Kamau v Lihanda & another (Civil Appeal E366 of 2020)
[2024] KEHC 1284 (KLR) (Civ) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1284 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E366 OF 2020

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

PENINAH NDUTA KAMAU ..... APPELLANT

AND

PETERKIN LIHANDA ..... 1ST RESPONDENT

BARRACK OTIENO OGIGO ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. M. Obura (SPM) in Miimani CMCC No. 4128 of 2012 delivered on 7th December, 2020)

JUDGMENT

1. The 1st respondent sued the appellant Peninah Nduta Kamau vide Milimani CMCC No. 4128/2012 seeking compensation for injuries he sustained on 21/12/2011 while he was travelling aboard the appellant's motor vehicle registration no. KAR 307R Nissan Van along Nairobi-Naivasha Road at Fly-over.

2. The appellant contended that the motor vehicle had been sold to the 2nd respondent at the time it collided with motor vehicle registration no. KTCB 6649 Mersey Fergusson.

3. Interlocutory judgment was entered against the 2nd respondent. The appellant in her evidence said she had sold the motor vehicle to the 2nd respondent for kshs.400,000.

4. The trial court found that the motor vehicle was still registered in the name of the appellant.

5. The trial court found that there was no evidence that the appellant has sold the motor vehicle to the 2nd respondent.

6. The trial court found the appellant and the 2nd respondent 100% jointly and severally liable for the accident and assessed damages at ksh.800,000 plus special damages of ksh.65,776 for medical costs.

7. The appellant has appealed against the judgment on the following grounds;

   i. That the learned magistrate erred in law and in fact in finding that the 1st defendant is vicariously liable for the injuries, loss and damage suffered by the plaintiff.

   ii. That the learned magistrate erred in law and in fact in overruling the 1st defendant's objection of production of the medical report by the plaintiff.

   iii. That the learned magistrate erred in law and in fact in failing to consider the submissions filed by the 1st defendant on vicarious liability.

   iv. That the learned magistrate erred in law and in fact in finding that the 1st defendant was the owner of the motor vehicle at the time of the accident.

   v. That the learned magistrate erred in law and in fact in entering judgment against the defendants jointly and severally for general and special damages as well as costs of the suit.

   vi. That in the circumstances, the judgment of the learned magistrate is a miscarriage of justice.

8. The parties filed written submissions as follows; the appellant submitted that the 1st respondent's testimony at trial was that he and a group of other people hired the accident motor vehicle from the 2nd respondent which was a clear indication of the correctness of appellants assertion of selling the subject motor vehicle to the 2nd respondent.

9. Further that the insurance policy at the time of the accident the 2nd defendant was the insured and statutory notice was issued to Mayfair Insurance a fact that was admitted by the 1st respondent during re-examination.

10. The appellant argued that in the absence of the transfer being effected in favor of the 2nd respondent, the police abstract and an insurance policy such as the one produced by the 1st respondent ought to have been considered as conclusive evidence to the contrary of the motor vehicle search certificate as to the actual owner of the subject motor vehicle.

11. It was the appellant submission thus that she proved on a balance of probabilities that she had sold the subject motor vehicle to the 2nd respondent.

12. On vicarious liability the appellant argued that the police abstract produced in court indicated that Harrison Mugo Gachiri who was not added as a party to the suit was the driver of the subject motor vehicle and no evidence was presented to indicate that the said driver was employed or an agent of the appellant.

13. The law on vicarious liability is well settled. Vicarious liability is a legal doctrine that assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently.

14. The 1st respondent submitted that it is not in contention that the driver of the motor vehicle was in fact an employee of the Appellant and evidence has been adduced to that effect. The Appellant did not adduce proper evidence on the ownership transfer of the Motor Vehicle to the 2nd Respondent as such the Trial Court did not in any way error determining the issue of ownership.

15. Further, that 2nd respondent provided evidence showing that the motor vehicle was in the name of the appellant at the time of the accident. The available information and documentation provided did not convincingly support the claimed transfer of ownership to the degree necessary and thus the appellant did not prove to the required standard.

16. On vicarious liability the 1st respondent submitted that the appellant failed to rebut the contention of the appellant that she was the owner of the suit motor vehicle by at least producing a certificate of official search from the Registrar of Motor Vehicles to state otherwise.

17. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witness.

18. The issues for determination in this appeal are as follows;

    i. Whether the trial court was right in finding the appellant jointly and severally liable with the 2nd respondent.

    ii. Whether the appeal should be allowed.

19. On the issue as to whether the trial court was right in holding the appellant and the 2nd respondent 100% jointly and severally liable, I find that there is no dispute that the motor vehicle is still registered in the name of the appellant.

20. I find that the appellant's evidence was that the motor vehicle had been sold to the 2nd respondent for ksh.400,000 at the time of the accident.

21. Although the appellant is alleging that the 2nd respondent was the beneficial owner, the law states that the person registered in presumed to be the owner unless the contrary is proved.

22. It was the duty of the appellant to prove that she had sold the motor vehicle. The trial failed to note that the police abstract indicated the 2nd respondent was the beneficial owner of the motor vehicle.

23. In the circumstances, I find that the appellant rebutted the presumption that she was the owner of the motor vehicle.

24. Interlocutory judgment having been entered against the 2nd respondent the trial court ought to have held the 2nd respondent 100% and ought to have exonerated the appellant.

25. I find that the appellant rebutted the presumption under the *Traffic Act* by showing that the 2nd respondent was the beneficial owner of the motor vehicle at the time of the accident having bought it from the appellant.

26. I set aside the trial court's judgment on liability and I discharge the appellant.

27. I substitute the judgment with a finding that the 2nd respondent is 100% liable for negligence on the basis of the interlocutory judgment entered against him.

28. The quantum of damages remains as assessed by the trial court.

29. Judgment be and is hereby entered in favour of the 1st respondent against the 2nd respondent in the sum of ksh.865,776 plus costs and interest at court rates from the date of the trial court's judgment until payment in full.

30. The case against the appellant is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent