



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

CIVIL CASE 45 OF 2003

ABDI ALI DERE PLAINTIFF

VERSUS

FIROZ HUSSEIN

TUNDAL

ASIF HUSSEIN

ADAM

MWABIRE CHIDZAO KADUNGO DEFENDANTS

J U D G M E N T

The plaintiff Abdi Ali Dere, has filed this suit against Firoz Hussein Tundal (1st defendant), Asif Hussein Adam (2nd defendant) both trading as Tundal Transporters and Mwabire Chidzao Kadungo (3rd defendant). The claim arises out of a road traffic accident that occurred on 31/7/02 along Nairobi – Mombasa Road near a place called Machinery. The collision was between motor vehicle KAH 141 H owned by plaintiff and KXW 371 owned by 1st and 2nd defendants. The plaintiff blames the 1st and 2nd defendants' driver for the occurrence of the accident and claims damages for loss of the lorry and loss of user of the lorry for 3 months which totals Kshs.3,486,850/= and costs of this suit. 3rd defendant is sued as the driver of motor vehicle KXW 371.

The defendants in their defences denied ownership of the motor vehicle KXW 371 which was allegedly involved in an accident with motor vehicle KAH 141H Z A 5542 belonging to the plaintiff. They also denied the occurrence of the accident and without prejudice, that if any accident did occur at all, it was caused by the negligence of the plaintiff's driver or that the said driver substantially contributed to it. They also denied the damages allegedly suffered by the plaintiff and put the plaintiffs to strict proof. The plaintiff filed a reply to the defence denying the allegations therein.

The plaintiff (PW1) Abdi Ali Dere, recalled that he was the owner of motor vehicle KAH 141 H ZA 5542. On 31/7/02, the said motor vehicle was transporting cooking fat from Mombasa to Thika when it was involved in an accident at machinery along Mombasa-Nairobi Highway. He was informed of the accident. He produced a log book of his vehicle as Exhibit No. 1. He also conducted a search at motor vehicle registry to establish ownership of motor vehicle KXW 371. He produced the search as Exhibit 2 (a) and (b). He found it to be registered in the name of Firoz Hussein Tundal. After reporting to Makindu police station he was issued with a police abstract (Exhibit No. 3) which indicated that the 3rd defendant was charged with a traffic case at Makindu Magistrate's Court, was convicted and sentenced to a fine of

Kshs.4,000/= in default 9 months imprisonment. The proceedings in that case, Traffic Case No. 5/02 were produced in evidence (Exhibit 4). He appointed Beyond Horizon Assessors who did an assessment of the vehicle. PW3 Michael Runjigi, of Beyond Horizon Assessors who did the assessment on 22/8/02, found the vehicle to have been extensively damaged and the cabin could not be repaired though the trailer had minor damages. He found the vehicle to have been a total loss. He prepared the report which he sent it without prejudice to Managing Director of Morbixin Ltd. with attention of Abdi Ali Dere. He assessed the value of the vehicle to be Kshs. 2,680,000.00, salvage would cost 250,000/=, he was paid 12,600/= as labour charges and charged Ksh. 5,000/= for court attendance. The assessor's report is Exhibit 5.

The driver of the plaintiff's vehicle was said to have perished in the accident. PW2 David Ngari was employed by the plaintiff and he testified that after leaving Machinery at about 6.00 a.m. at a place where there was a descending slope, Motor vehicle KXW which was behind KAH 141 H started overtaking KAH 141 H. The road was narrow at that place. At first, PW 2 said KXW hit them from the rear and their vehicle left the road and hit a tree while KXW went to overturn ahead. He further said that another vehicle came from the opposite direction and that is why the driver of KXW swerved to their side and hit their vehicle. He later said that their vehicle was hit at the front cabin. He said that their vehicle was driven at a speed of about 50 KPH and was on its side of the road when the collision occurred.

The defendants did not call any evidence in support of the defences. On 25/2/04, the three counsels for plaintiff, 1st defendant, 2nd and 3rd defendants filed list of agreed issues. The court will be guided by the said issues in its judgment.

Though the defendants denied the occurrence of the accident on 31/7/02, in the submissions by their counsels, it is admitted. The police abstract Exhibit No. 3 and the court proceedings in Traffic Case No. 5/02 of Makindu do confirm that an accident did occur between the two vehicles KAH 141 H and KXW 371. The first issue is settled.

The 2nd agreed issue is who the proprietor or owner of motor vehicle KXW 371 is, the first or second defendant. The 1st defendant has tried to prove that the 2nd defendant is the owner of the said vehicle while the 2nd defendant has also attempted to show that he is not the owner but the 1st defendant. The plaintiff produced as Exhibit No. 2 (a) and (b) a certificate and receipt from Kenya Revenue Authority which shows that as of 16/8/03, the registered owner of motor vehicle KXW 371 was Firoz Hussein Tundal. The accident herein occurred on 31/7/02 and over 2 weeks later, the registered owner was Firoz Hussein Tundal. Section 8 of the Traffic Act Cap 403 Laws of Kenya provides as follows:

“The person in whose name and vehicle is registered shall unless the contrary is proved, be deemed to be the owner of the vehicle.”

It means that prima facie the 1st defendant is the owner of the vehicle unless the contrary is proved. The abstract Exhibit 3 at paragraph 1 (a) shows the owner of KXW 371 is A.H. Adam. The plaintiff has not confirmed that the 2nd defendant Asif Hussein Adam is the same person as A.H. Adam. The initials can stand for anything.

Besides, the plaintiff testified that the 2nd defendant is the owner of the vehicle because he had taken out the insurance cover. There is totally no evidence to prove that the 2nd defendant had insured the said vehicle. The court cannot go by mere word of the plaintiff and what he was told. Documentary evidence could have gone a long way in proving that fact. The 1st defendant has not in any way tried to explain why he was registered as the owner when he was not one. He did not avail any evidence of sale or change of ownership. Besides, under Section 9 of Traffic Act, if the vehicle had been sold and was awaiting change of names, it should not have been on the road. In sum the 1st defendant has not proved the contrary that though registered as the owner he is not one. The court holds that the 1st defendant was the owner of motor vehicle KXW 371 as at 31/7/02. There is no evidence that the 2nd defendant was the owner or was in possession of the same or that the person named in the abstract to same as the one named in the plaint.

Having found that the 2nd defendant is not and cannot be held to be the owner of motor vehicle KXW 371 he cannot be held to be the employer of the 3rd defendant and cannot be liable for the accident. The next issue to consider is whether the 1st defendant was the employer of the 3rd defendant. The 3rd defendant did not testify in this case. There is no evidence in support of his defence therefore. The plaintiff alleged that 3rd defendant was driving motor vehicle KXW 371 as a servant or agent of the defendants. However, no evidence was adduced in support of this allegation. As observed by counsel for 1st defendant, the plaintiffs never issued notice to the defendants to produce the 3rd defendant's employment record if any. Apart from the fact that the 3rd defendant was driving the vehicle at the time of the accident there is no evidence of the relationship between the 3rd defendant and 1st defendant. I believe 3rd defendant conveniently kept off and did not testify to avoid an explanation of how the accident occurred and his relationship with the defendants. The defendants' counsels relied on the case of **ANYANZWA versus GASPERIS C.A. 31/1981** where the Court of Appeal held and I quote:

“For one to establish vicarious liability it must be shown that the agent at the material time was acting on the owner's behalf and for the owner's benefit. Mere knowledge or permission of the owners is not enough to establish vicarious liability.”

On the basis of the above holding, this court has no evidence as to whether the 3rd defendant was acting on behalf of the 1st defendant or for his benefit and vicarious liability can therefore not attach as against the 1st defendant.

It is however not in dispute that the accident occurred. The 3rd defendant was convicted in traffic case which is evidence of his guilt. The fact of conviction is however not evidence that he was solely to blame for the accident. The evidence of PW2 the only eye witness seemed questionable of what exactly happened. At one time he said motor vehicle KXW hit their trailer from the rear but later changed the story to say their vehicle was hit on the cabin when the driver of KXW sighted an oncoming lorry and swerved to the left hitting KAH 141 H. The vehicles were said to be descending or going down hill. No evidence has been led as to how the deceased driver of KAH 141 H attempted to avoid the accident at all. There is no evidence that he braked or tried to swerve early enough on sighting the oncoming vehicle whereas another was overtaking. The court should have been told what that driver tried to do as a prudent driver, to try to avert that accident. It seems he did nothing and must have therefore contributed to the accident to some extent. In my assessment I would apportion liability at 30% as against the driver of the plaintiff and 70% as against the 3rd defendant.

I wish to point out at this stage that even though the employer may not be vicariously liable because the master/servant or agency relationship has not been established, the ANYANZWA Case (Supra) went on to hold that a party who has been injured by the negligent act of a driver of an insured motor vehicle of another person may have his damages satisfied by the insurer of that motor vehicle only if the driver was joined as a defendant, his negligence established and judgment obtained against the driver of his employer and that the driver should be an authorized driver within the policy of insurance. In this case the driver is the 3rd defendant and this court has found him liable for the accident to the extent of 70% and all that needs to be looked at is the insurance policy if judgment is not entered against the driver.

The 2nd last issue is whether the plaintiff suffered loss. Among his claims is a claim for loss of user for a period of 3 months. However, during the hearing the plaintiff did not produce the documents he intended to produce in court in support of his claim. He did not have evidence of his income. Even if the plaintiff had evidence of loss of use the question is whether he would be entitled to loss of user since the plaintiff claims the value of the motor vehicle. Counsel for the 1st defendant cited the case of **KIMANI versus ATTORNEY GENERAL C.A 6/1969** which related to loss of land and the plaintiff claimed loss of user, and the Court of Appeal held that the Respondent should not have been awarded both the value of the land at the date of its loss and damages for loss of its use thereafter. This is because the plaintiff was no longer the owner of the land and had no further claim either to ownership or possession of the land. In my view, this same principle would apply to this case because once the vehicle was damaged beyond repair, the plaintiff could not claim to own or possess it and it would not be proper for him to claim the

value of the vehicle as of that date and loss of user thereafter. In the case cited, the court further held that the plaintiff could recover interest on the amount awarded from the date of the loss. That is what the plaintiff would be entitled to if he gets judgment.

The plaintiff also claims breakdown and labour charges amounting to kshs. 272,520/=. At the time of PW1's testimony the receipts and vouchers intended to be produced did not have revenue stamps. The court allowed counsel to go and get the same and he did. He produced the receipts and vouchers as a bundle Exhibit No. 7. In the bundle there are only 2 receipts issued to the plaintiff which are transport of the wreckage and one is dated 15/8/02, while the other is dated 2/2/03. The variation in dates is not explained. The other documents in the bundle are vouchers. Vouchers are not evidence of payments. They can be made by the plaintiff without there being any payment. The documents did not support the claim at all.

The assessment report produced by PW3 was made to the Managing Director Norbixin Ltd. and attention to Mr A.A. Dere. Norbixin Ltd is not party to this suit. The plaintiff seems to be contending that he is a director of Norbixin Company but there is no evidence to that effect. Even if he were director, the plaintiff did not tell the involvement of Norbixin in this suit. Norbixin is a legal entity and so is the plaintiff. The two should not be mixed up. The log book for motor vehicle KAH 141 H 1542 is in the names of the plaintiff but not Norbixin Ltd. There is no nexus between the plaintiff, Norbixin and this case. The valuation report is therefore not relevant to this case. It is the property of Norbixin Ltd.

In addition to the above, the report was addressed on without prejudice basis. It can only be used in this case if both the parties reached an agreement on it otherwise it was meant for the use of Norbixin alone. It is not admissible in evidence by virtue of Section 23 of the evidence Act. The sum of this is that there is totally no evidence in support of the claim for the value of the plaintiff's motor vehicle. Cruel as this decision may seem, yet the plaintiff was represented by counsel who is aware that such document written on without prejudice basis would be inadmissible.

From the foregoing this court has no option but dismiss the plaintiff's suit with costs.

R.V. WENDOH

JUDGE

Dated at Machakos this 22nd day of September 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE