IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 162 OF 2010

BETWEEN

HARRISON GEITA ……..……..……..APPELLANT

AND

TWIGA CHEMICALS LIMITED ……..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri

(Sergon, J.) dated 23rd April, 2010

in

H.C.C.A NO. 80 of 2006)

****

JUDGMENT OF THE COURT

1. The respondent, Twiga Chemicals Limited by a plaint filed in court in November, 2001, in the Chief Magistrate's Court at Nyeri filed suit against the appellant in respect to a motor vehicle accident.

2. The particulars of the claim were that at all material times in the suit, the respondent was the registered owner of motor vehicle KAD 932Y while the appellant was the registered owner of motor vehicle KTP 834. On or before 29th November, 1998, at around 4.00 pm the respondent was lawfully driving along Ndunyu –Nyeri murram road while the appellant and or his driver, agent or servant so negligently drove motor vehicle KTP 834 that it caused it to ram into the respondent's motor vehicle. In the plaint filed in court, the respondent prayed for special damages in the sum of Ksh. 227,485.60 being *inter alia* the cost of survey fees and repair to motor vehicle KAD 932Y.

3. The trial magistrate upon hearing the parties entered judgment against the appellant finding that the special damages had been proved with a 30% contributory negligence on the part of the respondent.

4. The appellant being dissatisfied with the trial magistrate's decision and lodged a first appeal to the High Court. In a judgment dated 23rd April, 2010, the Honourable Judge ***(Sergon J.)*** dismissed the

appeal with costs. The Honourable Judge expressed himself on the issue of liability and contributory negligence as follows:

"I have re-evaluated the evidence tendered before the trial court. … It is apparent that both motor vehicles were joining the main road from a feeder road before they collided. The respondent blamed the appellant for joining the main road from a feeder road without stopping to give way. The appellant on the other hand claimed that his driver had stopped and checked before joining the main road. It would appear from the record that the police blamed the driver of KTP 834 for the accident…. I have considered the principles for contributory negligence vis a vis the evidence tendered before the trial court. On liability, I am unable to interfere with the decision of the trial magistrate. It has been argued by the appellant that since his driver was not joined to the suit, he cannot be held vicariously liable. On this account, he has urged this court to set aside the judgment. It is a well settled principle of law that 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. (See Karisa – v- Solanki, [1969] E.A. 318). It is therefore not a must for the driver to be joined to the suit in order to make the owner the vehicle vicariously liable for the acts of the driver".

5. Aggrieved by the judgment of the High Court, the appellant has filed this second appeal. He has raised several grounds of appeal that can be compressed as follows:

(i) That the learned Judge erred in law and fact for not taking into consideration that the appellant was sued alone as the defendant while the driver who was driving motor vehicle registration KTP 834 was not joined as the 2nd defendant and the police officers failed to charge the driver with a traffic offence.

(ii) That the measurements taken by the traffic police officers at the scene of accident has never been produced as an exhibit before the court.

(iii) That the learned Judge erred in law and fact in not taking into consideration that the driver of motor vehicle KAD 932Y was an ex-police officer and the traffic police officers at the scene were biased and against the driver of KTP 834.

(iv) That the learned Judge erred in law and fact for not taking into consideration that the said accident was reported at Othaya Police Station and not at Nyeri Police Station as stated in the judgment.

(v) That the learned Judge erred in law in failing to take into account that the respondents motor vehicle was first repaired at Nyeri for the sum of Ksh. 15,000/= and later taken to Nairobi for a second repair at Ksh. 227,485.60 and there was no reason for the same vehicle to be repaired twice.

(vi) The learned Judge erred in not considering the evidence of the appellant's witnesses.

6. At the hearing of this appeal, the appellant was in person and he filed written submissions. The appellant adopted in entirety the contents of his written submissions dated and filed in court on 10th March, 2014. The respondent having been served with a hearing notice did not attend the hearing.

7. In his written submissions, the appellant reiterates the grounds of appeal. He submitted that the suit filed before the Chief Magistrate's Court was not filed by the respondent company but its driver; that the basis of this statement is that the respondent company never appeared in court even once despite service of hearing notices. That it is not true the driver of motor vehicle KTP 834 was to blame as stated by the police. That motor vehicle KAD 932Y should not have been driven to Nairobi but should have been repaired at Nyeri. That wherever motor vehicle KAD 932Y was repaired in Nairobi he was not present and it is only the Bill that was sent to him. That he refused to pay the Bill when the present suit was filed against him. The appellant submitted that an accident cannot be caused by two people but by one party but in this case, the trial magistrate erred in ordering that he was 70% to blame. He submitted that the trial court ordered the respondent to pay 30% for the repair of his (appellants) vehicle of which the respondent

has not paid. The appellant submitted that since the respondent has never appeared in court, it is important to find out the source of the matter as the respondent's driver was an ex-policeman and he should be brought before court to explain why the matter was filed in Nyeri Court and not in Nairobi through the counsel of the company.

8. We have considered the written submission by the appellant and examined the judgment of the High Court. This is a second appeal and this Court in enjoined to consider only points of law. ***Section 72*** of the ***Civil Procedure Act*** stipulates that:

"Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—

(a) the decision being contrary to law or to some usage having the force of law;

(b) ***the decision having failed to determine some material issue of law or usage having the force of law;***

(c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits".

9. The submissions by the appellant before this Court largely raises questions of fact and the appellant is urging this Court to re-evaluate the facts on record and make findings thereon. This being a second appeal, we reiterate that our mandate is to deal with questions of law and not issues of fact.

10. On vicarious liability, the appellant contend that he cannot be vicariously liable since the driver of motor vehicle KTP 834 was not joined as a defendant in the suit. We find that from the evidence led, the appellant is the registered owner of the vehicle KTP 834. In the case of ***Osapil –v – Kaddy, 2000 1 EALA 187,*** it was held that the person in whose name the vehicle is registered is presumed to the owner thereof unless proved otherwise. In the instant case, the Honourable Judge correctly stated that it is a well settled principle of law that 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 (See ***Karisa – v- Solanki, [1969] E.A. 318*****).** We are satisfied that the appellant being the registered owner of motor vehicle KTP 834 is liable for the negligence of the person who was driving the vehicle. If at all the appellant wanted to join the driver of motor vehicle KTP 834, he was at liberty to do so and join him as a third party. Our view on this matter is fortified by the case of ***Kenya Bus Services Ltd –v- Humphrey, [2003] KLR 665,***which followed the case of ***Karisa vs Solanki, [1969] E A 318,*** where the following proposition was made:

"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 (see Bernard v Sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver".

11. The appellant in his submissions before this Court contends that motor vehicle KAD 932Y should not have been repaired in Nairobi and that he was not present when the said vehicle was being repaired at the cost of Ksh. 227,485.60. From the record of appeal, it is apparent that the respondent's claim as per the plaint is for special damages of Ksh. 227,485.60. In the case of ***Siree Limited –v – Lake Turkana El Molo Lodges, (2002) 2E.A. 521*** this Court stated that where monies due and owing can be calculated to a cent, they must be claimed as special damages. In the case of ***Maritim & Another – v- Anjere, (1990-1994) EA 312 at 316***, this Court emphasized:

"In this regard, we can only refer to this court's decision in Sande – v- Kenya Cooperative Creameries Limited, Civil Appeal No. 154 where as we pointed out at the beginning of this judgment,Mr. Lakha

readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damges awarded as special damages but which were not pleaded in the plaint must be disallowed."

12. We have examined the record of appeal and analyzed the judgment of the High Court. We are satisfied that the respondent's claim for special damages was pleaded in the plaint and proved before the trial magistrate. We are satisfied that the Honourable Judge did not err in finding that the claim for Ksh. 227,485.60 was proved as special damages and judgment properly entered for the same.

13. The appellant has taken issue with issue of contributory negligence as established by the trial magistrate and upheld by the High Court. We do appreciate that the appellant was unrepresented and appeared in person before us. We note that the appellant has a layman's understanding of the concept of contributory negligence. It is trite law that an appellate court will not interfere with the findings of fact by a trial court unless there is a misdirection or the court acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. We note that there is concurrent findings of fact on contributory negligence by the two courts below and no good reasons has been given to us to interfere with the findings.

14. In totality, we find that this appeal has no merit and we hereby dismiss the same. The respondent not having appeared, no order as to cost is made.

Dated and delivered at Nyeri this 31st day of March, 2014.

ALNASHIR VISRAM

….....

JUDGE OF APPEAL

MARTHA KOOME

….....

JUDGE OF APPEAL

J. OTIENO-ODEK

….....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR