



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 65 OF 2017

OKUN ALEMBA FRANCIS.....APPELLANT

VERSUS

ALFRED OPANDE ODIDI (suing as legal representative

Of the estate of HELLEN AKINYI OPANDE) Deceased.....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. R. K. Langat Magistrate in Rongo Magistrate's Civil Case No. 177 of 2015 delivered on 13/1/2018)

JUDGMENT

1. The Respondent herein, **Alfred Opande Odidi**, filed **Rongo Senior Resident Magistrate's Civil Case No. 177 of 2015** (hereinafter referred to as '**the suit**') against the Appellant herein, **Okun Alemba Francis**, and **Sainil Investments Limited** as a legal representative of his wife one Hellen Akinyi Opande who died out of some injuries she sustained in a road traffic accident which occurred on 14/07/2013. He sought for General Damages, Special damages, Costs and Interests.

2. The Respondent sued the Appellant herein as the beneficial owner of the offending motor vehicle registration number KBW 267R (hereinafter referred to as '**the vehicle**') and Sainil Investments Limited as the registered owner of the vehicle. The Appellant herein defended the suit whereas Sainil Investments Limited did not participate in the suit and as a result an interlocutory judgement was entered against it. The Appellant denied all the averments and put the Respondent into strict proof. The suit was fully heard. The Respondent testified as **PW1** and closed his case. The Appellant adopted his evidence in a sister file **Rongo Senior Resident Magistrate's Civil Case No. 178 of 2015** and closed the defence case.

3. In a considered decision which was rendered on 08/06/2017 the trial court found the Appellant herein and Sainil Investments Limited wholly severally and jointly liable for the accident and awarded Kshs. 20,000/= on General Damages for pain and suffering before death, Kshs. 800,000/= on Loss of Dependency and Kshs. 132,000/= on Special Damages together with Costs and Interests.

4. Only the Appellant was aggrieved by the judgment and preferred the appeal subject of this judgment. In a Memorandum of Appeal filed on 23/2017 the following four grounds were preferred: -

- 1. THAT the learned magistrate erred in law and fact by ignoring the Appellant's evidence and treating it superficially.**
- 2. THAT the learned magistrate erred in law and fact by finding that the respondent had proved the case on a balance of probability.**
- 3. THAT the learned trial magistrate erred in law and fact in that he disregarded the Appellant's submissions and judicial authorities with the resultant miscarriage of justice to the appellant.**
- 4. THAT the learned trial magistrate erred in law and fact by failing to evaluate the entire evidence on record and make a finding that the Respondent had proved his case against the appellant on a balance of probability and thereby arrived on wrong findings on the issues before the court.**

5. Directions were taken and the appeal was disposed of by way of written submissions where both parties filed their respective submissions. Counsel for the Appellant submitted on the subject of liability only. He contended that the Appellant was not liable since he did not authorize the driver one Boyi to drive his vehicle and as such he was not vicariously liable. He relied on the decisions in **Storey vs. Ashton (1869) L.R. 4QRB 476**, **Norgan vs. Launchbury (1972) All ER 606**, **Anyanzwa & 2 Others vs. Lugi de Casper & Another (1981) KLR 10**, **Kaburu Okelo & Partners vs. Stella Karimi Kobia & 2 Others (2012) eKLR** in buttressing the submission that the driver was on a frolic of his own and did not bind the Appellant.

6. The Respondent opposed the appeal. He supported the decision of the trial court and prayed that the appeal be dismissed with costs. In doing so, the Respondent took the Court through the evidence adduced at the trial court in demonstrating how the Appellant was vicariously liable. The Respondent also supported the assessment on quantum of damages.

7. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga& Another (1988) KLR 348**.

8. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto.

9. This appeal is mainly on the limb of liability. The starting point are the pleadings. It is now settled law that each party is bound by its pleadings and any evidence that tends not to support the pleadings is for rejection (See the Court of Appeal case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** and that of **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281**).

10. In this case the Appellants filed a defence on 04/02/2016 where he denied liability. As said the Appellant's main contention is that he did not authorize the driver who caused the accident to drive the vehicle more so given that he did not even know him. Of particular interest is part of the evidence of the Appellant who testified as DW1 in **Rongo Senior Resident Magistrate's Civil Case No. 178 of 2015** where he stated that: -

.....On 23/1/2015, I left my car at homeat around 10 am I received a call from my wife that they wanted to go for a funeral. They asked me if I can give them my vehicle to attend funeral at Migori County. A relative had passed on. My driver was at Mombasa. I had parked. I told my wife to look for a driver. They got a driver. I did not see the driver. They went for the funeral. I was told there was an accident.....

11. On cross-examination the Appellant had the following to say: -

.....My wife called me as the owner of the vehicle, requesting me to release motor vehicle to her. I advised her to look for a driver. They got the driver. I did confirm that the driver was competent.....

12. From the evidence of the Appellant it is so clear that the Appellant permitted his wife to use the vehicle. He even advised her to look for a driver and when the Appellant's wife got one the Appellant confirmed that the driver was competent to drive the vehicle. I therefore do not see how the Appellant would turn around and claim that he did not authorize the driver to drive his vehicle. The Appellant is the one who permitted the use of the vehicle and even approved of the driver as competent. The vehicle was therefore driven with the authority of the Appellant. I hence do not agree with the Appellant that he did not know the driver and that the driver was on a frolic of his own. The driver was duly authorized agent of the Appellant. One may pose the question; suppose the driver was not competent, would the Appellant have allowed him to drive the vehicle? Definitely not and that is demonstrated by the fact that the Appellant first ascertained and was satisfied that the driver was competent to drive the vehicle before he allowed the use of the vehicle.

13. Infact all the decisions cited by the Appellant and many more others support the Respondent's case in settling the legal position that vicarious liability only attaches to the owner when the tortious act is done in the scope of or during the course of one's employment or authority. In this case the driver was duly authorized to drive the vehicle by the Appellant hence the Appellant was rightly found to be vicariously liable for the tortious act of the driver.

14. I therefore affirm the finding of the trial court on liability and find that the appeal on liability is, but unsuccessful. Since the Appellant did not contest the award of damages I would as well not venture into that arena. The upshot is that the entire appeal is for rejection and is hereby dismissed with costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 21st day of May 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Obach instructed by the firm of Messrs. H. Obach & Partners Advocates for the Appellant.

Miss. Kuke instructed by the firm of Messrs. Everlyne Kuke & Company Associates Advocates for the Respondent.

Evelyn Nyauke – Court Assistant