



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CIVIL APPEAL 59 OF 2007**

**JASPER MURIITHI NJAGE..... APPELLANT**

**VERSUS**

**SAMSON MICHENI MURIITHI.....1<sup>ST</sup> RESPONDENT**

**PHARES NJERU NYAGA .....2<sup>ND</sup> RESPONDENT**

**JAMES MURIITHI NKORU.....3<sup>RD</sup> RESPONDENT**

*(An appeal from the judgment/Decree of Hon. Mr. S.O. Mogute (RM) in Meru*

*CMCC No. 408 of 2003 delivered on 17<sup>th</sup> July 2007)*

**JUDGMENT**

The first respondent, Samson Micheni Muriithi was the plaintiff in the lower court. I shall hereafter call him Samson. He filed a case against the appellant and the second and third respondent. The appellant Jasper Muriithi Njage was aggrieved by the lower court judgment and has filed this appeal. I shall hereinafter call him Jasper. The second respondent, Pharis Njeru Nyaga was the first defendant in the lower court. I shall herein call him Pharis. At the time when this appeal came up for hearing, Pharis was deceased. The third respondent was the third defendant in the lower court. Interlocutory judgment was entered against him in the lower court on 15<sup>th</sup> April 2005. Samson in his lower court claim averred that on 17<sup>th</sup> September 2002 he was traveling as a passenger in the motor vehicle registration No. KAK 917Z. The vehicle was involved in an accident resulting in his injuries. He therefore prayed against all the defendants that judgment be entered for special and general damages. His claim was to the effect that Phares and Jasper were owners of that vehicle while the 3<sup>rd</sup> respondent was their employee. Pharis in his defence denied that he was the owner of the said motor vehicle. Similarly, Jasper the appellant herein also denied that the said motor vehicle belonged to him. It should be noted that at the lower court Pharis did not give evidence. Samson in his evidence stated that on the fateful day he saw Pharis speak to the third respondent before the accident. The significance of that conversation was not explained. Thereafter Samson boarded the motor vehicle which was later involved in an accident. He produced before court a certificate of search of the said motor vehicle which indicated that Jasper was the owner of the motor vehicle. He also produced the police abstract which indicated that Pharis was the owner of the vehicle. On being cross examined, he stated that the vehicle belonged to Jasper. He called PWII, a police corporal in charge of traffic Meru South. That witness stated that after the accident, the third

respondent was arraigned in RM court Chuka and charged with a traffic offence. That the third respondent was fined Kshs. 500 for driving unroad worthy vehicle. On the second count of causing death by dangerous driving, he was sentenced to 4 years imprisonment. This witness confirmed that Samson was amongst the injured. PWIII was a doctor who gave details of the injuries suffered by Samson. He produced in evidence his report. The appellant gave evidence whereby he stated that he was not owner of the motor vehicle. That vehicle, he said, belonged to Pharis. He produced before court an agreement for sale which showed that on 4<sup>th</sup> December 2001 he sold that vehicle to Pharis. After selling it, he stated, that he did not have control over it. The agreement was exhibited before court and it provided that the possession of the vehicle was passed on to Pharis on the date of that agreement. He therefore stated he was not involved with the motor vehicle when the accident occurred where Samson was injured. Although he acknowledged that the search indicated that he was the registered owner, he maintained that he had sold the vehicle to Pharis. After receiving that evidence, the learned magistrate in his considered judgment had this to say in part:-

***“The third defendant (the third respondent) was an agent of the other defendants i.e. (first and second defendants) (i.e. Phares and Jasher) This is so because the plaintiff produced plaintiff exhibit No. 1 which is a certificate from the registrar of motor vehicles to show that the motor vehicle which caused the accident was registered in a name of the second dependant. (Jasher)”***

The magistrate proceeded to find all the three defendants liable and awarded Samson in general damages Kshs. 200,000/=. That judgment aggrieved Jasher who has filed this appeal. He has brought before court the following grounds for this court’s consideration.

- 1. The learned trial magistrate grossly erred both in law and fact in failing to consider the legal effect of the sale agreement between the appellant and the 2<sup>nd</sup> respondent thereby wrongly finding that he was liable to the 1<sup>st</sup> respondent in terms of compensation of damages.**
- 2. The learned trial magistrate erred in law and fact in failing to consider the submission of the appellant thereby wrongly awarding the 1<sup>st</sup> respondent an exaggerated amount of damages which was against the weight of the evidence adduced.**
- 3. The learned trial magistrate erred in law and in fact in that he failed to consider the doctrine of vicarious liability and failed to find out who was the master of the driver at the time of the accident and for whose benefit the vehicle was being drive or used.**
- 4. The learned trial magistrate erred in law by failing to properly interpret the principles applicable in the law of Agency and also law of contracts thereby misdirecting himself and arriving at the wrong decision.**
- 5. The learned trial magistrate erred in law and in fact in that he failed to find that ownership and vicarious liability were not necessarily one and the same thin in law.**
- 6. The learned trial magistrate erred in law and in fact in that he rejected the appellant’s defence against the weight of evidence and the applicable law.**
- 7. The learned trial magistrate erred in law and in fact in finding that the plaintiff had proved his case on the balance of probabilities when in fact in law he had failed to do so.**

Ground No. 1 3, 4, 5, 6 and 7 can be considered together. The issues that arise from these grounds relate to the ownership of the motor vehicle and the relationship between the appellant and the third respondent, the driver. The plaintiff was duty bound in law to establish a master and servant relationship between Jasher and the third respondent. A servant is defined in the Black’s Law Dictionary as follows:-

***“A person who is employed by another to do work under the control and direction of the employer.***

***A servant, such as a full time employee, provides personal services that are integral to an employer's business, so a servant must submit to the employer's control of the servant's time and behavior."***

Samson in the evidence he adduced in the lower court did not at all prove that there was a master and servant relationship between Jasper and the third respondent. In the case of **Meto & Another v. Kihanguru & 3 others (2002) 2KLR** The Court of Appeal held as follows:-

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

If the plaintiff had proved that there was a relationship of master and servant between Jasper and the third respondent which he did not do, he had yet another hurdle to overcome to prove that Jasper was the vicariously liable for the acts of the third respondent. The book on Law of Torts by **Salmond** had this to say on that matter:-

***"A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (1) a wrongful act authorized by the master, or (2) a wrongful and unauthorized mode of doing some act authorized by the master. It is clear that the master is responsible for acts actually authorized by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all..... In other words, a master is responsible not merely for what he authorizes his servant to do, but also for the way in which he does it, if a servant does negligently that which he was authorized to do honestly, or if he does mistakenly that which he was authorized to do correctly, his master will answer for that negligence, fraud or mistake."***

In the evidence that Samson adduced in the lower court, he did not establish that Jasper was vicariously liable for the acts done by the third respondent. Indeed he failed to prove whose servant the 3<sup>rd</sup> respondent was. On the issue relating to the ownership of the subject motor vehicle, I find that the learned magistrate in his considered judgment failed to accurately address his mind on the evidence before him. Section 8 of the Traffic Act Cap 403 provides as follows:-

***"The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."***

Although Samson produced before court at the trial the certificate of official search of the subject motor vehicle, it should be noted that Jasper also produced a sale agreement showing that at the date of the accident, he had sold his vehicle to Pharis. His evidence was not contradicted. Therefore, there was contrary evidence to show that the certificate of search could be contradicted. More than that, going by the pleadings and in particular the plaint, it is clear that Samson was of the view that Pharis was the beneficial owner of the subject motor vehicle. Indeed that is how he described them in the plaint. In respect of Jasper, he described him as the official registered owner of the motor vehicle. The learned magistrate did not consider the pleadings as they were in relation to the evidence that was adduced. Had he done so, he would have found either Pharis or Jasper to be liable but not both of them. Pharis did not give evidence in the lower court. And he therefore did not prove the defence that he had filed. On the other hand, Jasper did give evidence and supported his defence in which he had denied being the owner of the motor vehicle. In my view, there was clear evidence before court that the subject motor vehicle had been sold to Pharis, but that at the time of the accident he had not registered the same in his name. I find that there was no basis for the finding of liability by the learned magistrate as against Jasper. In respect of ground No. 2, I have considered the injuries suffered by Samson as per the evidence of PWIII. Samson suffered a fracture of his right scapular bone which the doctor stated that could be the cause of arthritis. He also suffered painful right shoulder and painful and swollen right hand fingers. Taking that into consideration and considering the authorities that were relied upon by the plaintiff; I find that I cannot fault the assessment of general damages by the learned magistrate. In that regard therefore, ground No. 2 fails. In the end I find that the other grounds succeed and the judgment of this court is as follows:-

***1. The appellant appeal is hereby allowed and the lower court's judgment in CMCC No. 408 of 2003 Meru in respect of Jasper Muriithi Njage only is hereby set aside and is substituted with an order dismissing the plaintiff's suit as against Jasper Muriithi Njage with costs of that suit being awarded to the said Jasper Muriithi Njage.***

***2. Jasper Muriithi Njage is also awarded costs of this appeal as against Samson Micheni Murithi.***

Dated and delivered at Meru this 1<sup>st</sup> day of October 2009.

**MARY KASANGO**

**JUDGE**