REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO.39 OF 2017

ONESMUS KINYUA MUCHUDU.....APPELLANT

VERSUS

MISHI KAMBI CHARO

KENNEDY NDETO NZUKO.....RESPONDENTS

(Being an Appeal against the judgment of the Honourable S. R. Wewa (PM) delivered on 24/04/2017 in Malindi PMCC No. 381 of 2015))

Coram: Hon. Justice R. Nyakundi

IRB Mbuya Advocates for the Appellant

Njoroge & Njoroge Advocates for the 1st Respondent

Murimi, Ndumia, Mbago & Muchela Advocates for the 2nd Respondent

JUDGEMENT

The appellant **ONESMUS KINUA MICHUDU** has appealed against the Judgment and consequential orders made by **Hon. S. R. Wewa (PM)** in **PMCC No. 381 of 2015 on 24.04.2017.** The learned trial magistrate had made the following findings:

(a) Liability apportioned at 100% against the 1st Defendant.

(b) The 2nd Defendant is vicariously liable.

(c) The plaintiff is awarded Kshs. 450,000/- general damages.

(d) The Plaintiff is awarded Kshs. 2,000/-special damages; and

(e) costs and interest of the suit.

Being aggrieved with both the Judgment and decree of the said court, the appellant filed this Memorandum of Appeal dated 3.08.2017 modelled as follows:

(1). That the Learned Trial Magistrate erred in fact and law in failing to write and pronounce a judgment containing a concise statement of the case, the points of determination, the decision thereon, and the reasons for such a decision as is required by law.

(2). That the Learned Trial Magistrate erred in fact and law by holding the Appellant wholly liable for the accident without providing reasons and there not existing sufficient evidence establishing the Appellant's negligence.

(3). That the Learned Trial Magistrate erred in law and in fact in failing to apportion any liability to the 1st and 2nd Respondents.

(4). That the Learned Trial Magistrate erred in considering only facts largely beneficial to the Respondents over facts beneficial to the Appellant.

(5). That the Learned Trial Magistrate erred in law and fact by failing to consider the Appellant's defence and submissions against the evidence of the Respondents.

(6). That the Learned Trial Magistrate erred in law and in fact by failing to exercise her exercise her discretion judicially by making an award above the courts discretionary range and failing to correctly take into account the applicable principles of law an award and assessment of damages.

(7). That the Learned Trial Magistrate in failing to properly and or at all evaluate the evidence on record cumulatively hence reaching a wrong decision on liability and quantum.

(8). That the learned Trial Magistrate erred in law and in fact in considering matters which were neither pleaded nor proved by the Respondents.

Background

Vide a Plaint dated 21.09.2015, the 1st Respondent filed MALINDI PMCC NO. 381 of 2015, MISHI KAMBI CHARO alias MITCHEL KAMBI VERSUS ONESMUS KINYUA MICHUDU & KENNEDY NDETO NZUKO seeking general and special damages arising from a road traffic accident involving Ricksaw registration number KTWA 886U and Motor Vehicle Registration No. KCC 342P which occurred along Malindi-Lamu road on or about 24.04.2015 at Serengeti area.

In the plaint its averred that the Plaintiff sustained head injuries involving bruises on the lower lip and contusion below the right eye, posterior dislocation of the right elbow, blunt injury to the neck, and cut wounds on the left hand. All these was blamed on negligence of both Defendant's and/or her authorized agent, servant or employee as pleaded in paragraph 4 of the plaint.

The 1st Defendant filed his Defence on the 16th of October, 2015 denying that he was the registered and or the beneficial owner of Motor Vehicle Registration No. KCC 342P as alleged in Paragraph 4 of the Plaint. the 1st Defendant alleged in his defence that the accident and if at all it occurred, was wholly caused by the 2nd Defendant or his driver, agent and/or servant in control of tricyle registration No. KTWA 886U and that the Plaintiff substantially contributed to its occurrence.

The 2nd Defendant on the other hand filed his Defence on 10th November, 2015 and in his defence averred that the accident was caused wholly by the negligence of the driver of Motor Vehicle Registration No. KCC 342P. These recital of pleadings formed the basis of the trial.

It is necessary at this stage to go into the evidence which was presented before the learned trial magistrate. The trial comprised of the evidence by **PW1 Oyoo Kwendo**, No. 83325 stationed at Malindi traffic base informed court that he was the investigating officer in the matter before court. He stated that an accident occurred on the 24.04.2015 at around 5:00pm. The accident involved Motor Vehicle Registration Number KTWA 886U Tuktuk and Motor Vehicle Registration Number KCC 342 P Toyota Probox. That the former was being driver by Daniel Kinyua while the latter was being driven by Joshua Linturi. Motor Vehicle Registration No. KCC 342P was heading towards Malindi from Garsen while KTWA 886U was heading towards Lamu upon reaching Serengeti area the two vehicles collided. He later stated that the tuktuk driver was to blame for the accident as he made a U-turn on the road. A Police Abstract and a P3 Form for the Plaintiff were later issued.

Upon cross examination PW1 stated that the owner of KTWA 886U is the second defendant. That the tuktuk veered off its lane of travel into the lane of the oncoming vehicle. He confirmed that the driver of Motor Vehicle KCC 842P was on his lane and cannot be blamed.

PW2 MISHI CHERO on the other hand during examination in chief stated that she was travelling using a tuktuk from Malindi on the said day, the Registration Number. KTWA 886 U. in her evidence, she blamed the owner of the oncoming Motor Vehicle. Both defendants closed their cases without calling any witnesses.

Having looked at the evidence in the lower court, the learned trial magistrate does not appear to have made a decisive finding either way as to who between the two defendants' driver or agent facilitated occurrence of the accident. The evidence of PW1 on oath alluded to circumstances on the collision but can best be described as 'hearsay' because he was neither an eye witness nor did he visit the scene immediately the incident took place.

Issues for determination

The discretionary jurisdiction of the first appellate court being judicial is to be exercised on the basis of evidence and sound legal principles. **(See the case of Shah, Paul v E. A. Cargo Handling Services Ltd 1974 EA 75).**

I stand by the Court of Appeal for East Africa in ***Peters v Sunday Post Limited [1958] EA 424*** where **Sir Kenneth O'Connor** stated as follows:-

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a

jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

Whether negligence was sufficiently proved.

As regards the issue on negligence its settled that the evidence to proof that any party is guilty of negligence has material bearing in common Law and statutory. What was expected of the trial court from the onset? In my view was to answer the question on vicarious liability. The Law as to the scope of vicarious liability of a master in tort for acts of a servant is well founded in as stated by **Sir Charles Newbold P in Muwonge v Attorney General of Uganda [1967] EA at pg 17** as follows:

"An act may be done in the course of a servant's employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently or criminality, or for his own benefit, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out then his master is liable."

It was further stated in **Canadian Pacific Railway v Lockhart [1942] ALL ER 464** cited with approval by the Court of Appeal in **Patel v Yafesi & Others 1972 EA 28 at Page 31** that:

"A master is liable even for acts which he has not authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes, although improper modes, of doing them. In other words, a master is responsible not duly for what he authorizes a servant to do, but also the way in which he does it."

The following position is the Law on proof of negligence in Kenya. In **Kiema v Kenya Cargo Hauling Services [1991] KLR 464** the court held interalia:

"That the onus of proof is on he who alleges and where negligence, is alleged, the position is that there is as yet no liability without fault and a plaintiff must prove some acts of negligence against the claim is based on negligence."

In reviewing the applicable **Law Salmond and Houston** on the **Law of Torts 9th Edition** noted:

"Negligence is a conduct, not state of mind – conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do."

Until the primary tort of negligence in Law has been proved there could be no recovery of money paid voluntarily by the defendant. Indiscriminate application of the principles on causation and proximate cause in a traffic accident claim could operate inequitably and prejudicial to the adverse party.

Whether the 2nd Respondent was vicariously liable for the accident in question.

Vicarious liability imposes liability on employers for the wrongful acts of their employees as such an employer will be held liable for torts committed while an employee is conducting their duties. It is not in contention that the learned Magistrate misguided herself in merely stating that the 2nd Defendant was vicariously liable and no evidence had been adduced to that effect and how she arrived at this finding is also not stated in the judgment. Then it stands to reason that we should interrogate the principles or elements required for this tort to hold. In the case of **Yewens v Noakes [1880] 6 QBD 530 Bramwell LJ** stated that, ***"...a servant is a person who is subject to the command of his master as to the manner in which he shall do his work."*** Further, in the case of **Joel v Morison [1834] EWHC KB J39** it was held that:

"The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

As such it stands to reason that the employer will only be liable when the wrongful act occurs during the course of the duties of the

employee. However, if the employee was on a frolic of his own then the employer is not liable. In the instant case, we are not told whether the employee was acting in the course of his duties or in total disregard of his employer's express instructions. However, this is not a ground to exonerate the employee unless it can be shown that the Plaintiff was made aware and freely consented to the risk.

> ***"I think the true test on vicariously liability can best be expressed in these words; was the servant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligence, or even fraudulently, or contrary to the express orders, the master is liable."*** **(See Launchbury v Morgans [1973] AC 127).**

The same conclusion was reached in **Bachu v Wainaina (CA No. 14 of 1976 Nakuru Automobile House Ltd v Zavdin CA 63 of 1986)** where the Court observed:

> ***"In order to fix liability on the owner of a car for the negligence of his driver, it was necessary to second either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent. To establish, the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."***

What is important for present purposes is whether the wrongdoing employee's employment did involve his performing intimate tasks and did result in the employee's occupying something akin to master/servant relationship authority, with respect to the claimant.

It is noteworthy that, in addressing the same issue consistent with elemental notions of vicarious liability the Court in **Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co. [1925] SC 79 802**, stated:

> ***"The question is not to be considered merely by applying the test whether the act in itself is one which the servant was authorized or ordered or forbidden to do. The employer has to shoulder responsibility on a wider basis, and he may, and often does, become responsible to third parties for acts which he has expressly or completely forbidden the servant to do. – it remains necessary to the master's responsibility that the servant's act be one done within the sphere of his service or the scope of his employment, but it may have this character although it consists in doing something which is the very opposite of which the servant has been intended or ordered to do, and which he does for his own private ends. An honest master does not employ or authorize his servant to commit crimes of dishonesty towards third parties, but nevertheless he may incur liability for a crime of dishonesty committed by the servant if it was committed by him within the field of activities which the employment assigned to him, and that although the crime was committed by the servant solely in pursuant of his own private advantage."***

My understanding of this doctrine on vicariously liability is for the claimant to establish the agency relationship between the master and the servant; alongside with the task thereby delegated to him to perform on behalf of the master. Thus in **Basley v Curry {1999} 174 DLR** the Court pronounced itself as follows:

> ***"The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts. It is fair that the person or organization that creates the enterprise and hence the risk should bear the loss."***

The principles set out in the authorities cited on vicariously liability raises the following questions? Was the driver of the offending motor vehicle engaged on the respondent's business? Or was he acting as a stranger to his contract of employment? Did the respondent's operations of its business and intentional torts of their driver, agent, or servant or employee sufficiently linked to his employment duties to justify imposition of vicarious liability.

It is in dispute whether the 2nd defendant was under the instructions of his employer to warrant the learned to come up with the conclusion that he was vicariously liable. This suggests that whether the negligent act furthers the respondent's aims is more relevant when it points the other way, because one assumes that intentional torts do not further employer's ends; it is only remarkable when the intentional torts do, in fact making imposition of vicarious liability appropriate.

By clothing the driver, servant or agent with power of being in control of the aforesaid motor vehicle, the defendant introduced a risk however small but real of its abuse. This in my view the respondent may fairly be held responsible for the misuse of such power done in the course of his duties as delegated in the contract of service. That is what the comparative dictum in **Joan Doe v Bennee [2004] S.C.J. No 17** emphasized that:

> ***"Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public, effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps reduce the risk of harm in the future."***

This court notes that the issue of vicarious liability and negligence are issues that could have been as well been addressed during the submission stage. This court also notes that the Appellant who was the 1st defendant in the lower court matter did not file submissions to persuade the court otherwise on the above issues. There are no duly filed submissions on record bearing the lower court's stamp attributed to the appellant.

Having noted the above, this court is left with no option but to rely on the evidence of PW2 who was the only eye witness who indicated that the Tuktuk she was travelling on was on its way to Gongoni when the Motor vehicle KCC 342P veered off its lane of travel in attempt to overtake thereby causing the accident.

On the basis of the above assessment of principles of case Law, I find it perfectly in order to hold that the learned trial magistrate came to a correct conclusion in finding the 1st Defendant 100% liable though she did not attempt to delve into the issues as why she came up with the said conclusions. As I make this decision, I bear in mind the principles in **British Fame Owners v Macgregor (owners) [1943] 1 ALL ER 33, Sharns v Sethna [1963] EA 239 – 249 –** where both Courts stated that:

> ***"The Law on this is settled that there should be no interference by this Court with the findings of fact about the contribution to an accident by two or more negligent drivers save in circumstances where the individual choice or exercise of discretion is wrong in principle or on occurrence of irrelevant material or factor or misapprehension of the evidence resulting in an erroneous decision."***

In my respectful view that is the position, I take in this appeal on the findings arrived at by the learned trial magistrate on vicarious liability and negligence.

As regards the ground on quantum, this was not seriously argued but it's important to reflect on the principles to be borne in mind as illustrated in the cases of: **H. West & Son v Shephard [1963] 2 A ER 625, Butt v Khan Civil Appeal No. 2 of 1977.**

Quantum:

It will be useful to set out a brief statement on quantum. The principles on which an appellate court will go about interfering with the trial court findings on award of damages has been clearly discussed in a number of cases. Just to cite a few of these to demonstrate that the law is settled in this matter in Kenya. In the case of ***Butt v Khan 1982 -1988 1 KAR*** the court pronounced itself as follows:

> **"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low**. See ***also Robert Nsioki Kitavi v Coastal Bottlers Ltd 1982 -1988 I KAR 891-895***.

It is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of

each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.

As regards similar injuries the quantum of damages awarded should not be at variance in a manner to contravene the principles in ***Butt v Khan case (supra)*** which I consider settled concerning circumstances an appellate court can interfere with the decision of an inferior court or tribunal.

In the present appeal when I apply the principles in this case it is not in dispute that the respondent suffered multiple injuries with 8% permanent disability due to chronic pains and the expected post traumatic arthritis of the left elbow joint.

I have reviewed the evidence and entire Judgment by the learned trial magistrate. The observations I make is that the circumstances surrounding the award of damages under the various heads was well thought by the trial court. Based on the evidence, the award on quantum was within acceptable limits.

I find no grounds to interfere with the decision on quantum and do accept it as conclusive, in reference to this issue on damages, it is accordingly affirmed.

The 1st Respondent will have the costs of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF APRIL, 2021.

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules.(info@mbuya-law.co.ke ganzala@mbuya-law.co.ke njorogesimonadv@yahoo.com msa@mmmn.com)