



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 24 OF 2015

BETWEEN

JOHN NDERI WAMUGI ..... APPELLANT

AND

RUHESH OKUMU OTIANGALA ..... FIRST RESPONDENT

JULIUS THIGA KAREMI ..... SECOND RESPONDENT

GEOFFREY KAREMI THIGA ..... THIRD RESPONDENT

*(An appeal arising out of the Judgment of the High Court of Kenya at Busia, (Tuiyott, J.) dated 12<sup>th</sup> February, 2015*

in

H.C.C.A. NO. 56 OF 2013)

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JUDGMENT OF THE COURT

1. On 12<sup>th</sup> September, 2000 **Ruhesh Okumu Otiangala**, the 1<sup>st</sup> respondent, was travelling as a fare paying passenger in a motor vehicle registration number KAM 343 C when the motor vehicle was involved in a road traffic accident along Busia - Mumias road and he sustained various bodily injuries.
2. At the time of the accident, the said motor vehicle was being driven by **Julius Thiga Karemi**, the second respondent, as an employee of **Geoffrey Karemi Thiga**, the 3<sup>rd</sup> respondent.
3. By an agreement dated 23<sup>rd</sup> October, 1999, the 3<sup>rd</sup> respondent had purchased the said motor vehicle from **John Nderi Wamugi**, the appellant, but as at the date of the accident the transfer had not been registered.
4. Following the said accident, the first respondent filed a suit, **CMCC No. 34 of 2001 at Busia**, against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as well as the appellant. The trial court entered judgment for the plaintiff (1<sup>st</sup> respondent) against the three defendants, jointly and severally. General damages were assessed at Kshs.200,000/=.

5. The appellant was aggrieved by the said decision and preferred an appeal to the High Court, basically arguing that the trial court erred in finding him liable for the said accident, having sold the motor vehicle in question to the 3<sup>rd</sup> respondent long before the occurrence of the accident.

The appellant added that he had already received the full purchase price for the motor vehicle, though he had no documentary evidence as to when he was paid.

6. The second and third respondents contested the appeal, arguing that according to conditions **3** and **4** of the **sale agreement** in respect of the motor vehicle, ownership of the same had not passed to the 3<sup>rd</sup> respondent since the appellant was still in possession of the vehicle registration (**log**) book.

The said conditions stipulated as follows:

**“3. The seller undertakes to sign transfer documents in favour of the buyer upon the buyer completing payment under this agreement.**

**4. The seller further undertakes to hand over all title documents to the buyer upon fulfillment of condition 3 hereof.”**

7. The High Court, (**Tuiyot, J.**) held that the appellant had failed to prove that he had received the full purchase price as at 12<sup>th</sup> September, 2000 when the accident occurred and therefore property in the vehicle had not passed on to the 3<sup>rd</sup> respondent.

The court stated:

**“For this reason the appellant had not, on a balance of probabilities, proved that contrary to being the registered owner of the motor vehicle, the real owner was the 2<sup>nd</sup> respondent.”**

The appeal was thus dismissed.

8. Undeterred, the appellant preferred a second appeal to this Court. More or less the same arguments as those made before the High Court were repeated before us. The appellant contended that the High Court erred in law in holding him liable for the accident of 12<sup>th</sup> September, 2000 when by that date he had already sold the motor vehicle and the 3<sup>rd</sup> respondent had taken full possession of it and obtained appropriate insurance cover for it.

9. Apart from advancing the above arguments, **Mr. Samba**, the appellant’s learned counsel, also submitted that the learned judge misdirected his mind on the issue of vicarious liability, arguing that at the time of the accident the second respondent was not driving it on behalf of and/or for the benefit of the appellant. The second respondent had sworn an affidavit stating that he was in the employment of the 3<sup>rd</sup> respondent.

10. **Mr. Manwari**, learned counsel for the respondent, submitted that the outcome of the appeal was hinged on the intention of the parties as to when property in the motor vehicle was to pass to the buyer, the third respondent. He urged the Court to consider the provisions of **section 20 (a)** of the **Sale of Goods Act** in light of special conditions numbers **2** and **3** in the sale agreement. Since transfer of ownership of the motor vehicle had not been effected as at the date of the accident, the appellant was jointly liable, counsel added.

11. We have considered the entire record of appeal as well as the rival submissions by counsel. Vicarious liability is not pegged on legal ownership but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor. There is no dispute that on 23<sup>rd</sup> October, 1999 the appellant sold the motor vehicle to the third respondent. Although the appellant retained the motor vehicle registration book pending payment of the full purchase price, the third respondent had full use and control of the motor vehicle. There is also no dispute that the second

respondent was driving the motor vehicle as an employee of the third respondent when the accident occurred on 12<sup>th</sup> September, 2000 resulting into injury of the first respondent, who was a passenger therein.

12. Under those circumstances, **section 20 (a)** of the **Sale of Goods Act** is of little relevance, if at all, in determining whether the appellant was vicariously liable for the second respondent's negligence. The section provides as follows:

**“Unless a different intention appears, the following rules apply for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer-**

- a. **Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed.”**

13. With due respect to learned counsel for the respondent, the principle of passage of property rights had nothing to do with this matter. Passage of property is a contracted principle and its relevance with respect to the **Sale of Goods Act** is to determine the point at which a seller ceases to be the owner of property and the buyer assumes ownership of the said property.

On the other hand, vicarious liability is a doctrine in the law of torts that assigns liability for an injury to a person who did not personally cause the injury but who has a particular legal relationship to the person who acted negligently. Such liability is not pegged on ownership, but on the legal relationship, for example between an employer and an employee.

14. The main issue that fell for determination by the first appellate court was whether, in the aforesaid circumstances, the appellant was vicariously liable for the negligent acts of the 2<sup>nd</sup> respondent, the lawful driver of the motor vehicle. **BLACK'S LAW DICTIONARY**, 9<sup>th</sup> edition at **page 998** defines vicarious liability in the following words:

**“Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.”**

15. In **HCM ANYANZWA & 2 OTHERS V LUIGI DE CASPER & ANOTHER** [1981] KLR 10, this Court held that *“vicarious liability depends not on ownership but on the delegation of tasks or duty.”* We believe the learned judge misdirected himself when he addressed himself to the issue of legal ownership of the motor vehicle in determining whether the appellant was vicariously liable for the tort of negligence committed by the second respondent, who was an employee of the third respondent. It is the third respondent who had supervisory power over his driver and not the appellant. The appellant cannot therefore be held to be vicariously liable.

16. The reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle in a case of this nature, to the total exclusion of employer/employee relationship, would amount to grave injustice to the appellant.

17. For these reasons, we allow the appeal and set aside the judgment of the trial court and that of the High Court as against the appellant.

For avoidance of doubt, the decree that flowed from the trial court shall be executed as against the second and third respondents, jointly and severally, to the total exclusion of the appellant. The second and third respondents shall bear the appellant's and first respondent's costs of the suit in the trial court, the High Court and in this Court.

**DATED and delivered at Kisumu this 17<sup>th</sup> day of November, 2015**

**D. K. MARAGA**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**