REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 184 OF 2011

VYAS BROTHERS LIMITED……..……..… APELLANT

VERSUS

SHADRACK LAGAT ……..... RESPONDENT

(An Appeal from the Judgment and Decree of the Principal Magistrate Honourable D.K KEMEI (PM), in Eldoret CMCC No. 838 of 2009, dated 27th October, 2011)

JUDGMENT

1. The appellant *Vyas Brothers Ltd* is aggrieved by the judgment and decree of the lower court in Eldoret CMCC No. 838 of 2009. The appellant was the defendant in the suit filed in the lower court while the respondent *Shadrack Cheruiyot Lagat* was the plaintiff.

2. In his amended plaint dated 21st April, 2010, the respondent sued the appellant seeking special and general damages for injuries sustained on 26th March, 2009 while he was travelling in motor vehicle registration No. KAV 112S which was owned by the appellant.

It was the respondent's case that the accident occurred because of the negligence of the appellant's authorized driver or agent in the manner in which he drove, controlled or managed motor vehicle registration No. KAV 112S. The particulars of the alleged negligence were pleaded at paragraph 4 of the amended plaint.

3. In its amended statement of defence dated 23rd February 2010, the appellant admitted that its motor vehicle registration No. KAV 112S was involved in an accident on 26th March, 2009 but denied that the respondent was injured in the accident as alleged or that it had authorized any person to drive the aforesaid motor vehicle on that day. In the alternative, the appellant pleaded that the respondent by his negligent conduct contributed to the occurrence of the accident. The particulars of the respondent's alleged contributory negligence were pleaded in paragraph 7 of the amended defence.

4. After a full trial, the learned trial magistrate entered judgment on liability in the ratio of 70:30 for the respondent against the appellant. He also awarded the respondent general damages in the sum of Kshs.400,000 together with costs and interest. The amount was reduced to Ksh. 280,000 after taking into account the respondent's 30% contribution.

5. This is the judgment that gave rise to the instant appeal. In its amended memorandum of appeal contained in a supplementary Record of Appeal filed on 14th August, 2014, the appellant relied on ten

grounds of appeal which as are follows:-

i. The learned trial magistrate erred in law and in fact in holding the defendant/appellant vicariously liable for the acts of Kaushal Patel.

ii. The learned trial magistrate erred in law in failing to appreciate what constitutes vicarious liability.

iii. The learned trial magistrate erred in law and in fact in failing to note that the plaint as pleaded makes no reference to vicarious liability.

iv. The learned trial magistrate erred in law and in fact in holding that most people are colour blind without any evidence being led to the effect by the respondent and that finding by the learned trial magistrate was a misdirection in law and totally uncalled for.

v. The leaned trial magistrate erred in law and in fact in failing to hold that the respondent was most probably injured at some other place and only relied on the description of the appellant's motor vehicle as appearing in the official search certificate in order to file suit.

vi. The learned trial magistrate erred in law and in fact in holding that the defendant did not join Kaushal Patel to the proceedings when in fact it was the plaintiffs duty to sue the correct party.

vii. The learned trial magistrate erred in law and in fact in failing to hold that the failure to join Kaushal Patel as a third party did not change the established law governing vicarious liability.

viii. The learned trial magistrate erred in fact and in law in failing to appreciate that Kaushal Patel was employed by the appellant as a manager and not a driver and his handling of the appellant's motor vehicle was therefore illegal and without authority.

ix. The learned trial magistrate erred in law and in fact in giving the phrase 'mutual arrangement between the defendant (now appellant"' a wide interpretation to include illegal and unauthorized acts of the appellant's employees thus pegging liability on the appellant for acts clearly not authorized by the appellant.

x. The learned trial magistrate erred in law and in fact in failing to hold that Kaushal Patel being not in possession of a drivers licence could not by any stretch of imagination be an authorized driver.

6. The parties agreed that the appeal be prosecuted by way of written submissions. Those of the appellant were filed on 12th March, 2015 while those of the respondent were filed on 15th June, 2015. By consent of the parties, the written submissions were highlighted before me on 1st March, 2016. Learned counsel *Mr. C.F Otieno* appeared for the appellant while learned counsel *Mr. Marube* represented the respondent.

7. This is a first appeal to the High Court. It is thus an appeal on both facts and the law. I am alive to the duty of the first appellate court which is to re-evaluate and reconsider the evidence presented to the trial court in order to draw its own independent conclusions regarding whether the judgment of the lower court should stand. In so doing, I should remember that unlike the trial court, I did not have the benefit of seeing or hearing the witnesses and give due allowance for that disadvantage.

8. It is also trite that an appellate court should be slow to interfere with findings of fact made by a trial court. An appellate court should only reverse findings of fact made by a lower court if it is satisfied that the findings were based on no evidence or on a misrepresentation of the evidence or that in reaching such findings, the trial court applied wrong legal principals – See: ***Sumaria Another V Allied Industrial Limited (2007)2 KLR 1***; ***Peters V Sunday Post Ltd (1958) EA 424; Jabane V Olienja (1986) KLR 661.***

9. Briefly, the evidence tendered before the lower court is that the appellant through another company

known as Ndovu Estates Limited owned a farm in Narok which neighboured another farm owned by one R.M Patel. The respondent and his witness (PW2) were employed in R.M Patel's farm. On 26th March, 2009, the respondent was in the said farm when his supervisor one *Amit* instructed him and eight other workers to board motor vehicle Registration No. KAV 112S a Toyota Land Cruiser which was being driven by the appellant's servant one *Kaushal Patel.* PW2 was among the eight workers. They were to scare away Zebras which had encroached on their employer's farm using the said motor vehicle. PW1 and PW2 recalled that on boarding the vehicle, its driver started over speeding on a rough road and as a result, some of the passengers were tossed off the vehicle before it overturned and lay on the respondent. He sustained several injuries including a fracture on his left leg which was fractured. He was then rushed to Narok District Hospital and was later transferred to Tenwek hospital.

10. The only other material witness called by the respondent on the issue of liability was PW5 who was one of the police officers who investigated the circumstances in which the accident occurred. PW3 and PW6 were doctors who testified on the injuries sustained by the respondent while PW4 was an advocate of the High Court whose evidence centered only on service of a statutory notice on the appellants insurer and a demand notice on their advocates. According to the evidence of PW5, he visited the scene of the accident on 27th March, 2009 and found the vehicle still at the scene. After his investigations, he chose to open an inquest file instead of charging the driver of the vehicle with any traffic offence.

11. To counter the respondent's case, the appellant called two witnesses. DW1 testified that he was a director of the appellant company as well as Ndovu Estates limited. He admitted that the appellant owned Motor vehicle Registration No. KAV 112S jointly with NIC Bank. The vehicle had been assigned to Ndovu Estates Farm in Narok for purposes of carrying fuel and for use in field work. He admitted the occurrence of the accident as alleged but denied that the appellant had authorized *Kaushal Patel* (*Kaushal*) to drive the aforesaid motor vehicle on the material day. He stated that *Kaushal* had been employed by the appellant as a manager and not as a driver; that the vehicle's authorized driver was *Philip Kiprop* (DW2); that *Kaushal''*s authority was limited to running the daily operations of the farm which did not include driving any vehicle as he was not a licenced driver. He also testified that the appellant used to drive away Zebras in its farm by motor bikes and people on foot and never with a vehicle and that therefore, the appellant could not have authorized an unlicenced driver to use its vehicle to repulse Zebra's in another person's farm.

12. DW2 *Philip Kiprop* confirmed DW1's claim that he was the only person employed as a driver by the appellant and the only one assigned to drive the aforesaid motor vehicle. He recalled that on 26th March, 2009 he was not in the farm as he had travelled to Eldoret to pick some spares for the vehicle. He had left the motor vehicle parked in a shade but he had left its keys in the manager's office.

13. I have carefully considered the grounds of appeal, the evidence adduced before the trial court, the written and oral submissions made by the advocates on record and all the authorities cited.

It is clear from the evidence on record and the submissions by both parties that the occurrence of the accident in which the respondent sustained some injuries is not disputed nor is it disputed that the appellant was the owner of the vehicle that was involved in the accident. It is also not disputed that the vehicle was at the time being driven by one *Kaushal Patel* who was the appellant's manager in the Ndovu Estate's farm. What is hotly contested and was apparently the main issue for determination by the trial court is whether the appellant was vicariously liable for the injuries sustained by the respondent in the accident in question.

14. In view of the foregoing, I find that the key issue that arises for my determination in this appeal is whether the learned trial magistrate erred in his application of the doctrine of vicarious liability in this case.

