



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO 36 OF 2007

SERAH WAMBUI MURIITHI.....APPELLANT

VERSUS

NEWTON KIRAGU MURIITHI.....RESPONDENT

(APPEAL ARISING FROM THE JUDgment of Hon M.K.K. Serem

Resident Magistrate in Nyeri Civil Case No. 237 of 2006)

JUDGMENT

1. This is an appeal against the judgment of M.K.K. SEREM then SRM in which he found the Appellant liable at 100% and award the Respondent Ksh. 80,000/- in general damages and Ksh. 5450/- in special damages.
2. Being aggrieved by the said judgment the Appellant filed the present appeal and raised the following grounds of appeal.
 1. *The learned trial magistrate erred in law and in fact in finding the Appellant liable for the accident the subject matter in this case when there was no evidence to support the same.*
 2. *The learned trial magistrate erred in law and in fact in failing to appreciate that the Respondent Defendant was the person vicariously liable for this accident at any rate.*
 3. *The learned trial magistrate erred in law and in fact in failing to find that the Plaintiff/Respondent herein failed to prove his case on a balance of probabilities against the appellant.*
 4. *The learned trial magistrate erred in law and in fact in failing to appreciate that from the evidence thereon the respondent/plaintiff accepted blame and had a case against the defendant/appellant herein.*
 5. *The learned trial magistrate erred in law and in fact in failing to appreciate that the negligence being the foundation of the suit has not been proved and hence no cause of action.*
 6. *The learned trial magistrate erred in law and in fact in failing to appreciate the appellants defence.*
 7. *The learned trial magistrate erred in law and in fact in misdirecting himself on the issues of trial herein.*

1. The Appellant therefore prays that the appeal be allowed and the judgment of the lower court set aside and substituted with an order dismissing the suit with cost.
2. By a plaint dated 28th March 2006 the Respondent sued the Appellant in respect of an accident alleged to have occurred on 20/11/2005 involving motor vehicle Registration No. KAK 881X along Karatina-Kerugoya road due to the negligence of the Appellant as a result whereof the Respondent suffered deep laceration wound on the parietal area of the head, tenderness and swollen left thigh among other injuries.
3. The Appellant filed a statement of defence wherein she stated that the accident was caused by a person who was driving the said motor vehicle without her authority and further that the accident was occasioned by factors well beyond the control of the Appellant her authorized driver servant and or agent.
4. This being a first appeal the court is supposed to analyse the evident tendered at the trial and to come to his own conclusion.
5. P.W.1 NEWTON KIRAGU The Respondent herein testified that on 20th April 2005 he was traveling in motor vehicle Registration No. KAK 881X owned by the Appellant and that he was driving the accident motor vehicle at first but that at the time of the accident David Waweru the son of the Appellant was allegedly driving the motor vehicle when the same hit a pot hole and lost control and rolled. In support of his claim he produced discharge summary police abstract medical report and treatment evidence together with payment receipts thereon.
6. In cross examination by Mr. Nderi for the Appellant the Respondent admitted that the Appellant had given him the motor vehicle and had been driving the same and that he gave it to the son of the Appellant to driver while he was seated in the drivers cabin.
7. P.W.2 ZECHARIA MURIUKI an Occupational Therapist testified that he examined the Respondent on 20/11/2005 and prepared medical report on the same and classified the injuries harm.
8. Based upon the said evidence the trial court found that the motor vehicle was being driven by the Appellants son and that since the Respondent did not have control of the said motor vehicle that the Appellant did not call any evidence to explain how the accident happened the Appellant was liable at 100% with general damages assessed at Ksh. 80,000/-
9. Directions were given that the appeal be determined by way of written submissions which have now been filed.

SUBMISSIONS

10. On behalf of the Appellant it is submitted that the Respondent is a step son of the Appellant and on the material day had been authorised to drive the said motor vehicle and that at the same point he allowed the Appellant son to take control and driver the motor vehicle when the accident occurred and that the Respondent did not discharge the burden of proof of how the accident occurred and that the trial court was wrong in shifting the burden upon the Appellant.
11. It was further submitted that the trial court did not address the issue of the fact that the Respondent at all material times was the ostensible owner of the motor vehicle who had management, direction and control of the same and therefore the act of the driver who took control of the motor vehicle under his authority were necessary his act for which he is vivaciously liable.
12. In support of this submission the Appellant relied upon the case of PA. OKELO & M.M. NEREKO t/a KABURU OKULO & PARTNERS v STELLA KARIMI KOBI & 2 OTHERS [2012]eKLR.
13. On behalf of the Respondent it was submitted that the Appellant was the lawful owner of the accident motor vehicle and that the accident was self involving and that since the driver did not testify he is accordingly wholly liable in support thereof case of DIRAMA TEMA MACHUYU & OTHERS v KINGERU BUS SERVICES HIGH COURT AT NAIROBI CIVIL CASE NO. 108 OF 1989 where Ringera J as he then was held that where the is evidence that a motor vehicle overturned on a highway the doctrine of res ipsa loquitur applies and the burden of proof is accordingly shifted to the driver or owner thereof to disprove the presumed negligence.
14. On the issue of vicarious liability of the Appellant it was submitted that the person who was driving the motor vehicle was the Appellants son and that the mere fact that the Respondent handed over the ignition key to the Appellant's son does not mean he was in actual control and

possession of the motor vehicle.

15. From the pleadings herein, the evidence and submissions tendered the following issues are for determination

- a. Was the Respondent in actual control of the accident motor vehicle**
- b. Was the driver authorized by the Appellant to driver the said motor vehicle**
- c. Is the Appellant liable.**

16. From the evidence tendered before the court it is clear that the Appellant had authorized the Respondent to drive the motor vehicle and that he along the way gave the said motor vehicle to the son of the Appellant who was not authorised by the Appellant to drive the said.

17. It is therefore clear that any negligence attributes to the Appellant was caused by the Respondent and therefore agree with the submissions by Mr. Nderi for the Appellant that any acts of the driver who took control of the motor vehicle under the authority of the Respondent are the acts of the Respondent and can not be attributed to the Appellant.

18. It is therefore clear that the trial magistrate acted on having principles in reacting as find as as per the holding in JABANE v OLENJA [19867ELR 661 who was the agents lawful agents drives and or servant and therefore entitled to interfere with the finding as it is the Respondent who was the agents lawful agents drives and or servant and therefore any actions done on his behalf are attributes attributable to him the fact that the person he had given to drive the motor vehicle was the Appellant's son not withstanding.

19. For the reasons stated herein above I would allow the appeal herein on liability set aside the judgment and substitute the same with an order dismiss the Respondent case.

20. On the issue of quantum no evidence was tendered to show that in accessing the damage the court took into account irrelevant factor as left out a relevant one or that the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estandi of damages and therefore would not interfere with the same.

21. I would therefore allow the appeal herein set aside the judgment on liability and substitute the same with an order dismissing the suit in Nyeri CMC No. 237 with no order to cost the parties herein being family members.

Dated and delivered at Nyeri this 13th day of February 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the absence of the parties and the advocate

J. WAKIAGA

JUDGE