IN THE COURT OF APPEAL FOR EAST AFRICA

AT NATROBI

(Coram: Law VP, Mustafa & Musoke JJA)

CIVIL APPEAL NO 23 OF 1976

BETWEEN

VYAS INDUSTRIES.....APPELLANT

AND

DIOCESE OF MERU..... RESPONDENT

JUDGMENT

Law VP On September 5, 1970, a motor car belonging to the Diocese of Meru ("the plaintiff") collided with the back of a stationary lorry owned by the appellant firm ("the defendant"). The plaintiff sued the defendant for Kshs 17,636 representing the damage done to its car. By paragraph 3 of the plaint, it was pleaded that the collision occurred by reason of the negligence of the defendant, the main complaint being that the lorry had been left on the main road in the dark without lights. By its defence, the defendant denied negligence and pleaded contributory negligence on the part of the plaintiff's driver.

At the outset of the trial, Mr Sharma for the defendant submitted that the suit was incompetent and should be dismissed as a firm cannot drive and the plaint contained no allegation that the defendant's liability was vicarious, arising out of the negligence of a servant or agent. Counsel for the plaintiff refused to amend his plaint, contending that there was no need for an amendment. The learned judge ruled as follows:

> "There is substance in the preliminary objections raised by defence counsel. The particulars of allegations which appear to have been omitted could conveniently be covered by evidence. An order striking out the plaint on the grounds argued by Mr Sharma would result in an injustice. The hearing will therefore proceed."

It seems from the above ruling that the learned judge agreed that the plaint was defective in not pleading facts showing the defendant to have been liable on the basis of vicarious responsibility for the negligence of a servant or agent and that he proposed that this matter should be an issue in the suit, to be decided on the evidence without amendment of the plaint.

The hearing of the suit then proceeded. Ownership of the lorry had been admitted in the defence filed by the defendant and it was proved by a police witness that one Watuku arrived at the scene of the accident after about half an hour and told him that he was in charge of the lorry and had gone to report to his employers. There was also evidence that the lorry's rear lights were not working although the headlights were on. The defence called one witness, a Mr Vyas, a partner in the defendant firm, who deposed that the only other partner, his wife, was what is known as a "sleeping" partner. He said he had closed down

his business in April, 1970 and dismissed all his employees including Watuku. Since then, the lorry had stood in the yard of his business premises unused and uninsured. The keys were kept in his office. Early in September 1970, he went with his wife to the hospital. He produced a medical certificate showing that he was admitted to hospital on September 3 and that he remained there as an inpatient until September 12. He had not permitted Watuku to use the lorry on September 5 at which time Watuku was not employed by him.

The learned judge did not believe that Mr Vyas had closed down his business and dismissed his employees. He described this assertion as a deliberate lie. He did not think that Watuku could have taken the lorry without permission and held that at the time of the accident, Watuku was driving the lorry in the course of his employment as a servant of the defendant. He found Watuku 80% to blame for the accident and the plaintiff's driver 20% to blame and awarded the plaintiff Kshs 13,600, being 80% of the agreed damages of Kshs 17,000 with interests and costs.

From this decision, the defendant has appealed. On its behalf, Mr Sharma has made three main submissions:

1. That the plaint disclosed no cause of action as it did not aver that the defendant was vicariously liable for negligence of a servant or agent and could not as a firm be itself guilty of negligence.
2. That the issue of vicarious liability never became an issue in the suit and that in any event, it was not proved that Watuku was employed by the defendant at the time of the accident.
3. That the apportionment of blame was wrong in principle.

As regards the first ground, although I agree that the plaint was defective, I consider that it did disclose a cause of action. As was said by DuParcq LJ in *Hewitt v Bonvin* [1940] 1 KB 188:

> "It is plain that the appellant's ownership of the car cannot of itself impose any liability on him … it is true that if a plaintiff proves that a car was negligently driven and that the defendant was its owner and the court is left without further information, the negligent driver was either the owner thereof or some servant or agent of his: *Barnar v Sully* (47 TKL 557)."

To the same effect is the dictum of Sir Charles Newbold in *Karisa v Solanki* [1969] EA 318 at page 322:

> "Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible."

In the instant case, the person sued was a firm, a person who cannot drive whether negligently or otherwise. It could only be liable vicariously and in my view, the learned judge should have insisted upon the plaint being appropriately amended. However, the plaint did allege ownership and negligence which is sufficient to raise a presumption that at the time of the accident, the lorry was being driven by a person for whose negligence the defendant was responsible and to that extent, it disclosed a cause of action.

