REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL APPEAL 287 OF 2002

G-TECH INDUSTRIAL AUTO SERVICES LTD…….....APPELLANT

VERSUS

RICHARD NANDI MUDANYA…….....……...1ST RESPONDENT

PETER MUIRURI…….....…….....2ND RESPONDENT

J U D G M E N T

The appeal before me arises from a suit which was brought by the 1st respondent Richard Nandi Mudanya in the Senior Principal Magistrate's Court at Nairobi. The suit was brought against G-Tech Industrial Auto Services Ltd (now the appellant) and its employee Peter Muiruri (now the 2nd respondent). The 1st respondent sought general damages from the appellant and 2nd respondent arising from injuries suffered by the 1st respondent in a road traffic accident, involving motor vehicle KAE 810 M (hereinafter referred to as the subject vehicle). It was alleged that the accident was caused by the negligence of the 2nd respondent. It was further contended that the 2nd respondent was the insured owner/driver of the subject vehicle and that the appellant was vicariously liable for the 2nd respondent's negligence. A joint defence was filed by Wainaina & Ireri Advocates on behalf of the appellant and the 2nd respondent. In the defence, it was maintained that neither the appellant nor the 2nd respondent was the insured owner of the subject vehicle. It was denied that the said accident was caused by the negligence of the 2nd respondent or that the appellant was vicariously liable. In the alternative, it was contended that the accident was caused by the negligence of the 1st respondent.

Before the hearing of the suit commenced, Wainaina & Ireri Advocates were granted leave to withdraw from acting for the 2nd respondent. On the 12th of April, when the suit came up for hearing before the Senior Principal Magistrate, the 1st respondent's advocate applied for interlocutory judgment to be entered against the 2nd respondent because he was not in court. The court granted the order.

Two witnesses then testified in proof of the 1st respondent's case. These were the 1st respondent and Dr. Peter Stanley Otiato. The 1st respondent testified that on the material day he was walking on the right side of the road when a vehicle came from behind him, hit him and threw him to the left side. He was injured and was taken to the hospital by Peter Karanja the driver of the subject vehicle. He was admitted at the Metropolitan Hospital for four days. The 1st respondent produced a police abstract report of the accident, a P3 and treatment notes from the hospital. He stated that he was later bonded to testify against the driver of the subject vehicle. The 1st respondent blamed the driver of the subject vehicle for the accident. He conducted a search with the Kenya Revenue Authority and established that the owner of the subject vehicle was one Stephen Mbatia. Under cross-examination, the 1st respondent explained that

Stephen Mbatia had taken his car to the garage and that the garage belonged to the appellant who had employed the 2nd respondent.

Dr. Otiato produced a medical report which he prepared after examining the 1st respondent. He explained that he had treated the 1st respondent regularly for a period of about four months. He found that the 1st respondent had head injuries with multiple cuts and bruises which necessitated surgery. He also had a bruised left elbow, abrasions of both hands, a deep cut wound on the lateral aspect of the left foot, ankle and contusion of the left lumbo-sacral region. The injuries had healed leaving several healed scars. At the time of preparing the report, the right lumbo-sacral area was still tender and movement of the trunk were limited at the waist.

The appellant testified through Peter Gitau Githugu. He explained that the appellant company was a business which he was running up to the year 2000. The 2nd respondent was an employee of that company. The appellant explained that he was aware about the accident in which the 2nd respondent knocked the 1st respondent. The witness explained that the subject vehicle involved in the accident neither belonged to him nor was in his garage. Nor was the 2nd respondent on duty, on road test during the accident. The witness did a search and confirmed that the subject vehicle was owned by one Stephen Mbatia. Shortly after the accident, the 2nd respondent stopped working for the appellant.

Counsel for the 1st respondent, filed written submissions, urging the court to find that the 1st respondent had proved his case on a balance of probabilities. It was maintained that the appellant was vicariously liable for the acts of his employee, the 2nd respondent, against whom interlocutory judgment had already been entered.

Counsel for the appellant, also filed written submissions, contending that the 1st respondent had failed to establish liability against the appellant. It was contended that the 1st respondent, did not join the registered owner of the subject vehicle to the suit, nor did he produce any documents to show that the subject vehicle was sent to the appellant's garage. The court was urged to find the appellant not liable for actions done by the 2nd respondent outside his employment. The court was therefore urged to dismiss the suit against the appellant.

In his judgment, the trial magistrate found that the 1st respondent was knocked down by the subject vehicle and that the subject vehicle was being driven by the 2nd respondent. The trial magistrate further found that the 2nd respondent was at the material time an employee and servant of the appellant. He found that the subject vehicle was under the control of the 2nd respondent. He maintained that the appellant was vicariously liable for the accident by virtue of the fact that it was involved in business of repair of subject vehicles and that the 2nd respondent was under their authority and control at the time of the accident. The trial magistrate therefore gave judgment in favour of the 1st respondent and awarded 1st respondent general damages of Kshs.85,000/= for pain and suffering.

Being aggrieved by that judgment, the appellant has brought this appeal raising six grounds as follows: -

(1) That the learned magistrate erred in law and fact in the manner he analyzed the evidence tendered before him.

(2) That the learned magistrate erred in law and in fact when he found that the appellant was liable for the acts of the 2nd respondent and yet no proof was tendered to show the 2nd respondent was acting on the appellant's instructions.

(3) That the learned magistrate failed to appreciate that it was not upon the appellant to join in a third party as the appellant was not seeking indemnity and or contribution from the third party.

(4) That the learned magistrate failed to appreciate that no evidence was tendered to prove that the

motor vehicle in question was at the appellant's garage.

(5) That the learned magistrate erred in law and in fact in failing to find that it was the duty of the plaintiff/respondent herein to join the owner of the motor vehicle in question to explain where his motor vehicle was at the time of the accident.

(6) That the learned magistrate erred in both law and fact when he found that the appellant had not proved his case on a balance of probabilities.

Counsel for the appellant, submitted that the appellant was not sued as the owner of the subject vehicle, but as the employer of the 2nd respondent. It was submitted that there was sufficient evidence before the court confirming that the subject vehicle was being driven by the 2nd respondent. It was maintained that there was no nexus between the appellant and the 2nd respondent. Nor was there any relationship between the appellant and the registered owner of the subject vehicle. It was contended that the trial magistrate erred in relying on hearsay evidence that the registered owner had taken the subject vehicle to the appellant's garage. It was submitted that the trial magistrate misdirected himself in holding that the ownership of the subject vehicle was not in dispute and also in blaming the appellant for failing to issue a third party notice against the owner of the subject vehicle. The court was urged to find the judgment of the trial magistrate unsupported by the evidence.

For the 1st respondent, it was submitted that the 2nd respondent was sued as a driver of the subject vehicle, and the appellant sued as the employer of the 2nd respondent. It was contended that the appellant and 2nd respondent having filed a joint defence admitting the description of the parties, the only issues were negligence and vicarious liability. The court was referred to a statement made by the defence counsel from the bar, that at the time of the accident the 2nd respondent was repairing the subject vehicle and was on road test. The court was also referred to the evidence of the 1st respondent, that he was taken to the hospital by the 2nd respondent, and that the appellant is the one who paid the hospital bills.

It was maintained that the ownership of the subject vehicle was not in issue as the claim was based on master-servant relationship. It was further submitted that under Section 112 of the Evidence Act, the burden shifted onto the appellant to show that the 2nd respondent was not on duty and that the subject vehicle was not at their garage. Under Section 115 of the Evidence Act, it was contended that the onus was upon the appellant to prove that that special relationship did not exist. It was maintained that the appellant having failed to seek a third party notice to join the owner of the subject vehicle, the relationship must be presumed under Section 19 of the Kenya Evidence Act. The court was referred to the case of ***Ngumbao vs Mwatate & 2 Others (1988) KLR 549***, and urged to dismiss the appeal with costs.

In a rejoinder to the respondent's submissions, it was maintained that the principle of vicarious liability can only apply where there is a nexus between the employer and the employee showing that the employee was acting under the direction or control of the employer. It was submitted that no such relationship was pleaded or established. It was submitted that Section 112 of the Evidence Act cannot shift the burden where there are no such circumstances pleaded.

I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. Firstly, I note from the record, that the trial magistrate entered interlocutory judgment against the 2nd respondent because the 2nd respondent did not attend the court for the hearing of the suit despite having been properly served with a hearing notice. It would appear that the trial magistrate applied Order IXA Rule 6 of the Civil Procedure Rules which provides for the entry of interlocutory judgment where one or more defendants fail to enter appearance. In this case Order IXA Rule 6 of the Civil Procedure Rules was not applicable as appearance was entered on behalf of the 2nd respondent by Wainaina Ireri & Co. Advocates on 25th June 1999. The suit having been listed before the trial magistrate for hearing, the non-attendance of the 2nd respondent for the hearing of the suit could only be dealt with under Order IXB Rule 6 of the Civil Procedure Rules which provides as follows: -

"***If some only of the defendants attend, the court shall proceed with the suit and shall give such judgment as is just in respect of the defendants who have not attended."***

That rule does not provide for the entry of interlocutory judgment in default of attendance nor does it provide for the entry of judgment prior to the hearing of the suit. The trial magistrate can only proceed with the hearing of the suit, and having heard the evidence for the plaintiff and the available defendant, give such judgment as is just in respect of the absent defendant. This position is fortified by Order IXB Rule 3 of the Civil Procedure Rules which deals with the situation where only the plaintiff attends court. In such a situation it is provided :

"***If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied –***

(a) that notice of hearing was duly served, it may proceed ex parte;

(b) that notice of hearing was not duly served, it shall direct a seconds notice to be served;

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

This rule does not provide for interlocutory judgment but provides that the hearing may proceed *ex-parte*.

Thus the entry of interlocutory judgment against the 2nd respondent prior to the hearing of the suit was wrong.

From the evidence, it was not disputed that the registered owner of the subject vehicle was one Stephen Mbatia. The appellant and the 1st respondent each produced a search from Kenya Revenue Authority confirming the registered ownership of the subject vehicle. It is also apparent from the evidence of the 1st respondent and the appellant's witness, that at the time of the accident the subject vehicle was being driven by the 2nd respondent. The evidence of the 1st respondent having been unchallenged regarding the circumstances of the accident, I am satisfied and do find that the accident was caused solely by the negligence of the 2nd respondent.

The question is whether the appellant who was not the owner of the subject vehicle can be held vicariously liable for the negligence of the 2nd respondent. In determining this question the court has to consider whether the subject vehicle was under the direction and control of the appellant such as to render the actual ownership of the subject vehicle immaterial, and secondly whether the 2nd respondent in driving the motor vehicle was acting under the express instructions of the appellant in a journey in which the appellant had interest or derived financial interest, such that it can be concluded that the 2nd respondent was an agent or employee of the appellant for whose negligence the appellant can be held vicariously liable. The case of ***Ngumbao vs Mwatate & 2 Others*** is instructive in this regard.

In paragraph 2 of the plaint, the 1st respondent contended that the 2nd respondent was at all times the registered insured owner/driver of the subject vehicle. This was denied by the appellant and the 2nd respondent. No evidence was adduced in support of the allegation that the 2nd respondent was the insured owner of the subject vehicle. However, as already observed, there was clear evidence that 2nd respondent was the driver of the subject vehicle at the material time.

In his evidence in chief, the 1st respondent did not adduce any evidence connecting the appellant either with the subject vehicle or with the 2nd respondent. The attempt to provide a connection came in the 1st respondent's evidence under cross-examination when he stated as follows: -

"***The 2nd defendant is the one who employed the 1st defendant. The garage belonged to the 2nd defendant. Stephen Mbatia had taken the car to the garage."***

The 1st respondent did not however explain the source of this information nor did he offer any evidence to confirm these allegations. In the absence of any evidence from Stephen Mbatia, the allegation was nothing more than mere hearsay. An attempt was made to rely on a statement made by the defence counsel from the bar on 5th February 1999, whilst applying for an adjournment, to the effect that at the time of the accident the 2nd respondent was repairing the subject vehicle and was on road test. A statement made by an advocate from the bar cannot be used to contradict pleadings or evidence adduced by a party under oath. The appellant's witness specifically denied that the subject vehicle was being repaired at its garage. The witness also maintained that the 2nd respondent was not on duty on road test at the time of the accident. Although it was not disputed that the 2nd respondent was an employee of the appellant, the mere fact that the 2nd respondent was an employee of the appellant was not sufficient to establish liability. It was incumbent upon the 1st respondent to go further and prove that the appellant was vicariously liable for the negligence of the 2nd respondent. That could only be done by establishing that the subject vehicle was under the control of the appellant and that the 2nd respondent was driving the subject vehicle as an agent or servant of the appellant, for the benefit or interest of the appellant. That burden remained squarely upon the 1st respondent.

The trial magistrate appears to have wrongly shifted this burden onto the appellant. The fact that the appellant was in the business of repairing motor vehicles was not sufficient reason to conclude that the subject vehicle was under the control of the appellant for repairs. Nor did the fact that a report of the accident was made to the appellant's witness and he paid for the treatment of 1st respondent. That was only a logical and human thing to do as the appellant looked into the circumstances of the accident. The 1st respondent simply did not prove any nexus between the appellant and the subject vehicle. The failure by the 1st respondent to call the registered owner of the subject vehicle as a witness to explain the circumstances, in which his motor vehicle ended up with the 2nd respondent, completely weakened the 1st respondent's case. I find that there was no evidence upon which the court could come to the conclusion that the subject vehicle was being driven by the 2nd respondent on the appellant's instruction or under the direction and control of the appellant, nor was there any evidence that the appellant had any interest in the journey. The trial magistrate was therefore wrong to find the appellant vicariously liable and the judgment against the appellant cannot stand.

Accordingly, I allow this appeal, set aside the judgment of the lower court against the appellant and substitute thereof an order dismissing the 1st respondent's suit against the appellant.

Those shall be the orders of this court.

Dated and delivered this 9th day of October, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the appellant absent

Gichumu for the respondent