REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

AT NYAHURURU

CIVIL APPEAL CASE NO. 88 OF 2017

(Formerly Nakuru HCCA No. 59 of 2016)

METRO LOGISTICS LIMITED........................APPELLANT

-VS-

AGNES MUENI DAVID MUYA...............1ST RESPONDENT

ALIOS FINANCE KENYA LIMITED......2ND RESPONDENT

(An Appeal from the Judgement & Decree of Honorable J. Wanjala Senior Principal Magistrate, Nyahururu in Nyahururu PMCC No. 34/2015 dated 27th April 2016)

JUDGEMENT

INTRODUCTION

1. This is an appeal by Metro Logistics Limited, the 1st Respondent in the original action from the judgement of Honorable J. Wanjala Senior Principal Magistrate in Nyahururu PMCC 34/2015 dated 27th April 2016 whereby the Learned Principal Magistrate found by Metro Logistics Limited, the Appellant herein 100% liable for the self-involving accident of its employee, Agnes Mueni David Muya, the plaintiff in the original action and awarded her general damages to the tune of 1,500,000 and special damages to the tune of 69,500 together with the costs of the suit. The appeal was brought vide a Memorandum of Appeal dated 26th may 2016 citing 11 grounds mainly challenging the finding of 100liability towards the Appellant.

2. Summarily, the Appellant's case was that on 1/4/2014 motor vehicle registration number no. KBU147A was transporting liquor from Nairobi to Nyahururu when it was involved in an accidental Museveni along Olkalau Nyahururu road. The said motor vehicle prior to the accident was in good condition and was inspected at the breweries and certified to carry beer. The accident was therefore caused by negligence on the part of the 1st Respondent who was the driver driving at an excessive speed in the circumstances therefore filing to control the motor vehicle registration number KBU 147A.

3. The 1st Respondent's case was that on 1/4/2014 she was in course of her employment diving Motor Vehicle Registration No. KBU 147A when the back tyre of the said vehicle bursted causing the said motor vehicle to lose control and to fall on the right hand said and as a result she sustained injuries. She alleged that the tyre burst was caused by overloading of the said motor vehicle.

APPELLANT'S SUBMISSIONS

4. The Appellant averred that the totality of the 1st Respondent's testimony was that she knew the motor vehicle was overloaded however she knowingly and willingly drove it. Further, prior to the accident she had left the road slightly to allow a Probox to pass and when she returned back to the road the rear right tire of the vehicle burst and that she had driven all the way from Nairobi to Olkalou and nothing had happened.

5. The Appellant was adamant that although there were several allegations of negligence in the plaint the Respondent did not allege any negligence on the Appellant in her testimony and none of those allegations were proven therefore the 1st Respondent did not discharge the onus which rested upon her to show on a balance of probabilities that the accident was occasioned due to any fault on the part of the Appellant. On burden of proof the Appellants quoted that cases of ***Registered Trustees of Maximum Miracle Centre V Andrew Mlewa Mkare (2016) eKLR***, ***Treadsetters Tyres Ltd Vs John Wekesa Wepukhulu (2010) eKLR***, ***John Karanja Njuguna Vs. Eastern Produce (K) Ltd (Savani Tea Estate) (2020) eKLR*** and ***Section 107 and 108 of the Evidence Act.***

6. The Appellant maintained that the 1st Respondent did not produce any document to show and/or reveal the weight of the cartons that she carried and the required weight that the pick-up was supposed to carry as to allege that the 100 cartons were too much for the pickup. Furthermore, the 1st Respondent did not produce any document to show that the motor vehicle was smaller than a pick up and what capacity it could carry.

7. In addition, the Appellants asserted that DW2, who worked at Metro Logistic as a security manager testified that on 1/04/14 the motor vehicle was in good condition before the accident. He further testified that when motor vehicles enter the breweries for purposes of carrying beer, it is first inspected and certified fit to carry beer and that the 1 st Respondent arising from her long time in employment as a driver ought not to have left with an overloaded vehicle.

8. The Appellant relied on ***Section 13 (1) (a) of The Occupational Safety and Health Act, No. 15 of 2017*** which makes it mandatory for every employee to ensure his or her own safety at work while ***Section 14*** of the said act imposes a duty on an employee to report any dangerous situation. Further in addressing the issue of employees ensuring their own safety the Appellant quoted on the cases of ***Purity Wambui Murithii v Highland Mineral Water Co. Ltd (2015) eKLR, Mohamed Farrah Vs Kenya Ports Authority (1988-1992) 2 KAR 283, Mwanyule v. Said t/a Jomvu Total Service Station (2004) KLR 47***

9. On the issue of tyre burst the Appellant maintained that the learned magistrate erred in law and fact in finding the Appellant was liable despite evidence by the 1st Respondent that she was all along in control of the accident motor vehicle and also attributing the tyre burst to the negligence off the Appellant. The Appellant asserted that a reasonable skilled driver when faced with the same situation would have slowed down or applied emergency brakes or taken any corrective action to avoid the accident. To buttress this point the Appellant relied on the cases of ***M A (Minor suing thro' next friend) and mother A N v Wanjiru Mwangi & Another (2017) eKLR*** and ***Omari Motors Garage Ltd v John Ochieng Otiende (2016) eKLR*** in addressing the issue of a tyre burst in a self-involving accident.

10. The Appellant submitted that a tyre burst cannot lead to an accident unless the vehicle is being driven at an excessive and high speed such that when the tyre burst the 1st Respondent was unable to slow down to avoid the accident. Furthermore, the Appellant averred that if the vehicle was indeed overload, the doctrine of *volenti non fit injuria* then applies as the 1st Respondent voluntarily assumed the risk with full knowledge of the risk involved in driving an overloaded vehicle. Finally, the Appellant indicated that it cannot be vicariously liable and tendered the cases of ***Mwanyule v Said t/a Jomvu Total Service Station (2004) KLR 47*** and ***Eastern Produce K Ltd V Joseph Mamboleo Khamadi (2015) eKLR*** to prove the same.

THE 1ST RESPONDENT'S SUBMISSIONS

11. The 1st Respondent on her part reiterated that it was not her duty to load the vehicle as that was the duty of the breweries and supervised by the agents of the Appellant hence she could not tamper with the packaging as she usually reports for duty when it's already done. She submitted that given the degree of risk involved in being a driver the Appellant ought to have ensured that the motor vehicle was proper to be driven by the 1st Respondent.

12. The 1st Appellant maintained that the employer has a duty of care to his or her employees and that the Appellant was under a responsibility to ensure her safety by ensuring that the motor vehicle was not overloaded and was in proper condition to be driven as the danger of the Respondent being in an accident was unforeseeable.

13. Furthermore, the 1st Respondent averred that the doctrine of *volenti non fit injuria* as relied on by the Appellant was not applicable in this instant because mitigating effects that the Appellant ought to have provide to lessen the degree of injury given the risk involved was not implemented in the first place.

14. The 1st Respondent asserted that the Appellant failed to demonstrate why they were not liable for the injury she sustained by failing to adduce evidence to show that the Appellant's company car was in proper condition to be driven by its employees and was not overloaded at all. Further, she maintained that in failing to demonstrate that the Appellant company exercised its duty of care towards its workers then the leaned magistrate was well guided to apportion liability at 100% in her favour against the Appellant as the latter failed to rebut her testimony and evidence on the issue of liability.

15. The 1st Respondent concluded by urging this honorable court to uphold the reasonable judgement of trial court which was reasonable and commensurate with the injuries that she suffered and reiterated that litigation must come to an end as it has been 5years since the cause of action herein and should this appeal succeed she will continue to suffer gross prejudice.

ANALYSIS

16. First and foremost, the court is guided by in executing its mandate by the principles enumerated in the case of ***Selle vs. Associated Motor Boat Co. [1968] EA 123*:**

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**

17. Having thoroughly perused the pleadings contained in the record of appeal and the lower court file the primary issue for determination by the court is liability which shall be tackled as follows;

On vicarious liability;

18. In **Securicor Kenya Limited vs Kyumba Holdings Ltd CA73/2003** the Court of Appeal defined the doctrine of vicarious liability by quoting with approval a passage from ***Winfield and Jolowicz on Tort 14th Edition*** as follows:-

> **"The doctrine may be stated as follows: Where A, the owner of a vehicle expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B's negligence in the operation of the vehicle."**

19. The Court of Appeal has laid down the test for establishing whether an employer is vicariously liable for his/her servant's negligence in ***Joseph Cosmas Khayigila V Gigi & Company Ltd & Another CA 119/1998*** as follows:

> **"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show 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."**

20. The Court of Appeal in the ***Tabitha Nduhi Kinyua (Supra) Case*** further cited with approval ***Ormrod & Another vs Cross Ville Motor Services Ltd & Another 1953 (2) AER 753 CA*** where Lord Denning L.J stated:

> "**The law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to third party to be used for purposes in which the owner has no interest or concern."**

21. In **Morgan's V Launchbury & Others, (1972) 2 ALL ER 605** the House of Lords held, inter alia:

> **"The owner ought to pay, it says because he has authorized the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is on control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorized or requested the act, or if the actor, is acting wholly for his own purposes. The rules have stood the test of time remarkably well**.

22. Consequently, the 1st defendant was in the course of duty when she got involved in the accident. She was transporting liquor from Nairobi to Nyahururu under the instructions of her employer, the Appellant herein using the company car motor vehicle registration number no. KBU147A owned by the Appellant as shown in the copy of records from KRA ***(marked as exhibit 10).*** That she was an employee of the Appellant is not disputed and she even produced evidence to that effect ***(June and September 2014 payslips marked as Exhibit 1 (a) and 1(b).*** The 1st defendant was therefore using the car at the owners request and/or authorization creating an agency relationship between her and the Appellant. Inevitably, the Appellant is vicariously liable for the 1st defendant's actions under this case.

23. Moreover, the Appellant's argument of *volenti non fit injuria* cannot then apply under this circumstances and especially not by simply stating that the 1st defendant knew that the car was overloaded and still drove it and ignoring the fact that she asserted that she did it knowing as well that the repercussion of not was losing her job. It is instructive to note, and the court ought to take notice of the bargaining power between an employer and an employee, thus, the defence of *volenti non fit injuria* is not acceptable under the circumstances of this case.

On burden of proof;

24. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of appeal held that:

> **"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-**
>
> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

25. Further, in ***Kenya Kazi Limited -Vs- Nandwa [1988] eKLR*** the Court of Appeal cited the case of ***Henderson -Vs- Henry E. Jenkins & Sons [1970] AC 282 page 301*** as hereunder: -

> **"In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial**

the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift.

But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

26. And at page 30 letter **H Lord Pearson** made a finding that:

"From these facts it seems to me clear, as a prima facie inference, that the accident must have been due to default of the defendants in respect of inspection or maintenance or both. Unless they had a satisfactory answer, sufficient to displace the inference, they should have been held liable."

27. That the 1st Respondent was involved in an accident is undisputed as evidenced by the police abstract ***(marked as exhibit 7)***. The primary eyewitness to the self-involving accident was the 1st defendant herself. In the foregoing, her testimony is uncontroverted therefore we rely on her word against the Appellant's. The 1st defendant claimed that the accident was due to a tyre burst occasioned by overloading of the motor vehicle

28. Although I appreciate the Appellant's assertions that a tyre burst alone cannot cause an accident the Appellant besides tendering did not tender credible evidence to bolster their defence and show that the 1st Respondent was over speeding hence causing the accident. The car in question was overloaded and therefore may have caused the 1st defendant to completely lose control of it and notably her life was also at stake so the assertion that she did not do anything to avert the accident is not fair-minded.

29. With regard to the argument by the Appellant that the accident was caused due to over-speeding by the 1st Respondent ***Section 107 of the Evidence Act*** provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist"

30. During the defence hearing, the Appellant called one witness DW1, a security manager in the Appellant Company who testified that he visited the scene of the accident and found police but he did not know what caused the accident. He also alleged that the vehicle was okay before the accident and once the vehicle enters the breweries it is inspected and certified fit to carry beer.

31. He also alluded to a statement by one Joseph Karanja who was a senior mechanic in the Appellant Company but had since left the company. The witness did not adduce any corroborative evidence to show that the car was in deed okay before the accident not even the certificate of inspection from the breweries. He also did not produce any evidence to prove that the car was not overloaded. Furthermore, he is not a primary witness to the accident and only went to the scene after the accident had happened.

32. The statement made by Joseph Karanja remains a mere allegation. I find that there is no probative value in that statement as it was uncorroborated. The defence did not call the said Joseph Karanja as a witness neither did the adduce evidence to show that the car was inspected and was in good condition.

33. Looking at the foregoing, there is no evidence of over-speeding as alleged by the Appellant, and also a point a note is that the Appellant does not dispute the fact that the motor vehicle involved in the accident was indeed overloaded as alleged by the 1st Respondent.

34. In **Embu Public Road Services Ltd v Riimi [1968] EA 22** the court stated that:

"Where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence."

35. Having carefully analyzed the evidence, and both submissions by counsels representing the plaintiffs and the defendants, I am convinced that the 1st defendant proved her case on a balance of probabilities.

QUANTUM OF DAMAGES

36. The Appellant did not appeal against the quantum of damages nor demonstrate how the award in general damages for pain and suffering is excessive or that the learned magistrate took into account irrelevant matters or failed to consider a relevant matter. I find no reason to interfere with the amount awarded as general damages for pain and suffering to the Respondent. In the result the court upholds that award.

CONCLUSION

37. In the upshot, I find, in view of the evidence tendered at the trial, the trial court exercised its discretion judiciously in finding the Appellant 100% liable for the accident. The Appellant is vicariously liable for acts of negligence attributed to the 1st Respondent.

38. Thus the court makes the following orders;

i. The appeal is therefore dismissed with no orders as to costs in the circumstances of the instant case.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 13TH DAY OF MAY, 2021

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CHARLES KARIUKI

JUDGE