REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 138 OF 2010

(CORAM: F. GIKONYO J)

GRACE KARIMI suing as legal Representative of

the estate of Silas Kobia Francis…..…… APPELLANT

Versus

MARCELLO BUANTAI ……..…….....…. RESPONDENT

(Appeal from the judgment of Hon. K. W. Kiarie, Senior Principal Magistrate Meru in CMCC. NO. 351 of 2009)

JUDGMENT

Grounds of Appeal

[1] Being aggrieved by the judgment of Hon. K. W. Kiarie, Senior Principal Magistrate (as he then was) in Meru CMCC. NO. 351 of 2009 the Appellant filed the following 6 grounds of appeal against the said judgment;

> ***(1) That the Honourable Trial Magistrate erred in fact and in law in finding the Defendant not to blame against the overwhelming evidence on record for the Plaintiff.***
>
> ***(2) That the Learned Trial Magistrate erred in law and in fact by*** *relying on extraneous factors.*
>
> *(3) That the Learned Trial Magistrate erred in law and in fact by importing the defence of* ***independent contractor*** *when the said evidence was not pleaded in specie.*
>
> *(4) That the Learned Trial Magistrate erred in law and in fact by failing to analyse the entire evidence on record and instead relying only upon the evidence of the submissions.*
>
> *(5) That the Learned Trial Magistrate erred in law and in fact by failing to appreciate the fact that Defendant's evidence and his witness is contradicting and no evidence documentary or otherwise was led to support the evidence of independent contractor.*
>
> *(6) That the judgment is wholly unfair and it amounted to miscarriage of justice.*

[2] On 12th March, 2015, parties agreed, and the court directed that the appeal shall be determined by way of written submissions. Both parties filed their respective submissions which are part of the record save I

will state the core of those submissions.

Appellant's submissions

(3) The Appellant summed up the grounds of appeal into two;

> ***(1) That the Trial Magistrate erred in law and fact in failing to find the Defendant liable in view of the evidence on record in support of the Appellant's case; and***
>
> ***(2) That the Learned Trial Magistrate relied on matters that were*** *extraneous in arriving at his decision.*

[4] According to the Appellantthe following matters are not in dispute; the occurrence of the accident; the cause of and death of the deceased; ownership of Motor vehicle registration number KVV 287; and the person who was driving the vehicle at the material time. According to the Appellant, the only issue in controversy before the lower court and this appeal is liability; whereupon the Appellant completely disagreed with the trial magistrate's decision to absolve the Respondent of blame. The Appellant believed that the evidence by the Respondent was*''concoctions cleverly tailored to defeat the appellant's claim''*.Her reasons for this belief were that; the subject motor vehicle was never reported as having been stolen; allegations that Kenneth Kimathi was a mechanic was not proved; and the said Kenneth Kimathi was never called as a witness. She stated further that the Respondent was charged in Maua Traffic Case No 287 of 2009 with, and convicted for the offence of permitting a defective m/v to be used on the road. To the Appellant, the said Kenneth Kimathi was the agent of the Respondent. She submitted further that the purported evidence of independent witness was alluded to in the submissions and had not been pleaded anywhere in the defence or in the statements by the Respondent. Such introduction of evidence through submissions is contrary to the law and specifically Order 2 rule 4(1) of the Civil Procedure Rules and therefore, the trial magistrate erred in relying on such evidence to make his decision.The Appellant was of the firm view that parties should be confined to their pleadings and a decision should not be made on matters not forming issues in controversy. She referred the court to the case of **ABDULLAHI IBRAHIM AHMED vs. LEM LEM TRUKULE MUZOLO [2013] eKLR.**On that basis, the Appellant is convinced that the decision herein was a miscarriage of justice and should be set aside.

Respondent's submissions

[5] The Respondent seems to take up a preliminary point on the competence of the appeal. He says that there is no certified decree as required by section 65 of the Civil Procedure Act, and therefore, the appeal is incompetent and should be dismissed. He however submitted on more substantive issues especially that the plaint did not plead that the person who caused the accident was the driver of the Respondent and was in the course of his employment. This he considered to be an important impleading which is lacking in the plaint. This is so because the Respondent denied the person driving was his driver but unauthorized person who was on a frolic of his own. He stated that this defence was contained in the Amended Plaint to which the Appellant did not file a reply. The Respondent submitted that the evidence shows that the driver of the m/v in question was one KENNETH KIMATHI GITONGA who was a mechanic to whom the m/v had been taken for repairs. He was even convicted of traffic offences. And, based on this evidence, the Respondent submitted that he could not have been vicariously liable for actions of such independent contractor who was not an employee of the Respondent. This appeal does not, therefore, have any merit and should be dismissed. He relied on literary works by ***Salmond on Torts, 14th Edition page 643 – 651;*** and ***Charlesworth on Negligence, 4th Edition page 78-85.*** He also cited the cases of **STENNET vs. HANCOCK & PETERS (1939)2 All ER 578;** and **KESI vs. SEDYA (1973) E.A 251**.

DETERMINATION

[6] Upon meticulous consideration of the facts presented inthis case, the arguments of parties, I can see a pull between the parties on the scope of vicarious liability of the master for wrongful actions of the servant. Invariably, the subject of vicarious liability comes into sharp focus; and the entire appeal may as well turn on this point. These terms of Master and Servant as have been used in common law are

important as they will reveal the distinction between a servant and independent contractor which is the core argument in this appeal. From the arguments presented, I can state that the major thrust of this appeal is whether the trial magistrate made a proper impression of the facts before him in deciding that the accident herein was caused by an independent contractor for whose actions the Respondent was not vicariously liable. In the law on negligence, a master is vicariously liable for any tort committed by his servant while in the course of his employment. But for vicarious liability to arise the following two things must co-exist:

(1) ***There must be a relationship of master and servant between the Respondent and the person who committed the wrong complained of; and***

(2) ***The servant committed the wrong in the course of his employment.***

But it should be understood that the servant herein for purposes of vicarious liability must be distinguished from an independent contractor. The independent contractor is engaged under a contract and for a particular assignment under the contract. Unlike in the ordinary master and servant relationship, the employer of independent contractor has no control over the independent contractor in respect of the manner in which he does his work. Their relationship is governed by the terms of the contract. As such, the independent contractor is liable for wrongs committed by him or his servants or agents. Therefore, the employer in that kind of contract is not vicariously liable for the wrongs of the independent contractor or his servants or agents. This distinction between a person employed under a contract of service (servant) and contract for services (independent contractor) is important in this appeal which may as well turn on that distinction. On this subject, I find a lot of assistance in the literary works cited above to wit; ***Salmond on Torts, 14th Edition page 643 – 651;*** and ***Charlesworth on Negligence, 4th Edition page 78-85.***

[7] I now turn to the facts of the case. As is the noble duty of first appellate court, I will evaluate the evidence and come to my own conclusions. I am aware that there is no set or particular style of analysing evidence. Nonetheless, the exercise entails the court deciphering the facts arising out of the evidence tendered and placing them on the legal thresholds on admissibility, relevance and proof. Therefore, as the entire evidence as was recorded by the trial magistrate is already part of record, I will not rehash the said evidence in order to avoid a dull repetition and wastage of judicial ink and mind on mere copying of what has already been recorded. Bu as I have already stated, I will decipher the facts of the case arising from the evidence and determine whether they prove the Appellant's case on a balance of probabilities.

[8] PW1 testified as the personal representative of the deceased. PW1 also testified on the loss of dependency. The critical evidence on liability came from PW2, PW3 and PW4. PW2 was a passenger in the m/v that was involved in the accident. He confirmed that the driver of the said vehicle was Kenneth Kimathi who he said was driving at very high speed and swerved off the road thus hitting the deceased cyclist. He stated that after he alerted Kimathi that he had hit a cyclist, Kimathi reversed and ran over the deceased's head.This latter piece of evidence and the incident as described by PW2 is rather strange and disturbing but that is for another day. According to this eye witness, the deceased was riding off the road when he was hit by Kimathi. PW2 testified that he knew Kimathi as a driver and not a mechanic. He placed the blame for the accident squarely on Kimathi. PW3 and PW4 also gave evidence in support of the evidence adduced by PW2 and introduced a very important piece of evidence; Traffic Case No 278 of 2009 in which the Respondent was charged with and was convicted on own plea of guilty for permitting use of a defective m/v KVV 287 on the road contrary to section 55(1) of the Traffic Act, Chapter 403, Laws of Kenya. The Appellant also produced criminal proceedings in Traffic Case No 260 of 2009 against Kimathi who was also convicted of inter alia causing death by dangerous driving of the m/v in question.The Respondent testified also and all the three witnesses, DW1, DW2 and DW3 stated that Kimathi was a mechanic and not a driver of his said m/v. Faced with these pieces of evidence, the trial magistrate relied on the defence witness and the unsworn statements made by Kimathi in his defence in the Traffic proceedings and concluded that the said Kimathi was an independent contractor on a frolic of his own when he caused the accident. He did not make any reference or analysis of the import of the evidence in the Traffic Case No 278 of 2009. He did not say why he could not take those proceedings into account. Here there is a clear omission and which made the trial magistrate to misdirection in his finding. He completely shut his judicial eye to the evidence which showed that the Respondent had been

convicted on his own plea of guilty of permitting a defective vehicle to be used on the road. In law, the trial court ought to consider all the evidence which is relevant to the case when making his findings and eventual judgment. But the trial magistrate did not do so. Worthy of note is that this case was based on injury to third party by the use of m/v KVV 287 on the road and therefore, that evidence on permitting use of defective m/v on the road was worth of consideration in the overall impression of the case. The above requirement is a matter of the law, and must be accomplished regardless of whether the trial magistrate may or may not come to the same conclusion. I also note that the Respondent did not seek to join the said Kenneth Kimathi Gitonga as a third party to whom they were seeking contribution or indemnity.In that light, the omission of the evidence in Traffic Case No 278 of 2009 was critical error of principle and which impaired the decision by the trial magistrate. On that basis, I hereby set aside the entire judgment of the trial magistratetogether with all attendant effects thereto.I do not wish to say much after my foregoing decision because I think this case is fit for to be remitted back to the lower court for hearing *de novo* for reasons I shall record. First, I do not wish to express opinions which may impede the trial of the case. Second, given the decision he made, the trial magistrate did not give much thought or proper consideration to the quantum of damages; similarly, parties did not address at all the issue of quantum of damages in the appeal. With this rather unique scenario I order that this case shall be remitted back to the lower court for hearing*de novo*. Nevertheless, although the appeal has succeeded, the nature of result of the appeal does not warrant condemning any party to costs. In light thereof, I order each party to bear own costs of the appeal. It is so ordered.

Dated, signed and delivered in open court at Meru this 4th day of July 2016

F. GIKONYO

JUDGE

In the presence of:

M/s. Njenga advocate holding brief for Mr. Mokua advocate for appellant

Mr. Rimita advocate for respondent

F. GIKONYO

JUDGE