REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 236 OF 2013

CONSOLIDATED WITH CIVIL APPEAL NO. 237 OF 2013

DANIEL MBWIKA MUTISYA (SUING AS THE BROTHER AND

PERSONAL REPRESENTATIVE OFTHE ESTATE OF WILLIAMSON

KILONZO MUTISYA (DECEASED).....1ST APPELLANT

PENINAH MUTINDI KIMONYI.....2ND APPELLANT

VS

BAYA NYANJE BAYA.....RESPONDENT

(Being appeals from the judgment delivered by the Hon. I.M Kahuya.Ag SRM Kangundo on 11th Nov. 2013 in Kangundo Civil Suit No. 54 of 2013 and Kangundo Civil suit No. 50 of 2013.)

JUDGMENT

Introduction

1. Although the two appeals no. 236 and 237 of 2013 were lodged separately and submissions filed in the different appeals, the same issues arose for determination. Hence, the consolidation herein for purposes of the judgment.

2. On 16/9/2012 the deceased was driving the respondent's motor vehicle Reg. No. KAZ 764 S Toyota G Touring that the driver lost control and overturned as a consequence the deceased who was a passenger sustained a fatal injuries. The respondent was sued as the legal owner of the said motor vehicle. The suit in the Principal Magistrate's Court at Kangundo Civil Suit No.48 of 2013 was chosen as the test suit and judgment was delivered as follows:

> "As such I do not find the first defendant liable for the acts of the deceased. As regards the second defendant, I also don't find him liable because legally speaking he was the owner of the subject motor vehicle but it was the first defendant that enjoyed the use and possession hence, he should not have been partly to the suit. In a nut shell, the plaintiff's case is dismissed with costs to the defendants."

3. It is out of that judgment that the appellant was dissatisfied and hence appealed to this court. The Memorandum of Appeal had the following grounds:

> 1. "1. The learned Magistrate erred in law and in fact by ruling that a driver must be enjoined in a suit or his personal representative in case he is dead for the doctrine of vicarious liability to apply.
>
> 2. The learned Magistrate erred in law and in fact in finding that the deceased driver was not the owners agent at the time of the accident But was driving on private engagements and whatever he was doing with the respondents' motor vehicle had nothing to do with the respondent's business.
>
> 3. The learned Magistrate erred in law and in fact in finding that the defendant was not liable for the acts of his deceased authorized driver.
>
> 4. The learned Magistrate erred in law and in fact by not putting any consideration to the Plaintiff's Submissions or fully analyzing the plaintiff's submissions before arriving at her judgment on liability.

5. The learned Magistrate erred in law by not finding that the Appellant was a 3rd party within the meaning of the motor vehicle Third Party Risks Cap (405) Laws of Kenya and ought to be compensated for injuries sustained by the defendant's insurance.

6. That the learned Magistrate erred by finding that the Appellant had not proved liability against the respondent.

7. That the learned Magistrate erred in fact and in failing to consider the evidence adduced by the investigating officer to who clearly stated that the insured's driver was to blame for the occurrence of the said accident and was the author of his own misfortunes.

8. That the learned Magistrate erred in law and in fact by ruling she would have awarded the Appellant Ksh 2,174,455 as general damages which was minimal as general damages which was minimal and unreasonable in the circumstances bearing in mind the conventional awards in case of similar nature.

9. That the learned Magistrate erred in law and in fact by disregarding and failing to appreciate the whole evidence tabled by the Appellant.

10. That the learned Magistrate erred in law and in fact by dismissing the Appellant's suit with costs.

REASONS WHEREFORE: *The Plaintiffs pray s that this appeal be allowed and seek court orders:*

a. THAT the lower court's judgment dismissing the Appellant's case with costs on liability made on 11.11.2013 be set side.

b. THAT this Honourable Court do find the Respondent 100% vicariously liable for the negligence of his deceased authorized driver/agent.

c. THAT this Honourable Court do find that the deceased was a 3rd Party within the meaning of Cap 405 Laws of Kenya and his estate had proved his case against the Respondent on a balance of probabilities.

d. THAT the Honourable Court do set aside the finding on quantum and substitute it with an award that is commensurate with the conventional awards in cases of similar nature.

e. THAT the Respondent do pay costs of this appeal and those of the lower court.

4. The parties agreed to file written submissions in support and to oppose the appeal.

Submissions

Appellants Submissions

5. The Appellant urged that he had filed the suit in the lower court in the capacity as the father and personal representative of the deceased for claim of damages as a result of the accident. Various suits were filed and the test suit was Kangundo PMCC NO. 48 of 2013 where the issue on liability was determined and the same was adopted in Kangundo Civil Suit No. 54/2013 that was the appellant's suit in the lower court.

6. Grounds 1, 3, 4, 6, 7 and 9 were urged as one ground in their submissions. The Investigating Officer's (pw1) evidence was that the driver Stephen Musyoka was to blame for the accident, which was corroborated by (pw2) the plaintiff in Kangundo PMCC No. 50 of 2013. The respondent had testified by confirming to be the beneficial owner and was in actual possession. He had lent his motor vehicle to his friend Stephen Musyoka to use it for purposes of attending a wedding.

7. The Counsel urged the court to set aside the judgment of the lower court. On strict and vicarious liability, counsel relied on ***Jonathan Ngumbao v. Piri Wa Mwatate & 3 ors*** Mombasa Civil Appeal No. 43 of 1987 where the owner of a vehicle could be held vicariously liable for the negligence of his servant or agent even though the servant or agent is not made a co-defendant one had to prove the following:

a. That the owner's driver committed a fort, in the present case, a fort of negligence

b. That the driver was the owner's servant/agent

They urged that the driver was wholly to blame for the accident and he was not to be made a party to the proceedings for the owner to be held liable but they had proved that the driver had the authority to drive the said motor vehicle.

8. On ground 2 and 10, counsel urged that when an owner of a vehicle had lent out or given out his motor vehicle the court was to rely on the principle set down in ***Kenya Bus Services Ltd v. Dina Kawira Humphrey*** [2003] eKLR it was held that where it is proved that a car has caused damage by negligence then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible which presumption is made stronger or weaker by the surrounding circumstances and it was not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver. ***In Kenya Horticultural exporters Ltd v. Julius Munguti Maweu*** [20101] eKLR the driver had the express authority to use the motor vehicle but ended using it for private engagements, the driver gave a lift to his friends and the trial judges on appeal held that if the defendant had authorized the driver to use the vehicle for official

and personal use then permission for personal use included inviting friends thus both employer and employee had duty of care over those passengers to ensure their safe conduct while in the said vehicle. In regards to this authority counsel urged that the driver (deceased) was therefore expected to utilize his skill as a driver to avoid being reckless or negligent and prayed the appeal be allowed with costs.

Respondents' Submissions

9. It was Counsels' submission that from the evidence on record, the 1st defendant (respondent) had agreed to lend the vehicle to the deceased. Counsel urged the court to rely on the submissions filed in the lower court and to uphold the magistrate's decision as far as vicarious liability was to apply if the driver was the agent or did something for the benefit of the defendant. Permission was not enough to establish vicarious liability.

10. The counsel referred the court to ***Tabitha Ndulu Kinyua v. Francis Mutua Mbuvi & Anor*** [2014] eKLR where the appellant was the plaintiff in the lower court and she had been given a lift by the 1st defendant (1st respondent) who was driving and was also an employee of the 2nd defendant (2nd respondent). The court of Appeal upheld the decision of the high court and trial court that there was no vicarious liability against the 2nd defendant (2nd respondent).

11. Also in ***P.A Okello & Anor t/a Kaburu Okello v. Stella Karimi Kobia & 2 Ors [2012] eKlr*** Waki J. held that vicarious liability arises when the tortious act is done in the scope or during the course of employment. It was their submission that the 1st defendant (respondent herein) had no interest or was not to benefit in any way from giving a lift to the appellant.

12. Finally counsel urged that the authorities relied on by the appellant did not contradict the legal position rather they reinforced the position that there was no strict liability on the owner merely because his vehicle caused an accident, that liability could have attached if the vehicle was being driven for the joint benefit of the owner and driver or the owner was in control or on his instructions. Counsel urged the court to abandon issue 5, 7 & 10 of the record of appeal and finally urged the appeal to be dismissed and the judgment of the lower court be upheld.

Issues for determination

13. The court has referred to the record of appeal, the submissions by both parties and has framed the following issues for determination

a. Whether the respondent was vicariously liable for the tort occasioned by the driver (deceased).

Determination

14. The appellant urged that the trial magistrate erred in finding no liability on the respondent. The appellant in the lower court case had relied on the doctrine of '*Res Ipsa Loquitor*' as far as to establish negligence and or carelessness of the defendant, his driver or agent. It is worth to note that the appellant never enjoined the driver of the motor- vehicle or since he was deceased his estate. The 1st defendant (respondent) had entered appearance and filed a statement of defence. The defence stated as follows:

1. ….

2. The 1st defendant denies being the beneficial owner, of Motor Vehicle Registration No. KAZ 764S Toyota G. Touring at the material times or at all and put the Plaintiffs to strict proof thereof.

3. The defendants deny the plaintiff was a passenger in the defendants' alleged motor vehicle or at all and put the plaintiff to strict proof thereof.

4. Without prejudice to the foregoing the defendants contend that if the accident occurred which is otherwise denied, it was inevitable and occurred in spite of the exercise of careful and prudent driving and further the same was unforeseeable it is further pleaded that the accident was caused by an Act of God."

15. This court being a court of first appeal it has a duty to analyze and re-asses the evidence on record and reach its own conclusions in the matter. This was established in ***Selle v. Associated Motor Boat Co***. [1968] EA 123 as follows:

"An appeal to this court from a trial by a High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence evaluate it itself and draw it's own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour.of a witness is inconsistent with the evidence in the case generally."

16. Further this court has to re-analyze the evidence from the record of appeal and it will not lightly differ from the findings of fact of a trial judge who had the benefit of seeing and hearing all the witnesses and will only interfere if it is based on no evidence or it is shown the trial court acted on wrong principles as was held in ***Ephantus Mwangi v. Duncan Mwangi Wambugu*** (1982 – 88) 1KAR 278.

17. The appellant was a witness (pw1) who did not see the accident happen. The police Corporal Lawrence Karisa No. 75612 (pw1) in Kangundo Civil Suit No. 48 of 2013 stated as follows in his evidence in court on 11.9.2013.

"One Stephen Musyoka was driving from Tala -Nairobi on reaching at the accident stop, he drove at high speed. He had two excess passengers and while negotiating a corner, he lost control of the motor vehicle and it veered off the road rolling several times. As a result five passengers died on the spot. The driver was to blame due to overspending and overloading."

18. The above was the testimony of a police officer that was the appellant's witness in the lower court. Counsel in this case chose to adopt the evidence of pw1 & pw2 and closed his case. The defendant (Respondent) had been brought in the suit for being vicariously liable for the torts of the driver (deceased). Did the appellant establish this principle in his evidence? The respondent's evidence was adopted. In his evidence in chief, he stated as follows:

"The driver of the subject motor vehicle was Samuel (deceased). He was a colleague. He borrowed the vehicle in order to attend a wedding. He was to return it back to me. I didn't know he was going to ferry passengers."

On cross-examination he further stated as below:

"*The insurance policy shows me as the owner.*

Yes, Stephen drove the vehicle with my permission.

Yes, he drove the vehicle with my permission.

At the time of accident, Samuel was driving on his own business not mine."

19. The appellant relied on ***Kenya Horticultural Exporters*** (Supra) to demonstrate that the deceased had the express authority to use the vehicle. In this case the judges found that the defendant had authorized its driver (Dominic) to use the vehicle for both official and personal use. They went further to hold that permission for personal use included inviting in of his friends unto the said vehicle. The above case is different from the instant case in that the driver was an employee to the defendant and hence employer-employee relationship was created. The appellant (company) had failed to adduce evidence during trial. The trial judge was left with the uncontroverted evidence of the respondent, which remained unchallenged. The appellant had a duty to tender evidence on whether there were any restrictions or limitations on the vehicle's use, whether he was authorized to carry passengers and whether the public was forewarned against being lifted in the said vehicle. It is for these reasons that the trial judge found the appellant liable and the court of appeal judges upheld the finding. However, in the instant case, the respondent availed evidence to the effect that he had lent his vehicle to the deceased to use it for attending the wedding, he was not to ferry passengers. The court of Appeal decision would have bound this court had the circumstances been the same.

20. Further in ***Kenya Bus Services Ltd*** (supra) the master's liability for his servant's tort existed since the driver was an employee to the appellant and hence gave rise to vicarious liability. The owner of a vehicle is found to be liable where it is proved that a car has caused damage by negligence and if in the absence of evidence to the contrary a presumption arises that a person drove it for whose negligence the owner is responsible.

In ***Bernard v. Sully*** (1931) 47 T.L.R 557, it was held that the presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.

21. The only issue for determination as seen was whether the deceased (Samuel) was driving the said vehicle for the benefit of the respondent. As stated from the respondent's evidence he had lent his vehicle, which was to be returned. Whatever the deceased decided to act on was not within the control of the respondent and he had not instructed him to carry passengers.

The court of Appeal decision in ***Tabitha Nduli Kinyua*** (supra) the appellant had been carried as a passenger by the driver to the 2nd respondent company. The judges held the 1st respondent's actions (driver) of giving a lift to the appellant was not for the purpose or benefit of the 2nd defendant but for his own benefit. The court further relied on ***Ormrod & Anor v. Crossvile Motor Services Ltd & Anor*** 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."

22. There are also instances where a person can be liable even if he is not a master to the person who committed the act. Liability placed upon the employer/master due to the master/servant relationship is not absolute. This principle could have applied in this instant case if it was established and proved that the car had caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person whose negligence the owner is responsible.

23. The respondent clearly gave his evidence that the deceased was a friend and he had lent his vehicle for attending a wedding. The evidence on the deceased being lent the respondent's vehicle and he was not his driver or servant remained unchallenged. This implied that the act of carrying passengers, which the deceased did, was out of his volition. If evidence had been given to the contrary then this court would address itself to the question whether the deceased had acted within the meaning of being the respondent's employee. A wrongful act being within the course of employment is a question of fact which was discussed in **Clerk & Lindsell on Torts**, 19th Edition pg. 335 that a wrongful act is deemed to be done in the course of the employment-

> "If it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relations between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for the acts which he has not authorized, provided they are so connected with acts which he has authorized that they may rightly be regarded as modes- although improper modes- of doing them"

Conclusion

24. In conclusion, the court finds that the appellants did not establish the existence of agency relationship between the respondent and the deceased and that the carrying of the passengers was not in strict instructions from the respondent. The Trial Magistrate did not err by finding that the driver or his estate was to be enjoined as a defendant. In ***Joseph Njuguna v. Cyrus Njathi*** [1999] eKLR Githinji J. (as he then was) considered the judgment in the Court of Appeal in ***Jonathan Ngumbao,*** supra, and held as follows:

> "The Court of Appeal was not saying that the owner of a motor vehicle cannot in law be vicariously liable for negligence of his driver if the driver is not made a co-defendant. All the Court of Appeal was saying is that if the driver is not made a co-defendant and the court finds that the owner is not vicariously liable, then the injured party is left with no remedy because he cannot get remedy from a driver who is not a party to the suit."

The judge went further to state that: -

> "The correct position in law is clear from the decision of the Court of Appeal in **Jonathan Ngumbao v. Piri Wa Mwatate & 3 Ors** that owner or apparent owner of a vehicle can be held vicariously liable for the negligence of his servant or agent although the servant or agent is not made a co-defendant in the suit. But before the owner or apparent owner can be held to be vicariously liable for the acts of his servant or agent, plaintiff must prove at least two things. First that the owners driver committed a tort, in the present case, a tort of negligence. Secondly, he must prove that the driver was owners servant or agent. There is no strict liability on the owner merely because his vehicle caused an accident while it was being driven by somebody else.

I respectfully agree.

25. Further, in establishing circumstances under which an owner can be held liable for an agent's negligence it was emphasized in ***Morgans v. Launchbury & Ors*** [1972] 2 All ER 606 the House of the Lords that-

> "To fix liability on the owner of a car for the negligence of the driver, not being a servant, it must be shown that the driver at the material time was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is 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 a task or duty delegated to him by the owner. The fact that the driver is using the car with the owner's permission is not sufficient to establish vicarious liability. An owner who hires out his car to a person to be used for purposes in which the owner has no interest or concern escapes liability."

Orders

26. Accordingly, for the reasons set out above, the court makes the following orders:

a. The appeals Machakos HCCA Nos. 236 and 237 of 2013 are dismissed.

b. There shall be no order as to costs.

Order accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 7TH DAY OF NOVEMBER 2018.

G.V. ODUNGA

JUDGE

Appearances:-

M/s Mutunga & Co. Advocates for the Appellants.

M/s Getrude Matata & Co. Advocates for the Respondent.