REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
Civil Appeal 92 of 1999

AUTOMOBILE ASSOCIATION OF KENYA ……..…..…..……... APPELLANT

VERSUS

JAMES JAGUGA ……..…….…….... RESPONDENT

(Being an Appeal from the Judgement of Resident Magistrate Mary J. Kiptoo Esq., Resident Magistrate, in Eldoret Senior Principal Magistrate's Court Civil Case No. 1592 of 1996 given on 6th Day of August 1999

JUDGEMENT

This is an appeal from the judgement of Ms. Mary Kiptoo Ag. Resident Magistrate in Eldoret SPMCC No.1592 of 1996 delivered on 6th August 1999. After the trial, the learned magistrate found the appellant vicariously liable and awarded the respondent damages against the appellant in the sum of Kshs.50,800/=. The appellant being dissatisfied with the decision of the learned trial magistrate has appealed to this court on 3 grounds, that: -

> **1. The learned trial magistrate erred in law in holding the defendant vicariously liable despite evidence showing that the tort feasor, one Silas**
>
> **Imbagwa was acting in his own private capacity outside his scope of employment. Vicarious liability had not been pleaded.**
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> **2. The trial magistrate erred in law and fact in failing to take into account the evidence and submissions of the defence.**
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> **3. The trial magistrate erred in law and fact in holding that the defendant was vicariously liable without ascertaining that the tort of vicarious liability had not been pleaded.**

At the hearing of the appeal Mr. Tuiyot for the appellant submitted that he would address the appeal on two issues. Firstly, whether the learned magistrate was entitled to find that the appellant was vicariously liable for acts of its employee, on the evidence on record. Secondly, whether the learned magistrate was entitled to make that finding when the respondent did not plead vicarious liability in the plaint. He appears to have abandoned the ground that the trial magistrate failed to take into account the evidence and submissions of the defence.

On the first issue as to whether vicarious liability was established on the evidence, he sought to rely on the case of **Muwonge –vs- Attorney-General of Uganda [1967] EA 17**. He submitted that in that case the guiding principles on the application of the doctrine of vicarious liability were enunciated by the Court of Appeal for East Africa. The requirement was that the servant must have been carrying out what he was required to do, even if he carried it out in a criminal manner. That was the only situation in which a master could be held vicariously liable for the acts of his servant.

He submitted that, in our present case, the appellant was Automobile Association of Kenya. The respondent was a member of the association. One day, the respondent had a breakdown of his vehicle and called the appellant. One Mr. Silas Imbagwa offered to help. The said Silas Imbagwa said that he would himself be responsible in repairing the vehicle. Therefore, in his view, Silas Imbagwa acted outside his scope of employment. The respondent paid Silas Imbagwa and never obtained a receipt for the payment from Automobile Association of Kenya. The fact that the respondent did not ask for a receipt showed that he had engaged Silas Imbagwa in a private capacity.

He further submitted that, the respondent being a member of Automobile Association of Kenya, he must have known the rules of the association, which were produced in evidence. The respondent's ignorance of the rules of the association should not be taken as a defence, as he must have received the constitution and rules of the appellant association. It was the respondent's responsibility to familiarize himself with the said rules. From the rules and regulations, specifically article 3.9 and 3.10, the objects of the Automobile Association of Kenya (hereafter referred to as the appellant) were stated. The respondent was given the regulations.. The responsibilities of the appellant were merely to provide information on garages for repair of vehicles for members and not to carry out repairs. When Silas Imbagwa carried out the repairs, he was acting outside the scope of his employment. On the second issue, he submitted is that vicariously liability was not pleaded in the plaint. Vicarious liability was therefore not available to the respondent. The appellant should never have been found vicariously liable. The court erred in finding the appellant vicariously liable, as vicarious liability was not pleaded.

Mrs. Fundi for the respondent opposed the appeal. On the issue of evidence to support vicarious liability, she submitted that it was not disputed that Silas Imbagwa was an employee of the appellant. The respondent called the offices of the appellant enquiring for repairs and check up of his vehicle. An employee of the appellant one Silas Imbagwa, told the respondent that he would send someone to attend to his problem. The fact that Silas Imbagwa stated that he would be responsible for the repairs did not mean that he was acting outside his employment. She submitted that the respondent did not get a receipt for payment made to Silas Imbagwa because the repairs were not done. He also did not know that repairs were for free.

On ignorance of the appellant's rules, she submitted that those rules were not laws. Therefore ignorance of the rules by the respondent could be a defence. The witness for the appellant (DW1) could not confirm whether the respondent received those rules. The respondent testified that he used to receive monthly magazines only and not rules.

She submitted further that there was a card produced in evidence, which indicated the benefits available to members of the appellant. The benefits were said to be technical services. They were to be provided on request. The respondent made the request for those technical service benefits in our present case.

She also submitted that the appellant's witness (DW1) testified that the appellant could provided emergency repairs lasting up to 30 minutes. In this particular case the services requested by the respondent were of the nature of an emergency, and therefore Silas Imbagwa was acting in the course of his employment, in the circumstances of this case.

On the failure to plead vicarious liability in the plaint, she submitted that Order VI rule 4 of the Civil Procedure Rules highlighted the matters to be specifically pleaded. Vicarious liability was not one of them. She sought to rely on the case of **Vyas Industries –vs- Diocese of Meru [1982] KLR 114**. She submitted, that when an issue was raised in submissions and evidence was tendered on the same, the court could consider and make a decision on that issue. In her view, the trial court was correct in addressing the issue of vicarious liability. She also sought to rely on the case of **Odd Jobs –vs- Mubia [1970] EA 476**. She argued that the magistrate indicated in her judgement the reasons as to why she came to her decision on vicarious liability.

I have considered the submissions of both counsel. I have also perused pleadings and the proceedings in the lower court and the judgement. The first ground of complaint is that the learned trial magistrate erred in holding that the appellant was vicariously liable for actions of Silas Imbagwa. , in the absence of

evidence to support that finding.

My understanding of the law is that an employer is vicariously liable for the actions of his servant if the actions of his servant were done within the course of the servant's employment. The master is vicariously liable so long as the act of the servant is done in exercise of duty.

The scope of the application of the doctrine of vicarious liability between a master and servant was enunciated by the Court of Appeal for East Africa in the case of **Mungowe – vs- Attorney-General of Uganda [1967] EA 17**, in which Newbold P; stated at page 18–

> **"The test of a master's liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant, at any rate when the criminal act is towards benefiting the servant himself. ……**
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> **Each case must depend on its own facts. All that one can say, as I understand the law, is that even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable."**

In our present case, the evidence that is not controverted was that the respondent was a member of the appellant association in 1996. On 4th February 1996 the respondent had a breakdown of his car registration number KZQ 385 at Eldoret. He called the appellant's branch office at Eldoret for assistance. The telephone call to the appellant was picked by Silas Mukhale who is also called Silas Imbagwa (whom I will refer to as Silas) who was a field mechanic employed by the appellant. The said Silas informed the respondent that he would attend to the problem of the respondent's car personally and that the respondent should take the car to KVDA headquarters at Eldoret. The said Silas actually went to KVDA headquarters Eldoret, tried to repair the car but the faults were not rectified. That the respondent paid the said Silas some money for the repairs (which amount was not disclosed in evidence) but was not given a receipt. That though initially Silas said the repairs would take only up to 20 minutes, the car took more than a week to be repaired, and that was after the respondent engaged the services of a car repairer and paid Kshs.50,800/= for the repairs. It is not disputed also by the appellant that the appellant could, through his employees, carry out minor repairs for members vehicles on site, when a member reports a breakdown of his car. It is not disputed that such minor repairs are not defined in any document that was communicated to the respondent or produced in court.

The appellant's Counsel has argued before me that the respondent's function did not involve carrying out the repairs that were carried out on the motor vehicle of the respondent. Those repairs were major repairs and as such the appellant could only advise the respondent of garages where the respondent would have taken his car for repairs. His second argument was that Silas did not have authority to carry out the repairs and the fact that Silas informed the respondent that he (Silas) would be personally responsible for the repairs, and also the fact that the respondent paid some money to the said Silas without demanding for a receipt from the appellant showed that the respondent knew that Silas was carrying out the repairs in his private capacity. He further argued that the repairs were done on Saturday outside the official working hours of the appellant. Additionally some correspondence from Silas after the incident showed that Silas did not have authority to carry out the repairs.

In my view, whether or not someone can be said to be acting in the cause of employment is a question that a court has to decide on the facts of each case. That is what was enunciated by the Court of Appeal for East Africa in the case of **Mungowe –vs- Attorney-General of Uganda [1967] EA 17.**

From the evidence on record, it is clear to me that the appellant could carry out minor repairs of vehicles of members on site. The difference between minor and major repairs was not defined. It was for the appellant or its employees to decide whether to carry out repairs or to refer the member to a garage. Silas was an employee of the appellant. The witness for the appellant (DW1) testified that the said Silas was a field mechanic. The respondent called the office of the appellant for assistance in rectifying the fault of

his vehicle. He talked to Silas who said that he would assist. That in my view, was on the face of it, an official transaction. Therefore the appellant cannot claim not to be liable vicariously for the assistance offered by Silas to the respondent. In my view, Silas was acting in his official capacity as an employee and mechanic of the appellant.

Did the repair function cease to be official on the ground that Silas received some money without giving a receipt and that repairs were done outside working hours? From the evidence on record the respondent stated that he only used to receive monthly magazines. The witness for the appellant (DW1) could not confirm whether the respondent was given the documents such as the constitution and rules, that could spell out the terms and conditions of repair. Counsel for the appellant has argued that the respondent should have familiarized himself with the rules and that ignorance of the rules is no defence. With due respect, I hold a different view. Only ignorance of the law is no defence. Rules of any institution have to be communicated for them to be taken as notice to the person to whom they were communicated. In this case there was no evidence that the rules of the appellant were communicated to the respondent.

Even if, for argument's sake, I am to assume that the said rules were communicated to the respondent, I find no rule, and I have not been referred to any rule, that states the time when repairs were to be carried out or whether they are to be paid for or not. In the circumstances of this case, I am convinced that Silas presented himself to the respondent as acting in the course of his employment of the appellant in carrying out the repairs to the motor vehicle of the respondent and also receiving money for the repairs. In those circumstances, I find that the said Silas was acting in the cause of employment, and as such the appellant could be held vicariously liable on that account, even if the said Silas carried out his duties irregularly. In my view, there is no evidence on record to show that the said Silas might have been acting outside the scope of his employment. I agree with the finding of the learned magistrate that there was sufficient evidence to hold the appellant vicariously liable for the acts of Silas, their employee.

I now turn to the second issue that the vicarious liability was not pleaded. It is true that the plaint does not plead vicarious liability. It also does not mention Silas at all. The defence mentions Silas. The appellant admits employing Silas and alleges that the said Silas carried out the repairs on a Saturday during his own spare time away from the appellant's premises.

Evidence was led by both the respondent and the appellant on whether the appellant was vicariously liable for the actions of Silas in this case that is whether Silas was acting in the course of employment. Counsel for both parties made written submissions on the same and whether Silas was acting in the course of his employment or in a private capacity.

In the case of **Odd Jobs –vs- Mubia [1970] EA 476** the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision. That decision was followed by the Court of Appeal in the case of **Vyas Industries –vs- Diocese of Meru [1982] KLR 114** in which the Court of Appeal cited with approval the decision in the case of **Odd Jobs –vs- Mubia [1970] EA 476** in the following terms –

> **"The circumstances in which an unpleaded issue can become an issue in a suit is a question which was considered in Odd Jobs –vs- Mubia [1970] EA 476 in which it was held that:**
>
> **a) a court may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the issue had been left to the court for decision.**
>
> **b) On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it."**

As I have said earlier, in our present case, the issue of the vicarious liability of the appellant for the acts of its employee Silas was an issue that was raised in evidence. It was also raised in written submissions by both counsel for the parties. It was therefore an issue that was left to the learned magistrate to decide upon. I am therefore of the view that the learned magistrate was correct in deciding on the issue of

vicarious liability, even though it was not pleaded in the plaint.

For the above reasons, I dismiss the appeal with costs to the respondent.

Dated and delivered at Eldoret this 1st day of August 2005.

George Dulu

Ag. Judge

In the Presence of: Omondi h/b for Nyaundi for appellant

Mrs. Fundi for respondent