15. I would like to start by addressing the appellant's complaint that the learned trial magistrate erred by invoking the doctrine of vicarious liability while it was not pleaded anywhere in the respondent's pleadings. I have perused the original plaint and the amended plaint filed by the respondent. While it is true that the respondent did not expressly plead that the appellant was vicariously liable for his injuries,

the omission in my view was not fatal and could not have legally prevented the application of the aforesaid doctrine. I say so because in paragraph 4 of the amended plaint, the respondent pleaded facts that sought to establish a master-servant or Agent relationship between the appellant and the driver of the motor vehicle involved in the accident. He also proceeded to lead evidence to establish the legal relationship between the appellant being the owner of the vehicle and its driver from which vicarious liability could have been inferred as a matter of law. I am therefore unable to find any merit in that ground of appeal.

16. What is of fundamental concern is whether the learned trial magistrate properly applied the doctrine of vicarious liability in this case given the evidence on record.

The legal parameters for the application of the above doctrine are well settled. They have been established in a long line of authorities including those relied upon by the parties in this appeal. It will be sufficient to cite just a few of them since they espouse the same principles.

In ***Shighadai V Kenya Power & Lighting Co. Ltd & Another [1988] KLR 682,*** the Court of Appeal held inter alia as follows;

> ***"The owner of a vehicle is liable not only for the negligence of a driver if that driver is his servant acting in the course of his employment but also if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owners business or for the owners purposes".***

In ***Khayigila V Gigi & Co. Ltd & Another [1987] KLR 76,*** the same court stated as follows;-

> ***"In order to fix liability on the owner of a car for the 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 the agency relationship, it is 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"..***

In ***Njoka Tanners Limited V Catherine Kagwiria (2010) eKLR*** , *Hon Wanjiru Karanja J* (as she then was) relied on the Court of Appeal decision in ***Geoffrey Chege Nuthu V M/S Anverali & Brothers Civil Appeal No 68 of 1997*** where the Court of Appeal held as follows;

> "***The law is so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently or criminally or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable."***

Lastly, in the case of ***Harrison Geita V Twiga Chemicals Limited (2014) eKLR,*** the Court of Appeal stated that "***where it was 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. This presumption is made stronger or weakened by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver…".***

17. What clearly emerges from the above authorities is that the doctrine of vicarious liability only applies where it is established that the driver of a vehicle was the servant of its owner and that at the time of the accident, he was acting in the course of his employment. However, if the driver was not a servant of the vehicle's owner, it must be proved that he was the owners agent who was driving the vehicle with the owner's consent or request for his purposes and for his benefit.

18. In his judgment, the learned trial magistrate found the appellant partly liable for the respondent's

injuries mainly on grounds that at the time of the accident, it's vehicle was being negligently driven by its servant *Kaushal;* that *Kaushal* being the appellant's manager had authority to assign tasks for the vehicle; that he must have been driving the vehicle with the appellant's authority since he was not dismissed from his employment after the accident and that the appellant did not find it necessary to join him in the proceedings as a third party to demonstrate that at the time of the accident, he had been acting on a frolic of his own.

19. Applying the principles I have enumerated above and having carefully evaluated all the evidence presented before the lower court, I find that the learned trial magistrate erred in his finding that the doctrine of vicarious liability applied in the respondent's case. The evidence on record does not support that finding. I have come to this conclusion for the following reasons.

20. First, though it was not disputed that *Kaushal* was driving the appellant's vehicle at the material time and that he was the appellant's servant, there was no concrete evidence placed before the trial court to demonstrate that in driving the appellant's vehicle, *Kaushal* had been acting in the course of his duties. There was evidence from DW1 and DW2 which was not disputed by the respondent that *Kaushal* had been employed by the appellant as a manager and not as a driver; that the appellant's authorized driver was *Philip Rop* (DW2) and that *Kaushal's* scope of employment was limited to running the operations of the farm which did not include driving any of the appellant's vehicles. In the absence of evidence to the contrary, it cannot validly be said that in driving the appellant's vehicle to scare away Zebras in a neighbouring farm, *Kaushal* had been acting in the course of his employment.

21. Secondly, as illustrated in the cases of ***Shighadai V Kenya Power & Lighting Co. Ltd & Another (supra)*** and ***Khayigila V Gigi & Co. Ltd & Another(supra),*** for vicarious liability to be founded on the basis of an Agent- Principal relationship between the vehicle's owner and its driver, it must be established that the driver committed some tort when driving the vehicle with the owner's consent, request or instructions for his purposes and for his benefit. See also: ***Nakuru Automobile House Ltd V Ziaudin Mombasa Civil Appeal No 63 of 1986.***

22. In this case, there is direct evidence from the appellant through its director (DW1) that it had not instructed or requested *Kaushal* to drive the vehicle on the company's behalf to repulse Zebra's in *R.M Patel's* farm which is the purpose for which the vehicle was being used when the accident occurred. The respondent did not lead any evidence to demonstrate how the appellant company could have derived any benefit from the exercise of repulsing zebras in a farm then did not belong to it.

23. Given the foregoing, it is my finding that the learned trial magistrate misdirected himself in finding the appellant vicariously liable on grounds that *Kaushal* had been driving the vehicle at the material time as its servant or agent without going further to interrogate the evidence to establish whether the respondent had proved that *Kaushal* was at the time acting in the course of his employment and if not, whether he was acting as the appellant's agent on its request or instructions and for its benefit. It is trite that he who alleges must prove – *See* ***Section 107*** of the ***Evidence Act.***

The burden of proof lay on the respondent to prove his case against the appellant on a balance of probabilities. In my view, the respondent totally failed to discharge that burden by failing to prove on a balance of probabilities that the doctrine of vicarious liability applied against the appellant in this case.

24. The fact that the appellant did not immediately sack *Kaushal* or join him as a third party in the proceedings in the lower court does not amount to proof that he was the appellant's authorized driver or that he had undertaken the aforesaid activity in *R.M Patel's* farm on the appellant's behalf. The appellant had a choice of deciding whether or not to join *Kaushal* as a 3rd party and failure to do so cannot be a basis for founding liability.

25. The purpose of joining a third party in a civil suit if a defendant decides to take such an approach is to have the question of liability as between the defendant and the third party determined by the court. But such a determination cannot in any way affect the issue of liability between the plaintiff and the defendant. In this case therefore, the appellant's failure to join *Kaushal* as a third party in the suit was not

a relevant factor for consideration by the trial court in determining the issue of liability between the respondent and the appellant.

26. Before concluding this appeal, I wish to briefly comment on an issue which the parties extensively submitted on regarding the colour of the vehicle involved in the accident. The appellant's counsel made heavy weather regarding the apparent confusion in the respondent's case on whether the vehicle in question was white or blue in colour. My take is that the colour of the vehicle was immaterial as in my view, what was important is that the vehicle was clearly identified by the respondent and his witness through its registration number. The issue of the colour of the vehicle and the learned trial magistrate's offhand comment about the respondent being colour blind would only have made a difference in this appeal if the appellant had disputed the ownership of the vehicle or that it had been involved in the accident.

27. Finally, I wish to distinguish the authorities cited by the respondent in this appeal. My reading of the said authorities reveals that the holdings in those cases were based on different facts from the facts in this case. In the ***Kenya Bus Service Ltd V Dina Kawira Humphrey [2003] eKLR*****,** vicarious liability was adjudged on the appellant on its admission that the driver who was driving its bus was its servant, agent or employee who at the time of the accident was acting within the scope of his duty. In the ***Njoka Tanners Ltd*** case (Supra) Hon. *W. Karanja* J (as she then was) based her finding on liability on the fact that the defendant's driver had committed the acts of negligence attributed to him in the course of his duties. None of the above scenarios apply in this case. And in the ***Harrison Geita*** case, the Court of Appeal held inter alia that where it is proved that a car had caused damage by negligence, in the absence of evidence to the contrary, a presumption arose that it was driven by a person for whose negligence the owner is responsible. In this case, there was evidence by the appellant which proved that it was not responsible for the acts of negligence which gave rise to the respondent's claim.

28. For the reasons I have stated in this judgment, I am fully satisfied that the learned trial magistrate erred in both law and facts in finding that the appellant was vicariously liable for the injuries sustained by the respondent.

In this case therefore, I am entitled to interfere with the trial court's finding on the issue of liability. I must however state that I have reached this finding with much regret as it is apparent that given the time lapse, the respondent might be left without a remedy, a situation which would have been avoided had *Kaushal* been joined as a second defendant in this case or had he been sued on his own so that whatever the case, it would have been possible for him to be held liable for the injuries sustained by the respondent. This is however neither here nor there. What is important is that this appeal is merited and ought to be allowed.

29. I consequently allow the appeal and set aside the judgment of the lower court. It is substituted by a judgment of this court dismissing the respondent's case against the appellant with costs.

Given the situation which the respondent now finds himself in, the order that best commends itself to me is that each party shall bear its/his own costs of the appeal.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 28th day of April, 2016

In the presence of:

Mr. Mwaka holding brief for Mr. C.F Otieno for the appellant

Mr. Marube for the Respondent

Naomi Chonde – court clerk