REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL NO. 114 OF 2017

PETER MUTUNGA KILONZO.....APPELLANT

VERSUS

TITUS MULINGE KATIVANGA.....1ST RESPONDENT

STEPHEN KIBUGU.....2ND RESPONDENT

(Being an appeal from the judgement delivered by the Honourable E. Agade, Resident Magistrate in Kangundo SPMCC 110 of 2016 delivered on 21.7.2017)

JUDGEMENT

1. According to a plaint filed in the subordinate court, the appellant was a passenger in a Motor Vehicle registration number KBD 895F registered in the names of the 2nd respondent and beneficially owned by the 1st respondent. While he was travelling on 29.12.2015 along Nairobi- Kangundo Road, the respondents' vehicle was involved in an accident and as a result the appellant suffered serious bodily injuries. The appellant claimed damages and pleaded ***res ipsa loquitor***.

2. In their defence, the Respondents denied the accident; they denied the applicability of *res ipsa loquitor*. They denied the injuries and prayed that the suit against them be dismissed. They pleaded that the accident was caused or substantially contributed by the rider of the motorcycle that the Appellant was riding as a pillion passenger. They further pleaded that the accident was caused or substantially contributed by the Appellant's own negligence.

3. After hearing the matter, the learned magistrate held that the appellant had failed to prove his case as he had failed to prove negligence and dismissed the suit with no order as to costs which decision has precipitated this appeal.

4. This appeal is against the finding of the trial court. The contents of the appellant's appeal are set out in the memorandum of appeal dated and filed on 21st August, 2017.

5. Counsel for the appellant, Mutunga and Co Advocates, submitted that during trial, the uncontroverted evidence of the investigating officer blamed the respondent's driver for the accident and that the respondents did not call any evidence to controvert this evidence. Therefore, the court should proceed to set aside the finding of the trial court. Learned counsel submitted that the driver though not having been made a party to the case, the court ought to make the owner vicariously liable as was found in the case of **Joseph Njuguna v Cyrus Njathi (1999) eKLR.** Counsel further submitted that the negligence of the driver ought to be imputed on the owner of the vehicle. Counsel cited the case of **Karisa v Solanki (1969) EA.** On the issue of quantum, counsel submitted that the amount of Kshs 130,000/- ought to have been awarded for soft tissue injuries.

6. Counsel for the Respondent supported the findings of the trial court and consolidated the appeal into two issues, liability and quantum. On the issue of liability, counsel relied on the finding in the case of **Farida Kimotho v Ernest Maina (2002) eKLR** that the happening of an accident is not prima facie evidence of negligence but there ought to be affirmative evidence of negligence that caused the accident. On the issue of quantum, counsel proposed a sum of between Kshs 50000/ and Kshs 100000/ and cited the case of Ndungu **Dennis v Ann Wangari Ndirangu & Another (2018) eKLR.**

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 so as to reach an independent conclusion as to whether or not to uphold the judgement. This was observed in the case of ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**.

8. The principal witness on the issue of liability was CPL Mohammed Yusuf who was PW 2. He testified that the driver indicated that the vehicle developed a mechanical problem and it veered off the road where it landed on the left side of the road and some passengers were injured. He produced the abstract, and P3 form for the Appellant. On cross-examination, he testified that he had no sketch plan of the area

and no details of the accident were in the police file. Pw3 was the appellant who testified that he blamed the driver of the vehicle for causing the accident for he was overspeeding at the time when the vehicle veered off the road and hit a wall and fell. He stated that he sustained cuts and went to Kangundo Hospital for treatment. He produced the treatment card and receipts as exhibits. He also produced the copy of records and the receipts as well as the demand letter. The Appellant closed his case and so did the Respondent who called no witnesses.

9. Was liability proved in these circumstances? **Sections 107**, **108** and **109** of the **Evidence Act, Chapter 80 of the Laws of Kenya** places the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the Appellant to prove liability on the balance of probabilities. Although, PW 2 did not investigate the accident, he produced the police abstract which confirmed the fact of the accident, the date it occurred, the fact that there was an indication that the vehicle developed mechanical problems and veered off the road. The eye witness who was the appellant testified that he was a passenger and that he sustained injuries, and his evidence corroborated that of the police officer that the vehicle veered off the road. The appellant's evidence was that the driver was overspeeding and that the vehicle veered off the road and hit a wall. None of the evidence of the appellant and his witness has been controverted. The police abstract relied on was produced. The officer who investigated the cause of the accident however did not testify.

10. The germane issue for consideration is whether the appellant established negligence that an accident occurred, that the vehicle veered off the road and that the driver had indicated that the vehicle was faulty. There was oral evidence of the Appellant that the vehicle was over speeding. In other words, could the appellant rely on the doctrine of *res ipsa loquitor* to make the case that the respondents were liable?

11. In the case of **Barkway v South Wales Transport Company Limited [1956] 1 ALL ER 392**, **393 B** the nature and application of the doctrine of *res ipsa loquitur* was stated as follows:

> *The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.*

12. Apart from the fact that the accident took place, the evidence that the vehicle veered off the road: that the driver indicated that the vehicle was faulty and oral evidence of the eye witness was that the vehicle was over speeding. This was presented before court and it was not controverted. Though the evidence of the person who did investigate the matter was not provided neither was there production of sketches of the accident scene which showed, for example, the condition of the road, the speed of the driver from which the court could infer negligence on the part of the respondent, I am satisfied that there was sufficient evidence to infer negligence on the part of the respondents. It is obvious that a properly maintained vehicle and properly driven does not just veer off the road while in motion. The accident was self involving and that the appellant who was a passenger had witnessed it. The appellant was a passenger and had no control in the manner in which the vehicle was driven and or managed. The respondents in their statement of defence had pleaded that the appellant was a pillion passenger. However this was not correct as the appellant was indeed a passenger in the accident vehicle and which was confirmed in the p3 form and the police abstract. The respondents opted not to adduce evidence to controvert the same. I am satisfied that the appellant was a passenger in the ill fated vehicle.

13. The testimony that the vehicle veered off the road, that the driver indicated that the vehicle was faulty and oral evidence of the eye witness that the vehicle was over speeding was sufficient and, in addition, the fact that a vehicle could veer off the road and hit a wall, and that a faulty vehicle could be allowed to operate on a highway means that on a balance of probabilities an inference of negligence can be made. Further the doctrine of vicarious liability applies to rope in the registered owner of the accident vehicle for the torts of the driver.

14. In **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another[2015] eKLR, 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*

15. In this case, I find and hold that the appellant did prove negligence against the respondents on the balance of probabilities. The respondents did not tender any evidence to controvert the evidence of the appellant that the vehicle veered off the road: that the driver indicated that the vehicle was faulty and that the vehicle was over speeding. In **John Joel Koskei v Kenya Power & Lighting Co. Ltd [2005] eKLR**, the court made a finding of negligence imputed to the permitting of use of a faulty motorcycle and in the case before me, in the absence of contrary evidence, I find that with the evidence on record the respondents permitted a faulty vehicle to be used to ferry passengers and in so doing, they were negligent. I buttress this finding with the case of **Joseph Njuguna v Cyrus Njathi (1999) eKLR**, where the court found the vehicle owner vicariously liable where the driver was negligent. I would therefore disagree with the findings of the trial court and find the Respondents liable for negligence. The fact that the names of the driver were not availed, the liability of the owner(s) cannot be avoided even where the drivers cannot be traced for the simple reason that the vehicle could not have been on the road by itself. It must have been driven, managed and or controlled. The registered owner is vicariously liable for the torts of the servant.

16. The learned trial magistrate in her judgement has pointed out that in line with the provisions of Section 8 of the Traffic Act, the only names that appear in the copy of the records is that of the 2nd Respondent and therefore because the investigating officer did not testify as to how he arrived at the decision to include the name of the 1st Respondent as owner of the subject vehicle, liability against the 1st Respondent had not been proved. Though this was not an issue during trial and the Respondents had not challenged this fact by failing to call witnesses, I find it necessary to address the issue so as to ensure that justice is done in the circumstances of this case. I am in agreement with the findings of the trial court and find no liability against the 1st Respondent but find the 2nd Respondent 100% liable. The copy of the search records of the motor vehicle revealed that the 2nd Respondent was the registered owner. If the said 2nd Respondent intended to adduce evidence to the

effect that ownership of the motor vehicle had changed hands then he ought to have tendered evidence to that effect but he did not. Hence he cannot escape from liability for the torts of the driver. I am guided by the finding by the court of appeal in **Joel Muga Opila v East African Sea Food Limited [2013] eKLR** that held as follows:-

> **"In any case in our view an Exhibit is evidence and in this case, the Appellant's evidence is that the Police recorded the Respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with the words to the effect that the owner was East African Sea Food was not seriously rebutted by the Respondent who in the end never offered any evidence to challenge or even to counter that evidence. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in Court without any objection its contents cannot be later denied."**

The 2nd Respondent being registered as owner of the vehicle was under obligation to controvert the appellant's evidence but he did not do so. If he intended to seek indemnity and or contribution from the 1st respondent nothing prevented him from doing so. However he did not. Even though the police abstract indicated the 1st respondent as a beneficial owner, the 2nd respondent who was registered as the owner vide the copy of records must be held liable for the accident. Hence I find that liability was proved against the 2nd respondent. To that extend it follows that the trial courts finding on liability was arrived at in error and must be set aside.

17. On the issue of quantum, the appellant has proposed the figure of Kshs 130,000/- while the Respondents had proposed the amounts of between Kshs 50,000/- and 100,000/- backed up by the cases of **Ndungu Dennis v Ann Wangari Ndirangu & Another (2018) eKLR.** Based on the uncontroverted evidence of Dr. James Muoki and the medical report that the Respondents had made no attempt to object to its content and reliance, I find that the report is cogent evidence of the injuries suffered by the appellant. Therefore I shall rely on the same to award general damages of Kshs 120,000/- for pain and suffering due to the severity of injuries as per the medical report. The cited authority above is relevant in that injuries sustained by the plaintiff therein are more or less the same as the appellant herein.

18. On the issue of special damages, there are on record receipts totalling to Kshs 18,880, whose production has not been objected to. I shall award the Kshs 10,000/- for court attendance and Special damages of Kshs 8,480/- that was pleaded and proved.

19. In the result the appeal is allowed. The judgement of the trial court is set aside and substituted with an order that judgment is entered for the appellant against the 2nd Respondent as follows:-

a. Liability 100%

b. General Damages Kshs 120,000/-

c. Special Damages Kshs 8,480/-

d. Court Attendance Kshs 10,000/-

The Appellant is awarded the costs of this appeal and in the lower court.

Orders accordingly.

Signed, Dated and delivered at Machakos this 17th day of July, 2019.

D.K. KEMEI

JUDGE