Mogo Auto Limited v Kevogo (Civil Appeal E134 of 2023)
[2024] KEHC 16999 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEHC 16999 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E134 OF 2023

PJO OTIENO, J

FEBRUARY 21, 2024

BETWEEN

MOGO AUTO LIMITED ..... APPELLANT

AND

WILSON KEVOGO ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Sylvia A. Wayodi (RM) in Kakamega SMCC Case No. E075 of 2023 delivered on 9th August, 2023)

JUDGMENT

Background of the Appeal

1. By way of a statement of claim dated 28th April, 2023, the respondent, as the claimant then, sued the appellant, as the respondent then, for general damages, special damages in the sum of Kshs. 10,503/- costs and interest of the suit. The suit was grounded upon the tort of negligence whose particulars were well set out.

2. The respondent's case was that on or about 7/3/2023 at about 1030hrs he was riding Motor Cycle Registration Number KMDN 0669C along Kakamega Kisumu around, when at Stendi Kisa junction, the driver of Motor Vehicle Registration Number KCT 251E registered in the name of the appellant carelessly made an abrupt turn thereby knocking the respondent and occasioning to him injuries and thus damage.

3. In a response to the statement of claim dated 2nd June, 2023, the appellant denied the occurrence of the accident and stated in the alternative that if at all the accident ever occurred, then it was caused by the negligence of the respondent.

4. In a judgment of the trial court delivered on 9th August, 2023, the court found the appellant 100% liable for the accident and awarded the him Kshs. 10,503/- in special damages, Kshs. 550,000/- in general damages together with costs and interest of the suit.

5. Aggrieved with the decision of the trial court, the appellant lodged a memorandum of appeal dated 28th August, 2023 and challenged the judgment on the grounds that;

    a. The learned magistrate erred in fact and law by holding the appellant was liable despite the fact that the respondents did not have any reasonable cause of action against the appellant herein.

    b. The learned magistrate erred in fact and law by holding the appellant liable despite of it being a mere financier of the suit motor vehicle and having an insurable interest to the subject motor vehicle that caused the accident subject of the proceedings at the trial court.

    c. The learned magistrate erred in fact and law by finding the appellant vicariously liable for negligent actions and omissions of a third party who was not an agent/employee/servant or even in control of the subject motor vehicle under the instructions of the appellant.

    d. The learned magistrate erred in fact and law in failing to consider the appellant's submissions on liability.

    e. The learned magistrate erred in fact and law by weighing the respondent's case in isolation from the appellant's case and by precluding herself from assessing the magnitude of liability impartially.

    f. The learned magistrate erred in fact and law in failing to accord the appellant's evidence and submissions due consideration.

6. For the above reasons, the appellant prays that the judgment on liability be set aside and substituted with a different award and that costs of the appeal be awarded to the appellant.

7. The appeal has been canvassed by way of written submissions which the court had dutifully read and derived valuable assistance. The court will not set out the submissions in details but a short summary shall suffice.

8. It is the submission by the appellant that a financier cannot be held vicariously liable and argue that vicarious liability depends not on ownership but on the delegation of tasks or duty and cite the case of HCM Anyanzwa & 2 other vs Lugi De Casper & Another (1980) KLR. They add that the respondent witness denied knowing the driver of the subject motor vehicle and therefore the appellant cannot be held liable on account of being a mere financier since the motor vehicle was jointly registered with the appellant for purposes of securing its interest in a financial arrangement. The appellant places reliance on the case of Ali Abdi Dere v Hash Hauliers Limited & another 92018) Eklr in that regard. It is its position that the respondent ought to have sued the person with the insurable interest over the subject motor vehicle who in this case, according to the police abstract, was Raphael Ongala Olala and as per the certificate of insurance the policy was valid as from 16/12/2022 up to 15/12/2023 which covers the time of the accident.

9. They contend that the failure of the respondent to join the owner of the subject motor vehicle and the driver at the time of the accident meant that no decree could be passed by the lower court and they cite the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (intended Plaintiff) (2022) Eklr and Florence Nafula Ayodi & 5 others v Jonathan Ayodi Ligure v John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 others (Applicants/Intended Interested Parties) (2021)Eklr on who is a necessary party to a suit and the conditions to be satisfied.

10. It is further contended and submitted that during the cross examination of the respondent at the trial court, captured at pages 110-111 of the record of appeal, he admitted that he conducted a search of the suit motor vehicle and it brought two owners; the appellant and one Elizabeth Akinyi Wambi but he only chose to sue the appellant.

11. It is the submission by the respondent that the loan agreement that was adduced as evidence by the appellant showed one Raphael Ongala Olala as the borrower whereas the motor vehicle search showed the motor vehicle was registered in the joint names of Elizabeth Akinyi Walibi and Mogo Auto Limited. He claims that no evidence was tendered to corroborate how Raphael Olalo Ongalo came to have a direct legal ownership to the vehicle and how Mogo Auto Limited ended up being registered as joint owners with Elizabeth Akinyi Walibi and for that reason it cannot be viewed or said that joint registration was done on the basis of the loan agreement dated 16/12/2022 sought to be relied upon.

12. It was additionally argued that it was the responsibility of the appellant to take out a third party notice against the party they claim was negligent and in that regard he cites the case of David Mwangi Kamunyu v Raphael Njambi Ruguru (2022) eKLR.

Issues, Analysis and Determination

13. The court has duly considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the respondent and discerns the issue for determination to be whether the appellant was proved to be vicariously liable for the injuries occasioned on the respondent

14. This being an appeal from the Small Claims Court, the court is obligated by the provisions of section 38 of the *Small Claims Court Act* to consider only questions of law and if it be shown that the appeal raises such point on law then it has the unwavering obligation to reappraise, reexamine and reevaluate the entire evidence afresh with a view to coming to own conclusions.

15. The liability of a financier in an accident occasioned by a motor vehicle jointly registered in its name was discussed in Ali Lai Khalifa & 8 Ors. v. Pollman's Tours and Safaris & 2 Ors. Mombasa HCCC No. 106 of 2002 where it was held as follows;

> " The legal position is this: if it can be demonstrated that a registered owner of a motor vehicle hired out to a third party or the said vehicle was used in the circumstances which did not allow for the doctrine of vicarious liability on the part of the registered owner, to apply, then the latter is not liable."

16. Similarly, the court in Justus Kavisi Kilonzo v. Coast Broadway Company Ltd. and Diamond trust (K) Ltd. Mombasa HCCC 169 of 2007 held as follows:

> " I take the following view of the matter. The basis of the defendant's statement of defence, the co-ownership is admitted. But the same is explained in paragraph 2 of thereof. In that paragraph, the 2nd defendant avers that it is registered as co-owner of the said vehicle only as financier thereof under a Hire Purchase Agreement dated 29.8.2004. Otherwise, the possession, control direction and management of the said vehicle was at all material times with 1st defendant, its servants and or employees. The Plaintiff has not filed a reply to that defence to rebut the 2nd defendant's averment regarding its status vis a vis the said vehicle. It must therefore be taken that the said averment is factually correct. That position is also not denied by the plaintiff in his replying affidavit filed in opposition to the application. I have also noted that the 1st defendant has not denied the 2nd defendant's said status."

17. From the above two decisions, the burden of proof is placed on the financier to prove that indeed its interest in a joint registration is to protect its interest as a financier.

18. DW1, in his evidence captured at page 111 of the record of appeal admitted that the suit motor vehicle was jointly registered in the name of the appellant and one Elizabeth Akinyi Walibi. He further stated that they had financed one Raphael Ongala Olala and exhibited the security and asset financing agreements both dated 16. 12.2022. The said documents were produced with the concurrence of the respondent who never objected to such production.

19. When the respondent had the chance to test that evidence, he chose not to impugn the position of the appellant that it was merely a financier. No attempt was ever made to challenge the assertion that the driver of the motor vehicle on the date of the accident was not known to the appellant and was not its employee so as to be held vicariously liable. On the same note, the pleading in the response to the claim on the same facts was never responded to with the consequence that the question of the liability of the appellant was at the core of the case.

20. In the judgment, the trial court indeed appreciated the law under section 8 of the *Traffic Act* that registration is merely prima facie evidence that can be upset with an explanation by way of other evidence. Here there was evidence tendered that the motor vehicle was jointly registered to protect the appellant's interest as a financier. That evidence was sufficient to show that the appellant was merely interested in the motor vehicle as security for the payment of its loan. Why the loan was granted to a person other than the registered owner was not in the views of the court relevant to be the basis of the decision against the evidence adduced by the appellant. The court discerns from the documents filed and produced in evidence established that the loan was advanced to Rapahel Ongala olala on the security of the motor vehicle owned by Elizabeth Akinyi Walibi. The court appreciates that under the *Movable Property Security Rights Act* one can offer as security a motor vehicle to secure the borrowings of another. Nothing was thus untoward in the appellant accepting the motor vehicle as security. On the face of the logbook and the deeds on financial arrangements between the appellant and Rapahel Ongala olala, there was sufficient evidence to support the conclusion that the appellant was a financier and not the owner in possession and control. With such evidence the trial court was in error in holding the appellant liable.

21. The second error the trial court committed was the failure to properly apply the principle of vicarious liability. For the principle to be applicable there must be established a servant-master, employer-employee or agent- principal relationship between the driver and the owner of the motor vehicle. The second fact to be established is that the said servant, employee or agent was in the course of duty and within the scope of authority in executing the instructions, express or implied, of the master, employer or principle. In this matter, it was expressly pleaded that the driver, who was never sued as a party, was described as the agent or servant of the appellant. However, in cross examination, the respondent was affirmative that 'the driver was not from Mogo an employee'.

22. It is to this court clear that there was no urgency established between the driver and the appellant to invite the application of the principle of vicarious liability against the appellant. The finding of fault in negligence against the appellant was thus made on no evidence and in fact against the evidence by the respondent himself. In the decision the trial court overemphasized the fact of registration and overlooked the fact of causation by the tortfeasor. Had the court properly addressed its mind on causation, it ought to have appreciated that vicarious liability is never dependent on ownership but on the relation between the driver, as the principal tortfeasor, and the registered owner of the

motor vehicle. This court takes guidance from the decision in John Nderi Wamugi vs. Ruhesh Okumu Otiangala, Civil Appeal No. 24 of 2015 where the court of appeal stated:

> " Vicarious liability is not pegged on legal ownership (of a vehicle) but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor."

23. That error by the trial court is a clear and sufficient reason to interfere with the factual findings by the trial court by an appellate court. The finding on liability against the appellant having been in error on the application of the principle of vicarious liability is hereby set aside.

24. Lastly, the appellant having been a legal person incapable of personally driving the motor vehicle, it was imperative that the principal tortfeasor, be joined to the proceedings so that this wrong be proved with his participation. The court takes the view that in every case founded on the tort of negligence, it is fatal to sue the registered or beneficial owner without suing the driver as the primary tortfeasor. In the opinion of the court, without finding fault with the driver, no other party may be connected to the tort. Secondly, without joining the driver to the suit, any finding of fault upon him would affront the rules of natural justice on the right to be heard. The driver of the motor vehicle having not been sued, the suit was given a false start. Its fate was predetermined for failure by that fundamental failure.

25. For the reasons set in the foregoing paragraphs, the court finds the appeal to be wholly merited and it is therefore allowed with costs to the appellant.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF FEBRUARY, 2024.

PATRICK J O OTIENO

JUDGE