



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCA NO. 12 OF 2017

(FORMERLY ELDORET HCCA NO. 80 OF 2013)

**LAWRENCE MUSANGI MBITHI (Suing as legal representative/administrator of the
Estate of STEPHEN MUTUA MBITHI.....APPELLANT**

=VERSUS=

MARGARET NYANGARA MWANCHA.....1ST RESPONDENT

JACKLINE NGINA GICHUKI.....2ND RESPONDENT

ACTROSE VARSANI MERCHANTS LTD.....3RD RESPONDENT

[Being an appeal from the Judgment of the Resident Magistrate's Court at Eldama Ravine RMCC. No. 47 of 2010 delivered on the 4th day of June, 2013 by Hon. M. Kasera, Ag. SPM]

JUDGMENT

Introduction

1. The appellant's case is set out in his submission of 6/2/19 is as follows:

“It was the appellant's evidence that on or about the 17th day of November 2009, the deceased was lawfully travelling in Motor vehicle registration no. KBH 653 Z Toyota Pick up Double cabin along Eldoret Nakuru road near Equator trading centre. Motor vehicle registration no. KBH 653Z and KAZ 860V Mercedes Benz Trailer caused the accident thereby occasioning the deceased fatal injuries leading to his death.

The appellant blamed the cause of death on the negligence of the driver for motor vehicle registration no. KBH 653Z which belongs to the 1st Respondent and motor vehicle registration no. KAZ 830V which belonged to the 2nd and 3rd Respondents. The appellant's evidence was therefore that the defendant is to shoulder 100% liability.

On the issue of quantum, the appellant provided a death certificate and other relevant documents as exhibits. The deceased was only 27 years at the time of his death and he was a casual laborer earning at Ksh.27,000/= per month and further owing to the fact that the deceased suffered excruciating pain prior to his death. The appellant submitted that an award of Ksh.6,241,500/= would be sufficient as compensation....

The defence opposed the case and urged the Court to dismiss the same”.

2. The appellant submitted two grounds of appeal that:

“a) The appellant's case was dismissed without due regard to the law and the appellant's overwhelming evidence tendered in Court and

b) The appellant's suit dismissed without regard to the appellant's submissions”.

3. Counsel for the 3rd Respondent filed written submission urging that liability for the road accident had been proved and that the appellant had proved his case against the 3rd Respondent as follows:

1. **Who is to blame for the road accident?**

Your Lordship,

It is the 3rd Respondent's position that the Court was right in its judgment and cannot be faulted by any stretch of imagination on account of the evidence on record. It is not denied that an accident occurred, but what led to the accident and who was to blame for the accident **MUST** and ought to be specifically demonstrated in evidence and pleadings. The Appellant made no attempt to demonstrate the above hence the Court's finding.

We submit that the 3rd Respondent was not in any way to blame for the said road accident since no evidence was led to find fault for liability to attach. We reiterate our earlier submissions and state that the Appellant did not prove his case against the 3rd Respondent and the Court's finding is squarely correct based on the facts placed before it.

Your Lordship,

It is trite law that he who asserts must prove his case. No evidence was adduced by the Appellant to fault the 3rd Respondent in any way. In this case, the burden of proof lies with the Plaintiff/Appellant who wants the Court to find in his favour. It is not enough just to claim. One must specifically bring evidence before a Court to sustain the claim.

Section 107 of the Evidence Act succinctly states that:

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

Further, Section 108 of the Evidence Act, states thus:

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Your Lordship,

In the case of *Statpack Industries v. James Mbithi Munyao*, Nairobi HC Civil Appeal No. 152 of 2003, the Court held as follows:

"It is trite law that the burden of proof of any fact or allegation is on the Plaintiff must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily as a result of someone's negligence. An injury perse is not sufficient to hold someone liable."

Your Lordship,

The driver of motor vehicle registration number KAZ 830X later charged as a result of the accident, but was acquitted for lack of sufficient evidence. We therefore submit that the 3rd Respondent was in no way liable and/or negligent for the said accident. Had the traffic Court found the 2nd Respondent guilty, then he would have been negligent and/or liable on his part for causing the accident and thus the 3rd Respondent would be equally to blame.

2. **Whether the Appellant proved his case against the 3rd Respondent**

Your Lordship,

We submit that the Appellant did not prove his case against the 3rd Respondent.

Your Lordship, he who alleges must prove. No evidence was adduced to prove ownership of the motor vehicle Registration Number KAZ 830X. It is trite law that the burden of proof is upon he who alleges, in this case the Appellant, was under duty by law to establish ownership of the motor vehicles KBH 653Z and KAZ 830X so as to connect the Respondents in which the Appellant failed to do hence the Court's decision.

In submitting, we rely on the Court of Appeal case of *Thuranira Karauri v. Agnes Ncheche* Civil Appeal No. 192 of 1996 Kwach, Pall JJA and *Bosire AJA* stated as follows:

"The Plaintiff did not prove that the vehicle which was involved in the accident was owned by the Defendant. As the Defendant denied ownership, it was incumbent on the Plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the Plaintiff, submitted that the information in the police abstract that the lorry belonged to the Defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."

Issues for determination

4. The issues for determination in this case is whether liability has been established against the drivers of motor vehicle named in the suit and whether the Respondents have been shown to be drivers of the motor vehicles as to justify vicarious liability. The second question of quantum arises upon liability.

Determination

5. There is no question that an appellate Court may in appropriate cases overrule the trial Court on liability and award of damages. See **Shabani v. Nairobi City Council** (1985) KLR 516 on the principle that:

“An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneousbased on some wrong principle or on a misappropriation of the evidence” citing Law, JA in **Butt v. Khan** Court of Appeal Civil Appeal no. 40 of 1977.

6. In the decision cited by the appellant, **Samuel Gikuru Ndungu v. Coast Bus Company Ltd** Nairobi EACA no. 177 of 1999, the Court of Appeal (Omolo, Lakha & Bosire JJA) (2000) held that the failure to join the driver of the motor vehicle is not fatal to a suit as follows:

*“As we stated earlier, the appellant did not sue the driver of the accident motor vehicle. In **Omar Athman v. Garissa County Council**, Nairobi High Court Civil Case No. 2484 of 1992 (unreported) which the trial Judge cited in his judgment but did not make any comments on, Aganyanya, J. struck out the plaintiff’s suit for incompetence because the driver of a motor vehicle in a running down defended suit was not made a party in the suit. In his view the liability against the owner of the vehicle in such a case being vicarious is dependent on a decree against his driver on the same facts.*

*In **Selle & Another v. Associated Motor Boat Company Ltd. & Others** [1968] EA 123, the respondents who owned and maintained a boat involved in an accident in which one of the appellants was injured, were held vicariously liable for their driver’s negligence even though the said driver was not a party in the suit. Likewise in **Mworia v. Kakuzi Ltd** [1982 – 88] KAR 523, the respondent was held liable for its driver’s negligence although the driver was neither made a party nor did he testify in the case against his employer. **Chesoni and Nyarangi Ag. JJA & Kneller JA**, dissenting, but not for the reason that the driver was not joined) held that on the basis of the evidence before the Court the respondent as owner of the accident motor vehicle was liable to the appellant in damages for the proved negligence of its driver.*

From the authorities it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employees’ liability but to his negligence. Having come to that conclusion we are unable to agree with Aganyanya J. that the non-joinder of the driver in an action as the one which gave rise to this appeal renders the suit incompetent.”

7. The position was similarly taken in the earlier (1998) Court of Appeal decision in **Geoffrey Chege Muthui v. M/s Anverali & Brothers**, C.A Civil Appeal no. 68 of 1997 at Nakuru that:

*“The law is, so long as the driver’s act is committed by him in the cause of his duty, even if he is acting deliberately, wantonly, negligently or criminally or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable (per Newbold P. in **Muwonge v. A.G of Uganda** (1967) EA. 17 at page 18....*

*We would follow the test of liability of a master for acts of his servant as laid down by Sir Charles Newbold in **Muwonge’s** respondent is liable to the negligence of its driver. We consequently allow the appeal and set aside the judgment and decree, which dismissed the appellant’s case with costs”.*

8. The failure of the appellant to join the respective drivers of the motor vehicles subject of the suit is not fatal if it can be shown that the said drivers were negligent and they were working in the course of their duty under employment by the owners of the motor vehicles.

Liability

9. The question in this case would therefore be whether any or both the drivers of the two motor vehicles in the accident subject of the suit were **negligent** and whether they were shown to have been **working in the course of the duty** with the Respondents, the latter who must be shown to be **the owner of the said motor vehicles**.

10. The submissions of the plaintiff before the trial Court which are the subject of the second complaint on appeal, that the trial Court failed to consider them were as follows:

“ON EVIDENCE

It was not in dispute that on or about 17th November 2009 the deceased was lawfully travelling in motor vehicle registration number KBH 653Z TOYOTA PICK UP DOUBLE CABIN along ELDORET-NAKURU HIGHWAY near EQUATOR BUILDING CENTER when the 1st and 2nd defendants driver and the driver of motor vehicle registration number KAZ 830X MERCEDES BENZ TRAILER so negligently drove, managed and/or controlled the said motor vehicles and permitted the same to cause an accident thereby occasioning the deceased fatal injuries.

ON LIABILITY

It was clear from the evidence in court that the accident occurred when motor vehicle registration number KBH 653Z TOYOTA PICK UP and KAZ 830X M/BENZ TRAILER were so negligently driven, managed. The circumstances which led to the accident are therefore wholly attributed to the defendants' negligence.

We therefore submit that the defendants should therefore shoulder 100% liability following the accident.

ON QUANTUM

On the issue of quantum the injuries were fatal. The plaintiff produced the death certificate and other relevant documents as exhibits.

The deceased was at the time of his death aged 27 years. He was a casual labourer earning an average of Kshs.27,000/= per month. He lived a happy and vigorous life without any serious ailments that would foreseeably reduce his life. Further the deceased suffered excruciating pain prior to his death.

By reason of his death his expectation of life was considerably shortened. It is our humble submission that the deceased was determined to live a happy life and he would have probably worked to the age of 55 years. We humbly pray for Kshs.6,241,500/=. The amount has been arrived at the calculations hereunder."

On liability, it was merely urged that "the circumstances which led to the accident are therefore wholly attributed to the defendant's negligence".

11. The plaintiff only called one eye witness who could have witnessed the accident, that is Pw4, a passenger in one of the motor vehicles who testified as follows:

"PW4

I am David Mule Daniel. I come from Embu County Mbeere District. I was working for com21. On 17.11.2009 I was in Nairobi. At 6:00 a.m. we were going to Eldoret – we left at 5:00 p.m. I was with 3 others, Wanjohi, Joel Stephen mutual and me. We were in double cabin KBH 653Z. I was behind the driver. All of us were working for com21. Stephen sat on the second seat I was behind driver who is Wanjohi he sat next to me. We did not manage to reach Eldoret. At 8:00 p.m. We were in Nakuru had supper. At Equator we were involved in an accident. It is the trailer that hit us off the road.

M. KASERA

PRINCIPAL MAGISTRATE

Cross-examined by Mugweru: *I do not have any document to show that I worked for com21. I left after the accident as my hand cannot hold anything. I do not do any work. I take care of goats. I cannot dig in the shamba. We were on the left off the road. Trailer was on its site. We were at the railway so it is narrow. Tractor came to our side our driver could not have done anything. There is a railway underneath. Our motor vehicle dropped on the railway – trailer had full lights. We were from Nakuru heading to Eldoret. The trailer was speeding. Our driver was Wanjohi. He was a driver.....he was a good driver it did not push us. The accident could not have occurred Wanjohi died.*

M.KASERA

PRINCIPAL MAGISTRATE

Cross-examined by Miss Cherutich: *Trailer was speeding. Our driver was going up the hill. I still go for clinics.*

M.KASERA

PRINCIPAL MAGISTRATE

Re-examination by Nyagaka: No question."

12. Pw1, the elder brother to the deceased and Pw2 the deceased's colleague at work both testified as to the deceased's employment at Com21 Ltd, his salary and his marital status, all for purposes of computation of the award of damages in the suit.

13. Pw3, the assistant Investigating Officer did not establish who was at fault and his testimony said:

"PW3

Stephen Muriithi Janjo. I am stationed at Timboroa Police Station in traffic duties since 2010 May. On 17.11.2009 I was at Eldama Ravine Traffic base in traffic duties. On 17.11.2009 at 11:00 I was called by base commander one Kibe. He informed us with PC Kamau that there was an accident near Equator Trading Centre at the railway bridge, O.C.P.D. gave us transport. We went to the scene. I was assisting

Investigating Officer. At the scene it was raining at the location of the accident. We found 2 motor vehicles KAZ 830X Mercedes Benz trailer 7439. KBH 653Z Toyota Hylux double cabin. Occupants of double cabin doctor Jason Moragon Stephen Mutua Mbithi who was stuck on the motor vehicle. We received his body from the double cabin MFI – 7 police abstract MFI – 7. Body was taken to Mercy Mission hospital on 20.11.2009. I attended post-mortem. Body was identified by his 2 relatives.

M.KASERA

PRINCIPAL MAGISTRATE

Cross-examined by Miss Mugweru: I commenced investigation immediately we arrived at the scene. We arrived at the scene in 30 minutes. Accident was on 17.11.2009. Motor vehicles were inspected. There were no pre-accident defects noted. Accident occurred where road was being repaired, so road was unmarked. Pick up was heading towards Eldoret. Driver's body was on extreme left while facing Nakuru. Motor vehicle KBH 653Z DMFI – 1. No pre-accident defects. I recorded that the file be put under an inquest. Later we were guided to charge driver Euticus Njoroge Gitau. We preferred 2 charges for causing death by dangerous driving accused 2 reckless driving. Euticus was driver of KAZ 830X ZC 7439 Mercedes Benz Actross. He was under influence of anything. Driver to KBH died on the spot. There were no eye witnesses. There were no statements of ey witnesses.

M.KASERA

PRINCIPAL MAGISTRATE

Cross-examined by Miss Cherutich: we could not exactly establish who was at fault. Court advised us to charge driver of KAZ ZC 7439. There is nothing to show that the motor vehicle was driven negligently.

M.KASERA

PRINCIPAL MAGISTRATE

Re-examination: Deceased was on the pick-up.”

14. The defence indicated that the 3rd defendant's evidence in the case was “to be as that in civil suit no. 29 /2011. It is the production of the Court file in Traffic case no. 107/2011”.

15. In Kabarnet Civil Appeal no. 11 of 2017, an appeal on the accident subject of this appeal, the Court on the basis of the evidence therein found that the driver of the motor vehicle KAZ 830X Mercedes Benz Trailer, on a balance of probabilities negligent. In this suit despite the conclusive evidence of Pw3, the assistant Investigating Officer, the balance of Probabilities test still indicate the said driver as being responsible for the accident because the position of driver's body (for motor vehicle KBH 652 which was heading towards Eldoret “at the extreme left while facing Nakuru” may be explained by the evidence of Pw4 that “the trailer came to our side our driver could not have done anything. There is a railway underneath. Our motor vehicle dropped on the railway....” and the reasonable explanation in re-examination that “the trailer was speeding. Our driver was going up the hill” and, therefore, the trailer was coming downhill.

16. The next question is whether the drivers of the Trailer KAZ 830X was shown to have been acting in the employment of the 3rd Respondent so as to support the invocation of the principle of vicarious liability.

17. The 3rd Respondent denied ownership of the suit motor vehicle by its defence dated 4/11/2010 in the trial Court as follows:

“6. The 3rd Defendant does not admit ownership of the motor vehicle registration number KAZ 830X.”

18. In accordance with the Court of Appeal authority of **Samuel Gikuru Ndungu v. Coast Bus Company** (2000), it was incumbent on the plaintiff to prove ownership of the motor vehicle. The appellant did not do so.

19. It is in this context that this Court in KBT HCCA No. 11 of 2017 said that had the drivers been joined in the suit, there could have been a basis of the passing of judgment on the driver personally despite failure of vicarious liability by reason for want of proof of ownership of the motor vehicle and the employment relationship between the driver and the owner of the motor vehicle.

20. While the Court empathizes with the plaintiff, liability is, on the evidence before the court, not established against the defendants.

Damages

21. As regards, the question of damages, it was not shown that the trial Court assessed the damages at an inordinately low figure as to be an erroneous estimate or that it acted on a wrong principle or misapprehended the evidence in any way. See **Butt v. Khan** and **Shabani v. Nairobi City Council**, Supra. See also **Southern Engineering Company Ltd. v. Mutia** (1985) KLR 730 where the Court of Appeal (Hancox, Nyarangi JJA. & Gachuhi, Ag. JA) held that:

“The measurement of the quantum of damages is a matter for the discretion of the individual judge which has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question.”

22. The Court does not feel called upon to interfere with quantum award by the trial Court.

Order

23. However, for the reasons set out above, the appellant's appeal is without merit and is dismissed.

24. There shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 12TH DAY OF NOVEMBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mburu Okara & Co. Advocates for the Appellant.

M/S Nyairo & Co. Advocates for the 3rd Respondent.