REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 510 of 2001

HASSANALI YUSUF……APPELLANT

VERSUS

JOHN MUHAKI…… RESPONDENT

J U D G M E N T

On 14/9/2001, the appellant, Hassanali Yusuf, moved to this court, by way of an appeal against the judgment of the Senior Resident Magistrate, Milimani, in Civil Case No. 8610 of 1995, delivered on 16/8/01, on the following grounds:

1. The Learned Magistrate erred in delivering the judgment ordering the appellant to pay General Damages of K.Shs.70,000/- and 700/- as special damages and costs when the plaint did not disclose any reasonable cause of action against the Appellant or at all.

2. The Lower Court erred in reaching the judgment delivered without any evidence, or at all, relating to the negligence of the appellant.

3. The Learned Magistrate erred in reaching the Judgment delivered in the absence of an averment in the plaint as to who was driving the motor vehicle in question and whether it was with the authority of the appellant or not.

4. The Lower Court erred in reaching the amount of damages without any evidence to establish as to who was driving the vehicle and without the driver being enjoined in the plaint.

5. The Lower Court erred in law and misdirected itself in reaching the decision arrived at without the Driver being enjoined in the plaint and establishing as to who caused the accident pleaded in the plaint.

6. The Lower Court erred in arriving at the figure of K.Shs.70,000/- although the injuries were all soft tissue, cured and healed, and had no disability of any nature.

Wherefore the appellant prays for the appeal to be allowed with costs, judgment of the lower court set aside; and the suit dismissed with costs.

My understanding of the issues in this appeal, both from the pleadings and the submissions by the two learned counsels, are that without enjoining the driver of the vehicle involved in the accident, as a co-appellant (Defendant at the lower court) a finding of vicarious liability does not hold against the appellant herein. That is the submission of Mr. Khan, learned counsel for the appellant. It was also submitted by Mr. Khan, for the Appellant, that the Respondent did not prove who was the driver of the concerned vehicle, KAC 415Q, at the time of the accident and whether or not it was the appellant or somebody else.

The second issue relates to the award of general damages, which, though not specifically termed excessive, are said to have been awarded without taking into account that the injuries were only soft tissue injuries which had healed.

I begin with the issue of non-joinder of the driver of the vehicle involved in the accident at the material day and time when the accident occurred. Learned Counsel for the appellant seems to be under the mistaken perception that without joining the appellant's driver, there can be no vicarious liability and the appellant cannot be liable for the injuries sustained by the Respondent. That is absolutely fallacious.

In KENYA BUS SERVICES LTD. – VS- DINA KAWIRA HUMPHREY, Civil Appeal No. 295 of 2000, the Court of Appeal of Kenya, at Page 5, said:

"It is our view that failure to sue the appellant's driver and the omission by the Respondent to directly refer to the appellant's liability as being vicarious was not necessarily decisive. It is sufficient that the relevant primary facts are pleaded and evidence led showing the legal relationship between the driver of the vehicle and the owner of the vehicle from which vicarious liability can be

inferred as a matter of law…."

And quoting from KARISA V. SOLANKI [1969] E.A. 318, Page 322, the Learned Judges of Appeal held:

"where is it 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."

And finally the Court of Appeal, in GEOFFREY CHEGE NUTHU VS. M/S ANVERALI & BROTHERS, Civil Appeal no. 68 of 1997, at Page 6, emphatically held:

"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."

In the appeal before me, the appellant admitted that the driver was in the course of his duty as a driver of the appellant's vehicle along Baba Dogo Road, Nairobi. The failure by the driver to report to the Appellant that the vehicle had caused an accident at the given time and date does not tally with the report in the Occurrence Book at the Police Station, that the vehicle had so caused the accident involving the Respondent. Otherwise why would the Muthaiga Police arrest and detain the vehicle? The Occurrence Book was, in addition, admitted in evidence, by consent of the parties at the lower court.

In brief, I find no merit in this challenge that without suing the driver as a co-[Defendant] Appellant, vicarious liability cannot be established against the appellant- owner/employer of the said driver.

In the appeal before me, the evidence on record shows that the appellant owned the vehicle which negligently caused the accident leading to the injuries and damages sustained by the Respondent. Further, the Appellant admitted that the driver of the vehicle, was his employee at the time. Accordingly, whether the driver was or was not sued as a co – [defendant] appellant is of no legal consequence. The appellant, by virtue of being both the owner of the vehicle and employer/master of the driver of the said vehicle at the time of the accident, sealed the liability onto the appellant.

The Subordinate court found, as a fact, that at the material time the driver was an agent/employee of the Appellant.

In MORGANS V. LAUNCHBURY & OTHERS [1972] 2 ALL E.R. 606 the House of Lords held:

"In order to fix liability on the owner of a car for the negligence of the driver, it is necessary to show either, that the driver was the owner's servant or at the material time the driver was acting on the owner's behalf as an agent."

Turning to the issue of the quantum of the general damages, I have reviewed the Medical Report by Dr. Walter Jaoko, dated 27/3/95, and carefully gone through the authorities cited as comparables, and doing the best I can, and in light of the passage of time since those comparables were decided, all in the late 1980's, and taking into account the cost of living index between then and when the Subordinate Court in this appeal delivered its judgment, on 19/8/2001, I feel that the general damages awarded are on the lower side.

Accordingly, I revise the general damages upwards to K.Shs.100,000/-.

All in all therefore, I dismiss the appeal herein, with costs to the Respondent and against the Appellant. The said damages and costs to be with interest, at court rates, from the date of the judgment of the Subordinate Court till payment in full.

DATED and delivered in Nairobi, this 17th day of May, 2006.

O.K. MUTUNGI

JUDGE