IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, OKWENGU & G.B.M. KARIUKI, JJ.A.)

CIVIL APPEAL NO. 228 OF 2005

BETWEEN

JOHN GICHUKI NDINGURI.....APPELLANT

AND

NJERI CHUCHU.....RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Ang'awa, J.**) delivered on 23rd day of March, 2004*

in

H.C.C.C No. 394 of 2003)

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JUDGMENT OF GITHINJI, JA

[**1**] This is an appeal from the Judgment of the High Court (**Ang'awa, J**) dismissing the appellant's suit for damages, arising from a road traffic accident.

[**2**] By a plaint filed in the High Court on 30th April 2003, the appellant averred that the respondent was the registered owner of motor vehicle registration number KAE 307Q Mitsubishi canter; that on 29th April 2002 he was lawfully travelling in the vehicle; that the respondent's driver, servant or agent carelessly and negligently drove the motor vehicle and caused it to veer off the road and ran into a tree causing an accident; and that the appellant sustained serious injuries and suffered loss and damage. He pleaded the particulars of negligence as driving at an excessive speed in the circumstances; failing to stop, slow down or swerve to avoid the accident and failing to take due care as expected of a prudent driver. He also pleaded the particulars of injuries as fracture of both femurs, dislocation of the right ankle, massive injuries on both thighs and deformed thighs.

[**3**] The appellant also pleaded the particulars of special damages as follows:

(a) police abstract - Shs. 100/-

(b) medical report - Shs. 2,000/-

(c) medical expenses - Shs.261,149/-

(d) loss of earnings - Shs. 25,000 per month

(e) Wheel chair - Shs. 4,500/-

[**4**] The respondent filed a defence. She denied the facts relating to the accident, pleaded and averred that the appellant was

not lawfully travelling in the said vehicle and that the driver was not negligent or careless. The respondent also denied the particulars of negligence and injuries and special damages.

[**5**] At the trial, the appellant gave evidence and called **PC Stephen Kinyanjui** – a traffic police officer who investigated the accident and **Dr. Peter Njuki Njeri,** a medical officer who examined the appellant. The appellant stated in his evidence that he was a businessman; that on the material day, he went to Kiambu and hired motor vehicle reg. No. KAE 307Q to deliver timber; that the vehicle delivered the timber; that as the vehicle was returning to Kiambu at about 5 p.m. the driver lost control of the vehicle and the vehicle overturned; that it was raining and the vehicle was traveling at speed of about 100 Kph; that he was taken to Kenyatta National Hospital and admitted for four months and that he was earning, Shs.50,000 from his timber business. PC Stephen Kinyanjui stated in his evidence, amongst other things, that he went to the scene of accident and drew a sketch plan; that the appellant was a passenger; that he issued a police abstract relating to the road accident and a P3 form to the appellant; that he recorded statements; that the accident was caused by carelessness of the driver; and that he charged the driver with the offences of careless driving and driving a defective motor vehicle.

[**6**] The respondent stated in her evidence at the trial that she was a business woman and that her motor vehicle Reg. No. KAE 307Q was used solely to distribute soda; that the vehicle was in the garage on the material day; that she did not know the circumstances under which the vehicle was collected from the garage; and that she did not permit the appellant to carry timber in the vehicle. The respondent however admitted that the appellant was travelling in the vehicle when he was injured and that the vehicle was being driven by her driver. In her evidence in cross-examination, she stated that the vehicle was taken from the garage by the appellant and her driver and that the vehicle was stolen.

[**7**] On the issue of liability, the learned Judge stated in the her judgment: -

"There was no attempt by the plaintiff to establish that he was a lawful passenger to be so authorised in the said vehicle. I would note the evidence of the two witnesses. I would believe the evidence of the defendant. I do so as the vehicle was reflected on the police abstract to be defective. The driver was careless in driving a defective vehicle. Further the owner of the said vehicle was known and was charged but the case seems to be pending before court. It seems that this driver may be a relative of the plaintiff. I would dismiss this suit on the issue of liability."

[**8**] The On the issue of damages, the learned Judge made a finding that had the appellant proved liability against the respondent, she would have awarded Shs. 150,000 as general damages, Shs. 1,750 for medical report and Shs. 150,000 for loss of earning, being loss of business at Shs. 25,000 per month for six months, and would have dismissed the rest of the claims of special damages.

[**9**] The appellant avers that the learned Judge erred in law and in fact by holding that by virtue of the respondent's agent being the appellant's relative, the respondent was not liable; by dismissing the suit without considering its merits; by not holding the respondent who had allowed a defective motor vehicle to be used vicariously liable; by believing the evidence of the respondent which was inconsistent and uncorroborated; by the dismissing the suit, yet holding that the respondent's agent was negligent; and by ignoring the appellant's evidence which was strong and consistent.

[**10**] The primary facts on which the suit was based are not in dispute. The respondent was the registered owner of motor vehicle Reg. No. KAE 307Q, a Mitsubishi Canter. The copy of the records from Registrar of Motor Vehicles produced at the trial proved that fact. In addition, the respondent admitted that the motor vehicle belonged to her. The appellant pleaded he was a passenger and that the motor vehicle was being driven by the respondent's driver or agent and that the driver caused the accident by careless driving. The appellant pleaded particulars of negligence and gave evidence in support of the evidence. PC Stephen Kinyanjui supported the appellant's evidence that he was a passenger; that the appellant was injured in the accident; and that the accident was caused by the negligence of the driver. The police abstract produced at the trial indicated that the respondent was the registered owner, and that the vehicle was being driven by JAIVES WATAKU CHUCHU. The respondent admitted in her evidence in cross-examination that the person who was driving the vehicle at the time of the accident was her driver. The trial court made a finding that the driver was negligent. Thus, the appellant proved that he sustained injuries as a result of a road traffic accident caused by the negligence of the respondent's driver.

[**11**] The main complaint in the appeal is that the learned Judge erred in not finding the respondent vicariously liable for the accident. This court is bound to re-evaluate, analyse and reconsider the evidence which was before the trial court, and make its own independent findings while giving due consideration to the fact that it has had no advantage enjoyed by the trial Judge of seeing and hearing the witnesses. As **rule 31** of the **Court of Appeal Rules 2010** provides, the Court has power to confirm, reverse and vary the decision of the trial court, remit the proceedings of the trial court or to order a re-trial.

[**12**] **Mr. Muchoki,** learned counsel for the appellant referred to the evidence and relied on the case of **Paul Muthui Mwavu v Whitestone (K) Ltd. [2015] eKLR**.

Similarly, Mr. Orwando for the respondent referred to the evidence and relied on three authorities viz; **Nakuru Automobile House Limited v. Ziaudin [1987] KLR 31**}; **Morgans v Launchbury [1972] 2 All ER 606** and **Joseph Cosmas Kyayigila v Gigi & Co. Limited & Another [1998] KLR 76**.

In **Morgans v Launchbury**, (supra) the House of Lords of United Kingdom held in part:

> ***"(1) In order to fix vicarious 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 his agent. To establish the existence of 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 a task or duty thereby delegated to him by the owner…"***

That principle has been applied in this jurisdiction as the cases of **Nakuru Automobile House Ltd. v Ziaudin** (supra), **Khayigila v Gigi & Co. Ltd.** (supra) illustrates. However, it is important to appreciate that vicarious liability of the owner of a motor vehicle arises in two situations:

> **(a) where the person driving the vehicle is the servant of the owner and driving the vehicle in the course of his employment, or**
>
> **(b) where the person driving the vehicle is an authorized agent of the owner and driving the vehicle for or on behalf of the owner.**

It is also important to appreciate that whether vicarious liability attaches to owner of a motor vehicle or not ultimately depends on the facts of each case.

[**13**] In the present case, the respondent admitted that the person who was driving the vehicle was her driver and that the driver went out to work with the vehicle. So according to the first principle in **Morgan's case** (supra), the respondent would normally be vicariously liable as the driver was her servant. It is evident from the portion of the judgment of the trial court quoted in paragraph 7 above that the trial judge did not adequately evaluate the evidence and the reasons for rejecting the appellant's claim, are somewhat unintelligible. The finding that the driver was a relative of the appellant was not supported by the evidence. Further, the fact that the vehicle was defective at the time of the accident was not a sufficient proof that the vehicle had been taken to the garage for repairs.

[**14**] The only defence to vicarious liability pleaded by the respondent was that the appellant was not lawfully traveling in the vehicle. The particulars of the defence were not given. By **section 109** of the **Evidence Act,** if the respondent wished the court to believe that the appellant was not lawfully travelling in the motor vehicle, the burden of proof was on her. Further, by **section 112** of the Evidence Act, whether or not the appellant was lawfully travelling in the vehicle was a fact specially within her knowledge, and the burden of proving or disapproving that fact rested on her. The respondent merely stated in her evidence that the vehicle had been taken to the garage; that the driver and appellant "**stole**" it from the garage and that she had not permitted the driver to hire out the vehicle to carry timber. Quite inconsistently, she stated that the driver went out to work with the vehicle. There was no concrete evidence to support those allegations. The respondent did not call any witnesses including the garage owner to show that the vehicle was in the garage or that she was solely running the business of distribution of soft drinks. It is obvious that the vehicle was a commercial truck and by admission of the respondent, she did not know the appellant before. Moreover, the respondent did not state in her evidence that she had given general instructions to her driver not to hire out the vehicle.

[**15**] On the facts of the present appeal, the evidence established that at the time of the accident, for which the respondent's driver was responsible, the respondent's driver was acting in the course of his employment as a driver and that the respondent was in law vicariously liable for the negligence of the driver her own employee.

[**16**] As regards general damages, the appellant's counsel submitted that the appellant sustained serious injuries and that the award of Shs. 150,000/- was inordinately too low and an erroneous estimate of damage. He cited the High Court case of **Solomon Muturi Evans & 2 Others v Mary Wangari Kungu [2003] eKLR** where an award of Shs. 400,000/- was given in 2003 for similar injuries. This is a case where the appellant sustained fracture of the right and left femur and other injuries. The fractures needed surgery and internal fixation by a plate and bone grafting. The fractures healed but the appellant was left with several ugly scars. He was discharged from hospital after four months on a wheel chair which he used for 3 months. He was left with a limping gait.

The assessment of damages is an exercise of judicial discretion and an appellate court can only interfere with the award if it is inordinately too low or too high as to represent an entirely erroneous estimate or if the judge applied wrong principles or misapprehended the evidence.

In this case, the learned Judge did not refer to the prevailing awards for similar injuries or give any reason for the award. In the circumstances, I am satisfied that the award of Shs. 150,000/- was too low and erroneous and should be enhanced to Shs. 400,000/-.

The appellant testified that he paid Shs. 241,149/- to Kenyatta National Hospital as medical expenses and produced a receipt, which the court

admitted as evidence, but allowed the respondent to call rebuttal evidence. The respondent did not call rebuttal evidence. The claim was rejected for the reason that the receipt was inadmissible in law. The claim was rejected in error, as the learned Judge admitted the documentary evidence and there was no evidence to show that the receipt was not genuine. There was no appeal or cross appeal against the other awards of special damages or against the rejection of some claims.

[**17**] For the foregoing reasons, I would allow the appeal and set aside the judgment of the High Court. I would allow the appellant's claim and enter judgment for the appellant against the respondent on liability and assess damages as follows:

(i) General damages for pain and suffering - Shs. 400,000/-

(ii) Special damages

(a) Medical report - Shs. 1,750/-

(b) Medical expenses - Shs. 241,149/-

(c) Loss of earnings - Shs. 150,000/-

Total = Shs. 792,899/-

[**18**] In view of the long delay in the conclusion of the trial and the appeal, the judgment sum shall carry interest at court rates from the date of this judgment.

[**19**] As **Okwengu, JA** agrees, judgment is entered for the appellant in terms of paragraph (17) above. The judgment sum shall carry interest at court rates from the date of judgment.

This judgment is read pursuant to Rule 32(3) of the Court of Appeal Rules, **G.B.M. Kariuki, JA** having ceased to hold office.

Dated and Delivered at Nairobi this 31st day of July, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGEMENT OF HANNAH OKWENGU. JA.

I have had the advantage of reading the judgment of Githinji, JA in draft. I agree with the judgment and I have nothing useful to add. The judgment of the court shall be in terms of paragraph 19 of the judgment of Githinji, JA.

Dated and delivered at Nairobi this 31st day of July 2018.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR