



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 97 OF 2018**

**MWAI KIBAKI FOUNDATION.....APPELLANT**

**VERSUS**

**ALICE WANJIRU & EDWARD MAINA KIBUTU**

**(Suing as personal representatives of**

**DAVID KIHUNGU MURUGI-Deceased).....RESPONDENTS**

*(Being an appeal from the judgment delivered by Honourable I. Orenge (Mr.)*

*(Senior Resident Magistrate) on 25<sup>th</sup> January, 2018 in CMCC No. 4544 of 2014)*

**JUDGEMENT**

1. The respondents filed an action before the Chief Magistrate's Court, Nairobi in their capacities as personal representatives of the estate of David Kihungu Murugi (*the deceased*) against the appellant and Fatuma Hassan, who is not party to this appeal, vide Nairobi CMCC NO. 4544 of 2014.
2. In their plaint filed on 6<sup>th</sup> August, 2014 the respondents pleaded that sometime on or about the 7<sup>th</sup> of June, 2013, the deceased was carrying on his business of loading cargo onto the motor vehicle registration number KBT 022S parked at a loading bay along Nairobi-Mombasa Road at Salama Market, when Fatuma Hassan (*the 2<sup>nd</sup> defendant*) negligently drove motor vehicle registration number KAW 039A (*the subject motor vehicle*), causing the same to crash onto the deceased, who as a consequence sustained fatal injuries.
3. The respondents further pleaded that the appellant, being at all material times the owner of the subject motor vehicle, was vicariously liable for the accident.
4. The respondents sought for general and special damages against both the appellant and Fatuma Hassan, the 2<sup>nd</sup> defendant in the suit.
5. The record shows that the appellant entered appearance and filed a statement of defence largely denying the facts surrounding the accident as pleaded in the plaint, as well as the particulars of negligence pleaded against it.
6. It was also pleaded by the appellant that at all material times, it had allocated the subject motor vehicle to the 2<sup>nd</sup> defendant, who thereafter failed and/or refused to return the same on claims that the appellant owed her money. As such, the appellant pleaded that it is the 2<sup>nd</sup> defendant who ought to have been held solely liable.
7. Furthermore, the appellant pleaded negligence both on the part of the deceased and the 2<sup>nd</sup> defendant.
8. When the parties appeared before the trial court on 23<sup>rd</sup> August, 2018, the respondents through their advocate on record withdrew the case against the 2<sup>nd</sup> defendant. Subsequently, the respondents called two (2) witnesses to testify in support of the plaintiffs' case whereas the appellant relied on the evidence of one (1) witness in support of the defence case.
9. At the close of the trial, parties filed and exchanged written submissions, following which the learned trial magistrate ultimately entered judgment in favour of the respondents as follows:

a) Liability-100%

b) General damages

(i) Loss of dependency Kshs.1,600,000/=

(ii) Loss of expectation of life Kshs.100,000/=

(iii) Pain and suffering Kshs.10,000/=

c) Special damages Kshs.64,700/=

**Total Kshs.1,774,700/=**

10. The appellant being aggrieved preferred this appeal and put forward a total of 15 grounds in its Memorandum of Appeal.

11. Though the appellant put forward a total of 15 grounds of appeal, those grounds revolve the twin questions of liability and quantum.

Parties were directed to file and exchange written submissions on the appeal. On its part, the appellant contends that whereas ownership of the subject motor vehicle is not disputed, the doctrine of vicarious liability could not have applied since the 2<sup>nd</sup> defendant was neither its employee nor its agent, and the respondents did not prove that such a relationship existed, therefore, the learned trial magistrate erred in finding the appellant vicariously liable.

12. The appellant further argues that going by the testimony of PW2, it is clear that the deceased was loading the farm produce at an undesignated area and was not a keen onlooker of the road, which goes to show that he ought to have been found partly negligent in view of the accident.

13. It is also the appellant's submission that there are certain discrepancies which the learned trial magistrate ought to have taken into account but did not for example that, despite PW1's testimony that she and the deceased were married and shared three (3) children, no copies of a marriage certificate or birth certificates were produced in support thereof.

14. The appellant further argued that the names by which the deceased was referred to in various documents bore inconsistencies; and also that the whereabouts of the accident were not clearly established.

15. In conclusion, the appellant argues that the learned trial magistrate similarly erred in awarding special damages whereas the same were not proved and that the award on general damages was excessive given that neither the deceased's earnings nor dependency were ever proved.

16. On their part, the respondents have submitted that the evidence tendered show that the subject motor vehicle was being driven at high speed and that the said motor vehicle crashed and sandwiched the deceased between itself and the motor vehicle registration number KBT 022S which was in fact stationary which evidence was not rebutted by the appellant. Thus, the respondent's position is that the learned trial magistrate was right in finding the appellant wholly liable for the accident.

17. It is the respondents' submission that the evidence adduced show a co-existing agency relationship between the 2<sup>nd</sup> defendant and appellant and thus, the appellant was rightly held vicariously liable for the acts of the defendant.

18. The respondents further argued that they had tendered sufficient evidence to ascertain who the deceased's dependants were. The respondents also aver that the award of damages was reasonable and there is no reason to have the same set aside.

19. I have re-evaluated the case that was before the trial court and further considered the rival submissions on appeal.

Grounds 1), 2), 3), 4), 7), 8) and 9) of this appeal touch on liability and I will therefore determine them together. It is the evidence of Alice Wanjiru (PW1) that she came to learn of the accident through Bernard Macharia Maina (PW2), at which point they reported the same to the relevant police station and were issued with a duly filled police abstract.

20. PW1 further stated that a search conducted on the subject motor vehicle revealed that the same was owned by the appellant; a copy of the search records was produced as *P. Exh 3*.

21. During cross examination, PW1 admitted not knowing the driver of the subject motor vehicle but was certain that the appellant was its registered owner.

22. In his evidence, PW2 stated that while loading farm produce together with the deceased on the side of the road at Salama Market on the fateful day, he witnessed the subject motor vehicle being driven at high speed while approaching their direction.

23. PW2 said he shouted and moved but unfortunately, the deceased was not so lucky as he was hit and seriously injured.

24. This witness testified that the deceased was pronounced dead on arrival at the hospital. PW2 said that the driver of the subject motor

vehicle fled the scene. PW2 also stated that the subject motor vehicle hit a bump and lost control.

25. On her part, Judy Wanjiku Kibaki (DW1), a trustee of the appellant, stated that the 2<sup>nd</sup> defendant was never an employee of the appellant but was a volunteer to mobilize people for the campaign being undertaken on behalf of the appellant in respect of the 2007 general elections.

26. The said witness further avered that the whereabouts of the subject vehicle were at all material times unknown and that the 2<sup>nd</sup> defendant has to date not returned the same to the appellant, hence the appellant should not be held liable for the accident.

27. During cross examination, DW1 confirmed ownership of the subject vehicle to be that of the appellant, adding that the same was only allocated to the 2<sup>nd</sup> defendant, who was to use and return it in exchange for an allowance.

28. In rendering his decision, the learned trial magistrate stated that the 2<sup>nd</sup> defendant was at all material times driving the subject motor vehicle under the instruction of the appellant and was thus an agent of the appellant, which made the appellant vicariously liable in the circumstances. The said magistrate went further to hold that the appellant did not adduce any evidence to show any attempts made at recovering the vehicle from the 2<sup>nd</sup> defendant as claimed.

29. It is apparent from the evidence tendered that an accident took place involving the subject motor vehicle which led to the death of the deceased. This fact was acknowledged by DW1 who indicated that she received news of the accident, though she did not reveal from whom.

30. It is also not disputed by the appellant that it is the registered owner of the motor vehicle.

31. PW2 who accompanied the deceased to the loading bay on the material day did not identify the 2<sup>nd</sup> defendant as the driver but DW1 confirmed that the vehicle had been allocated to the 2<sup>nd</sup> defendant and was therefore in her possession at the time of the accident with the authority of the appellant.

32. The relevant question to be determined here is whether the learned trial magistrate was right in finding the appellant 100% liable on the premise of vicarious liability. Vicarious liability was defined in the case of **Joseph Cosmas Khayigila v Gigi & Co. Ltd & Another (Civil Appeal No. 119 of 1986)** inter alia 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.”***

33. Applying the above principles, it is evident that vicarious liability not only comes into play in employer-employee relationships but also in instances of an agency relationship.

34. The court in **Investments and Mortgages Bank limited v Nancy Thumari & 3 others [2015] eKLR** offered a brief yet precise definition of an agency relationship as follows:

***“...To establish agency relationship, it is necessary to show that the driver was using the car at the owner’s request express or implied or on its instruction and was doing so in the performance of the task or duty thereby delegated to him by the driver.”***

35. The appellant is of the submission that it merely allocated the subject motor vehicle to the 2<sup>nd</sup> defendant as its volunteer in respect of the 2007 general elections. The 2<sup>nd</sup> defendant was at material time using the vehicle to carry out the so-called delegated volunteer tasks and could in essence be described as being an agent of the appellant, thus giving rise to vicarious liability.

36. The appellant did not summon the 2<sup>nd</sup> defendant as a witness to shed light on their relationship, neither did the appellant tender any evidence to show that the 2<sup>nd</sup> defendant was utilizing the vehicle for her own personal errands on the fateful day or that the deceased in any way contributed to the accident through her own negligence.

37. It is therefore reasonable to settle for the argument that the appellant would bear responsibility for the accident resulting from the negligent driving of the subject motor vehicle by the 2<sup>nd</sup> defendant.

38. In the case of **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another (2004) eKLR** wherein it was held in part as follows:

***“...in Ormrod & Another –vs- Crossville Motor Services Ltd & Another 1953 (2) AER 753 CA, Denning LJ 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 a third party to be used for purposes in which the owner has no interest or concern.”***

39. In the premises, I am of the humble view that the learned trial magistrate correctly found the appellant 100% liable.

40. Grounds 5, 6 and 10 are in respect of quantum. It is evident from the grounds of appeal that the appellant is essentially challenging the awards made under the heads of loss of dependency and special damages and has urged this court to disturb the same in line with the principles set out in *Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) Kar 5* where the Court of Appeal stated *inter alia* as follows:

*a) That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or*

*b) The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.*

41. PW1 testified before the trial court that prior to his death, the deceased carried out his own business of loading and transporting vegetables and earning Kshs.20,000/= every month, out of which he would give her between Kshs.8,000/= and Kshs.10,000/=. She indicated that the deceased was her husband and that they had three (3) children aged between 3 years and 14 years at the time of his death.

42. PW1 also stated that she spent about Kshs.60,000/= on funeral expenses, though she did not have any receipts for the same. Upon cross examination, the witness also indicated that she did not have copies of the birth certificates for her children.

43. On his part, PW2 gave evidence that he only came to know the deceased's wife after the accident and saw her at the funeral.

44. Upon considering the above, the learned trial magistrate found that the deceased was a family man who carried out a loading business. However, given that no evidence of his earnings was tendered, the said magistrate opted to apply a global sum in assessing the award of Kshs.1,600,000/= for loss of dependency. The trial magistrate also awarded special damages of Kshs.64,700/= as pleaded.

45. In addressing my mind to the subject of proof of dependency, it is true on the one hand that the respondents did not tender in evidence copies of a marriage certificate or letter from the chief, or the birth certificates for the deceased's children. On the other hand, the trial court proceedings show that a grant of letters of administration was issued to the 1<sup>st</sup> respondent and this was not controverted by the appellant. The appellant did not also dispute that the deceased had children but purported to do so during cross examination. In this respect, I am of the considered view that marriage certificate or birth certificates are not the only evidence of proof of a marriage or children and am therefore satisfied that the dependants were properly identified.

46. The deceased's age was ascertainable through a copy of the Death Certificate produced before the trial court. He was Said to be 33 years old at the time of his death.

47. As concerns the deceased's earnings, it is evident from the testimony of the plaintiffs' witnesses that the deceased carried out a business as opposed to being employed though no documentation was adduced to indicate his earnings/profits. I have taken into account PW2's testimony corroborating PW1's oral evidence regarding the nature of the work the deceased undertook and the earnings amounting to Kshs.20,000/= per month. Nevertheless, there was no way of ascertaining that this is what the deceased in fact earned or gained as profits.

48. The courts have held on previous occasions that where it is not possible to ascertain the earnings of a deceased person, a global award may be applied, which is what the learned trial magistrate did in the present instance. I find this approach to have been appropriate in the circumstances and therefore I see no reason to interfere with the award.

49. In respect of special damages, PW1 did not tender any evidence to prove the same. The said witness further admitted that she had no receipts to prove funeral expenses incurred. Suffice it to say that it cannot be disputed that the respondents incurred certain expenses in undertaking the funeral and burial arrangements for the deceased. In fact, the Court of Appeal awarded Kshs.60,000/= for funeral expenses in the case of *Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR* and stated that funeral expenses can reasonably be awarded where the same are reasonable and legitimate.

50. The respondents pleaded to be awarded Kshs.50,000/= for funeral expenses as well as Kshs.10,000/= for the coffin. I find an all-inclusive award of **Kshs.50,000/=** to be reasonable. However, the other expenses were pleaded but not proved. I am therefore inclined to substitute the learned trial magistrate's total award of Kshs.64,700/= with Kshs.50,000/=.

51. The upshot is that the appeal against liability is dismissed.

However, the appeal as against quantum partially succeeds.

Consequently:

a) The appeal as against the award on loss of dependency is dismissed.

b) The appeal as against the award on special damages is allowed. The award of Kshs.64,700/= is set aside and is substituted with Kshs.50,000/=.

52. For the avoidance of doubt the award on appeal is as follows:

**a) General damages**

(i) Loss of dependency

Kshs. 1,600,000/=

(ii) Loss of expectation of life                      Kshs.100,000/=

(iii) Pain and suffering                                      Kshs.10,000/=

**b) Special damages                                      Kshs.50,000/=**

**Total    Kshs.1,760,000/=**

53. In the circumstances of this case, a fair order on costs is to direct that each party meets its own costs of the appeal.

**Dated, Signed and Delivered at Nairobi this 12<sup>th</sup> day of July, 2019.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondents