REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 134 OF 2017

MWK (Minor suing through father

and next friend)**EKM...APPELLANT**

=VERSUS=

JAMES NJOGU..RESPONDENT

(**Being an appeal from the judgement of the Honorable E. Agade (Ms.) RM in Kangundo SPMCC 76 of 2016 delivered on 8.9.2017**)

BETWEEN

MWK (Minor suing through father

and next friend) **EKM...PLAINTIFF**

=VERSUS=

JAMES NJOGU..DEFENDANT

JUDGEMENT

1. According to a plaint filed in the subordinate court on 29.6.2016, the appellant filed suit on behalf of his daughter who was a passenger in a Motor Vehicle registration number KCD 370C registered in the names of the respondent. While she was travelling on 11.9.2015 along Tala-Nairobi Road the respondent's vehicle veered off the road, overturned and rolled and as a result the appellant's daughter suffered damage and loss and injuries as particularized in paragraph 5 of the plaint. The appellant pleaded negligence as well as special damages particularized in Paragraph 4 of the Plaint. The appellant sought special and general damages, interest and costs of the suit.

2. In his defence filed on 7.9.2016, the respondent denied the accident; denied negligence; denied that the appellant's daughter was a fare paying passenger. He denied the injuries and loss and denied the applicability of res ipsa loquitor though the appellant did not plead so. He prayed that the suit be dismissed with costs.

3. After hearing the matter, the learned magistrate found that the appellant did not talk of the driver of the accident vehicle and no evidence had been tendered as to who was the driver of the suit vehicle. She found that the respondent was proved as owner of the suit vehicle but however found that mere occurrence of an accident was not proof of negligence. Reliance was placed on the case of **Daniel Kimani Njoroge v James K. Kihara & Another (2011) eKLR**. He found that the respondent could not be faulted for the accident and that there was no proof that anyone caused the accident hence dismissed the suit. She found that she would have awarded general damages of Kshs 800,000/- in placing reliance on the case of **Benjamin Mwela Kimono v Daniel Kipkirong Tarus & Another (2015) eKLR**. This decision has precipitated this appeal.

4. This appeal is against the finding of the trial court on liability. The contents of the appellant's appeal are set out in the memorandum of appeal filed on 5.10.2017. Counsel prayed that the judgement of the trial court be set aside and judgement be entered in favour of the appellant at 100% liability against the respondent.

5. Counsel for the appellant submitted on the issue of liability. Learned counsel submitted that the trial court erred in failing to find that the appellant was travelling as a passenger as pleaded and failing to find that the minor could not have been negligent. Reliance was placed on the case of **SKN v Eric Ndungu Warui & Anor (2014) eKLR.** Counsel submitted that the trial court misapprehended the law on vicarious liability and placed reliance on the case of **Charles Ochieng Ogola v Bhole Kondele Ltd (2017) eKLR.** Counsel urged the court to allow the appeal.

6. Counsel for the Respondent filed no submissions.

7. This being a first appeal this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that reach so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**.

8. The Evidence in the trial court was thus; **Pw1 EKM** testified as the father of the minor. He testified that his daughter was involved in an accident and when he reached the scene, he saw that the suit vehicle had rolled. He testified that the minor was hospitalized in Kenyatta for a month and then he recorded a statement at the police station. He testified that his daughter was injured as a result of the accident and he sought that the court assist him to cater for the cost of treatment and cater for injuries. On cross examination, he testified that he did not witness the accident.

9. On 6.7.2017, the counsels on record indicated consent to have the statement and medical report of the doctor produced by consent. The appellant closed their case and so did the respondent without calling any witnesses.

10. The following issues are to be determined.

a) Whether the appellant proved that the accident was caused by the negligence of the respondent.

a. S**ections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. The learned author ***WVH Rodgers*****, Winfield and Jolowicz on tort 17th Edition Sweet and Maxwell, 2006 at 132** stated that there are three ingredients making up a case of negligence were established. These are:-

> ***a) There must exist a duty of care owed by the defendant to the plaintiff.***
>
> ***b) The defendant ought to have failed to exercise that duty of care.***
>
> ***c) That such failure must have resulted into injuries, loss or damage to the plaintiff.***

11. It is already an established fact that the accident occurred as evidenced by the police Abstract (Pexh 11).

12. The appellant wants the court to find that in the absence of uncontroverted evidence, the accident that was caused was as a result of negligence on the part of the respondent. This position is in agreement with the circumstances in the case of **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another[2015] eKLR, where the court observed** that:

> ***The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2nd respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2nd defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2nd respondent."***

13. The circumstances in the above case were different from the instant case where there was no evidence of how the accident occurred. This brings into play the issue of admissibility of evidence. Pw1 told the court that he was told how the accident occurred and that he did not witness the same.

14. It is trite law that evidence other than that by the person who saw, felt, heard or touched shall be considered hearsay evidence. (See **Section 63 (1) and (2) of the Evidence Act**. In the **12th edition of Phipson on Evidence**, the following statement is given: "Former oral or written statements by any person, whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted". (para. 625 (12th ed. 1976)) Thus, in a trial for negligence, a parent cannot give evidence of what a victim told him. Nor could a written statement by the victim to the same effect be adduced. In the instant case I find that the evidence of Pw1 was inadmissible as to how the accident occurred and the court could not place any reliance on the same so as to make a finding on negligence. I therefore reject the evidence of Pw1 as hearsay.

15. It is important to note that there are exceptions to the Rule against hearsay. In **Cullen v. Clarke [1963] I.R. 368, 378**, Kingsmill Moore J. gave his opinion on the same:

> "***In view of some of the arguments addressed to the Court, it is necessary to emphasize that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts which they assert; .... This is the rule known as the rule against hearsay. If the fact that the words were spoken rather than their truth is what it is sought to prove, a statement is admissible*****."**

16. Material to this appeal, under the doctrine of *res gestae* contemporaneous spontaneous statements about a fact in issue or as to the state of mind of the maker at any relevant time are admissible as evidence of the truth of their contents. Similarly Public documents, i.e. entries made by authorized agents of the public relating to facts of public interest or notoriety are generally admissible at common law. Evidence given in previous proceedings between the same parties may be read at a subsequent trial provided the issues are the same, the witness who made the statement is unavailable and the other side had the opportunity of cross-examination in the previous proceedings. See Section 33, 38, 45, 68 and 79 of the Evidence Act. The father of the minor was the only one who tendered evidence in the case. There was no eye witness account of how the accident took place save only that of Pw1 who arrived at the scene and found that the vehicle had rolled.

17. Whereas it can be argued that indeed an accident occurred, this is not in itself proof of negligence in the absence of other sufficient evidence. Indeed, it is only the father of the victim who testified in the case. A police abstract was produced by consent and which indicated the involvement of the respondent's vehicle in the accident and that the matter was pending investigations. Hence the issue of an accident is not in dispute. The respondent opted not to tender evidence in rebuttal of the appellant's evidence. The respondent in his statement denied the appellant's claims. The respondent filed a reply to the said defence and reiterated the averments in the plaint. Upon the close of the appellant's evidence the respondent ought to have tendered his evidence in rebuttal but he did not thereby implying that the appellant's version of events remained unchallenged.

18. The appellant's counsel assailed the trial court for misunderstanding the doctrine of vicarious liability yet the appellant did not plead the same. In the adversarial system, every party is bound by their pleadings. Indeed the appellant did not plead the issue of vicarious liability. The trial magistrate seemed to blame the appellant for failing to enjoin the driver of the respondent yet in the same breath was of the view that the driver could be blamed or the owner vicariously. Even though the appellant failed to plead the aspect of vicarious liability I find that the same is implied from the descriptive part vide paragraph 4 of the plaint dated 29.6.2016 where the blame is directed at the respondent, his driver, agent, servant or employee. It is common knowledge that most drivers often flee from the scene of an accident and never to be traced even by their employers and in such circumstances a victim of an accident should not be denied access to justice simply because such a driver has not been enjoined into the suit as long as the owner has been sued. Even though the victim of the accident was not called to testify I find the evidence of her father who is the appellant herein is sufficient. The issues for determination herein are firstly whether the appellant established liability against the respondent and secondly whether the appellant is entitled to compensation for injuries sustained.

19. As regards the first issue the appellant aged about seven years old had been a passenger in the respondent's vehicle. Under normal circumstances a passenger is not in control of how a vehicle is driven and or controlled as that is the duty of the driver and or servant of the owner or the owner if he is the one driving it. That being the case then the respondent could not have contributed to the accident in any way. The appellant testified that on arrival at the scene he found that the respondent's car had indeed rolled. It is common knowledge that a properly driven vehicle does not just veer off the road and roll severally unless the driver is careless or reckless. The respondent being the registered owner of the vehicle is vicariously liable for the torts of his servant or agent. The police abstract produced as exhibit 11 indicates that the accident was self-involving and hence in the absence of any other vehicle involved then the respondent's driver or servant or agent was clearly negligent on the material date. The respondent or his servant owed a duty of care to the appellant by ensuring that she was safely driven up to her destination. As an accident took place resulting in injuries to the appellant I find that the respondent had breached that duty of care. It would therefore follow that the trial magistrate in her analysis on the respondent's liability was erroneous since the respondent's vicarious liability was obvious as it had been pleaded vide paragraph 4 of the appellant's plaint. Even if the issue of vicarious liability might not have been expressly indicated the same was not at all fatal to the appellant's case. In the case of **Lake Flowers Vs Cila Franklyn Onyango& Another (2008) eKLR** the court held as follows:

> "***We agree with the plaintiff's complaint both in the Memorandum of Appeal and the submissions before us that vicarious liability was not pleaded in the plaint; and that the driver of the Mitsubishi Canter was not joined as a party to the proceedings in the superior court. However; it is our view that the failure to sue the appellant's driver and the omission by the 1st Respondent to directly refer to the appellant's liability as being vicarious was not necessarily fatal to his claim. It is sufficient that the relevant primary facts were pleaded and evidence led to show the owner of the Mitsubishi Canter and from which vicarious liability can be inferred as a matter of law. An as put in Dritoo v West Nile Administration (1968) EA***
>
> ***" where it is proved that a car has caused damage by negligence, then in absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible.''***

From the above authority I find that the learned trial magistrate went into error regarding the legal position on vicarious liability and therefore ought not to have dismissed the appellant's case on the failure to enjoin the driver of the ill- fated accident vehicle. The lower court's finding on liability was thus erroneous. Having established that the respondent was vicariously liable in damages to the appellant and having established that the appellant did not contribute to the said accident I find the respondent wholly liable in damages to the appellant at 100%. The appellant had established negligence against the respondent. The appellant's appeal on liability must therefore succeed.

20. As regards the second issue the appellant sustained a fracture of the left femur distal third as well as blunt injuries on forehead and left thigh and haermatoma on left lobe of the brain. The medical report dated 5.4.2016 by Dr. G.K Mwaura produced by consent indicated that the appellant's healing and prognosis was fair. The appellant being a minor is likely to heal faster than an adult. In the case of **Am Vs Mohamud Kahiye Nbi CC. No.209 of 2010** Waweru J awarded the sum of Kshs 800,000/ as general damages to a plaintiff minor who had sustained rib fractures and blunt injuries on the thorax and abdomen. The appellant's injuries appear not to be that severe and hence I am of the considered view that an award of Kshs 300,000/ would be adequate as general damages for pain and suffering.

21. In the result I find merit in the appeal. The same is allowed. The trial court's judgement is hereby set aside and substituted with judgement being entered in favour of the respondent as follows;

> ***a) Liability apportioned at 100&***
>
> ***b) General damages of Kshs 300,000/***
>
> ***c) Costs of the suit both in the lower court and in this appeal***

Orders accordingly.

Dated and delivered at Machakos this 5th day of May, 2020.

D. K. Kemei

Judge