The second question is whether the issue of vicarious responsibility became an issue in the suit. The circumstances in which an unpleaded issue can become an issue in a suit is a question which was considered in *Odd Jobs v Mubia* [1970] EA 476 in which it was held that:
a) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue had been left to the court for decision;
b) on the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.

That is, in my view, the position here. At first, Mr Sharma sought to exclude the issue from the court's consideration and successfully objected to a question by the plaintiff's advocate directed as to whether Watuku was employed by the defendant. Mr Sharma, however, changed his stand at a later stage of the trial and called Mr Vyas to give evidence on this very issue and he addressed the court on it. In these circumstances, I am of the opinion that the issue was left to the court for decision and I consider, in the

light of all the evidence, that the judge was right on a balance of probabilities in holding that at the time of the accident, Watuku was a servant of the defendant acting in the course of his employment, so as to make the defendant vicariously liable for his negligence. It follows that in my view, the first two grounds of appeal fail.

That leaves the third ground, relating to the apportionment of blame, a question which will not be interfered with on appeal unless the judge has come to a manifestly wrong decision or based his apportionment on wrong principles. Mr Sharma submitted that this was the position here. The plaintiff's driver struck the rear of the defendant's stationary and unlit lorry at a high speed on a straight road, having apparently completely failed to see it as the road surface showed no signs of brakes having been applied. In these circumstances, Mr Sharma submitted that the plaintiff's driver should have been held more to blame than the defendant's driver and he relied in this respect on the decision of this court in *Patel v Yafesi* [1972] EA 28 that the greater blame attaches to a driver who runs into an unlit stationary lorry on a straight road.

I agree with Mr Sharma's submission on this point. I would hold that the plaintiff's driver was 75% to blame for the accident and the defendant's driver 25% to blame. I would therefore award the plaintiff 25% of the agreed damages of Kshs 17,000, that is to say Kshs 4,250, and order that the decree appealed from be amended by substituting the figure of Kshs 4,250 for the figure of Kshs 13,600 with interest thereon at 8% per annum from August 24, 1971 and such costs of the suit as are appropriate having regard to the amount awarded.

As regards the costs of this appeal, which has only in my view succeeded to a limited extent, I would award the defendant half its taxed costs of the appeal. As the other members of the court agree, it is so ordered that the appeal be allowed to the extent indicated above.

Mustafa JA. The facts in this appeal have been fully set out in the judgment of Law VP which I have had the advantage of reading in draft. I will refer to them only briefly.

The car of the respondent (hereafter called the plaintiff) ran into a stationary lorry of the appellant (hereafter called the defendant) and sustained damage. The defendant was sued in its firm name. In its plaint, the plaintiff alleged, *inter alia*, negligence on the part of the defendant in leaving its lorry stationary on a road without rear lights. The defendant, in its defence, denied negligence and also pleaded contributory negligence on the part of the plaintiff.

At the commencement of the trial, Mr Sharma for the defendant rightly, in my view, submitted that a firm cannot drive and that as there was no averment that the negligent act was done by one of the defendant's employees or agents in the course of his employment or within the scope of his authority, the suit should be struck out as incompetent, unless an amendment to the plaint alleging vicarious liability was made.

Mr Havelock for the plaintiff, curiously enough, refused to amend. In my view, that was the first error in this matter. However, the trial judge ruled against the prayer for striking out and thought that omitted averments and allegations could be covered by evidence at the trial. With respect, I think that the trial judge should have insisted on the plaint being amended before allowing the case to proceed. However, it is possible that as the defendant had admitted ownership of the lorry, there might have been a cause of action. Be that as it may, the hearing proceeded and evidence was led by the plaintiff that one Watuku admitted that he was in charge of the lorry. If at the end of the plaintiff's case the defendant had not opened its defence and called evidence, I have little doubt that the plaintiff's claim would have had to be dismissed as there was no evidence at all to link Watuku with the defendant. In calling evidence for its defence, the defendant committed an error to its own disadvantage. From the evidence adduced by the defendant, it transpired that Watuku had been its employee, at least, at one stage although it was alleged that he had been dismissed from service long before the collision. However, a link between Watuku and the defendant was disclosed and there was then material before the trial judge for him to have come to the conclusion he did.

On the merits of the appeal, I am in agreement with the views expressed by Law VP in his judgment and agree that the appeal against liability must be dismissed. I also agree with him on the apportionment of blame between the two parties. I concur in the order proposed by Law VP.

Musoke JA. I agree with the judgment of Law VP.

Dated and delivered at Nairobi this 6th day of August, 1976.

E.J.E LAW

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VICE PRESIDENT

A. MUSTAFA

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JUDGE OF APPEAL

J.S MUSOKE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR