

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 565 OF 1999

OMAR SHARIFF ALI & ABDALLA ALI ABDALLA APPELLANTS

VERSUS

TEITA ESTATE LTD RESPONDENT

JUDGMENT

This is an appeal against the Judgment of Senior Principal Magistrate, Mr Kanyangi, delivered on December 2, 1999 in Nairobi SPMCC EJ 446 of 1998.

It arises out of a claim for material damage to the Respondent's motor vehicle following an accident on June 30, 1995 along Nairobi – Mombasa road.

Although the Appeal is premised on five grounds outlined in the Memorandum of Appeal, the Appellant submitted at the hearing that there were essentially two issues: vicarious liability and proof of special damages.

Counsel submitted that there was no vicarious liability established against the 1st Defendant, as the owner of the offending motor vehicle. This is because the person sued as the 2nd Defendant, the alleged "driver" of the offending motor vehicle, was indeed not the driver of the said motor vehicle at the time, that someone else was the driver, and that the actual driver was not an employee of the 1st Defendant. Hence, he cannot be held vicariously liable for the acts of a stranger.

This argument is highly far-fetched and ludicrous. First and foremost, no such argument was pleaded in the Statement of Defence. The defence is a mere denial, and nothing more. Secondly, nothing would have been easier for the Defendant (Appellant) in the lower court to produce the relevant testimony to support his theory. Thirdly, the evidence adduced at trial sufficiently demonstrated that the 2nd Defendant was indeed the driver of the offending motor vehicle. The details of the insured owner, and his driver were provided by the police. There was evidence before the Court that the 2nd Defendant used two different names, thus causing this confusion. This is evident from the testimony of PW 4, Jerry Opudo, who produced the Police Abstract showing the 2nd Defendant's name as Salim Muhia Wangari or Abdalla Ali. The Respondent's insurers, according to this witness, investigated the accident, and found the particulars of the owner and the driver, and they even entered into correspondence with the owner about recovery of their loss. Finally, DW 2 admitted in evidence that he was the driver of the offending motor vehicle. With all this evidence before him, the Hon. Senior Principal Magistrate correctly found, on a balance of probability, that the 2nd Defendant was the driver of the offending motor vehicle, and that the 1st Defendant was vicariously liable for the acts of his driver.

The second issue relates to the proof of special damages. Counsel for the Applicant submitted that special damages must be specifically pleaded and strictly proved. He is correct. That is trite law. However, he is wrong in his submission that these were not proved merely because the vouchers presented were "invoices" and not "receipts". The invoices exhibited show the stamp mark "paid" with an indication of the cheque number and date of the payment. What more "proof" of payment did the Appellant expect? I am satisfied that the special damages were pleaded and proved.

Accordingly, this appeal is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 18th day of May, 2004.

ALNASHIR VISRAM

JUDGE