REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 60 OF 2011

STEPHEN THIRU NJENGA..APPELLANT

V E R S U S

CAROLYN MACHOKA..RESPONDENT

(Being an appeal from the judgement of Hon. C. Obulutsa (PM) in Civil Suit no. 5213 of 2008 dated 8th February, 2011)

JUDGEMENT

1. Stephen Thiru Njenga, the appellant herein, filed an action before the Chief Magistrate's Court, Milimani Commercial Courts, Nairobi against Carolyne Machoka, the respondent claiming ksh.104,308/= being special damages arising from an accident involving the appellant's motor vehicle registration no. KAS 317N and that of the respondent registration no. KAS 435R along New Muthaiga-Peponi road on 4/11/2007.

2. Judgement in default of appearance and defence was entered against the respondent hence the suit was proceeded for hearing as a formal proof. A total sum of four (4) witnesses testified in support of the appellant's case. In the end, Hon. Obulutsa, learned principal magistrate, dismissed the appellant's case on 8.2.2011 for the reason that the appellant had failed to prove liability against the respondent. Being aggrieved, the appellant preferred this appeal.

3. On appeal, the appellant put forward the following grounds in his memorandum:

> ***1. The learned magistrate erred in law and fact in failing to find that the plaintiff had proved his case on liability against the defendant.***
>
> ***2. The learned magistrate erred in law and fact in ruling that the plaintiff had sued the wrong person.***
>
> ***3. The learned magistrate erred in law and fact in failing to take into account and or appraising and or properly appraising the evidence before him and thus ruling against the weight of evidence and hence arrived at a bad decision.***
>
> ***4. The learned magistrate erred in law and fact in that he failed either to identify properly or to sufficiently address himself to the law applicable in the matter before the court and thus arrived at a bad decision.***

4. When the appeal came up for hearing learned counsels recordeda consent order 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. Though the appellant listed four grounds of appeal, I think two main grounds commend themselves for determination. The first ground is whether or not the appellant had tendered credible evidence to establish liability against the respondent. I have already stated that the appellant summoned four (4) witnesses in support of his case. It is the argument of the appellant that he presented credible evidence which put blame for the accident on the respondent. The appellant testified before the trial court claiming that on the fateful day he operated a public service motor vehicle registration no. KAS 317N along New Muthaiga-Peponi road. He said the motor vehicle was being driven by Martin Kiragu Ikere who called him that day to inform him that his motor vehicle registration no. KAS 317N was hit by motor vehicle registration no. KAS 435R. The appellant said he proceeded to the scene of the accident where he found the motor vehicles. The appellant produced a certified copy of the sale agreement which he used to acquire motor vehicle registration no. KAS 317N. P.C. Simon Kinuthia (PW3), a police officer based at Parklands Police Station told the trial court that he received a report concerning the accident involving the aforesaid motor vehicles. He produced the police abstract form confirming the occurrence of the accident. He said it was noted in the police abstract that the driver of motor vehicle registration no. KAS 435R was to blame. In cross-examination PW2 said he was not the one who did the investigation of the accident. Martin Kiragu Ikere (PW4), the appellant's driver told the trial court that on the material date he drove motor vehicle KAS 317N from Gachie towards Westlands when motor vehicle KAS 435R driven by the respondent lost control, veered of its lane, hit his motor vehicle at the rear right side. Accordingly PW3 blamed the respondent for the accident. Samuel Ngugi (PW3) a motor vehicle loss assessor presented a report showing the repair charges of KAS 317N was assessed at ksh,68,800/=. The appellant said he incurred a total loss of ksh.92,000/=. Faced with this evidence, the learned Principal Magistrate, dismissed the case stating that liability had not been proved. With great respect to the learned Principal Magistrate, he fell into error. There was sufficient evidence of one Martin Kiragu Ikere (PW4), the driver of motor vehicle registration no. KAS 317N which explained how the accident occurred. The evidence of PW4 were to the effect that he drove motor vehicle registration no. KAS 317N from Wangige to Nairobi when motor vehicle registration no. KAS 435R which was oncoming hit his motor vehicle on the right side and rammed into the motor vehicle behind him. P. C. Simon Kimani (PW2) informed the trial magistrate that the police report indicated that motor vehicle registration ...... was on fault. It should be noted that the evidence of PW2 and PW4 were never controverted or shaken in cross-examination. It was therefore erroneous to hold that there was no prove of liability.

5. The second ground of appeal which is important to this proceedings is whether or not the respondent was the right party to sue. According to the respondent, the proper party to sue would have been the owner of motor vehicle registration no. KAS 435R. The respondent argued that having failed to sue the owner, liability cannot be apportioned to the respondent since she was wrongly enjoined. The appellant was of the contrary view. I have re-evaluated the evidence over this issue. The record shows that the appellant testified that upon conducting official search of motor vehicle KAS 435R he found that the same was registered in the name of Ninestar Ltd while Carolyne Machika was the driver of the motor vehicle. The police abstract produced in evidence also confirmed that the respondent was the driver. In paragraph 3 of the plaint, the appellant described the respondent as the drive, registered owner, beneficial owner in actual possession and use of KAS 435R. According to the learned trial Principal Magistrate, there was no basis upon which the respondent was sued since she was not the owner. In my humble view this was an erroneous finding. The respondent was sued as the driver of motor vehicle registration KAS 435R. Liability was proved against the driver (Respondent) personally which the respondent cannot run away from. The respondent was sued to personally take blame but not vicariously liable for the acts of the driver or owner. There was uncontroverted evidence showing the respondent was the driver and in possession of motor vehicle registration KAS 435R. It was not necessary in the circumstances to create the nexus between the registered owner and the driver.

6. There was no appeal against the proposal to award the sum of kshs.92,400/= to the appellant had the suit succeeded. I have also examined the documents presented and I am convinced that the trial Principal Magistrate's proposal cannot be faulted.

7. In the end I find the appeal to be meritorious. The appeal is allowed. Consequently the order dismissing the suit is set aside and is substituted with an order entering judgment in favour of the

appellant and against the respondent. Costs of the appeal and suit is given to the appellant.

Dated, Signed and Delivered in open court this 10th day of February, 2017.

J. K. SERGON

JUDGE

In the presence of:

.... for the Appellant

.... for the Respondent