Juhudi Kilimo Company Limited v Amwayi & another (Suing as the legal representatives of the Estate of Grace Khasandi) & another (Civil Appeal E031 of 2023) [2024] KEHC 5333 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E031 OF 2023

REA OUGO, J

APRIL 26, 2024

BETWEEN

JUHUDI KILIMO COMPANY LIMITED ..... APPELLANT

AND

ALFRED MWANJE AMWAYI & ANGELINE ALIMA AMWAYI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GRACE KHASANDI) ..... 1ST RESPONDENT

PETER KHAKINA KHAEMBA ..... 2ND RESPONDENT

(Being an appeal against the ruling of Honourable J.Obeto Manasses, Resident Magistrate, delivered on 13th April 2023 at Sirisia in Civil Suit No. E079 of 2022)

JUDGMENT

1. The 1st respondents are the plaintiffs before the subordinate court and they sued the appellant and the 2nd respondent as 1st and 2nd defendants respectively. They alleged that the appellant and the 2nd respondent are the registered/legal/beneficial owners of motor vehicle registration number KBP 304K Fuso Canter. They alleged that the vehicle caused an accident that led to the death of Grace Khasandi and that the appellant and the 2nd respondent should be held vicariously liable for the actions or omissions of the driver.

2. The appellant at the lower court filed a notice of motion dated 18/1/2023 seeking to be struck out from the suit. Its application was on grounds that its role as the co-owner of the motor vehicle was limited to that of a financier. The appellant was neither in possession of nor in control of motor vehicle registration number KBP 304K Fuso Canter at the time when the alleged accident occurred.

3. An affidavit by its branch manager, Justine Kipkorir Kiprop was filled with the application. It was averred that the appellant agreed to advance the 2nd respondent a loan facility of Kshs 600,000/- payable at the interest rate of 19% per annum. To secure the appellant's interests as the financier, the appellant offered the vehicle as security for the loan. The said motor vehicle was jointly registered in the name of the appellant and the 2nd respondent. At the time of the accident, the appellant was neither the principal nor the insured of the said motor vehicle. Therefore, joint ownership was not sufficient to create vicarious liability on the part of the appellant. The appellant claims that he cannot be held liable for any acts of the driver of the motor vehicle who was in full control of the vehicle at the time of the accident simply by the fact that the appellant is the co-registered owner of the suit motor vehicle.

4. The application was opposed by the 1st respondent who filed their replying affidavit dated 12/2/2023. It was deposed that the appellant's application contained false statements and mere denials. It was averred that the appellant is the duly registered owner of the vehicle according to the NTSA records and that the appellant has not provided any proof to the contrary to warrant its name to be struck off.

5. The trial magistrate upon hearing the application arrived at the following decision:

> "After considering the pleadings as well as the submissions thereof, this court determines thus:
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> Application dated 18/1/2023 is dismissed with costs to the respondents.
>
> First defendant has an option at liberty to remain a party to this suit or the very least, an interested party but must definitely be party to these proceedings as the copy of records herein are not contested per se by the applicant. Besides, this court is interested in justice."

6. The appellant dissatisfied with the finding of the trial magistrate has preferred this instant appeal on the following grounds:

    1. that the learned trial magistrate erred in law and fact in dismissing the appellant's application dated 18th january, 2023 without considering the appellant's submissions as well as the authorities cited.

    2. that the learned trial magistrate erred in law and facts in failing to make a finding and/or hold that the appellant is not a necessary party to the proceedings.

    3. that the learned trial magistrate erred in law and facts in failing to take into account the disclosed relationship between the appellant and the 2nd respondent.

    4. that the learned trial magistrate erred in law and fact by failing to take into account that the appellant was neither the principal nor the insured nor in control or management of motor vehicle kbp 304k fuso canter at the time of the alleged accident.

    5. that the learned trial magistrate erred in law and fact by failing to take into account and making a finding and/or holding that the appellant was merely jointly registered as the owner of the suit motor vehicle of being a financier for the acquisition of the suit motor vehicle by the 2nd respondent and that its interest was limited to the recoveries of monies let to the 2nd respondent.

    6. that the learned trial magistrate erred in law and fact in failing to take into account and making a finding that vicarious liability does not depend on ownership but on the delegation of tasks or duty.

7. that the learned trial magistrate erred in law and fact in failing to take into account that cause of action has been disclosed by the 1st respondent against the appellant

7. The appellant in his submissions argued that it is trite law that vicarious liability does not depend on ownership but on the delegation of tasks or duty. He relied on the case of *Consolidated Bank of Kenya Limited v Mwangi & another (Civil Appeal E056 of 2021)* [2022] KEHC 3104 (KLR) (Commercial and Tax) (8 July 2022) (Judgment) where the court held as follows:

> "Ownership of a motor vehicle does not, of itself, establish liability for an accident. The plaintiff must prove that the owner is vicariously liable for the acts of the driver of the motor vehicle by showing that the driver is an employee or agent (see *Jane Wairimu Turanta v Githae John Vickery and Equity Bank Limited & Munene* Don ML HCCC No. 483 of 2012 [2012] eKLR). As whether the owner who has a financial interest in a motor vehicle has control over the driver, which is at the heart of this appeal, our courts have held that a financier's only interest in the security is to secure the repayment from the owner and it is not in control of the motor vehicle for that reason. In *Ali Abdi Dere v Hash Hauliers Limited & Another MKS* HCCC No. 16 of 2014 [2018] eKLR the court held that the position of a financier was merely to protect its interest in the motor vehicle it had financed and could not be held vicariously liable for the actions of its driver while in *Justus Kavisi Kilonzo v Coast Broadway Company Limited* MSA HCCC No. 169 of 2007 [2008] eKLR the court was of the view that a financier who had been registered as a co-owner of a motor vehicle did not mean that it was a necessary party to proceedings. The same position was taken by the Court of Appeal in *Mohammed Hassan Musa and Another v Peter Mailanyi and Another* NYR CA Civil Appeal No. 243 of 1998 [2000] eKLR stated as follows:
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> There is one other aspect of this appeal that we feel we must comment on. The plaintiff is an Advocate of the High Court of Kenya but in his attempt to realise the decree he resorted to what in effect amounted to jungle law. The third defendant, Diamond Trust (K) Ltd, which had nothing to do with the accident but had merely only financed the purchase of the motor vehicle which caused the accident was wrongly sued and attached. [Emphasis mine]"

8. The appellant submits that the 1st respondent's claim against the appellant is incompetent, misconceived, and legally untenable as no vicarious liability stands against the appellant.

9. The 1st respondent on the other hand submits that the appellant was properly enjoined to the proceedings by dint of them being the registered owner. The provisions of sections 8 and 9 of the *Traffic Act* Cap 403 are to the effect that the owner of the motor vehicle is the person whose name is registered. The 1st respondent produced a copy of records to show that the vehicle was jointly under the ownership of the appellant and the 2nd respondent. They submit that one cannot run away from liability whilst they claim ownership. They relied on the case of *Hotsun Enterprises Ltd b Judith Awino Onyango and Peter Shibanda Angamia v Eldoret Express & Anor* where the court held that a police abstract was capable of establishing on the balance of probabilities ownership of a motor vehicle and more so where the defendant fails to lead evidence to disapprove the fact.

Analysis And Determination

10. Having considered the appeal, and the rival submissions by the parties, the only issue before the court is whether the appellant was properly enjoined as a party in the proceedings before the subordinate court.

11. It is not in dispute that the appellant and the 2nd respondent are the registered owners of motor vehicle registration number KBP 304K Fuso Canter. However, the appellant in this case produced a letter

dated 16/5/2022 marked as JKK1 in which it approved the 2nd respondent's loan application. It also produced the 2nd respondent's loan account statement for the Kshs 600,000/- loan. This court in Jane Wairimu Turanta v. Githae John Vickery and Equity Bank Limited & Munene Don, Nairobi HCCC No. 483 of 2012 held:

> " The respondent raised the issue of vicariously liable since the logbook was jointly owned by the Bank and Munene Don. The doctrine of vicarious liability was expounded in the case of *Morgan vs Launchbury* (1972) 2 ALL ER 606 which stated that to establish agency relationship it was necessary to show that the driver was using the car at the owner's request express or implied or in his instruction and was doing so in performance of the tasks or duty thereby delegated to him by the owner. Moreover, the fact that the applicant was the owner of the vehicle by way of the log book being in its name.
>
> Such ownership was not sufficient to create vicarious liability for the negligence of anyone happened to drive it.
>
> It is common ground now that the Munene Don was not the servant of the applicant within the normally accepted meaning of vicarious liability from the facts Munene Don and the Bank would not ordinarily be vicariously liable for the tort of Munene Don since it was not an agent. The case of *HCM Anyanzwa & 2 Others vs Lugi De Casper & Anor* (1980) KLR 10 stated that "vicarious liability depends not on ownership but on the delegation of tasks or duty.""

12. It is clear that theappellant's interest in the vehicle was to secure its financial interest. The trial magistrate failed to consider that the 1st respondent did not prove that the appellant had control of the driver of the vehicle and therefore vicariously liable for the acts of the driver of the motor vehicle.

13. It is evident that the role of the appellant, in this case, was purely that of a financier concerned with repayments of the funds lent to the 2nd respondent and it safeguarded its interest by ensuring the joint registration with the 2nd respondent as owners of the said motor vehicle. Therefore, the ruling dated 13th April 2023 is hereby set aside and substituted with an order that the Appellant's application dated 18th January 2023 is allowed. The 1st respondent shall bear the costs of the appeal. The lower court file shall be transmitted back to the CMs Court for hearing and determination.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF APRIL 2024.

R.E. OUGO

JUDGE

In the presence of:

Miss Omuya h/b for Mr. Nyabegera -For the Appellant

1st Respondent - Absent

2nd Respondent - Absent

Wilkister C/A