



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAKURU

Civil Appeal 210 of 2006

LAKE FLOWERSAPPELLANT

AND

CILA FRANCKLYN ONYANGO NGONGA (*Suing as the personal legal representative of the Estate of FLORENCE AGWINGI OGAM (deceased)*)1ST RESPONDENT

JOSEPHINE MUMBI NGUGI2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Ondeyo, J)

dated the 20th day of September 2002 in H.C.C.C. No. 181 of 2001)

JUDGMENT OF THE COURT

On 28th August, 2000 *Cila Franklyn Onyango Ngonga*, herein the respondent, was travelling to Nairobi from Kisumu with his wife *Florence Agwingi Ogam*, the deceased, when the motor vehicle registration number *KAK 787T* herein, “*the nissan matatu*”, they were travelling in was involved in an accident with another motor vehicle registration number *KAH 331M* Mitsubishi canter herein, “*the mitsubishi canter*”, at Kinale in which the deceased and her child died. The respondent who was injured in the same accident took out letters of administration in respect to the deceased estate and filed a suit in that behalf in the superior court at Nakuru under both the Fatal Accidents and Law Reform Acts. The case was heard by *Ondeyo, J.* as she then was, on 18th June 2002. It appears to us that though counsel for the appellant was present, his clients did not turn up on the date fixed for the hearing of the case hence it did not testify in or defend it. The learned Judge wrote and delivered her reserved judgment on 20th September 2002 as a result of which she awarded the respondent a sum of *Kshs.10,000/=* for pain and suffering, *Kshs.80,000/=* for loss of expectation of life and *Kshs.784,662/=* for loss of dependency. There was also an order for costs of the suit and interest at court rates.

The appellant was said to be the owner of the mitsubishi canter. This is the motor vehicle the respondent testified he saw attempting to overtake another on coming white car from the Nairobi direction and which came directly into the way of and hit the front part of the nissan matatu thereby killing the deceased and her child instantly. The learned Judge wholly blamed the driver of the mitsubishi canter for the accident.

The appellant was dissatisfied with this decision and has filed this appeal. In its Memorandum of Appeal dated 6th September, 2006 and filed in the Court's sub-registry at Nakuru on 11th September, 2006, it has listed seven (7) grounds of appeal, namely:-

- 1. The learned Judge erred in fact and in law by failing to give a concise statement of the case, the points for determination, the decision thereon and the reasons for her judgment pronounced on 20th day of September, 2002**
- 2. The learned Judge erred in fact and in law in misdirecting herself that the 1st respondent had proved his claim as pleaded in the plaint.**
- 3. The learned Judge erred in fact and in law in entering judgment against the appellant on a finding of negligence and vicarious liability which had not been pleaded in the plaint.**
- 4. The learned Judge erred in fact and in law in holding that ownership of the vehicle KAH 331M Mitsubishi Canter had not been denied by the appellant and was not an issue to be proved by the 1st respondent at the hearing and failed to appreciate that the 1st respondent had failed to discharge the burden of proof placed upon him as a matter of law.**
- 5. The learned Judge erred in failing to hold that the 1st respondent had failed to prove that the appellant was the "registered owner, servant, driver and/or agent or(sic) motor vehicle registration number KAH 331m Mitsubishi canter as pleaded by the 1st respondent in the plaint and erred in fact and in law in finding that:**
 - (i) the canter (vehicle KAH 331M) was registered in the name of the 2nd defendant in absence of any evidence.**
 - (ii) the appellant was liable for the actions of the driver who was not a party to the suit and in the absence of any evidence as to who was the driver of the vehicle.**
 - (iii) the appellant was vicariously liable in the absence of any pleadings and/or evidence of vicarious liability.**
- 6. The learned Judge erred in holding that the appellant was wholly to blame for the accident, was overtaking in absence of any pleading in plaint and any conclusive evidence of overtaking and erred in entering judgment against the appellant only whilst dismissing the case against the 2nd respondent.**
- 7. The learned Judge failed to appreciate the totality of the evidence before her and in not considering the submission on behalf of the appellant."**

At the hearing of this appeal on 2nd October, 2008 **Mr. Mahida** – learned counsel for the appellant submitted that there were no particulars of negligence or vicarious liability pleaded in the plaint against the appellant and that the ownership of the mitsubishi canter was not proved. According to counsel, production of the police abstract to show ownership was not enough and that the respondent needed to do more. He submitted further that since the evidence showed that visibility was poor the Judge was wrong in absolving the 2nd respondent and wholly blaming the appellant for the accident.

Miss Ateya – learned counsel for the 1st respondent submitted that her client pleaded particulars of negligence in the plaint against the appellant and that the appellant was correctly found to be vicariously liable for the accident as owner of the mitsubishi canter. She stated that according to the appellant's defence, the particulars of the accident attributed to the negligence of the defendants was admitted and that failure to enjoin the driver of the appellant's motor vehicle to the suit was not fatal to the 1st respondent's claim. Counsel said that though visibility was reduced, the respondent clearly saw what happened. The 2nd respondent did not take part in this appeal, she having been absolved from blame by

the superior court.

Being a first appeal, the principles upon which this Court acts are well settled in that the 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 that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that she 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 – ***Selle v. Associated Motor Boat Company [1968] EA 123.***

The record of the superior court shows that after the respondent testified and closed his case on 18th June, 2002, counsel for the appellant and the 2nd respondent applied for an adjournment in order to summon their witnesses who were not in court at that time. This application was, however, refused by the trial Judge, who said:

“This plaintiff’s case was filed in court on 25.5.01, one year ago. The plaintiff has testified and closed his case. None of the defendants is present in court. Counsel for the 1st defendant says that they would attend and he does not know why he is not here. Counsel for the 2nd defendant says that he notified his client of the hearing date and does not know why he is absent. He wishes to call a police witness. It is not known why he did not do so much earlier. I have no reason why the defendants’ lots then (sic) witnesses are not here having known the hearing date. I refuse the application to adjourn as such adjournment only clear (sic) backlog of case. If the defence has no witnesses present the defence case should be closed.”

As a result of this ruling the defence counsel closed their clients’ defences. In her reserved judgment aforesaid, the learned Judge said:

“Although the Plaintiff said that the collision took place because the canter started to overtake when it was not safe to do so this is not set out in the particulars of negligence set out in the plaint and attributed to the driver of the canter. However, even if the said driver was not overtaking the plaintiff’s evidence is that the canter pulled out from the right onto the left where the Nissan was traveling and that is how the collision took place. The defendant No. 2 did not call any evidence to deny what the plaintiff said took place and how it took place. Therefore whether the driver of the canter was overtaking or not, I find that he left his side of the road, in foggy weather and came onto the Nissan’s side and that is what caused the collision. To drive on the wrong side of the road more so when it is foggy and when visibility is not clear, is to driver carelessly, and without due regard to other road users. The driver of the canter was obviously to blame for the collision.”

Counsel for the appellant disputes this finding and submits that the evidence adduced by the 1st respondent did not establish that the appellant was the owner of the canter motor vehicle or that it was to blame for the accident or that it was shown to have been negligent.

It is true that in paragraph 2 of the appellant’s defence, it was stated that:-

“Save that the 2nd dependent is party to the suit and its address for service is care of Jones & Jones, Advocates National Bank Building Second Floor, Kenyatta Avenue, P.O. Box 73, NAKURU the second defendant denies each and every allegation contained in paragraph 3 of the plaint.”

Paragraph 4 of the same defence repeated what was stated in paragraph 3 thereof, adding:

“and denies each and every allegation contained in paragraph 4, 5, 6 and 7 of the plaint and denies that it was negligent as alleged or at all and further denies each and every particulars of negligence. The second defendant further states that the collision was solely caused and or contributed to by the negligence of the first defendant by herself, her driver or servant who so negligently drove, managed

and controlled their vehicle KAK 787T in the opposite direction that he caused or permitted the same violently to collide with the second defendant's motor vehicle."

The appellant then proceeded to give particulars of negligence of the 2nd respondent by herself, her driver, agent or servant. But when the 1st respondent testified and said it was the owner (*the 2nd defendant*), his driver, agent or servant who drove the mitsubishi canter from its correct side of the road onto the way of the nissan matatu there was no evidence from the appellant to controvert it. This is because counsel for the appellant was not granted the adjournment sought in order to avail his witnesses. And in view of the 1st respondent's evidence which was thus unchallenged and which questioned the manner of driving of the appellant's driver, the learned Judge made the remarks in her Judgment which we have already referred to herein before holding the appellant wholly liable for the accident She, however, exonerated the 2nd respondent from blame.

Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and and/or attempt to partly or wholly blame the 2nd respondent for the accident on this appeal. Neither can it deny the ownership of the mitsubishi canter without any evidence to counter the police abstract produced by the 1st respondent which shows it to be the owner of that motor vehicle.

We agree with the appellant's complaint both in the Memorandum of Appeal and the submissions before us that vicarious liability was not pleaded in the plaint; and that the driver of the mitsubishi canter was not joined as a party to the proceedings in the superior court. However, it is our view that the failure to sue the appellant's driver and the omission by the 1st respondent to directly refer to the appellant's liability as being vicarious was not necessarily fatal to his claim. It is sufficient that the relevant primary facts were pleaded and evidence led to show the owner of the mitsubishi canter and from which vicarious liability can be inferred as a matter of law. And as was put in *Dritoo v. West Nile District Administration [1968] E.A. 428:-*

"Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible." Emphasis supplied.

In *Ndungu v. Coast Bus Company Limited [2000] 2 E.A. 462* it was held that:-

"From the authorities (Selle & Another V Associated Motor Boat Company Limited & Others [1968] EA 123 (ibid) and Mwonja V Kakuzi [1982] 46 (CAK) it would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged to the employee's liability but to his negligence."

And from the Memorandum of Appeal and the submissions made before us, there is no complaint against the quantum of damages awarded by the superior court. In the result, this appeal has no merit and we order it dismissed with costs to the 1st respondent.

Dated and delivered at NAKURU this 14th day of November, 2008

P. K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR