



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 15 OF 2017

JOHNSTONE NJAGI KITHAKA.....APPELLANT

- V E R S U S -

NICHOLAS NZIOKA MWASA.....1ST RESPONDENT

PETER MAINA KERU.....2ND RESPONDENT

(Being an appeal from the judgement of Hon. A. M. Obura (Mrs), SPM, delivered on 9th December 2016 in Milimani in CMCC No. 1062 of 2003)

JUDGEMENT

1) Nicholas Nzioka Mwasa, the 1st respondent herein, filed a claim in which he sought for compensation for personal injuries he suffered following a road traffic accident vide the plaint dated 28th January 2003. The 1st respondent alleged that on 12th August, 2002 while walking along Juja road in Nairobi, he was hit by motor vehicle registration number KAM 380W, where he sustained serious injuries. The said motor vehicle belonged to Johnstone Njagi Kithaka, the appellant herein, and was being driven by Peter Maina Keru, the 2nd respondent herein. The appellant filed his defence dated 21st July 2005 and denied ownership of the subject motor vehicle as well as the 1st respondent's claim.

2) The suit was heard by Hon. M. Obura, the learned Senior Principal Magistrate who eventually entered judgement for the 1st respondent as against the appellant jointly and severally as follows:

- i. Liability, appellant was held 100% liable.*
- ii. General damages ksh.400,000/=*
- iii. Special damages ksh.6,000/=*

3) Being aggrieved by the award, the appellant preferred this appeal and put forward the following 9 grounds of appeal in its memorandum:

- 1. The learned honourable magistrate erred in law and fact in entering judgement for the plaintiff against both defendants jointly and severally when the plaintiff had not proved his case against the appellant.***
- 2. The learned honourable magistrate erred in law and fact in finding and holding the defendants 100% liable for the accident.***
- 3. The learned honourable magistrate erred in law and fact in failing to accept the 2nd defendants evidence.***
- 4. The learned honourable magistrate erred in law and fact in failing to find and hold that the 2nd defendant was not the owner of the subject motor vehicle and therefore not liable.***
- 5. The learned honourable magistrate erred in law and fact in misdirecting herself on the law relating to various liability by holding the appellant liable for the negligent acts of the 1st defendant.***
- 6. The learned honourable magistrate erred in law and fact in failing to consider and take into account the 2nd defendants' uncontroverted primary evidence.***

7. The learned honourable magistrate erred in law and fact in failing to take into account the interlocutory judgment entered against the third parties.

8. The learned honourable magistrate erred in law and fact in failing to find and hold that the plaintiff had failed to prove his case against the 2nd appellant to the required standards.

9. The learned honourable magistrate misdirected herself in the appraisal of the evidence and therefore erred in her conclusion and findings.

4) The aforesaid grounds may be summarised into three main grounds namely:

i. Whether or not the trial magistrate erred in law and fact in holding that the appellant was the owner of the subject motor vehicle.

ii. Whether or not the trial magistrate finding on liability was misdirected.

iii. Whether or not the trial magistrate award on general damages was misdirected.

5) When the appeal came up for hearing, learned counsels consented to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival submissions.

6) The first ground of appeal is whether or not the trial magistrate erred in law and fact in holding that the appellant was the owner of the subject motor vehicle. The appellant submits that in his defence he denied he was the owner of the subject motor vehicle. He gave evidence which was to the effect that he sold the subject motor vehicle on 19/10/2001 to two brothers namely: Samuel Njuguna and Paul Mwangi, whom he had enjoined as third parties. The appellant states that he produced the sale agreement and the transfer of motor vehicle form duly signed by him transferring the motor vehicle to the buyers. The appellant further submits that the evidence produced by him on a balance of probabilities proved that he was not the owner of motor vehicle registration no. KAM 380W at the time when the accident occurred since he had sold it. The appellant argued that he cannot be held vicariously liable for the acts of the driver, the 2nd respondent because the motor vehicle was not being driven by the appellant's driver or employee.

The respondent did not submit on this ground of appeal.

7) In order for this court to determine this ground of appeal, it will have to look into the evidence tendered and the findings of the trial court. The trial magistrate noted that the appellant never stated that he sold the vehicle to third parties when he was served with the demand notice and the plaint. But he entered appearance generally denying ownership. If those facts were in the appellant's knowledge, he ought to have stated so in his defence. The trial magistrate by holding the car owner namely the appellant and the driver, the 1st respondent, liable for the accident observed that the appellant is at liberty to seek indemnity from third parties if his claims were true regarding ownership of the motor vehicle. Section 8 of the Traffic Act, Cap 405 Laws of Kenya provides that:

“The person in whose name a vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle.”

8) The copy of records of car ownership shows that the vehicle was registered in the appellant's name. The appellant and DW1 produced a sale agreement dated 19/10/2001, (Dexh 1) and the transfer of ownership dated 30/10/2001, (DEXh 2). This is proof that the appellant was no longer the car owner and thus vicarious liability and ownership could not apply to him in relation to the compensation to the 1st respondent for the injuries he sustained in the accident.

9) The record shows that though the plaintiff sued Peter Maina Keru and Johnstone Njagi Kithaka as the 1st and 2nd defendants respectively, there is no evidence that Peter Maina Keru was served with the suit papers. It is apparent that the suit proceeded for hearing as against Johnstone Njagi Kithaka alone. There is no evidence that Peter Maina Keru participated in the proceedings. It is also apparent that Johnstone Njagi Kithaka filed an application seeking to issue a third party notice against Samuel Njuguna Thuku and Paul Mwangi Thuku. A reading of the affidavit of service of Lijoodi Shisiali sworn on 24th June 2009, will show that a third party notice was served upon the aforesaid duo on 21st January 2009. It would appear the duo did not enter appearance thus prompting the appellant to apply for entry of a default judgement against the third party. The record does not show whether the request for judgment was ever granted by the court. There is also no evidence as to what happened to the case against Peter Maina Keru. A careful perusal of the trial court's judgment will reveal that the trial magistrate did not believe the evidence of the appellant in which the appellant had claimed that he had sold the accident motor vehicle to the aforesaid third parties before the accident. In fact, the learned Senior Principal Magistrate was emphatic that the appellant's attempt to take out third party proceedings was an afterthought. The trial magistrate went ahead to state that the appellant was at liberty to seek for indemnity from the third parties if his claims were true. Having carefully considered the evidence presented by the appellant before the trial court, it is clear in my mind that the learned Senior Principal Magistrate misapprehended the point. First, the appellant had already sought for judgment against the third parties. The learned trial magistrate should have determined the case between the appellant and the third parties instead of stating that the appellant should pursue the third parties for indemnity yet that was the purpose of taking out third party proceedings.

10) It is clear in my mind that the learned Senior Principal Magistrate did not assign any reasons as to why she disbelieved the appellant's evidence.

11) Secondly, there is no finding as to what happened to the case against Peter Maina Keru. The appellant had tendered evidence showing

that he did not know Peter Maina Keru but the trial magistrate did not seriously take into account that piece of evidence. It was important for the trial court to consider the evidence linking the appellant and Peter Maina Keru. This is important to establish vicarious liability between them. The appellant had expressly stated in his evidence that Peter Maina Keru was not his employee nor did he authorise him to drive the accident motor vehicle. In short the learned Senior Principal, improperly rejected the appellant's evidence which evidence were largely uncontroverted by the respondent. The lapses I have pointed out can only be cured by having the suit reheard afresh before another magistrate of competent jurisdiction.

12) I have been very cautious not to consider the merits of the case lest I influence the mind of the magistrate who will rehear the case. For the above reason I will not consider the other grounds of appeal which touches on the merits of the case.

13) In the end, this appeal is allowed. The judgment of the trial court is set aside. The case is remitted back to trial court to be heard afresh by another magistrate of competent jurisdiction other than Hon. A. M. Obura. The suit to be reheard afresh and on priority basis in view of the age of the case.

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

Dated, Signed and Delivered in open court this 4th day of May, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondents