REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 896 OF 2004

GEORGE KIMATHI MUGENYU.....PLAINTIFF

-VERSUS-

CHINA NATIONAL OVERSEAS ENGINEERING CORPORATION.....DEFENDANT/RESPONDENT

(An appeal against the decree and judgment delivered by Hon. Cherono (S.R.M) at the Chief Magistrate's Court, Nairobi, in Civil Suit No. 6248 of 1999 on 22nd September, 2004)

JUDGMENT

1. The Appellant, George Kimathi Mugenyu, being dissatisfied with the judgment of the Learned Trial Magistrate (Mr. Cherono S.R.M.) in CMCC no. 6248 of 1999, delivered on 22nd September, 2004. Through M/S Mbugua Mbugua & Company Advocate, filed this appeal on 18th October, 2004 against China Overseas engineering Corporation, the Respondent. The Appellant has set out four grounds in the Memorandum of Appeal summarized as follows;-

i. That the learned trial magistrate erred in law and in fact by finding that the plaintiff had not proved vicarious liability as against the defendant.

ii. That the learned trial magistrate erred in law and in fact in holding that since the defendant's driver was not joined as a party to the suit then vicarious liability could not attach as against the defendant.

iii. That the learned trial magistrate erred in law and in fact in failing to appreciate that the defendant's driver had admitted liability in writing for causing the accident.

iv. That the learned trial magistrate erred in law and in fact in dismissing the plaintiff's suit as against the defendant.

CASE BACKGROUND

2. The plaintiff sued the defendant for Kshs. 185,268/- plus costs of suit and interests. The claim arose from a road traffic accident involving motor vehicle registration no. KAB 234Z and KAH 708G that occurred along Mombasa Road, as a result the plaintiff's motor vehicle was extensively damaged causing

him loss and damages. He claimed that the accident was caused by the defendant who was driving at an exceedingly high speed and that the defendant admitted to liability and voluntarily signed an admission form which he (plaintiff) had drafted. Later, he took the car to Simba Colt who repaired the same and claimed the repair costs from his insurance. Pw2 on instruction of the Geminia Insurance, the plaintiff's insurer assessed damages at Kshs.174,776/-. The defendant on his part denied admission of liability by the driver and further indicated that the plaintiff's claim cannot succeed as he failed to enjoin the driver in his suit. The honorable magistrate in dismissing the plaintiff's claim held that;

> *"To me failure to enjoin the driver in this suit makes the suit fatal. Infact the production of the purported admission of liability letter signed by the plaintiff and the production of purported admission of liability letter signed by the plaintiff and the said George Ameka Ombwayo who is not a party to this suit is irregular and offends rules of parole evidence."*

It was further held;

> *"for the plaintiff to establish any negligence he must enjoin the tort feasor himself for which the defendant is being asked to be vicariously liable."*

SUBMISSIONS

3. Parties filed written submissions and came for highlighting of the same on 7th November, 2013. Miss Mutuku for the appellant submitted that the main ground of appeal was on the issue of vicarious liability and the Learned Trial Magistrate held the same was not proved against the defendant reason being the plaintiff did not enjoin the defendant's driver and therefore vicarious liability could not attach as against the defendant. Counsel however submitted that failure to enjoin the driver was not fatal she relied on ***Civil Appeal 210 of 2006 Lake Flowers –vs- Cila Francis Onyango Ngonga (Suing as legal representative of Florence Agwingi Ogam-deceased) and Josphine Mumbi Ngungi*** where the Court held that;

> *"the failure to sue the appellant's driver and the omission by the 1st respondent to directly refer to the appellant's liability as being vicarious was not necessarily fatal to his claim "*

Counsel submitted that the learned Trial Magistrate failed to appreciate that the defendant's driver admitted liability and that the defendant did not adduce any evidence to the contrary and as such the plaintiff's claim remained uncontroverted here she referred the Court to the case of ***Lake flowers vs Cila Francis Onyango Ngonga (Supra) w***here it was held that;

> *"without the appellant adducing evidence at trial to Counter what the 1st Respondent blamed the driver for, it was difficult to contest liability blamed on the against it by the superior Court"*

Counsel further submitted that Order VI Rule 9(1) of the Civil Procedure Rules provided that any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed and that the reason given by the Learned Trial Magistrate that the plaintiff did not take out a police abstract was not reason enough to dismiss the plaintiff's claim.

4. Mr. Odhiambo Counsel for the respondent submitted that the cases submitted by the plaintiff's counsel were distinguishable; that the case of **Lake Flowers** and ***Civil Appeal No. 510 of 2001 Hassanali yusuf vs John Muhaki*** (supra) facts were pleaded and facts led to show the owners of the vehicles. He submitted that the appellant did not even conduct a search to determine the owner of the offending vehicle; that the burden of proof rests with the appellant; that the investigation report referred to KAM 728G while the respondent's motor vehicle registration number was KAH 708G, that there was no police abstract and the Trial Magistrate was right to reach her decision; that should the Court allow the appeal and order that the matter be heard afresh there are no documents and urged the Court to uphold the learned Trial Magistrate's decision.

5. Miss Mutuku in reply reiterated her submissions and urged the Court to look at the matter on a balance

of probability that there was proof of the accident, the defendant's driver admitted liability and there was no need for a police abstract; that the defendant did not challenge the plaintiff's evidence and pointed out that the defendant's vehicle was branded and did not have reason to doubt that the vehicle belonged to the respondent nor did the respondent raise the issue of inconsistency in the vehicle registration numbers during trial. She submitted that the appellant had proved its case and urged the Court to set aside the judgment of the lower Court.

6. QUESTIONS OF LAW FOR DETERMINATION

i. Did the plaintiff prove vicarious liability?

ii. Does it mean that if the defendant's driver was not joined as a party to the suit then vicarious liability could not attach as against the defendant?

iii. Is the defendant's driver admission to liability in writing admissible?

iv. Should the plaintiff's suit have been dismissed?

ANALYSIS

7. This being the first appellate Court it is incumbent upon the court to re-assess and re-evaluate the evidence on record and arrive at an independent conclusion, but as we do so it must be remembered that we have neither seen nor heard the witnesses see the case of ***Sumaria & Another V. Allied Industries Limited, (2007) KLR 1.***

Vicarious liability has been defined by Black's Law Dictionary 9th Edition as *"Liability" that a supervisory party (such as employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties".*

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. ……*
>
> *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."*

8. Should the plaintiff's claim fail if the defendant's driver was not joined as a party to the suit then vicarious liability could not attach as against the defendant?

Order 1 rules 9 and 10 of the Civil Procedure Rules 2010 provide therein that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. Secondly, it gives the Court jurisdiction to substitute a party wrongly sued and to bring on board a party who ought to have been sued. In the case of ***NDUNGU –V- COAST BUS COMPANY LIMITED (2000) 2 EA 462*** the court held:-

> *"From the authorities (selle and Another –v- Associated motor Boat Co. Ltd and others, Mwonia – V- KAKUZI.) It would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged on the employee's liability but to his negligence."*

FINDINGS

9. Misjoinder or non-joinder of a party to a suit *perse* does not in itself render such suit fatally defective. Indeed Order 1 rules 9 and 10 of the Civil Procedure Rules 2010 provides therein that no suit shall be defeated by reason of the misjoinder or non-joinder of parties. Secondly, it gives the Court jurisdiction to substitute a party wrongly sued and to bring on board a party who ought to have been sued. I therefore find the learned magistrate erred in law and fact by dismissing the plaintiff's claim for not enjoining the driver to the suit. The appellant adduced evidence showing that the accident did occur, the driver admitted liability and damage was assessed at Kshs.174,776/-. I find that the learned trial magistrate failed to provide for quantum as it would have been had the plaintiff's claim have succeeded. It is trite law that the trial Court was under duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position is confirmed by the Court of Appeal in the case of ***MORDEKAI MWANGI NANDWA v BHOGALS GARAGE LTD CA NO. 124 OF 1993 reported in [1993] KLR 4448*** where the court held that,

> *"the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment"*
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> and in the case of ***MATIYA BYABALOMA & OTHERS v UGANDA TRANSPORT CO. LTD UGANDA SUPREME COURT CIVIL APPEAL No. 10 OF 1993 IV KALR 138*** where the court held that,
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> *"the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim".*
>
> also in the case of ***JOEL KIMITHU MWANGI v SHADRACK KUIRA [2010] High Court Civil Appeal 80 of 2008*** it was held that;
>
> *"When a trial court dismisses a suit for damages based on a running down claim, it is obligatory that it assesses damages that it would have otherwise awarded had it found favour with the Plaintiff's claim. In the circumstances of this case, the trial court decided not to assess the damages contrary to the usual practice aforesaid. That was an error on that part of the trial court as well. The practice is to assist the appellate court to determine the damages payable in the event that the appellate court finds for the Appellant as I have done in this appeal. That error notwithstanding, I believe I have jurisdiction to assess the damages."(emphasis mine)*

10. The assessment report carried out by Nguru enterprises in their report dated 18th August 1998 indicated that the respondent was the owner of the said motor vehicle and was being driven by the respondent driver one George Areka Ombwayo. The appellant adduced a motor vehicle surveyor's report by M. Gohil dated 18th November, 1996 placing the estimated costs for the repairs at Kshs. 174,776/-. There is an invoice from Simba Colt Motors Limited evidencing payments for the repairs carried out on the appellant's motor vehicle amounting to Kshs. 174,776/-. Guru Enterprises issued an invoice for Kshs. 6,800/- and also an invoice for Kshs. 3,692/- by M. Gohil for preparation of the motor vehicle surveyor reports.

I find that the appeal is merited and the same is allowed. The judgment of lower Court is hereby set aside. I also award damages at Kshs. 185,268/- being the pleaded and proved special damages by the appellant. I award the appellant costs.

Dated, signed and delivered this ***4th*** day of ***June*** 2014.

R. E. OUGO

JUDGE

In the presence of:-

…….....For the Appellant

…….……...For the Respondent

……...…….……..Court Clerk