and also called Dr. Maina Ruga as a witness. It was the respondent's evidence that one Daniel Wanjohi Kiama who was an employee of the appellant was the driver of the motor vehicle. The respondent was invited by the said driver to accompany him to Athi River where the said driver was going to fetch water for his boss. On the way back, the motor vehicle which was being driven at a very high speed lost control and overturned. The driver of the motor vehicle died. The plaintiff suffered injuries and was admitted at St. James Hospital from where he was transferred to Kenyatta National Hospital. Plaintiff's injuries included fracture of the right leg and left hand, for which he had to remain in plaster for 8 months. The plaintiff blamed the driver of the motor vehicle for the accident. Dr. Maina Ruga examined the plaintiff after the accident and prepared a medical report which he produced in evidence.

At the hearing of the suit the defendant did not call any evidence. The defence counsel however, filed written submissions urging the court to find that liability of the appellant was not proved. It was submitted that Daniel Wanjohi Kiama was on a frolic of his own and the appellant could not therefore be responsible for his actions. It was maintained that the respondent was not a lawful passenger in the motor vehicle. It was submitted that the respondent having been informed that the motor vehicle was being test-driven, he willingly assumed the risk by entering the said vehicle. It was submitted that the respondent had failed to prove that the motor vehicle was owned by the appellant. It was maintained that the respondent did not discharge the burden of proof as his evidence was full of contradictions and inconsistencies. With regard to quantum it was submitted that the plaintiff's injuries had healed with no residual deformities or permanent incapacity and therefore a sum of Kshs.100,000/= was adequate compensation.

Written submissions were also filed on behalf of the respondent in which it was maintained that the respondent had proved the ownership of the motor vehicle. It was also maintained that the respondent had also proved that the motor vehicle was being driven by the appellant's driver who was on official duty. It was submitted that the appellant was vicariously liable for the negligence of the driver. The court was urged to award general damages of Kshs.500,000/= given the injuries suffered by the plaintiff.

In her judgment subject of this appeal, the trial magistrate found that the respondent had proved his case on a balance of probabilities. The trial magistrate found that the respondent was lawfully traveling in the motor vehicle and that the motor vehicle was being driven by an authorized driver of the appellant. She found the driver negligent and held the appellant vicariously liable. The trial magistrate awarded general damages of Kshs.250,000/= to the plaintiff, but found the special damages not proved and awarded none.

The appellant being aggrieved by that judgment has raised 4 grounds of appeal as follows: -

1. The learned magistrate erred in fact and in law in finding the plaintiff had proved on a balance of probabilities negligence against the defendant yet the plaintiff did not adduce any evidence to prove the registered owner of the subject motor vehicle.

2. The learned magistrate erred in fact and in law in finding the defendant negligent for the alleged accident in face of the nature of the evidence before her that the plaintiff was an unlawful passenger in the said motor vehicle.

3. The learned magistrate erred in fact and in law in finding that the plaintiff/respondent had proved his case against the defendant/appellant in light of the inconsistencies of his evidence and his evidence and plaint.

4. The learned magistrate erred in fact and in law in awarding an excessive sum of general damages for pain and suffering and loss of amenities in the face of the evidence adduced and submissions made by defence counsel.

At the hearing of the appeal only two main issues were pursued i.e. ownership of the motor vehicle and vicarious liability. It was submitted that the respondent did not tender any evidence to show that the motor vehicle belonged to the appellant. It was pointed out that the police abstract report relied upon by the respondent did not mention the appellant but showed that the motor vehicle belonged to Bamburi Cement. It was submitted that vicarious liability could not lie against the defendant in the absence of proof of ownership of the motor vehicle. It was maintained that there was no evidence of any relationship between the appellant and Daniel Wanjohi who was said to be the driver of the subject motor vehicle.

In support of his submissions counsel for the appellant relied on the cases of: -

1. ***Katerega & Another vs Uganda Electricity Board 1995 – 98.(IEA 95)***

2. ***Shighadai vs Kenya Power & Lighting Co. & Another KLR 682***

Further it was submitted that there was no proof that the respondent was an authorized passenger in the motor vehicle.

For the respondent, it was submitted that the respondent testified that the motor vehicle belonged to the appellant and also produced a police abstract report of the accident. Relying on the case of ***Simon Kiarie vs Samuel Muigai Thuku Civil Appeal No. 332 of 2004***, it was maintained that ownership of the motor vehicle does not have to be proved by way of certificate of registration from the registrar of motor vehicle. It was maintained that the appellant having failed to tender any evidence, the court had to rely on the evidence tendered by the respondent. It was maintained that the appellant not having tendered any evidence disputing the respondent's claims regarding Daniel Wanjohi being employed by the appellant, there was sufficient evidennce to establish that the said Daniel Wanjohi was an authorized driver of the appellant and that he authorized the appellant to board the said vehicle.

I have carefully reconsidered and evaluated the pleadings and the evidence which was adduced before the lower court. On the pleadings, it is evident that the appellant specifically denied the respondent's allegation in paragraph 3 of the plaint that the appellant was the owner of the motor vehicle. The appellant also denied that the motor vehicle was being driven by the appellant's authorized driver, servant or agent. A clear issue regarding the ownership of the motor vehicle emerged from the pleadings. There was also an issue as to whether the said vehicle was being driven by the defendant's authorized driver, servant or agent. Further the appellant specifically denied that the accident was caused by the negligence of his authorized driver, servant, or agent. That was also an issue to be determined at the trial.

On the issue of the ownership of the motor vehicle, the respondent's evidence was that he knew Daniel Wanjohi Kiama and that the said Daniel Wanjohi Kiama was working with the appellant and would come with motor vehicles. On the

material day, Kiama came with the motor vehicle (KAL 148A) and asked the respondent to accompany him on a test drive. According to the respondent's evidence, it was a police abstract report which he produced as exhibit No. 3 which showed that the motor vehicle belonged to the appellant. Nevertheless, an examination of this abstract report, copy of which is on page 24 of the record of appeal, shows that the motor vehicle KAL 148A Mazda pick up was owned by Bamburi Cement. There is no mention of the appellant in the abstract report nor did the respondent lead any evidence to explain the relationship if any between Bamburi Cement and the appellant. It is also noteworthy that the police abstract report was produced in evidence by the respondent. No police officer was called to testify as to the circumstances in which the report was made. The requirements of Section 35 of the Evidence Act regarding the admissibility of documentary evidence as to facts in issue were not complied with. The report was therefore irregularly admitted in evidence, and cannot be relied upon as the information contained in the report is no more than hearsay evidence.

While I do accept the preposition that the certificate of registration is not the only way to prove ownership of a motor vehicle, the evidence adduced by the respondent fell far short in proving that the motor vehicle belonged to the appellant.

Further, although the respondent testified that Daniel Wanjohi Kiama was working for the appellant, he did not reveal the source of his information nor was there any evidence to confirm the respondent's contention that Daniel Wanjohi Kiama was driving the motor vehicle on an errand for his boss, or the identity of the boss. There was also no evidence to support the respondent's allegations that the motor vehicle was being driven negligently or that the appellant was vicariously liable for that negligence. Notwithstanding the fact that the appellant did not adduce any evidence, the burden remained squarely upon the respondent to prove his case. That burden could not be discharged by making unsubstantiated allegations.

Under Order XVII Rule 2 (3) of the Civil Procedure Rules the right of a defendant not to offer any evidence at the trial, without prejudice to non-admission of liability has been recognized. That rule provides as follows: -

"***After the party beginning has produced his evidence then, if the other party has not produced and announces that he does not propose to produce evidence, the party beginning shall have the right to address the court generally on the case; the other party shall then have the right to address the court in reply, but if in the course of his address he cites a case or cases the party beginning shall have the right to address the court at the conclusion of the address of the other party for the purpose of observing on the case or cases cited."***

The cardinal principle of law that he who alleges must prove is well captured in Section 107 to 109 of the Evidence Act which states as follows: -

"***107.(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

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 the 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."

The fact that the appellant did not tender any evidence did not therefore make the respondents burden to prove his case any lighter. It was still incumbent upon the respondent to lead evidence in support of the allegations he had made.

n his judgment the trial magistrate stated as follows: -

"***I am satisfied that the plaintiff has proved his case on a balance of probabilities. He has produced cogent evidence that an accident occurred and that he was injured. On liability, he did prove that the driver of the motor vehicle was an authorized driver. They had gone to Athi River to fetch water for his boss. The journey was therefore authorized. He has also demonstrated that he was traveling in the motor vehicle at the invitation of the driver. The defendant has tendered no evidence to disprove this. I do therefore agree with counsel for the plaintiff that the plaintiff was lawfully traveling in that motor vehicle. The accident was self involving, no other motor vehicle was involved. It occurred because the driver was speeding. He was clearly negligent and the owner of the motor vehicle must be held liable."***

The trial magistrate apparently erroneously accepted the respondent's evidence as unchallenged. She did not therefore critically analyze the evidence nor did she consider the pertinent issue regarding the evidence of ownership of the motor vehicle. I find that although there was evidence that the respondent was traveling in the motor vehicle, and that respondent suffered injuries in an accident involving the motor vehicle, there was no cogent evidence adduced before the trial magistrate, establishing that the appellant was the owner of the motor vehicle. Nor did the respondent lead any evidence to establish that Daniel Wanjohi Kiama was indeed an employee or agent or servant of the appellant or that Daniel Wanjohi Kiama in driving the motor vehicle was acting within the scope of his employment as an employee of the appellant such as to make the appellant vicariously liable for his negligence. Further the respondent having admitted that to his knowledge Daniel Wanjohi Kiama was a mechanic and that Kiama informed him that he was test-driving the motor vehicle, there was an element of contributory negligence on the part of the appellant in boarding the motor vehicle under those circumstances. I come to the conclusion that the respondent did not prove his case to the required standard as he did not establish the liability of the appellant.

On the issue of quantum, the respondent sustained injuries which included: -

(i) Right knee with a chip fracture upper tibial candyle.

(ii) Fracture left ulna with bruises on the left fore-arm.

There was no permanent incapacity, although at the time of examination there was some residual pain and weakness of the left forearm and right leg. The trial magistrate awarded a sum of Kshs.250,000/=. In my considered view the amount awarded was not so inordinately low or excessive, nor was it based on wrong principles as to justify the intervention of this court, and I find no merit in this ground of appeal.

The upshot of the above is that I find that the respondent failed to prove his case against the appellant. Accordingly I allow this appeal, set aside the judgment of the lower court, and substitute it thereof with an order dismissing the respondent's suit. I make no orders as to costs.

Dated and delivered this 6th day of June, 2008

H. M. OKWENGU

JUDGE