Issa Transporters limited v Tsama (Civil Appeal 107 of 2019) [2021] KECA 296 (KLR) (3 December 2021) (Judgment)

Neutral citation: [2021] KECA 296 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 107 OF 2019

A MBOGHOLI-MSAGHA, SG KAIRU & P NYAMWEYA, JJA

DECEMBER 3, 2021

BETWEEN

ISSA TRANSPORTERS LIMITED .... APPELLANT

AND

CHENGO PANGA TSAMA .... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Mombasa (D.O. Chepkwony, J.) delivered on 18th June 201 in Mombasa HCCA No. 151 of 2017)

JUDGMENT

1. This is a second appeal. The genesis of this appeal can be traced to Mombasa CMCC No. 346 of 2012 when the respondent filed suit against the appellant vide an amended plaint dated 9th October 2012. Prior to filing the amended plaint, the respondent had successfully made an application to enjoin one Jama Mohammed (2nd defendant) as a defendant in the suit.
2. The respondent alleged that on or about 10th May 2009, while the respondent was employed as a turn boy in the appellant's motor vehicle registration number KAY 054Q/ZC 3968, a Scania semi-trailer, the vehicle was negligently and carelessly driven by the appellant's duly authorized driver that he lost control and the motor vehicle crashed and overturned, as a consequence of which the respondent suffered severe injuries. The respondent prayed for the defendants to be held liable for the accident and the injuries and therefore prayed for judgment against the defendants for special damages of Kshs.1,500/=; general damages; costs and interest. The appellant denied the allegations as pleaded by the respondent and prayed that the suit be dismissed.
3. At the trial, it was only the respondent who called witnesses, that is, the respondent himself (PW1) and one Dr Ajoni Adede (PW2) who had examined the respondent and documented the injuries suffered. The appellant intended to call the driver of the motor vehicle but failed to do so after several adjournments and was compelled to close its case.

4. The learned trial magistrate was satisfied that the respondent had proved his case; and that the appellant had failed to controvert the evidence produced. The learned trial magistrate concluded that the appellant's driver was 100% to blame for the accident and that the appellant owed the respondent a duty of care. On quantum, the learned magistrate awarded the respondent Kshs.350,000/= general damages and Kshs.2,000/= as proved special damages.

5. Aggrieved by the decision of the learned trial magistrate, the appellant filed an appeal in Mombasa High Court Civil Appeal No. 151 of 2017 on the grounds that the learned trial magistrate erred in law and in fact by holding that the defendants were 100% vicariously liable for the accident; in failing to hold that the case had not been established against the appellant not being the owner of the accident vehicle and had nothing to do with the respondent's employment contract; in awarding Kshs.350,000/ = as general damages; and in failing to consider all the evidence and submissions on record.

6. On the issue of whether the appellant (1st defendant) was a proper party to the proceedings and whether vicarious liability had been established, the High Court noted that the appellant never amended its defence in response to the amended plaint that joined the 2nd defendant to the suit; and furthermore, that the appellant did not challenge or call any evidence to controvert the respondent's evidence. The High Court therefore held that the appellant was a proper party and was vicariously liable.

7. On apportionment of liability, the High Court held that no evidence was tendered by the appellant to contradict the occurrence of the accident, the extent of the respondent's blame for the accident, and the nature and severity of the respondent's injuries. The High Court found no reason to disturb the decision and award of damages and therefore dismissed the appeal.

8. The appellant, aggrieved by the decision of the High Court, filed this appeal on the grounds that the learned Judge erred in law and in fact by misapprehending the evidence and arrived at wrong conclusions; and by proceeding on wrong principles and so arrived on an erroneous decision. The appellant prays for orders that the judgment and decree of the High Court be varied or set aside; that the appeal be allowed with costs; and any other such orders this court may deem just. The appeal was argued by way of written submissions.

9. Counsel for the appellant submitted that the both the subordinate court and the High Court misapprehended the evidence on record leading to decisions that are perverse and bad in law. Counsel submitted that the burden of proof under Sections 107 and 108 of the *Evidence Act* rests on the party who desires the court to give judgment in his or her favour. Counsel cited *Kiema Mutuku v Kenya Cargo Handling Services Limited [1991] 2 KAR 258* for the proposition that aplaintiff must prove negligence against the defendant where the claim is based on negligence.

10. Counsel pointed out that the respondent, during examination in chief, blamed the driver for careless driving and losing control and that the driver was the owner of the motor vehicle and also the driver. Counsel submitted that the only blame attributable to the appellant was when the respondent stated that he blamed the appellant for safety apparatus, but failed to disclose the alleged apparatus being referred to, as the respondent had earlier admitted that he had put on a safety belt.

11. Counsel submitted that the respondent had stated in his testimony that "the luggage was for Issa Transporters. Juma I thought was the co-worker." Counsel contended that while the documentary evidence indicated that as at the date of the accident, the 2nd defendant was the registered owner of the motor vehicle, no evidence was led by the respondent to establish or prove contrary ownership as contemplated under Section 8 of the *Traffic Act*.

12. Further, the police abstract merely indicated the motor vehicle owner's address as being care of Issa Transporters. Counsel submitted that, the failure of the courts below to consider and uphold the ownership of the accident motor vehicle as per the records from the computerised motor vehicle registration system produced by the respondent was a misapprehension or error of law that led to their bad or perverse decisions.

13. Counsel contended that the police abstract cannot supersede or override the relevant official motor vehicle ownership records and can only be relied on as proof of ownership in the absence of anything to the contrary. Moreover, it was not demonstrated that the maker of the police abstract had personal knowledge on matters of ownership of motor vehicles; that the abstract information originated from a person possessing such personal knowledge; or that the abstract is part of a continuous record on vehicle ownership as required under Section 35 of the *Evidence Act*.

14. Counsel for the respondent submitted that the learned Judge applied the correct principles when dealing with the appeal as the first appellate court by analysing the evidence afresh which informed the decision to agree with the magistrate's findings. Counsel submitted that it was untrue that the respondent failed to prove that the appellant was the beneficial or actual owner of the motor vehicle since the respondent's testimony and tendered evidence in the form of the police abstract which was uncontroverted. That the evidence that the driver was a co-worker and the respondent was just a loader, and that the motor vehicle overturned leading to a presumption of negligence under the doctrine of res ipsa loquitor. The presumption of negligence and duty of care was not displaced when the appellant failed to call evidence to the contrary.

15. Counsel contended that there was ample evidence through the respondent's testimony and the police abstract produced at the hearing establishing the nexus between the appellant, respondent and the accident motor vehicle. During cross-examination, the appellant did not question the issue of ownership of the motor vehicle nor the evidence that the respondent was in the cause of employment with the appellant and that the driver was acting for the benefit of the appellant when the accident occurred. Counsel cited *Halsbury's Laws of England 4th Edition Volume 17 at paragraph 278* for the proposition that failure to cross-examine a witness on a material part of his evidence or at all may be treated as an acceptance of the truth of that part of his evidence.

16. It was further submitted that the copy of records is only prima facie evidence of ownership but is rebuttable and that in the instant case, the oral evidence and police abstract proved that the appellant was a beneficial or actual owner of the motor vehicle, thus displacing the prima facie evidence of the record of motor vehicle ownership. There was evidence that the appellant was in the course of employment by the appellant and that the goods being transported were for the benefit of the appellant. Counsel cited *Joel Muga Opija v East African Sea Food Limited [2013] eKLR* where the court held that the best way to prove ownership would be to produce a document from the Registrar of Motor Vehicles showing ownership but when the police abstract is not challenged and is produced in court without objection, its contents cannot be later denied.

17. Counsel submitted that the appellant's failure to call the driver of the motor vehicle as its witness allows for the inference that the evidence by the driver would have been unfavourable to the appellant's case if called; as per the holding in *Nguku v R [1985] KLR 412*. Counsel submitted that at the subordinate court, the appellant did not raise or submit on the issue of ownership of the motor vehicle and the issue of vicarious liability, which were only brought up in the appeal at the High Court.

18. Counsel contended that the appellant could not argue that liability was found against it in the face of the uncontroverted evidence regarding the nature of employment of the respondent and the driver employed by the appellant, the ownership of the goods in the vehicle, and the nature of the accident.

The evidence informed the presumption of negligence and shifted the burden to the appellant to show that the driver was not negligent.

19. Counsel also submitted that the vicarious liability was not only hinged on the issue of ownership but also the task being performed and for whose benefit. That the vehicle was transporting the appellant's goods for its benefit, therefore a presumption of agency arises as per the case of *Anyanzwa v Gasperis [1981] eKLR*.

20. As held in *Kenya Breweries Ltd V Godfrey Odoyo [2010] eKLR*, in a second appeal, this Court is confined to considering matters of law, unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.

21. Regarding the issue of who was the registered and or beneficial owner of the motor vehicle, the learned Judge found it telling that the appellant failed to call the driver as a witness; that the appellant did not file an amended defence after the amended plaint joined the 2nd defendant as a party; and that the appellant did not call any evidence challenging or controverting the respondent's evidence.

22. It is difficult to see how the learned Judge could have come to a different conclusion given the absence of any evidence on the part of the appellant. Analysed together, the record from the Registrar of Motor Vehicles and the police abstract indicated that while the 2nd defendant was registered as the owner of the vehicle, the appellant was a beneficial owner of the vehicle. Without any contradictory evidence called by the appellant, the respondent had sufficiently proved that the appellant was a beneficial owner of the accident vehicle. This Court in *Joel Muga Opija v East African Sea Foods Ltd [2013] eKLR* held that:

> " ...in our view an exhibit is evidence and in this case the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence...We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor Vehicles showing who the registered owner is, but when the Abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."

23. The evidence aside, the appellant, during the hearing and in submissions at the subordinate court, did not attempt to frame the issue of ownership as being pivotal to its case but instead chose to concentrate on the issue of liability for the accident, injuries to the respondent and the issue of quantum of damages. The learned Judge correctly viewed the failure of the appellant to call the driver as its witness in a negative light. This Court in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR* held:

> " We note that the failure to call a particular witness or voluntarily to produce documents or objects in one's possession is conduct evidence. (See J. Wigmore, Evidence § 265, at 87 (3d ed. 1940). In principle, failure by a party to call a material witnesses may be interpreted as an indication of knowledge that his opponent's evidence is true, or at least that the tenor of the evidence withheld would be unfavorable to his cause. An inference will not be allowed if a party introduces evidence explaining the reasons for his conduct, and reason for failure to call a witness and if the evidence is truly unavailable or shown to be immaterial."

24. Having correctly concurred with the finding that the appellant was a beneficial owner of the accident vehicle, the learned Judge was equally correct to concur with the finding that the appellant and the 2nd defendant were jointly and severally liable at 100%. The Judge rightly noted that the respondent had sufficiently demonstrated that the vehicle was being used for the appellant's benefit at the time; that the driver was acting as the appellant's agent; and that while driving fast, the driver lost control and the vehicle overturned and caused the respondent's injuries. This evidence was uncontroverted by the appellant, who also failed to demonstrate any of the negligent acts alleged to have been committed by the respondent in its statement of defence. In *JOSEPH COSMAS KHAYIGILA V GIGI & CO. LTD & ANOTHER Civil Appeal No. 119 of 1986*, this Court set out the test for establishing 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."

25. On the issue of quantum, the considerations to be taken into account before this court can interfere with an award of damages on appeal are set out in *Jane Chelagat Bor vs. Andrew Otieno Oduu [1988-92] 2 KAR 288; [1990-1994] EA 47*:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

26. In the present case, the appellant relied on a 1990 decision where the court awarded Kshs.120,000/= for similar but electrocution injuries to submit that Kshs.200,000/= was sufficient as general damages. The respondent's submission was that Kshs.500,000/= sufficed as general damages, based on a 2008 decision where for similar injuries and incapacity, the court awarded damages of Kshs.350,000/=. The learned Judge correctly analysed each party's proposal based on the cases cited and the rate of inflation at the time and rightly saw no reason to vary the finding of the subordinate court on quantum of damages.

27. Having considered the record before us, we are unable to find any fault on the part of trial court and the High Court. We find no merit in the appeal which is hereby dismissed with costs.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF DECEMBER 2021

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR