



Board of Magement St Paul Thomas Academy & another v Mwangi (Civil Appeal 33 of 2022) [2024] KEHC 3118 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3118 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL APPEAL 33 OF 2022**

J WAKIAGA, J

APRIL 3, 2024

BETWEEN

**THE BOARD OF MAGEMENT ST PAUL THOMAS
ACADEMY 1ST APPELLANT**

PIONEER INTERNATIONAL SCHOOL 2ND APPELLANT

AND

PARTRICK MUIRURI MWANGI RESPONDENT

*(Being an Appeal from the Judgement of Hon. V. A. Ochanda SRM
delivered on the 31st May 2022 in MURANG'A CMCC NO 55 of 2020)*

JUDGMENT

1. By a plaint dated 13th February 2020, the Respondent sued the Appellant for general and special damages arising out of a road traffic accident on the 26th November 2018 between the Respondent who was riding a motor cycle registration number KMEF 060Q and motor vehicle registration number KBV 346X owned by the 2nd Appellant but in the possession of the 1st Appellant.
2. By a statement of defence dated 14th August 2020, the Appellants denied ownership of the said motor vehicle and the occurrence of the said accident and particulars of negligence contained therein and further stated that the Respondent was illegally riding the subject motor cycle having not been licenced to operate the same and was therefore not entitled to benefit from the said illegality.
3. By a Judgement dated 31st May 2022, the trial Court found the 1st Appellant liable at 100% and the 2nd Appellant not liable and awarded general damages of Kshs.1,000, 000 and special damages of Kshs.4,050.
4. Being aggrieved by the said determination, the Appellants filed this Appeal and raised the following grounds of Appeal;



- a. The Court erred in law and fact by finding against the 1st Appellant on liability without any evidence in support.
 - b. The Court erred in finding that the 2nd Appellant was liable when it was sued vicariously for acts and omission of the 1st Appellant.
 - c. The trial Court erred in law and in fact by failing to uphold the principle that the Respondent was bound by his pleadings.
 - d. The Court erred by failing to uphold the principle of Ex dolo Malo no ovitur action and Ex turpi causa and thus condoning the illegal acts of the Respondent, leading to the same benefitting from his illegal act.
 - e. The Court erred in failing to apportion any liability upon the Respondents.
 - f. The Court erred in relying upon inadmissible evidence.
 - g. The award in damages was excessive in view of the injuries and degree of disability of the Respondent.
 - h. The Court erred in law and fact in holding that the Appellant was negligence and 2nd Appellant vicariously liable for the acts of the 1st Appellant.
5. Directions were issued on the hearing of the Appeal by way of written submissions. On behalf of the Appellant, it was submitted that the Respondent failed to adduce any evidence in support of assertion that the 1st Appellant was the driver and beneficial owner, insured or in possession of the subject motor vehicle, contrary to the Provisions of Section 107 of the Evidence Act as stated I the case of Rentco East Africa Limited v Dominic Mutua Ngozi [2021] eKLR.
 6. It was contended that the Respondent only sued the 2nd Appellant to bear vicarious liability for the acts and omission of the 1st Appellant who was referred as the driver and that for the Court to find on vicarious liability, it is necessary to establish agency relationship and that the driver was using the car at the owners request as was stated in the case of Wabukho Mbaya v Frida Lwile Onyango [2019] eKLR. It was submitted that no evidence was adduced to show that the 1st Appellant was involved in the accident as pleaded.
 7. It was contended further that the Court failed to uphold the principles of ex dolo malo no oritur action that is to say that no Court will aid a man who found his cause of action on immoral or illegal act, as was stated in Republic v Ministry of Road & another Exparte Vipingo Ridge Limited and another [2016] eKLR and that the Court ignored the fact that the Respondent had breached Section 103B of the Traffic Act, by not having a valid driving licence and failing to wear a helmet.
 8. It was stated that the Court failed to apportion liability as the accident could have been caused by a number of factors including lack of skills on the part of the Respondent. It was contended that the Court relied on inadmissible evidence of the Respondent's witnesses including police abstract which was not produced by its maker Contrary to the case of Kennedy Nyangoya v Bash Hauliers [2016] eKLR.
 9. It was submitted that the award in damages was excessive and therefore liable to be disturbed by the Appellate Court and that the authorities relied upon by the Court were in respect to higher percentage of disability. It was contended that an award of Kshs.100, 000 would have been adequate.
 10. On behalf of the Respondent, it was submitted that one could own a motor vehicle by being either the registered or beneficial owner and that the police abstract indicated the owner of the subject motor



vehicle as St. Paul Thomas Academy but that the same was registered in the name of the 2nd Appellant Pioneer International Schools Ltd both which were under Peter Munga Foundation as per the evidence of DW1. It was contended that both companies had a symbiotic relationship. It was contended that the 1st Appellant was rightly sued as it had the actual possession of the motor vehicle which was registered in the name of the 2nd Appellant.

11. On the doctrine of *dolo malo no ovitur* action, it was submitted that whereas the Respondent did not have a valid driver's licence at the time of the accident, the evidence before the trial Court confirmed that the accident was caused by the negligence on the part of the Appellant's driver who carelessly joined the road and therefore the Court rightly found the Appellants liable at 100% and that lack of a driving licence on the part of the Respondent was not the proximate cause of the accident in support of which reference was made to *Eustus v Njoroge Mwaura v Anwwaralli & Brothers Ltd* [1019] eKLR.
12. On the issue of apportionment of liability, it was submitted that the Appellant wrongly assumed that the Court would apportion liability or blame the Respondent without proof thereof, the Appellants have failed to rebut the Respondent's evidence, which blamed the Appellant. It was contended that failure to call the Investigating Officer was not fatal to the Respondent's case as was stated in *Catherine Mbithe Ngina v Silker Agencies Ltd*.
13. On the issue of vicarious liability, it was submitted that the 1st Respondent could rightfully be found liable through the negligence of its agents and servants and that the 1st Appellant was sued as the beneficial owner of the subject motor vehicle while the second Appellant was the registered owner as per the copy of records.
14. On quantum it was submitted that the award was not inordinately high to warrant interference by the appellate Court looked at against the injuries sustained by the Respondent which were fracture of the left femur and bruises on the left upper limb with degree of disability assessed at 5% and that the award was supported by the following cases: *Desmond Lempoko v KCB* where Kshs. 800,000 was awarded, *Tom Obita Ndago & Another v Alfonso Omondi Otieno* Kshs.700,000.
15. It was contended that the authorities cited by the Appellant of *Ibrahim Kalema Lewa v Esteel Co Ltd* [2006] eKLR where an award of Kenya shillings 300,000 was given relates to substantially different injuries than those sustained by the Respondent and that the award by the lower Court considered inflation.
16. It was contended that the Appeal lacked merit and should be dismissed with cost.
17. This being first Appeal, this Court is under a duty to re-evaluate the record of the proceedings before the trial Court, to come to its own conclusion thereon.
18. It was the Respondent's case that on the 13th of March 2020 while traveling from Maragua to Kaharati at Equatorial a motor vehicle came to his left and knocked him while he was ridding his motor bike and that he had not worked since 2015 and was dependent upon his parents. In cross examination he stated that the motor vehicle that knocked him belonged to Pioneer School and that he did not have a rider's licence at the time of the accident and that if he was not on the road, he could not have been knocked. He confirmed that the person who sold the motor vehicle to him was sued in Kigumo Law Courts.
19. PW2 Pcw Ruth Kemunto testified on behalf of the investigating officer and stated that that the accident was reported through a call and that CPL Ikagwa and PC Guichura went to the scene. It was her evidence that a bus from Equatorial Company registration number KBB346A collided with a motor cycle Registration number KMEF 060Q causing slight injuries to the rider. In cross examination she stated that the driver of the bus was on the wrong.



20. On behalf of the Appellant, James Kihara Muchiri a security ranger with Peter Munga Foundation, testified that the driver of the bus was working for Equatorial Nut Processors Limited and that each company had their directors but could seek assistance from each other.

Analysis And Determination

21. From the proceedings and submissions herein, I have identified the following issues for determination:
- a. Whether the Respondent proved his claim of negligence against the Appellants.
 - b. Whether the Respondent contributed to the accident and subsequent injuries and if so to what degree.
 - c. Whether the 2nd Appellant was vicariously liable for the action of the 1st Appellant.
 - d. Whether the principle of Ex dolo malo no ovitur action is applicable.
 - e. Whether the award was inordinately high so as to be interfered with by this Court.
22. For the purposes of this Appeal I will start by determining the issue of law raised by the Appellants to wit, the Respondent did not have a rider's licence and as such should not have been on the said road and therefore in awarding him damages the same benefitted from his illegal action.
23. This claim was purely based on the tort of negligence and the mere fact that the Respondent did not have a riders licences, a fact which he admitted at the trial in violation of Section 103B of the [Traffic Act](#) does not mean that he did not suffer an injury for which he was entitled to compensation, the state still retains a right to charge him for violating a traffic rule, but the mere fact that he did not have a riders licence cannot be a ground to defeat his claim in tort, I therefore find no merit on the Appellants' submissions herein as the principle advanced by the Appellants of the Respondents benefitting from illegality is not applicable in respect of a civil wrong.
24. On whether the Respondent proved his case against the Appellants', this is an issue of evidence, in finding for the Respondent, the trial Court had this to say: "the Plaintiff testified that the driver was trying to overtake from the opposite direction who hit the motor cycle. The driver of the motor vehicle KBR 387N testified that it is the rider of the motor bike who left his lane and collided into his motor vehiclePW2 explained how the accident occurred and who was to blame for the accident"
25. It is clear that the Appellant did not object to the production of the police abstract by PW2 and therefore the authority of Kennedy Nyangoya (supra) can not come to the aid of the Appellant as the said witness produced the police abstract on behalf of the Investigating Officer and the said police abstract confirmed that the Appellants driver was to blame. There was no evidence submitted by the Appellant to controvert the Respondent's version and this being a civil claim I find and hold that the Respondent proved his case on a balance of probability as held by the trial Court and therefore find no fault with her finding of fact.
26. There being no evidence on record showing that the Respondent contributed to the accident in any way I am unable to find fault with the trial Courts finding of fact on liability against the Appellants.
27. On quantum, the principles upon which an appellate Court may interfere with the trial Courts award were set out in Kemfro Africa Limited (supra) in this matter, the injuries sustained by the Respondent were not disputed at the trial, that is the same sustained fracture of the left leg, this being a first Appeal to enable the Court decide whether the award was inordinately high the Court has looked at comparable awards as follows:



- a. Salesio Ntela Aruyaru vs Julius Wachira Mathenge & another [2020] eKLR where the Plaintiff who sustained fracture of the left femur, multiple lacerations of scalp and face for which he stayed in the hospital for three months would have been awarded Kshs. 500,000 in general damages.
 - b. Ibrahim Kalema Lewa v Esteel Co Ltd [2016] eKLR quoted by the Appellant where the Plaintiff who sustained intertrochanteric fracture of the left femur was awarded Kshs. 300,000 which award was confirmed by this Court on Appeal.
28. I have weighed these authorities against those submitted by the Respondent to wit Catholic Diocese of Kisumu v Tete [2004] eKLR in which the Plaintiff suffered more severe injuries which included head injury, fracture of both superior and inferior rami with associated dislocation of the hip joint, comminute fracture of mid-shaft of the left femur among others was awarded Kshs. 1,300,000 Tom Obita Ndago & Another v Alfonse Omondi Otieno [2015] eKLR where the award of Kshs.800,000 was affirmed on Appeal in respect of the Plaintiff who sustained fracture of the left femur which resulted in shortened left leg.
 29. From the above authorities, I have concluded and hold that the award herein of Kshs. 1,000,000 was on the higher side and in exercise of the powers of this Court as first appellate Court substitute the same with an award of Kshs. 700,000 having considered the rate of inflation.
 30. The final issue for determination is the issue of vicarious liability as per the copy of records produced in Court, motor vehicle registration number KBV 346X was registered in the name of Pioneer International School Limited the second Appellant herein and it was not disputed that the same was the registered owner. The first Appellant's name only appeared in the police abstract and as submitted by the Appellant there was no evidence led that the 1st Appellant was either the registered or beneficial owner of the subject motor vehicle, neither was there any evidence that the same was an agent of the second Appellant.
 31. There was no evidence tendered by the Respondent to rebut the fact that the subject motor vehicle was not registered in the name of the 2nd Appellant and would therefore agree with the submissions by the Appellant that the Respondent did not establish his case against the 1st Appellant and therefore allows the Appeal as against the 1st Appellant, and dismiss the Respondent case against the same.
 32. In the final analysis I hereby enter judgement in favour of the Respondent on liability against the 2nd Appellant at 100% .
 33. I dismiss the Respondent claim against the 1st Appellant.
 34. I allow the Appeal on quantum and substitute the award by the trial Court with an award of Kenya shillings seven hundred thousand (Kshs.700,000)
 35. The Appellants having partially succeeded shall be entitled to cost of this Appeal while the Respondent is entitled to cost of the lower Court and it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 3rd DAY OF APRIL 2024

J. WAKIAGA

JUDGE

In the presence of :

Mr. Abiaga for Ms Maitai for 1st and 2nd Appellant



Mr. Kangethe for the Respondent

Quinteen - Court Assistant

