



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI 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 defendant's motor vehicle and died instantly. Plaintiff apparently claims damages under Law Reform Act and Fatal Accidents Act although he does not specifically plead so.

Plaintiff pleads in para 4 of the plaintiff that defendant's agent or servant negligently drove the vehicle and gives the particulars of negligence of the defendant's agent or servant.

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

Six issues for determination by court were filed on 28.4.93. The relevant issues regarding negligence are issues no. 2 and 3 which read:

2. Who to blame for the accident?
3. Whether it was the plaintiff or the defendant who was negligent.

When the suit came for hearing on 16.6.99, defendant's counsel applied for adjournment on the ground that defendant was absent as he is bereaved. Plaintiff's counsel opposed the application for adjournment and the court agreed with her and dismissed the application for adjournment.

Plaintiff's counsel then called one witness, the plaintiff and then closed the plaintiff's case. Plaintiff gave evidence generally relating to personal life of the deceased and the damages he was claiming. He testified in his evidence in cross examination that he does not know who was driving the defendant's motor vehicle but the owner is the defendant. He further testified that defendant's driver was prosecuted by police. Lastly, he testified that he was not present at the time of the accident and does not know how the accident occurred.

Miss Miecha for plaintiff submitted that police abstract is conclusive evidence to show how the accident occurred and that the owner of the vehicle is vicariously liable. Mr. Nyandoro for defendant submitted that since the driver of the motor vehicle was not sued, the defendant cannot in law be vicariously liable.

He relied on the Judgment of Dugdale J. In Civil Application 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 court had in mind to find that he was guilty of negligence it would not do so because the driver has not been made a party to the suit. Therefore vicarious liability cannot be attributed to the defendant and the claim must fail".

Mr. Nyandoro also relied on the judgment of the Court of Appeal in Jonathan Ngumbao versus Piri Wa Mwatate and three others - Mombasa Civil Appeal No. 43 of 1987 (unreported). He relied on the following passage at page 2 of the judgment:

"The most fatal omission, according to Mr. Jiwaji; was that the driver was not sued as a co-defendant with Mr. Jonathan Ngumbao who was alleged 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 is vicariously liable, the driver if negligent is responsible for payment of damages 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 personal representative, left the injured passengers without redress since the owner of the vehicle was not vicariously liable. Thus having not sued the driver the case stands or falls on the liability of the defendant".

The decision of Dugdale J. is not supported by the law. Mr. Nyandoro has misunderstood the judgment of the Court of Appeal in Jonathan Ngumbao versus Piri Wa Mwatate and three others (Supra). The Court of Appeal was not saying that the owner of a motor vehicle cannot in law be vicariously 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 not made a co-defendant and the court finds that the owner is not vicariously liable, then the injured party is left with no remedy because he cannot get a remedy from a driver who is not a party to the suit. Indeed, the decision in Jonathan Ngumbao versus Piri Mwatate & 3 others 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 the registered owner but the apparent owner to be vicariously liable for the negligence of driver who was the appellants agent.

The correct position in law is clear from the decision of the court of Appeal in Jonathan Ngumbao versus Piri Wa Mwatate & three others that the owner or apparent owner of a vehicle can be held vicariously liable for the negligence of his servant or agent although the servant or agent is not made a co-defendant in the suit. But before the owner or apparent owner can be held to be vicariously liable for the acts of his servant or agent plaintiff must prove at least two things. First that the owners driver committed a tort, in the present case, a tort of negligence. Secondly, he must prove that the driver was owners servant or agent. There is no strict liability on the owner merely because his vehicle caused an accident while it was being driven by somebody else.

In the present case, plaintiff pleaded that defendants servant or agent was negligent. He gave particulars of negligence and attributed the accident to the deceased. Negligence was framed as an issue which court had to decide. The record shows that defendant has never admitted that the driver of 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 not prove that the driver was negligent for he does not know how the accident occurred and did not call any witness who was present or a police officer who investigated the accident. He did not alternatively produce any documents to show that the driver of the vehicle was negligent. The police abstract is merely a record of the accident. It does not show whether the driver or the deceased is to blame for the accident. This particular police Abstract merely states that case is "pending under investigations". It does not even show the result of the investigations. If the driver was convicted in a traffic case it is the conviction which would be conclusive evidence of his negligence (see. A 47A of the Evidence Act) In this case, there is no evidence that the driver was convicted. All plaintiff stated is that the driver was prosecuted. He does not say in which traffic case and the result of the prosecution. The unfortunate result

in this case is that plaintiff has failed to prove that the accident was caused by the negligence of the defendant's servant or agent. So there is no negligence proved for which plaintiff can be held to be vicariously liable. Notwithstanding the result, I am required to assess the damages that court would have awarded had the plaintiff's suit succeeded.

However, I find it an exercise in futility to assess the damages because there were no attempts to prove the defendant's driver negligent so that even if plaintiff appeals to the Court of Appeal, there is no likelihood that the appeal will succeed.

The result is that I dismiss plaintiff's suit with costs to the defendant.

E. M. Githinji

Judge

30.6.99