Kinyanjui & another (Suing as the Legal Representatives of the Estate of Mariam Wambui) v Mega Transporters Company Limited & another (Civil Appeal E007 of 2020) [2023] KEHC 19729 (KLR) (4 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19729 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E007 OF 2020

DKN MAGARE, J

JULY 4, 2023

BETWEEN

SAMWEL KINYANJUI .... 1ST APPELLANT

MARTHA NG'ENDO KAHIGA .... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MARIAM WAMBUI

AND

MEGA TRANSPORTERS COMPANY LIMITED .... 1ST RESPONDENT

SUSAN MULUKA .... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of Hon. J.M. Omido – Principal Magistrate in Kwale PMCC 162 of 2018. The appellant was the Appellant in the lower court.

Duty of the first Appellate court

2. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

3. The Court is to bear in now that if need her seen the witnesses.it is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them

4. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same. The duty of the Appellate Court as regards damages is that of discretion. The Court of Appeal for East Africa in *Shah v Mbogo & Another Version Shah* (1968) EA 93, held as doth; -

> "The (appellate Court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice."

5. In the cases of *Peters v Sunday Post Limited* [1985] EA 424 where the court of Appeal rendered itself as follows: -

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

6. The Appellant filed a 6 paragraph memorandum as doth:-

   a. The learned Magistrate erred in law and in fact by failing to consider the appellant's' submissions against the 2nd Respondent.

   b. The learned Magistrate erred in fact and in law by dismissing the appellant's case against the 2nd Respondent.

   c. The Learned Magistrate erred in law and in fact by failing to appreciate that the appellant's proved their case against the 2nd respondent on a balance of probabilities.

   d. That the learned magistrate erred in law in and in fact by failing to consider as part of the Appellants' evidence, a copy of a records from the registrar of motor vehicles indicating the 2nd Respondent as the owner of motor vehicle registration number KBS xxxC.

   e. That the learned magistrate erred in law and in fact by failing to acknowledge that the 2nd respondent in her statement dated 6th May, 2016, did in fact admit in her own words being the owner and policy holder of motor vehicle registration number KBS xxxC, A Toyota Probox which she bought on 29th June, 2012.

   f. That the learned magistrate erred in law and in fact by holding that he appellant's' did not prove their case against the 2nd Respondent on a balance of probability.

7. However, the Appellant raised humongous and prolixious grounds of appeal. Only one ground was necessary, that is the failing to find the 2nd respondent vicariously liable for the accident.

8. In *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR, the court of appeal had this to say : -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the *Court of Appeal Rules*. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:
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> > "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric…A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs."

9. Pleadings and evidence by a plaint dated 31/8/2015, the award that deceased was a lawful passenger in motor vehicle Registration KBS xxxC. They were involved in an accident at Ng'ombeni KBE xxxV/ZC 9452 and the deceased died on the way to hospital.

10. The Appellant set out particular of negligence of the 1st Respondent and their driver, which included driving motor vehicle Registration No. KBE xxxV/ZC 9452 too fast and without due care and attention.

11. In addition, it was pleaded, among other things that the 1st Respondent rammed into Registration No. KBS xxxC causing death of the deceased. They also pleaded that the second Respondent was negligent in driving motor vehicle registration KBS xxxC and rammed onto motor vehicle Registration No. KBE xxxV/ZC 9452.

12. The deceased left behind parents and 2 children aged 12 and 10 years.

13. The deceased was had as a spare part shop at Kingorani making a profit of Kshs. 200,000/= amount.

14. The 2nd Respondent entered appearance and pleaded that the Appellant is not suited and lacks capacity and locus standi to institute suit on behalf of the Estate (Emphasis Mine).

15. The 2nd Respondent denied being the beneficial or registered owner of motor vehicle Registration No. KBS xxxC for at all. The 2nd Respondent pleaded that the deceased having borrowed motor vehicle Registration No. KBS 053 from the 2nd Respondent and she was at all material times the driver of the said vehicle. The deceased was the tortfeasor and the 2nd Respondent cannot be liable for the fatal injuries she caused, [pleading a doctrine of volenti non fit injuria

16. The 2nd Respondent stated that the death was caused by the deceased in her reckless driving. The 2nd Respondent relied on the doctrine of Voleti non fit nijuma and res ipsa loquitar. The losses were denied.

17. The 2nd Respondent stated that the deceased was the driver.

18. The Court dismissed the claim against the 2nd Respondent. The reason was that there was no nexus between the 2nd Respondent and the suit other than agreeing on the issue of the lack of pleading, one issue disturbed me.

19. The appellant was scantily on the plaint role of the driver and the 2nd Respondent.

20. It was common ground that the deceased borrowed the suit motor vehicle. Whether she was driving by herself if some other person was driving. It was not on behalf of the 2nd Respondent whether ownership was proved or not the Appellant did not proof that the driver was the agent of the 2nd Respondent.

21. Though the defence did not call any witness, the Appellant did not proof vicarious liability. In the case of *John Kioko Musingi v Jacinta Wambura Bisley* [1993] eKLR, the court, Justice J.W. Mwera, stated as doth: -

> " In this Nakuru Automobile case some friends/relatives of one of the directors in the appellant company had given a company car to some young men to go and enjoy themselves during a safari rally in which one of the company directors was participating. The use of that car there had no benefit to the appellant company. The appeal was allowed and in the course of judgment the case of *Morgans v Launchbury & Ors* [1972] 2 All ER 606.
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> In this case a husband who was using a wife's car went to a place and let his friend drive him home since he had had more than enough drink. This friend allowed some friends in this car to drop them home. An accident occurred and these friends were injured. They claimed against the car owner (the wife). They succeeded but she appealed successfully arguing that the accident occurred when the car was on no business of her own.
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> Lord Wilberforce said:
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>> "For I regard it is as clear that in order to fix vicarious liability on the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability".

22. In the case of *Khayigila v Gigi & Co Ltd & another* [1987] eKLR, the court of Appeal, per, Gachuhi JA, stated as follows: -

> " Several decisions were cited both local and the English decision. All these decisions state that for the owner of the vehicle to be vicariously liable, the driver must be a servant or an agent. For the vehicle owner to be responsible for the negligence of the agent, that agent must have been detailed to do a task beneficial to or on behalf of the owner. The recent decision of this court in *Nakuru Automobile House Ltd v Nasiruddin Ziaudin* Civil Appeal No 63 of 1986 based its decision on *Morgan v Launchbury and Others* [1972] 2 All ER 606 and held that the owner of the car was not vicariously liable for the negligence of the driver of the car who had borrowed it to enjoy the rally. The driver was not at the time of the accident driving the vehicle as a servant or an agent of the owner. In the present appeal, the second respondent was not driving the vehicle as a servant or agent of the first respondent. The

second respondent was not driving for the benefit of the first respondent nor did he have a task to do for and on behalf of the first respondent. He was driving the car for his own benefit and interest. I would also dismiss this appeal."

As per Nyarangi, JA, as then he was, he stated as doth: -

" That being so, one must ask the questions:

1. Was the 2nd respondent using the VW car at the material time at the request of the 1st respondent or on their instructions? and

2. If so, was he driving the car in performance of a task or duty delegated to him by the 1st respondent firm?

   On the facts, the first question must be answered firmly in the negative. Not only was the 2nd respondent not using the car at the time of the accident at the firm's request but he was using it furtively against its instructions. Indeed, had this accident not happened, the firm may well not have known that the 2nd respondent drove the car at night on his own and for purposes wholly unconnected with the spraying of the dents.

   In view of the answer to the first question, the second does not arise. True, the firm gave him a task to perform, and that task was the repair of dents and spray-painting thereafter. The one task which the firm did not give him, was driving the car. That act, was, on the undisputed evidence, forbidden. In the circumstances, it is difficult to avoid the conclusion that no liability attaches to the firm on the well-known principle of "respondent superior" and the learned judge's conclusion on that score cannot be faulted."

23. In this context, it does not matter whether the deceased or her driver was driving. The vehicle was not driven for the benefit of the 2nd defendant. The drier, whoever it was, was not an agent of the 2nd Respondent.

24. It is my considered view that despite personal tragedy that the Appellant suffered, for which this court notes, the law is not on his side.

25. The lower court was right to dismissing the suit against the 2nd Respondent. It is my singular duty to do the same. The Appeal is bereft of merit and is dismissed in limine with costs.

Determination

26. The upshot of the foregoing is that I make the following orders: -

   a. The appeal filed herein is bereft of merit and as such it is dismissed with costs of 55,000/= to the 2nd Respondent.

   b. The file is closed.

   c. Right of Appeal 14 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Chege for the 2nd Respondent

No appearance for Appellant