



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 83 OF 2019

JAMES KINJA M'THAIMUTA (Suing as the

legal representative of the estate of

David Murangiri (deceased).....APPELLANT

Versus

CYRUS MWENDA.....1ST RESPONDENT

HUNJAN SINGH..... 2ND RESPONDENT

HENRY MURITHI.....3RD RESPONDENT

(An appeal from the Judgment/Decree of the Hon. P.M. Wechuli (SRM) delivered on the 10/12/2018

in Tigania CMCC No. 34 of 2009)

J U D G M E N T

1. By a Plaint dated 21/4/2009, the appellant sued the respondents seeking general damages under both the Law Reform Act and the Fatal Accidents Act, special damages of Kshs 21,070/= (later amended to Kshs. 67,300/-) and costs of the suit.
2. The appellant's claim was that on or about 21/6/2008 at about 10:30 a.m. at Kararene Area along Meru-Maua Road, the deceased was lawfully walking behind his bull cart and on the correct side of the road. That the 3rd respondent, as the 1st and 2nd Defendant's agent, servant driver and/or employee, negligently drove Motor Vehicle Registration No. KAY 432F Toyota Matatu, that it hit the deceased thereby occasioning him serious injuries that led to his demise.
3. The respondents denied the claim and after trial, the trial Court found that the appellant had failed to establish a master/servant or principal/agent relationship between the 1st and 2nd defendant with the 3rd defendant to warrant the two defendants being held vicariously liable for the acts of the 3rd respondent. The trial Court thereby dismissed the appellant's suit.
4. Aggrieved by the said decision, the appellant filed his Memorandum of Appeal on 23/7/2019 listing five (5) grounds of appeal. The appellant complained that the trial Court erred in dismissing the appellants claim as being unproven in its entirety and further erred in failing to consider conventional awards in similar cases.
5. This being a first appeal, this Court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. In doing so, the Court must bear in mind that it did not have the advantage of seeing the witnesses testify. See **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**.
6. **James Kinja Thaimuta (PW1)**, father to the deceased and the appellant herein, told the Court that on 21/06/2008 he received a call and was informed to rush home. Upon his arrival, he was informed that his son was involved in a road accident at Kianjai market and had been taken to hospital.
7. He rushed to the hospital but found that his son had passed on. He also found the motor vehicle that had knocked the deceased and its driver. He later came to learn that the driver was known as Henry Murithi, the 3rd respondent. He however did not talk to the driver.
8. He reported the matter to the police and was issued with a police abstract (PEXh1). His advocate did a search on the motor vehicle and the

same showed the owner to be **Henjan Singh**. He obtained a limited grant in **Meru Succession Cause No. 183 of 2008** (PEXh 3). He obtained a death certificate at a cost of Kshs. 50/=. He also incurred medical and burial expenses for which he produced receipts as PEXh 6 to 13.

9. He told the Court that the deceased was at the time of his demise aged 21 years. He had done his KCSE education and had attained a D grade. That the deceased conducted transport business using a cow cart which he used to fetch water for customers for a fee from which he earned Kshs 10,000/= monthly out of which he gave the appellant Kshs 5,000/=.

10. That the deceased left behind the plaintiff (56yrs), Eunice James (52yrs), Luke Kirimi (29yrs), Lialin Karambu (25yrs), Lydia Kanaga (20yrs) and Stephen Muthomi (7yrs).

11. **Pw2 Nicholas Muthara** testified that he witnessed the accident. He told the Court that he saw a cart being pulled by a bull and there was someone who was behind the cart guiding the bull. That a matatu approached from behind at a very high speed and when it attempted to overtake the cart, it was unable to do so whereby it swerved back to its lane and hit the person who was guiding the cart it stopped about 70 metres from the point of impact. The victim was put in the motor vehicle and was rushed to hospital. He identified the motor vehicle registration number as KAY 432F.

12. **Dw1 Geoffrey Mururu** testified that he was the driver of the motor vehicle KAY 432F on the material day. That he was driving from Makutano to Maua heading on the same direction with the subject cart which was ahead of him. The deceased was in the cart when the ox-cart jumped suddenly and knocked his vehicle. That he stopped and asked the deceased why he had suddenly come on the road. He took the victim to Meru Hospital where he was pronounced dead.

13. The parties filed their respective submissions. The appellant submitted that the respondent failed to establish that the driver of the motor vehicle had no authority to drive the same. That the 3rd respondent was the only driver authorized to operate the subject motor vehicle. That DW1 was an authorised agent of the respondents hence the 1st and 2nd respondent were vicariously liable. The case of **PNM & Another (the legal representatives of the estate of LNM v Telkom Kenya Limited & 2 others [2015] eKLR** were cited in support of those submissions. It was submitted that a sum of Kshs. 1,368,373/33 would be sufficient compensation.

14. On their part, the respondents submitted that in order to fix liability on the owner of a vehicle for negligence of the driver, it was necessary to show either that the driver was the owner's servant at the material time or that the driver was acting on the owner's behalf. That the 3rd respondent was wrongly enjoined to the suit as he was not the driver in question on the material day. The cases of **Tabitha Naluti Kinyua versus Francis Mutua Mbuvi and another (2014) eKLR** were relied on in support of those submissions.

15. I note that the appellant did not attach the decree of the trial Court. That may have been a fatal mistake or oversight but for reason that it is but a mere technicality. In **South Nyanza Sugar Co. Ltd v. Daniel Obara Nyandoro (2010) eKLR**, it was held:-

"In my view, it will amount to miscarriage of justice for this court to strike out the appeal for the reason as advanced by Mr. Ogweno when the appeal had already been admitted and directions taken in the presence of counsel for both parties. In any event, the lower court record is before this court and no prejudice will be occasioned to the Respondent by reference to the same. In addition, it will be against the spirit of overriding objectives of the Civil Procedure Act as stated under Section 1A and 1B for this court to summarily reject the appeal for want of decree."

16. That paves the way for this Court to consider the appeal on merit. The main issue for determination is whether the 1st and 2nd respondent were vicariously liable for the actions of their alleged driver, the 3rd respondent. Put in another way, was the 3rd respondent an agent, servant and employee of the 1st and 2nd respondent.

17. The appellant claimed in the Complaint that the 3rd respondent was the driver of the subject motor vehicle at the material time. When he testified, he repeated the same allegation. In their defence, the respondents denied the appellant's allegation and put him on strict proof thereof.

18. At the trial, the respondents presented one **Geoffrey Mururu** as DW1 who told the Court that he was the driver of the subject vehicle at the material time. He went on to explain how the accident occurred.

19. I have looked at the police abstract. The same mentioned Henry Murithi, the 3rd respondent as a witness and the 1st respondent as the owner of the motor vehicle. The motor vehicle records however lists the 2nd respondent as the owner of the motor vehicle.

20. It was the evidence of Pw1 that he met the driver of the motor vehicle at the hospital and he later came to learn that he was named Henry Murithi. He never stated how he learnt that the driver was known as Henry Murithi. **DW1** testified that he was the driver of the subject vehicle at the time. That after the accident, he took the deceased to hospital and was there until 3 p.m. His evidence was not impeached or seriously challenged on the issue of him being the driver of the vehicle.

21. Vicarious liability depends not on ownership but on the delegation of tasks or duty. In **Jane Wairumu Turanta v Githae John Vickery & 2 others [2013] eKLR**, the Court cited with approval the case of **Morgan -vs- Launchbury (1972)2 All ER 606** wherein it was held:-

"To establish agency relationship it was necessary to show that the driver was using the car at the owners request express or implied or in his instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

22. The appellant did not state that **DW1** was the driver of the subject motor vehicle. His evidence was that, it was the 3rd respondent who was the driver of the subject vehicle. When **DW1** testified, he was not challenged that he was lying. Further, it was not established that he

was driving the vehicle on the instructions of or at the instance of the 1st and or the 2nd respondent.

23. Having failed to establish the connection between the 1st and 2nd respondent with the 3rd respondent, the 1st and 2nd respondent could not be held liable for the acts of the 3rd respondent. Vicarious liability could only arise if it was established that the 1st and 2nd respondent either gave express instructions to **DW1** or that **DW1** was driving the vehicle at the latter's instance or cause.

24. In the alternative, since the appellant had expressly alleged that the motor vehicle was under the control and direction of the 3rd respondent, the appellant should have led evidence to prove that fact. This he failed to prove.

25. In this regard, the trial Court cannot be blamed for arriving at the decision it did. There was no connection between the driver of the subject motor vehicle, **DW1** and the 1st and 2nd respondent. Further, **DW1** having not been enjoined in the suit as a party, no liability can be ordered against him.

26. I therefore find that the trial Court cannot be faulted on the decision it arrived at and I dismiss the appeal on that ground.

27. On quantum, the trial Court held that it would have awarded a global figure of Kshs. 800,000/= and the special damages proved at Kshs. 67,300/=.

28. In **Bashir Ahmed Butt v. Uwais Ahmed Khan [1982-88] KAR 5**, it was held that an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. That it must be shown that the trial Court proceeded on wrong principles or that it misapprehended the evidence in some material respect and thereby arrived at a figure which was either inordinately high or low.

29. In the circumstances of this case, I find that a global figure of Kshs. 800,000/- was appropriate.

30. Costs follow the event. The respondents will have costs of the appeal.

DATED and DELIVERED at Meru this 11th day of December, 2019.

A. MABEYA

JUDGE