IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Tunoi & Githinji JJ A)

CIVIL APPEAL NO 295 OF 2000

KENYA BUS SERVICES LIMITED……..... APPELLANT

VERSUS

DINA KAWIRA HUMPHREY (suing as the Adminstrator of the

Estate of **JOSEPHAT KINEGENI M'DAKA)……...RESPONDENT**

(An appeal from the judgment of the High Court

at Embu (Omwitsa, CA) dated 3rd day of March, 2000 in

HCCC No 105 of 1998)

JUDGMENT

The respondent in this appeal is the administrator of the estate of her husband Josephat Kinegeni M'Daka (deceased) who died in a road traffic accident on 7th January, 1998.

The deceased was travelling as a passenger in a bus registration No KAJ 073X owned by the appellant herein and which overturned at Nithi river bridge along Meru/Embu road causing fatal injuries to the deceased from which he died. The respondent sued the appellant to recover damages under the Fatal Accidents Act and the Law Reform Act for the negligence of the appellant's driver.

The respondent alleged that the appellant was vicariously liable for the negligence of its driver. The superior court found the appellant 100% liable for negligence and awarded damages to the respondent. This appeal is against the finding of liability and secondly against the quantum of damages.

The facts which gave rise to appellant's liability are pleaded in paragraphs 4,5 and 7 of the plaint which we set out below thus:

"4. At all material times to this suit, the defendant was the registered owner of the motor vehicle registration number KAJ 073X Leyland Bus which was being driven by its driver, servant, agent and/or employee within the scope of his duty.

5. On the 7th day of January, 1998, the plaintiff was lawfully travelling as a fare paying passenger in the defendant's bus registration number KAJ 073X, when the defendant's agent, driver, servant and/or employee so negligently controlled, managed and or drove the said bus along Meru-Embu road at Nithi river bridge that it plunged into the river causing fatal injuries to the deceased herein.

NB – Particulars of negligence on the part of the defendant's driver, servant, agent or employee are set out in paragraphs 5(i) – 5(vii).

6. .....

7. The plaintiff will rely on the doctrine of *res – ipsa loquitur* and shall henceforth hold the defendant liable in damages arising out of the accident."

The appellant averred in paragraphs 4,5 and 6 of the statement of defence as follows:-

"4. Paragraph 4 of the plaint is admitted.

5. Save that an accident occurred on the date and place alleged in paragraph 5 of the plaint the defendant denies the allegations contained at paragraph 5 of the plaint including all the alleged particulars and shall put the plaintiff to strict proof thereof.

6. The defendant shall contend at the hearing hereof that the accident was inevitable and an Act of God."

At the trial, the respondent called Ruth Kendi as a witness. She testified that she was a passenger in the bus, that the bus was travelling from Meru to Embu; that the bus was travelling fast down a steep hill at 5.30 am, that, as the bus approached the Nithi bridge it was swaying from side to side and that the bus overturned over the bridge. The appellant did not offer any evidence at the trial, but its counsel, Mr Ole Kantai made submissions both on the issue of vicarious liability and on the quantum of damages.

The first three grounds of appeal deal with the issue of vicarious liability.

The appellant in essence complains that the superior court erred in law in holding that vicarious liability was pleaded and in holding the appellant liable for the acts of its servant when vicarious liability was not pleaded at all. Mr Ole Kantai reiterates his submission in the superior court that vicarious liability was not pleaded in the plaint at all. He referred to the copy of the plaint dated 10th December, 1998 which was served on him and which does not contain the word "vicariously" in paragraph 7 of the plaint. He referred to another amended copy of the plaint dated the same day where the word "vicariously" has been inserted by hand in paragraph 7 of the plaint to aver that the plaintiff held defendant "vicariously" liable.

It is contended by Mr Ole Kantai that the amended copy of the plaint mysteriously appeared in the Court record sometime before judgment and after he had already made submissions. Mr Muindi, who held Mr Mutunga's brief and argued the appeal before us explained that he amended the plaint and filed the amended copy on the 18th December, 1998 and that the appellants' counsel might not have been served with the amended copy due to inadvertence. If we understand Mr Muindi correctly, his explanation is that he corrected the plaint before filing it and filed a corrected copy but that the copy served on appellants' counsel might not have been corrected.

The amendment is countersigned by Mr Mutunga and bears the date of filing of the suit. The amended copy of the plaint was in the Court record when submissions were made in the superior court on 21st September, 1999 because Mr Mutunga who appeared for the respondent at the trial specifically referred to the fact that vicarious liability was pleaded in paragraph 7 of the plaint. The learned Commissioner of Assize also referred to the fact that vicarious liability was pleaded in paragraph 7 of the plaint and to the hand written amendment in paragraph 7 of the plaint.

We are satisfied from Mr Muindi's explanation as was the Commissioner of Assize, that the plaint had been corrected before the filing and that the corrected copy was validly on record before the hearing of the suit.

But even if the amended plaint was to be discarded, it is our view that the failure to sue the appellant's driver and the omission by the respondent to directly refer to the appellant's liability as being vicarious was not necessarily decisive. It is sufficient that the relevant primary facts are pleaded and evidence led

showing the legal relationship between the driver of the vehicle and the owner of the vehicle from which vicarious liability can be inferred as a matter of law. No other inference could have been drawn from paragraph 5 of the original plaint.

According to the pleadings, we are concerned here with the master's liability for his servants' torts. In such a case, it is the existence of the relationship of the master and servant which gives rise to vicarious liability – see *Dritoo v West Nile District Administration* [1968] EA 428 at page 435 paragraphs E-F). In *Karisa v Solanki* [1969] EA 318 the Predecessor of this Court said at page 322 paragraph 9 G.

"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."

In this case the appellant admitted in paragraphs 4 and 5 of the defence that it was the registered owner of the bus which caused the accident, that the bus was being driven by its driver, servant, agent or employee within the scope of his duty and that on 7th January, 1998 the bus went out of control and plunged into the river at Nithi river bridge. The appellant denied the particulars of negligence pleaded and averred that the accident was inevitable and an Act of God. The appellant did not however contest the finding of negligence on the part of the driver both in the superior court and in this Court. Indeed, from the averments in the plaint and from the evidence of Ruth Kendi the doctrine of *Res Ipsa Loquitur* applied in this case and the appellant did not discharge the burden of showing that the accident occurred without the negligence of its driver. Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation.

From the facts admitted in the defence, the appeal on the issue of appellant's vicarious liability is unmeritorious.

By ground 4 of the grounds of appeal, the appellant states that the Commissioner of Assize erred in law in awarding damages under the Law Reform Act when there were no letters of administration or any valid letters of administration before the Court. The appellant's counsel submitted in support of that ground, *inter alia*, that the Senior Resident Magistrate Court, Runyenjes, had no jurisdiction to give the grant of letters of administration, firstly, because, there is a High Court at Embu and secondly, because the award of damages in the suit was over Kshs 2 million.

However, the record shows that the appellant's counsel's only contention was that if damages are being claimed under the Law Reform Act, the grant must be in existence before the filing of the suit. It was his submission in the trial that the grant was obtained on 15th December, 1998, when the suit was filed and that is the only issue which the superior court considered.

The issue of the validity of the grant of the letters of administration was not before the superior court and with respect cannot be raised in this Court. The respondent pleaded that she was suing as the administrator of the estate of the late Josephat Kinegeni M'Daka. By the date of filing the suit, she had been granted letters of administration in respect of the estate of Josephat Kinegeni M'Daka. As the appellant did not prove that the grant of letters of administration was obtained subsequent to the filing of the suit the claim for damages under the Law Reform Act was competent.

Moreover the magistrate who made the grant could not have known the amount of damages to be awarded to the respondent and the subsequent award of some KShs 2,000,000/= said to be outside the magistrate's jurisdiction could not, by itself, invalidate the grant.

In assessing damages (loss of dependency) under the Fatal Accidents Act, the learned Commissioner of Assize applied a multiplicand of KShs 14,000/= per month and a multiplier of 20 years to arrive at an award of KShs 2,240,000/= (KShs 14,000 x 20 x 12). The Commissioner of Assize also awarded KShs

100,000/= for loss of expectation of life, and KShs 24,000/= as special damages. The total sum awarded was KShs 2,364,000/ =. The appellant contends that the Commissioner erred in law and in fact in applying a multiplicand of KShs 14,000/= and a multiplier of 20.

According to the appellant's counsel, deceased's net monthly earnings of KShs 7,589/= should have been used and the multiplier should have been 10.

The assessments of damages are at the discretion of a trial judge and an appellate court will not disturb the award of damages:

"Unless so inordinately high or low as to represent and entirely errorneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or law." *Butt v Khan* (1977) 1 KAR 1. (See also *Kenya Bus Services v Mayende* (1989-1992) 2 KAR 232, *Kemfro v (A M Lubia) Olive Lubia,* (1982-88) 1 KAR 72 and *Kitavi v Coastal Bottlers Ltd* [1985] KLR 470).

The deceased's pay slip showed that his net monthly salary was KShs 7,589/=. Mr Muindi concedes that the multiplicand should have been KShs 7,589/= less 1/3 and not KShs 14,000/=, ie KShs 5,060/= pm to the nearest figure. The deceased was a P1 teacher employed by TSC. He was 32 years old at the time of death. He had three young children aged between 2 and 13 years. His widow was engaged in business. The appellant has not shown that the learned Commissioner erred in principle in applying a multiplier of 20 which in our view, adequately takes care of all the vicissitudes of life in the circumstances of the deceased.

Lastly, the appellant has not shown that the award of KShs 100,000/= given under the Law Reform Act, for loss of expectation of life was not taken into account while assessing damages under the Fatal Accidents

Act or that that sum would be inherited by the same dependants under the Fatal Accidents Act.

For the foregoing reasons, we dismiss the appeal on liability. We allow the appeal against the assessment of damages for loss of dependency under the Fatal Accidents Act to the extent that the award of KShs 2,240,000/= is set aside and replaced with an award of KShs 1,214,400/= (5060 x 12 x 20). The total award is therefore KShs 1,338,400/= (1,214,400/= + 100,000/= + 24,000/=). The appellant has succeeded in having the damages slightly reduced. We award to the appellant one half of the costs of the appeal.

Dated and delivered at Nairobi this 21st day of November, 2003

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR