REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. 75 OF 2018

NICODEMUS MASILA MAITHYA.....APPELLANT

VERSUS

MESHACK MUSYOKI.....

1ST RESPONDENT

BHAKATI DRIYA BUILDERS LIMITED.....2ND RESPONDENT

EXTROPICA (K) LIMITED.....3RD RESPONDENT

SUNRAYS CONSTRUCTION COMPANY LIMITED...4TH RESPONDENT

JUDGMENT

(Being an appeal against the decision of Hon. Martin M. Mutua (RM) delivered on 14th December 2018 vide

Chief Magistrate's Civil Case No. 44 of 2012 at Naivasha)

1. By a plaint dated 30th January 2012, the plaintiff (herein "the appellant") sued the defendants (herein "the respondents') jointly and severally seeking for the judgment against the respondents for orders:

    a) *Special damages of Kshs 2,875,*

    b) *General damages for pain, suffering and loss of amenities,*

    c) *Cost of the suit,*

    d) *Interest on (a), (b) and (c) at court rates,*

    e) *Any other or further relief that this Honourable court may deem just to grant.*

2. The appellant's case is that on or about 2nd October 2010, at about 7:45pm, he was travelling along North Lake road as a lawful passenger aboard motor vehicle registration No. KAQ 617B driven by the 1st

respondent. That when the vehicle reached the Ajabu gate the 1st respondent drove the subject vehicle in a negligent manner as per the particulars of negligence at paragraph 5 of the plaint thus causing it to lose control and overturn violently.

3. That as a result of the accident, he sustained the following injuries:

    a) *Comminuted fracture of the right tibia*

    b) *Blunt head injury*

    c) *Bruises on the right elbow*

    d) *Permanent incapacity assessed at 20%*

4. The appellant avers that the 2nd and 4th respondents are the beneficially owners, insured and/or were in possession of the subject motor vehicle while the 3rd respondent is the registered owner thereof. Further that the 1st respondent was an employee, servant and/or agent of 2nd, to 4th respondents.

5. That at the time of the accident, he was an employee of the 4th respondent and the subject vehicle was being used for the benefit of all respondents. Thus in the circumstances the 2nd to 4th respondents are vicariously liable for the acts and/or omissions of the 1st respondent.

6. However, the appellant's case was opposed by the 1st respondent vide a statement of defence dated 23rd March 2012, wherein he denied each and every allegation in the plaint. He further denied being an employee of the 2nd, 3rd and/or 4th respondents and that he was driving the subject vehicle in the course of employment. He also denied the occurrence of the accident, the particulars of negligence attributed to him and the injuries sustained by the appellant.

7. However, on a without prejudice basis, the 1st respondent averred that if an accident occurred, it

was caused by circumstances beyond his control and not in the manner alleged.

8. The 1st respondent further averred that, he has fully settled any claims arising from the accident and the same has been acknowledged by the appellant and therefore the appellant is estopped from any further claims. He sought for the suit to be struck out with costs.

9. Similarly, the 2nd respondent also opposed the appellant's claim vide a statement of defence dated 23rd March 2012 denying each and every allegation in the plaint. The 2nd respondent in particular denied that the appellant and the 1st respondent were its employees.

10. It was averred that the 1st respondent was in possession and control of the subject vehicle for his own purpose and business and therefore the 2nd respondent is not vicariously liable for any acts and/or omissions of negligence as pleaded. The 2nd

respondent further denied the occurrence of the accident, all the particulars of negligence and injuries as outlined in the plaint.

11. However, on a without prejudice basis, the 2nd respondent averred that, if an accident occurred any claims arising therefrom were fully settled by the 1st respondent and acknowledged by the appellant and therefore the appellant is estopped from further claims.

12. The 2nd respondent further aver that, the suit does not disclose any cause of action against it and is an abuse of the court process.

13. The 4th respondent in its statement of defence dated 23rd March 2012, denied each and every allegation in the plaint. It was the 4th respondent case that, the suit is an abuse of the court process, and does not disclose any cause of action.

14. The 4th respondent further denied being the beneficial owner, in possession, and insured of

motor vehicle registration KAQ 617B. It denied that the 1st respondent was its employee, servant, agent or driver and/or that the subject vehicle was being driven for its benefit. The 4th respondent denied being liable for the acts and/or omissions of negligence attributed to the 1st respondent under the doctrine of vicariously liable.

15. The 4th respondent further denied that the appellant was its employee and/or travelling as a lawful passenger in the subject vehicle in the course of his employment. Furthermore, that the accident occurred as stated. The injuries allegedly sustained by the appellant as pleaded in the plaint were denied.

16. However, on a without prejudice basis, the 4th respondent averred that, if an accident occurred though denied then any claims arising therefrom were fully settled by the 1st respondent and

acknowledged by the appellant and therefore the appellant is estopped from further claims.

17. The 3rd respondent did not enter appearance and file a defence and therefore an interlocutory judgment was entered against it on 19th November 2015.

18. Be that as it were, the case proceeded to full hearing. The appellant's case was supported by the evidence of (PW1) No. 80090 PC Paul Muthengi who confirmed that the accident occurred and was self-involving wherein one passenger died while others including the appellant sustained injuries. That the 1st respondent was charged with the offence of causing death by dangerous driving. He produced the police abstract that indicate the 2nd defendant was the owner of the subject motor vehicle.

19. The appellant adopted his witness statement as his evidence in chief and averred that, the 4th respondent had a contract to build houses at

Greenpark Water Services Ltd. That he was an employed by the 4th respondent as a carpenter earning Kshs. 500 per day and paid on weekly basis as confirmed by the book he signed confirming payments and a gate pass indicating as much.

20. Similarly, the 1st respondent was employed by the 4th respondent and he issued him with the gate pass and kept the book signed by all other employees when they were paid their wages. That in addition the 2nd respondent gave the 4th respondent possession of the subject vehicle in circumstances peculiarly within their knowledge.

21. The appellant averred that, on the material day, he, 1st respondent and another colleague were travelling in the subject vehicle and had gone for shopping at Kasarani market along North Lake Road. That upon reaching Ajabu gate while heading to the construction site, the 1st respondent lost

control of the vehicle causing it to overturn violently.

22. That as a result of the impact, he sustained injuries on the right side of the face, right hand and right leg and was rushed to Naivasha District Hospital where he was admitted for five (5) days and discharged. That on 12th January 2011, he was admitted at Kitui District Hospital where he was operated on and a plate fitted which is still in situ.

23. The appellant testified that, the 4th respondent gave him Kshs. 10,000 for his treatment at Naivasha but was not paid any other money. That the fracture on his right leg took five (5) years to heal during which period he was not working as his services were terminated. That he is not fully healed as he has a metal implant and cannot lift heavy loads. He produced the documents filed alongside the plaint in support of his case.

24. The 1st respondent adopted his written statement as evidence in chief and denied being an employee or agent of the 2nd 3rd and/or 4th respondents. He stated that he was an independent contractor and had borrowed the subject vehicle for his personal use.

25. He averred that on the material day at around 8:30pm he was driving along North Lake Road at a slow speed due to the poor condition and terrain of the road. That he passed a group of people standing on the side of the road who started banging the body of the vehicle and proceeded to board it without his authority and/or invitation. That he decided to stop at the side of the road to find out what was happening but unfortunately the vehicle rolled into a ditch and some of the people got injured.

26. He stated that the appellant was not a lawful passenger nor his employee but was one of the

people who forcibly boarded the subject vehicle. However, on humanitarian grounds, he catered for all the medical expenses of the injured persons including the appellant.

27. Subsequently, the injured persons including the appellant approached him seeking compensation and they reached an agreement which they put in writing and signed. Further, the appellant signed an acknowledgment of the amounts paid thus discharging him from further future claims. That the appellant was therefore estopped from laying a claim and that the instant suit was an abuse of the court process.

28. Shivji Ramji Bhanderi a director of the 2nd respondent adopted his witness statement as evidence in chief and denied that the 1st respondent was its employee. He stated that on the date of the accident, the 1st respondent was in possession and control of the subject motor vehicle for his own

purpose and not for the benefit of the 2nd respondent and therefore the 2nd respondent is not vicariously liable.

29. Further, that the 1st respondent informed him of the accident and the fact that the 1st respondent paid the appellant's medical bills and compensated the injured persons including the appellant. That, the appellant acknowledged the same and discharged the 1st respondent from further claims, consequently, in the circumstances, the appellant is estopped from claiming damages.

30. The 4th defendant relied on the evidence adduced by the witness of the 2nd defendant, DW2, and closed its case.

31. At the conclusion of the case, the trial court ordered the parties to file submissions which they did and by a judgment dated 14th December 2018, the trial court found the appellant had failed to adduce any evidence linking the 4th respondent as owner or

otherwise of the subject vehicle and that the 4th respondent was improperly enjoined in the suit and dismissed the suit against the 4th respondent with costs.

32. With regard to the 2nd and 3rd respondent, the trial court found that the 1st respondent had borrowed the subject vehicle from the 2nd and 3rd respondents to run his personal errands and therefore held that the 2nd and 3rd respondents were not vicariously liable for the accident and dismissed the suit against them with costs.

33. The trial court entered judgment on liability at 100% in favour of the appellant against the 1st respondent and awarded quantum as follows: -

    a) *General damages---------Kshs. 1,200,000,*

    b) *Special damages----------Kshs. 2,850*

    c) *Costs of the suit*

    d) *Interest on above*

34. However, the appellant is aggrieved by the decision of the trial court on the following amended grounds as stated in the memorandum of appeal, dated 7th October 2022:

a) That the learned Magistrate erred in law and in fact by dismissing the appellant's suit against the 2nd and 4th respondents.

b) That the learned magistrate misdirected himself in law and in fact by finding that the appellant had not proved his case against the 2nd 3rd and 4th respondents, despite the overwhelming evidence led by the appellant.

c)That the learned Magistrate erred in law and in fact by failing to appreciate that the 2nd 3rd and 4th respondents were vicariously liable for the actions of its employees.

d) That the learned Magistrate erred in law and in fact by failing to address his mind on

the evidence adduced and hence made an erroneous finding.

e) That the learned Magistrate misdirected himself in law and in fact by placing too much reliance on the 2nd and 4th Respondents' evidence, which was contradictory.

f) That the learned Magistrate erred in law and in fact by failing to consider the totality of the evidence adduced at trial.

g) That the learned Magistrate erred in law and in fact by failing to consider the parties ' written submissions.

h) That the learned Magistrate misdirected himself in law and in fact by failing to find that at the very least the 2nd 3rd and 4th respondents were liable for the accident.

35. As a result of the aforesaid the appellant seeks for the following orders: -

a) *The appeal be allowed.*

b) *The judgment delivered in Naivasha CMCC No. 44 of 2012 on the 14th December 2018 be set aside.*

c) *Judgment be entered in favour of the appellant against the 2nd 3rd and 4th respondent.*

d) *The costs of the appeal be provided for.*

36. The appeal was disposed of by filing of submission. The appellant in submissions dated 23rd May 2024, argued there was no contention on the ownership of the subject vehicle. Further, he proved on a balance of probability through the evidence of PW1 and as conceded by the 1st respondent that the accident occurred and as result he was severely injured.

37. That, the respondents did not challenge or contravene his evidence and both DW1 and DW2 admitted that the 1st respondent was the authorized

driver of the motor vehicle. Reliance was placed on the case of; *Unleek Electrical Company Limited vs Joseph Fanuel Alela Nairobi HCCC Appeal No. 676 of 2002 (unreported)* where it was held that if the only evidence before the court is that of the plaintiff, the court has no reason to disbelieve his testimony.

38. The appellant argued that DW2 was not present during the accident, and therefore his evidence of was largely hearsay and contrary to section 63 of the Evidence Act and hence inadmissible and of little value. He cited the case of; *Concord Insurance Company Ltd vs Jared Wigina t/a Hardwings Swervice (2009) eKLR* and *Ali Emoy Abdi Noor vs Sigma Feeds Limited & Another [2012] eKLR* where it was held that hearsay evidence is of little evidentiary value and cannot be relied on.

39. The appellant further submitted that, DW2 confirmed the 1st respondent was an employee of the 2nd respondent but did not produced any

evidence in court to show that the 1st respondent did not have authority to drive the subject vehicle. That, the evidence of DW2 that he gave the 1st respondent the subject vehicle as a friend and therefore the 1st respondent was solely to blame for the accident is an attempt to repudiate, rebut, disclaim, refute, decline, neglect and/or reject liability of the accident.

40. That the 2nd respondent being the beneficial owner of the subject vehicle and being the 1st respondent's employer, is vicariously liable for the actions of the 1st respondent. In support of his submissions he cited from *Salmon and Heuston on Torts (19th Ed) at page 521* where the court stated that:

> *"A master as opposed to the employer of an independent contractor is liable even for acts which he has not authorized provided that they are so connected with the acts which he has authorized that may be rightly regarded*

as modes though improper modes- of doing them. In other words, a master is responsible not merely for what he authorizes his servant to do, but also the way in which he does it. If a servant does negligently that which he was authorized to do correctly, his master will answer for the negligence, fraud or mistake"

41. The case of *Securicor Kenya Ltd vs Kyumba Holdings Ltd Civil Appeal No. 73 of 2002* was also cited where the court in defining vicarious liability quoted from *Winfield and Jolowicz On Tort 14th Edition* where it is stated that: -

"*The doctrine may be stated as follows: -*

Where A, the owner of a vehicle expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B 's negligence in the operation of the vehicle."

42. The appellant also relied on the case of; *Paul Muthui Mwavu v Whitestone (K) Ltd (2015) eKLR* where the Court of Appeal discussed the threshold of vicarious liability that; the driver was an employee of the company; the driver committed a tortious act in employment of the employer; the driver was acting in the scope of his employment.

43. The appellant further relied on the case of; *Joseph Njuguna vs Cyrus Njathi [1991] eKLR* quoting the case of; *Jonathan Ngumbao vs Peris Mwatete & 3 others* where the Court of Appeal held that the owner or apparent owner of a vehicle can be held vicariously liable for the negligence of his servant even where the servant is not a co-defendant. But that, the plaintiff is required to prove the driver committed a tort and the driver was the owner's servant.

44. The appellant also placed reliance on the cases of; P.*A Okiro & Another T/A Kaburu Okello and Partners*

v Stella Karimi Kobi Civil Appeal No. 183 of 2003; Joseph Cosmas Khayigila vs Gigi & Co. Ltd & Another Civil Appeal No. 119 of 1986; and *Rose v Plenty & Another 1976 1 ALL ER 97* where the courts set out circumstances in which the owner of a motor vehicle would be held vicariously liable for the negligence of its driver.

45. The appellant argued that so long as the 1st respondent is an employee; it does not matter that he was acting contrary to his orders. The case of; *Muwonge vs Attorney General of Uganda [1967] E.A. 17* and *Geoffrey Chege Nuthu vs M/S Anverali & Brothers Civil Appeal No. 68 of 1997* were cited where it was stated that an act committed within the course of duty, even if acted deliberately, wantonly, negligently, criminally or for own benefit or contrary to general instructions, renders a master liable.

46. That the appellant cannot be blamed for the accident as he did not have control over the motor vehicle. The case of; *Boniface Waiti & Another vs Michael Kariuki Kamau [2007] eKLR* was cited where the Court stated that a passenger cannot be penalized for the poor control of the vehicle he is conveyed in.

47. The appellant argued that the respondents failed to discharge their evidential burden by failing to prove the particulars of negligence attributed to him as outlined in their pleadings. He relied on the case of *John Wainaina Kagwe vs Hussein Dairy limited [2013] eKLR* where the court held that the defendant had failed to tender evidence in support of its defence, and therefore failed to prove any of its averments to exonerate it fully from culpability.

48. That the 1st respondent did nothing, such as driving at a reduced speed to avoid the accident. The case of; *Agnes Akinyi Okeyo vs Marie Stopes Kenya*

[2004] eKLR was relied on where the court found the driver of a motor vehicle 100% liable for the accident for failure to act to avoid the accident.

49. However, the 2nd and 4th respondents in submissions dated 25th January 2023, argued that the appellant failed to produce any evidence to show that 1st respondent was their employee and that the subject vehicle was being used for their benefit.

50. That the 1st respondent denied that he was an employee of any or all of the respondents and stated that he was an independent contract which evidence was unchallenged. Furthermore, the appellant did not state the nature of his employment he had the 4th respondent and where he was working. That, in cross-examination he admitted that at the time of the accident he was not in the course of his duties.

51. That in the given circumstance, the trial Magistrate correctly held that the appellant failed to produce

any evidence linking the 4th respondent to the subject motor vehicle.

52. The 2nd and 4th respondents further submitted that, it was the 1st respondent's evidence that he had authority to use the subject vehicle for his own errands and benefit and not as an employee of the respondents and there was no evidence adduced to the contrary. That, the appellant failed to prove liability against the 4th respondent and that the authorities cited by the trial court on vicarious liability were on point and the judgment is well reasoned.

53. Furthermore, all the authorities cited by the appellant on the issue of vicarious liability confirm that there must be an employer-employee or master-servant, principal-agent relationship; that the act complained of must be authorized by the employer, and the act must have occurred in the course of the servant, employee or agent's duties.

54. At the conclusion of the case, the court notes that the role of the 1st appellate court as stated by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*, is to re-evaluate the evidence afresh and arrive at its own conclusion.

55. The court stated as follows: -

> *"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In*

particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

56. The key question herein is whether at the case against the 2nd, 3rd and 4th defendants was improperly dismissed. To resolve that issue, regard must be held on the plaintiff/appellant's pleadings. In the plaint herein, he pleaded that the 2nd and 4th defendants were beneficial owners of the subject motor vehicle herein.

57. In support of that averment, the appellant stated in his statement in support of his claim, that he was an employee of the 4th defendant. However, as evidenced by the documents filed alongside the

plaint and produced in evidence, there is no document to support the allegation of the subject employment.

58. He further averred that the 1st respondent was an employee of the 4th respondent but again no documentary evidence was adduced in support thereof. The appellant made reference to a gate pass as proof of his employment by the 4th respondent. However, the said gate pass was not produced and neither can a gate pass be a legal document to support or prove employer/employee relationship. The appellant further alleges that he was being paid Ksh500 per day, again that allegation is not supported by any evidence.

59. Furthermore, the appellant avers that the subject vehicle herein had been given to the 2nd respondent by the 4th respondent, again there is no proof thereof. He actually states that the circumstances under which the vehicle was given to the 2nd

respondent by the 4th respondent was peculiar and only within the knowledge of the two companies. Therefore, he cannot verify the circumstances under which the 2nd respondent came into possession of the motor vehicle in question, if at all.

60. The 2nd respondent denied being the beneficial owners of the subject motor vehicle and/or being vicariously liable. In support of that averments, Shivji Ramji Bhandhi states that the 1st respondent was in possession of the subject vehicle for his own business. Mr Bhandhi also stated that the 1st respondent never drove the vehicle as its employee, agent or driver. That the 1st respondent did not controvert that evidence.

61. In the same vein, the 4th respondent denied being the beneficial owner of the subject motor vehicle or an employer or master of the 1st respondent, and relied on the evidence of Shivji Ramji Bhandhi. That the 1st respondent confirmed he was in possession

of the motor vehicle for his own business. The 4th respondent also stated that the 1st respondent was an independent contract. In support thereof, the 4th respondent produced an agreement dated 3rd August, 2009 wherein the 4th respondent is described as a main contractor and the 1st respondent as a sub-contractor. Notably that evidence is not controverted and therefore is clear that the 1st respondent was not an employer, agent or servant of the 4th respondent.

62. It is noteworthy that, the doctrine of vicarious liability is the liability held by a person or entity that is in charge (called the principal or master) of another person (called the agent or servant). The person, usually an employer, is responsible for the actions of their employee (or other subordinate) if that employee causes harm or injury to another person.

63. The principle of vicarious liability has been considered in various court decisions and in the case of; *Amalgamated Logistics International Ltd & another v MMK (2020) eKLR* the Court of Appeal stated as follows: -

> *"Vicarious liability has been well elucidated in Salmond on Torts, 1st ed at Pg 83 as;*
>
> > *"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 (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master."*
> >
> > *This Court in JOSEPH COSMAS KHAYIGILA V GIGI & CO. LTD & ANOTHER, Civil Appeal No. 119 of 1986 established a clear test for vicarious liability as follows: -*

"In order to fix liability on the owner of a car for the negligence of the 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 his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."

64. Furthermore, the ownership of a motor vehicle is covered under section 8 of the Traffic Act which provides that:

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

65. The Court of Appeal, *Anil v Ashur Ahmed Transporters Ltd [2023] KECA 1149 (KLR) [2023] KECA 1149 (KLR)* held that: -

> *"11. Under Section 8 of the Traffic Act, the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. Our understanding of this provision is that the registration of the vehicle is not conclusive proof of ownership but only prima facie evidence of title to a motor vehicle. The person in whose name the vehicle is registered is therefore presumed to be the owner thereof unless proved otherwise.*

66. In the instant matter the evidence is that the 3rd respondent is the registered owner of the subject motor vehicle. The 3rd respondent did not dispute the same. In exonerating him, the trial court's stated at paragraph 10 of the judgment that; 'the

undisputed fact is that the 1st respondent was running his own tasks.' That it is in evidence that he was not carrying out the business of the 2nd and 3rd defendant. Therefore, the 2nd and 3rd defendants cannot be held liable for the accident.

67. However, the 3rd defendant did not defend the suit and interlocutory judgment was entered against it. The trial court did not have any evidence upon which it based its finding that there was no relationship of whatever kind between the 1st and 3rd respondents. The 3rd respondent is the registered owner of the subject vehicle and therefore, there was need for an explanation as to how the 1st respondent came into possession of the motor vehicle. Therefore, the 3rd respondent could not be released from liability without any evidence.

68. Similarly, stretching liability under the doctrine of vicarious liability to the 2nd and 4th respondents

without the appellant satisfying the threshold of the doctrine is not tenable.

69. Consequently, the judgment of the trial court exonerating the 2nd and 4th respondent from liability is upheld whereas that regarding the 3rd respondent is set aside and judgment on liability entered in favour of the appellant as against the 3rd respondent. As such the 1st and 3rd respondent are held jointly and severally liable for the accident.

70. The appeal on quantum is not contested and in any case the parties who have been found liable have not challenged it.

71. Each party to meet costs of the appeal.

Dated, delivered and signed on this 25th day February 2026

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Ndungu for the Appellant

Mr. Okeyo for the Respondent

Ms Hannah court assistant