REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 5189 of 1991

JOSEPH NJUGUNA..... …….PLAINTIFF

VERSUS

CYRUS NJATHI..... ……DEFENDANT

JUDGMENT

The plaintiff is the father of Felista Wanjiru Njuguna who was**knocked down by defendants motor vehicle and died instantly. Plaintiffapparently claims damages under Law Reform Act and Fatal Accidents Actalthough he does not specifically plead so.**

Plaintiff pleads in para 4 of the plaintiff that defendants agent orservant negligently drove the vehicle and gives the particulars of negligenceof the defendants agent or servant.

Defendant filed a defence in which he denies negligence and attributesthe accident to the negligence of the deceased. He has given particulars ofnegligence of deceased in para 7 of the plaintiff.

Six issues for determination by court were filed on 28.4.93. Therelevant issues regards negligence is issue no. 2 and 3 which reads:

2. Who to blame for the accident?

3. Whether it was the plaintiff or the defendant who wasnegligent.

When the suit came for hearing on 16.6.99, defendants counselapplied for adjournment on the ground that defendant was absent as he isbereaved. Plaintiffs counsel opposed the application for adjournment andthe court agreed with her and dismissed the application for adjournment.

Plaintiffs counsel then called one witness, the plaintiff and then closedthe plaintiffs case. Plaintiff gave evidence generally relating to personal lifeof the deceased and the damages he was claiming. He testified in hisevidence in cross examination that he does not know who was driving thedefendants motor vehicle but the owner is the defendant. He further testifiedthat defendants

driver was prosecuted by police. Lastly, he testified that hewas not present at the time of the accident and does not know how theaccident occurred.

Miss Miecha for plaintiff submitted that police abstract is conclusiveevidence to show how the accident occurred and that the owner of the vehicle is vicariously liable. Mr. Nyandoro for defendant submitted that since thedriver of the motor vehicle was not sued, the defendant cannot in law bevicariously liable. He relied on the Judgment of Dugdale J. In CivilApplication NO. 1871/85 in which Dugdale J. held inter alia:

"The biggest problem in this case is that of vicarious liability. The defendant is the owner of the vehicle and it is he who has been sued.His driver gave evidence but he has not been made a party. If the courthad in mind to find that he was guilty of negligence it would not do sobecause the driver has not been made a party to the suit. Thereforevicarious liability cannot be attributed to the defendant and the claim mustfail".

Mr. Nyandoro also relied on the judgment of the Court of Appeal in<u>Jonathan Ngumbao versus Piri Wa Mwatate and three others - MombasaCivil Appeal No. 43 of 1987</u> (unreported). He relied on the followingpassage at page 2 of the judgment:

"The most fatal omission, according to Mr. Jiwaji; was that the driverwas not sued as a co-defendant with Mr. Jonathan Ngumbao who wasalleged to be the owner of the vehicle. We assume for the moment that defendant was the owner. If the owner is vicariously liable for the driver the owner pays in damages as well as the driver. If the owner isvicariously liable, the driver if negligent is responsible for payment ofdamages alone (see Anyanza, Otieno & Mbinji versus Bwigide Gasteris& Another Civil Appeal NO. 31 of 1981 (unreported).In the later case,this court pointed out that the failure to sue the driver or his personalrepresentative, left the injured passengers without redress since theowner of the vehicle was not vicariously liable. Thus having not suedthe driver the case stands or falls on the liability of the defendant".

The decision of Dugdale J. is not supported by the law. Mr. Nyandorohas misunderstood the judgment of the <u>Court of Appeal in JonathanNgumbao versus Piri Wa Mwatate</u> and three others (Supra). The Court ofAppeal was not saying that the owner of a motor vehicle cannot in law bevicariously liable for negligence of his driver if the driver is not made a codefendant. All the Court of Appeal was saying is that if the driver is notmade a co-defendant and the court finds that the owner is not vicariouslyliable, then the injured party is left with no remedy because he cannot get aremedy from a driver who is not a party to the suit. Indeed, the decision in<u>Jonathan Ngumbao versus Piri Mwatate & 3 others</u> disproves Mr.Nyandoro's contention is that the driver who caused the accident was not made a co-defendant but court found the appellant who was not theregistered owner but the apparent owner to be vicariously liable for thenegligence of driver who was the appellants agent.

The correct position in law is clear from the decision of the court ofAppeal in <u>Jonathan Ngumbao versus Piri Wa Mwatate & three others</u> thatthe owner or apparent owner of a vehicle can be held vicariously liable forthe negligence of his servant or agent although the servant or agent is notmade a co-defendant in the suit. But before the owner or apparent ownercan be held to be vicariously liable for the acts of his servant or agentplaintiff must prove at least two things. First that the owners drivercommitted a tort, in the present case, a tort of negligence. Secondly, he mustprove that the driver was owners servant or agent. There is no strict liabilityon the owner merely because his vehicle caused an accident while it wasbeing driven by somebody else.

In the present case, plaintiff pleaded that defendants servant or agentwas negligent. He gave particulars of negligence and attributed the accidentto the deceased. Negligence was framed as an issue which court had todecide. The record shows that defendant has never admitted that the driverof his vehicle was negligent. So, the first thing that plaintiff had to prove, is that the accident was caused by the negligence of the driver. He did notprove that the driver was negligent for he does not know how the accidentoccurred and did not call any witness who was present or a police

officerwho investigated the accident. He did not alternatively produce anydocuments to show that the driver of the vehicle was negligent.The police abstract is merely a record of the accident. It does not showwhether the driver or the deceased is to blame for the accident. Thisparticular police Abstract merely states that case is "pending underinvestigations". It does not even show the result of the investigations. If thedriver was convicted in a traffic case it is the conviction which would beconclusive evidence of his negligence (see. A 47A of the Evidence Act) Inthis case, there is no evidence that the driver was convicted. All plaintiffstated is that the driver was prosecuted. He does not say in which trafficcase and the result of the prosecution. The unfortunate result in this case isthat plaintiff has failed to prove that the accident was caused by thenegligence of the defendants servant or agent. So there is no negligenceproved for which plaintiff can be held to be vicariously liable.Notwithstanding the result, I am required to assess the damages that courtwould have awarded had the plaintiffs suit succeeded.

However, I find it an exercise in futility to assess the damages becausethere was no attempts to prove the defendants driver negligent so that even ifplaintiffs appeals to the Court of Appeal, there is no likelihood that theappeal will succeed.

The result is that I dismiss plaintiffs suit with costs to the defendant.

E. M. Githinji

Judge

30.6.99