



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 153 OF 2012

ERASTUS K. M'MBIJIWE APPELLANT

VERSUS

**JOSEPH KAURA M'BURIA (Suing As The Administrator Of The
Estate Of The Late MARTIN MURIUNGI KAURA.....RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. L. Komingoi, P. M. delivered
on 2nd June, 2011 in CMCC No. 1557 of 2004)**

JUDGMENT

1. The Appellant, **Erastus K. M'mbijiwe**, preferred this appeal following his dissatisfaction with the decision and judgment of the Principal Magistrate at Nakuru in CMCC 1557 of 2004 in which he was sued by the Respondent, **Joseph Kaura M'buria** (the administrator of the Estate of the late **Martin Muriungi Kaura**) for damages arising from a fatal road traffic accident which occurred on the 3rd April, 1999 along Nakuru-Njoro road involving motor vehicle registration number KZS 162 belonging to the Respondent and motor vehicle registration number KAE 215K. The claim was brought both under the Law Reform Act and the Fatal Accident Act, Cap 32 Laws of Kenya.
2. The Respondent's case as per the Plaint dated 30th July, 2001 was that the deceased was a passenger in the Appellant's motor vehicle registration number KZS 162 which was so negligently driven by the Appellant's authorized driver, servant and or agent that it collided with motor vehicle registration number KAE 215K which was being negligently driven and whereupon the deceased sustained fatal injuries.
3. The Respondent filed a defence in which he admitted that he was registered owner of the motor vehicle registration number KZS 162. He however denied all other allegations and in particular that the deceased was a passenger in the said motor vehicle and if he was, he was such a passenger unlawfully and without his knowledge and consent. Further he denied that the driver of the said motor vehicle was driving with his authority, knowledge and consent.
4. The Respondent contended that if the accident occurred and the Appellant was injured then he was solely to blame for taking a ride in a motor vehicle which was prohibited from carrying passengers without the Appellant's consent.
5. The Respondent therefore prayed for the dismissal of the Appellant's suit with costs.
6. The evidence adduced at the trial court was considered by the trial magistrate who arrived at the conclusion that the Appellant was vicariously liable for the actions of his driver and or agent. He was held to be wholly liable for the accident. Consequently, the Appellant was ordered to pay the Respondent the sum of Kshs. 303,500/-, costs of the suit together with interest thereon.

7. It is against this judgment that this appeal was preferred. The Memorandum of Appeal is dated 17th August, 2012 and comprises 10 grounds of appeal which are summarized as hereunder:
 - a) The learned trial magistrate erred in law and in fact in issuing a decree which was excessive and not in accordance with the provisions of law and the facts of the case;
 - b) That the learned trial magistrate erred in law and in fact in finding the Appellant negligent and vicariously liable whereas no evidence was adduced by the Respondent.
 - c) The learned trial magistrate erred in law and in fact in failing to consider the evidence given by the Appellant witnesses;
 - d) The learned trial magistrate erred in law and in fact by concluding that at time of the accident the deceased was in the course of duty and acting under instructions and or authority of the Appellant.
 - e) That the learned trial magistrate erred in law and in fact by demonstrating outright bias against the Appellant.
8. The Appellant thus prays that the appeal be allowed, the judgment and decree of the Principal Magistrate be set aside and the costs of this appeal be awarded to the Appellant.
9. Both counsel for the Appellant and Respondent agreed to canvass the appeal by way of written submissions. The parties filed written submissions to which they annexed various authorities in support of their respective positions. The Appellant's submissions were filed on 14th March 2014 while the Respondent did likewise on 11th April, 2014.
10. **P.C. Abaku Manderu (PW1)** testified that the accident was investigated by P.C. Mwangi who made a report to the effect that the driver of motor vehicle registration KZS 162 was to blame for the accident for failing to stop at a junction and to give way to the other motorist, in this case motor vehicle registration number KAE 215K. That said driver was speeding at the time and failed to keep to his lane whilst negotiating a corner. The driver and passenger in motor vehicle KZS 162 died at Valley Hospital while undergoing treatment.
11. **PW2** testified that he was the father of the deceased. He did not witness the accident and was only informed what had befallen his son. He stated that the son was 20 years old and was working in the Appellant's home as a herdsman. At the time of his death, he was earning Kshs. 6,000/-.
12. The Appellant admitted that the deceased worked on his farm as milkman with a monthly salary of Kshs. 1500. He testified that the vehicle was used to ferry milk produce to Nakuru town. He further stated that the driver was not authorized to carry any of the workers and at the time of the accident the deceased was not a lawful passenger.
13. The Appellant also called Philip Mugambi (**DW2**) who was the farm manager. He testified that that the driver, one Shadrack had made the routine delivery of milk and at the material time they did not have authority to drive the said motor vehicle. The evidence of Samuel Muhire (**DW3**) and P.C. Joseph Ndwiga (**DW5**) suggested that the deceased was driving at the time of the accident because his body was on the driver's seat when he was rescued from the wreckage.
14. The Appellant's submissions are to the effect that the evidence relied upon by the trial magistrate was contradictory. Counsel in particular contended that the testimony of the investigating officer gave two distinct scenarios of how the accident occurred. On the one hand, the driver failing to keep to his lane while negotiating a corner due to over speeding and on the other-hand that the driver failed to stop at a junction.
15. Counsel further submitted that the police report was ambiguous because it did not name the people interviewed nor did it contain the contents of their testimony. The report also does not identify the driver of the said motor vehicle at the time of the accident. Accordingly the evidence was not conclusive and therefore the trial magistrate was speculative and twisted the evidence to fit the Respondent's case.
16. Counsel also submitted that the evidence of the Appellant clearly suggests that the motor vehicle had been used for its daily routine and driven back to the farm; that at the time neither the

- deceased nor the alleged driver had the authority of the Appellant to drive the said motor vehicle. Further the evidence from witnesses places the deceased as the driver of the said motor vehicle.
17. Lastly, counsel contends that vicarious liability is not automatically presumed in law. The Respondent needed to show that the person who was driving the motor vehicle was not just an employee of the appellant, but was driving the subject vehicle in the course of his duties assigned by the employer. He relied on the decision in **Meto & Anor V. Kihanguru & 3 Others**, (2002) 2 KLR where the court of appeal held that:

“In order to fix liability on the owner of a car for negligence of its driver, it was necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as it agent”.

18. It was his submission that the two deceased Shadrack Kaburu and Martin Muriungi were not acting on the instructions of the Appellant at the material time. He further relied on the case of **Roy Parcels Limited V. Esther W. Ngure**, (2010) eKLR.
19. In response, the Respondent submitted that the Appellant had admitted in his testimony that one Shadrack Kaburu was the driver of the motor vehicle and not the Martin Muriungi. At the material time, Shadrack Kaburu was employed as a driver and therefore the Appellant was vicariously liable for the negligence of his servant.
20. Further counsel submitted that the police abstract confirmed that the motor vehicle was been driven by Shadrack Kaburu. The police report indicates that Martin Muriungi was a passenger. According to counsel the attempt to put Martin Muriungi as the driver was a spirited effort by the Appellant's witnesses.
21. The Appellant prayed that the Appeal be allowed with costs and that the trial magistrates' judgment be set aside. Whereas the Respondent humbly submitted that the appeal be dismissed with costs.

ISSUES FOR DETERMINATION

22. Looking at the grounds of appeal in their totality the issues that arise for determination are;
- i. Whether the trial magistrate correctly directed her mind with respect to the evidence that was presented before her.
 - ii. Whether the Respondent established vicarious liability.

ANALYSIS

23. This being the first appeal, it is the duty of this appellate court to assess and re-evaluate the evidence adduced before the lower court, keeping in mind that this court did not have an opportunity of seeing the witnesses and as they testified and of hearing their testimony and arrive at its own independent conclusion. (See **Peters V. Sunday Post**, (1958) EA 424 at pg. 429).
24. The occurrence of the accident and that the deceased died as a result of the accident are facts that are not disputed. Ownership of the vehicle is also a fact that is not disputed.
25. The negligence that was attributed to the driver was that he was driving too fast and failed to exercise control of the said motor vehicle and failed to give way at a junction and also failed to keep a proper look out of other road users. **PW1** produced an Accident Abstract Report in support. The issue of negligence is also not a contentious issue.
26. The most contentious issues arising herein relate to the driver of the motor vehicle and whether the task and duties on that material date were duly authorized by the Appellant as his servant or agent and whether the Appellant was vicariously liable for negligence.
27. The Appellant did not deny that both the driver and the deceased were in his employment. What is disputed by the Appellant is the authority of the driver to drive the vehicle.
28. It is trite law that the burden of proof lies upon the party that alleges a fact, therefore it was incumbent upon the Appellant to prove that the driver had no authority to drive the vehicle.
29. To prove the above the Appellant called **DW3** as a witness and he testified that the deceased **Martin Muriungi** who was employed as a milkman was the actual driver of the vehicle at the

- time of the accident as he was pulled out from the driver's seat. Whereas Shadrack who ought to have been the driver was removed from the passenger's seat
30. The evidence of **DW5** corroborated that of **DW3** and both were at the scene of the accident and witnessed the removal of the pair from the subject vehicle. **DW5** testified on meeting the pair earlier on in the evening of that fateful day that the two were in possession of the subject vehicle and it was the deceased milkman who was driving. He noticed that both were drunk but he did not arrest them but instead cautioned them on drunk driving.
 31. The trial magistrate chose to disregard the evidence of D.W.3 and D.W.5 and instead placed reliance on the evidence of **PW1** and the Accident Abstract Report that was produced in evidence in reaching her determination.
 32. This court notes that P.W.1 was not the Investigating Officer and never visited the scene nor did he investigate the accident and only came to court to produce the Police Report. The accident was investigated by a **P. C. Mwage** who filed a report and blamed the driver of the Appellant's motor vehicle for the accident. No reasons are given by **PW1** as to why the Investigating Officer was unable to come to court to testify.
 33. Had **P.C. Mwage** been called to testify as a witness he would have been better placed to give the **best evidence** and to produce the Accident Abstract Report and to give details of the investigations carried out at the scene and how the information and contents of the Accident Abstract were procured and the persons/witnesses present at the scene whom he interviewed to enable him compile and complete the report.
 34. Accordingly upon re-evaluating the evidence so as to reach its own conclusion this court is satisfied that the Accident Abstract Report without the proper officer to verify the information renders the evidence of very low probative value at most it is only prima facie evidence of the occurrence of an accident.
 35. Without the evidence of the Investigating Officer as to the driver of the subject motor vehicle the only evidence left is that of the Appellants witnesses who were at the scene and their evidence is corroborated and supports the fact that the pair took the vehicle and went on a frolic of their own and that the milkman was the driver.
 36. There is no evidence tendered by the Respondent to demonstrate that the deceased was driving with the authority or that he was performing tasks or duties assigned to him, therefore this court finds that vicarious liability has not been established.

FINDINGS

37. For the reasons set out above this court makes the following findings;
38. This court finds that the trial magistrate failed to consider the Appellant's evidence thus arrived at an erroneous determination.
39. This court finds that no evidence was adduced to demonstrate that the deceased milkman was assigned the duty and responsibility of a driver by the Appellant and therefore finds that vicarious liability was not established.

CONCLUSION

40. The appeal is found to have merit and is hereby allowed.
41. The judgment delivered on the 2nd June, 2011 by the Hon. L. Kimingoi is hereby set aside and is substituted with a judgment dismissing the Respondents' suit.
42. Each party shall bear their costs in both the appeal and in the case in the subordinate court.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 15th day of July, 2014.

A. MSHILA

JUDGE