



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 18 OF 2011

SUSAN MUHORO.....APPELLANT

VERSUS

EUNICE ATIENO ABWAO.....RESPONDENT

*(Appeal from the original judgment and decree of M.K. Kiema (RM) in Milimani Commercial Courts,
CMCC No. 4401 of 2005, delivered on 13TH January 2011)*

JUDGMENT

1. The Respondent, **Eunice Atieno Abwao**, sued, **Susan Muhoro** for injuries she suffered due to the negligence of the appellant and or her servant. She claimed that on 24th April 2002, she was standing on the road side along Ngong-race course road when the appellant or servant who was driving motor vehicle registration number KAM 023N knocked her down. When the matter came up for hearing in the trial court, the Magistrate found the appellant liable 100% and awarded the respondent a sum of kshs 304,700/= as damages.

2. The Appellant, aggrieved by the Trial Court's decision filed this appeal on the following grounds:

1. *The Learned Magistrate erred in law and in fact by failing to take into consideration and/ or give due weight to the appellant's defence on the merits, evidence tendered to the court at the hearing and the written submissions filed on her behalf by her counsel and/or statutory law and the authorities cited by the appellant's counsel thereby arriving at a wrong decision;*
2. *The Learned Magistrate erred in law and in fact in failing to appreciate that the person driving the appellant's motor vehicle registration number KAM 023 N at the time of the accident was neither an authorized driver nor an agent of the appellant ;*
3. *The Learned Magistrate erred in law and in fact in finding that the appellant was liable for the acts of the unauthorised driver..*

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peters v. Sunday Post Limited (1958) EA at Pg. 424**, it was held interalia as follows:

"It is a strong thing that for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether

the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: It is not enough that the appellate court might itself have come to a different conclusion."

4. The respondent's case, was that on the material day she was standing off the Ngong- Race Course road when motor vehicle registration number KAM 023N veered off the road and hit her. She claimed that she was taken to Kenyatta Hospital where she was admitted for a month. She produced treatment notes to that effect. She called Doctor **Cyprianus Okoth** who adduced evidence that the respondent suffered injuries which included a fracture of the right femur, acute abdomen with abruption of the placenta, deep cut in the scalp, blunt injury to the periorbital region, laceration in the left foot and bruises and lacerations on the left temporal region.

5. The appellant's case was that, on 24th April 2002, her husband **Charles Muhoro** was the one using the motor vehicle. She claimed that he had left the car for cleaning when the vehicle went missing. She averred that they reported the matter to the police and the car was found the next day at the Karen Police Station. She alleged that one of her store men **Thomas Kinyoro** who had no driving licence took the car without her authority. She admitted that the said **Thomas Kinyoro** was arrested and jailed for 2 years. The appellant further called DW2, **Charles Muhoro** who testified that on the material day he instructed his store keeper to clean the subject motor vehicle and the storekeeper drove it causing an accident.

6. I have re-evaluated the evidence as adduced in the lower court. When the matter came before me, the parties recorded a consent to have the matter dispose of by way of written submissions. I have considered the submissions of the parties as filed in this court.

7. The appellant submitted on liability, on the three grounds of appeal. She stated that she does not deny that the motor vehicle belongs to her or that there was an accident involving the motor vehicle only that **Thomas Kinyoro**, the foreman is the one who was driving the vehicle without authority having stolen it. She argued that the law is clear on when the owner should be held liable for the acts of the driver as was stated by the Court of Appeal in the case of **Paul Muthui Mwavu vs Whitestone (K) Ltd [2015].Eklr** where the judges of appeal extensively analyzed various case law on the same as follows **Geoffrey Chege Nuthu V M/s Anverali & Brothers Civil Appeal No. 68 of 1997 (Nuthu case)**, this court applied *Morgans v Launchbury & Others (1972)2 ALL E R 607* in which it was stated

"In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver 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 the performance of the task or duty thereby delegated to him by the owner..."

In **Israrel Mulandi Kisengi v The Standard Limited & 2 Others (2012) Eklr**, the appeal arose from the lower court judgement wherein the trial court held that the plaintiff could not sustain a case against the owner of the subject vehicle after finding that the driver was on a frolic on his own. In making its determination, the court held that the driver ought to have personally been liable for the injuries sustained by the plaintiff the hounourable judge agreed with the finding of the lower court and dismissed the appeal.

8. The respondent on the other hand submitted that, the appeal is defective and should fail since the record of appeal has been filed without leave of the court. She argued that the decree was issued on 13th January 2011, Memorandum of appeal was filed on 26th January 2011 and the record of appeal was filed on 20th June, 2015. He added that though there was a certificate of delay that was issued, the same was ready for collection on 12th May 2014, but the appellant filed the record of appeal on 20th June 2015 contrary to section 79 G of the Civil Procedure Act. She submitted further that, the trial magistrate considered all the evidence. The respondent argued that, the appellant did not bring out the duties of the **Thomas Kinyoro** as undertaken by him and concluded the same to be servant/employee relationship. She

added that, the appellant's evidence was hearsay since she was not in control of the car but DW2 had it and narrated to her what happened. She argued further that the said Thomas, was charged with dangerous driving and not theft or unlawful use of motor vehicle.

9. I wish to first deal with the issue of the appeal being defective as raised by the respondent. According to the court record, the judgement was delivered on 13th January 2011, the decree was issue on 6th September 2012, the memorandum of appeal was filed on 26th January 2011 and the record of appeal was filed on 20th June 2015. I note that a certificate of delay was issued by the trial court for reasons that the file had gone missing at some point calling for reconstruction of the file. From that certificate is it clear that the certificate was made ready for collection on 12th May 2014. The reasons for the delay have been exhaustively explained in the certificate. If the respondent was aggrieved by the delay of filing the record of appeal, there were remedies available to her including an application for dismissal for want of prosecution. She slept on her rights and cannot purport to raise the issue at this juncture, it is late in the day. In anycase, the lodging of the appeal by filing the appeal was done on time and only the record of appeal delayed due to reasons clearly laid out in the certificate of delay.

10. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. I will address the 3 grounds of appeal together. The appellant claims that the Magistrate erred in finding that the appellant liable for the actions of the driver who she concluded was an agent of the appellant and for failing to consider her evidence and defence. It appears that the appellant solely appealed against liability only. The appellant argues that the driver was her employee who worked as a store man. She also argues that on the day of the accident, she was not the one operating the car but her husband DW2, was the one who had the motor vehicle in his possession. DW2 claims that he left the car with the store man a Mr. Thomas Kinyoro who was only meant to clean the car. He claims that Thomas drove the car without the car keys causing the accident. It is clear that the appellant is admitting that Mr. Thomas was her employee only that he was not tasked with the responsibility of driving the motor vehicle. Other than the evidence adduced by the Appellant and her husband that Mr. Thomas was not driving with their authority, no further evidence has been adduced to convince this court that the Mr. Thomas was not acting with the authority of the appellant. Indeed, the police abstract and the proceedings of the lower court purely dealt with charges preferred against Mr. Thomas which included causing death by dangerous driving.

11. Given the fact that the appellant admits that Mr. Thomas was her employee, it was upon her to adduce concrete proof that he drove the motor vehicle without her consent. That, she did not do. She further failed to enjoin her employee in this suit to answer to the court on the issue of liability. It is not enough to say that Mr. Thomas was charged in a criminal matter and adduce evidence in that matter, she ought to have also lodged a complaint of her own with the traffic police to ensure that other charges are preferred against the Mr. Thomas and this would have helped her course in this case.

12. Having considered this appeal, I find that the trial court analysed the evidence by the parties properly. I am not convinced that Mr. Thomas Kinyoro was not authorised to drive the appellant's motor vehicle given the claim by the appellant that he drove despite the fact that he did not have the car keys. The appellant has admitted that Mr. Thomas was her employee and I am further convinced that she should be held vicariously liable for his actions and omissions.

13. In the end, I find no merit in the appeal and I hereby uphold the judgement of the trial court. The respondent shall have the costs of the appeal and suit.

Dated and delivered in open court this 3rd day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent