



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO 199 OF 2013

(FORMERLY NYERI HC CIVIL APPEAL NO 82 OF 2011)

**(APPEAL FROM DECREE PASSED ON 15/06/2011 IN MURANG'A PMCC NO 463 OF 2005 – A.
K. KANIARU, PM)**

STANLEY KIBURU WABERA.....APPELLANT

VERSUS

1. MARGARET GACHAMBI GICHUKI

2. ROSE NJOKI KENJU.....RESPONDENTS

J U D G M E N T

1. This is an appeal against the decree of the lower court by which the Appellant's suit for damages on account of personal injuries received in an accident in a bus stage in Murang'a Town involving a motor vehicle was dismissed. The Appellant was the plaintiff while the Respondents were the defendants. The Appellant's case was that he was hit by motor vehicle registration number KAN 081 Q while he was looking at some shoes on sale in the bus stage. It was his case that the motor vehicle was owned by the Respondents and driven by their servant or agent who was negligent.

2. The Respondents filed separate statements of defence and denied liability. They denied that any accident as alleged by the Appellant occurred. The 1st Respondent further denied that she was the owner of the motor vehicle or that it was being driven by her agent or servant. In the alternative and without prejudice, she pleaded that if such accident occurred it was solely caused or substantially contributed to by the Appellant's negligence. The 2nd Respondent on the other hand pleaded that at the time the accident occurred she had already sold and transferred the motor vehicle to the 1st Respondent who had possession of it.

3. The main thrust of the grounds of appeal is in respect to how the trial court dealt with the issue of vicarious liability as it related to the 1st Respondent.

4. The appeal was heard by way of written submissions which were subsequently highlighted orally. I have considered those submissions, including the cases cited. I have also read through the testimonies of the Appellant and his witnesses and also the testimony of the 2nd Respondent. The 1st Respondent did not testify or offer any evidence. Finally, I have read the judgment of the trial court.

5. The trial court found, correctly, that at the time of the accident the 2nd Respondent had long sold the accident motor vehicle to the 1st Respondent. The 2nd Respondent placed before the court a sale

agreement to that effect together with transfer documents that she had executed in favour of the 1st Respondent. It appears that the 1st Respondent never bothered to register the transfer and the name of the 2nd Respondent thus remained in the **Registry of Motor Vehicles** as the owner of it. In actual fact however, the motor vehicle was owned by 1st Respondent who had possession of it and who was trading with it as a matatu at the time of the accident.

6. But without registration of the transfer from the 2nd Respondent to the 1st Respondent, the Appellant obviously had no way of knowing that the 2nd Respondent had long sold and transferred the motor vehicle to the 1st Respondent. He was therefore entitled to sue her as owner of the motor vehicle. However, the fact of the sale and transfer of the motor vehicle to the 1st Respondent having been established at the trial, the court correctly dismissed the Appellant's case as against the 2nd Respondent. It is not clear if the trial court awarded costs of the suit to the 2nd Respondent; if it did so that would be wrong as the 2nd Respondent's name still appeared in the official records as the owner of the motor vehicle. She had a duty under the law to inform the **Registrar of Motor Vehicles** of the sale to the 1st Respondent.

7. As for the 1st Respondent, the preponderance of the evidence placed before the trial court was that she was the actual and beneficial owner of the accident motor vehicle with which she was trading at the time of the accident, and the trial court properly found so.

8. The trial court also found, again correctly, that indeed an accident had occurred involving the Appellant and the accident motor vehicle in which the Appellant was injured. The Appellant did not contribute in any way to the occurrence of the accident. He was blameless.

9. The trial court also found that at the time of the accident the motor vehicle was being driven, not by the 1st Respondent's driver or agent, but by another person who was apparently known but escaped and disappeared; he was referred to as a tout. He had driven the motor vehicle without the authority of its official driver, or the 1st Respondent for that matter. It was upon the basis of these facts that the trial court found that no vicarious liability could attach to the 1st Respondent.

10. However, there was another fact that the trial court appears not to have considered. This fact was that the official driver of the motor vehicle had left the motor vehicle in the bus stage apparently with its ignition key in place. At any rate the 1st Respondent did not call her official driver to testify and explain in what circumstances he had left the motor vehicle with its ignition key in place or, if he had taken away the ignition key, how it could have been driven off by the tout. The 1st Respondent was under a duty to explain this through her driver. If, as appeared to be the case, the driver had left the ignition key in place, this was an open invitation to the touts in the bus stage to drive the motor vehicle; and one of them actually did so!

11. Who then bears the consequences of this negligence on the part of the 1st Respondent's driver in leaving the motor vehicle with its ignition key in place in a public place with many young men about who were likely to be tempted to drive the motor vehicle? The 1st Respondent's driver had brought the motor vehicle into the stage in the course of his duties. He had left it there apparently to go and have a meal or something before resuming duty. His negligent act of leaving the key in the ignition was committed in the course of his duties. His employer, the 1st Respondent was clearly vicariously liable, and I so find. Judgment on liability should have been entered for the Appellant as against the 1st Respondent. As for damages, the Appellant has not challenged the assessments made by the trial court.

12. In the event, I will allow the Appellant's appeal as against the 1st Respondent. The judgment of the lower court in respect to the 1st defendant is hereby set aside; judgment for the plaintiff against the 1st defendant in the sum of KShs 300,000/00 (general damages) and KShs 36,082/00 (special damages) shall be substituted, with costs and interest at court rates. Interest on general damages shall run from the date

of the judgment of the lower court. Interest on the special damages shall run from the date of filing suit. The Appellant shall have costs of this appeal as against the 1st Respondent.

13. The Appellant's (plaintiff's) suit against the 2nd Respondent (2nd defendant) shall remain dismissed, but with no orders to costs. For the avoidance of doubt, the Appellant's appeal against the 2nd Respondent is also dismissed, again with no order as to costs. Those will be the orders of the court.

DATED AND SIGNED AT MURANG'A THIS 2nd DAY OF JULY 2015

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 3rd DAY OF JULY 2015