**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Coram: D. K. Kemei - J**

**CIVIL APPEAL NO. 56 OF 2018**

**JOHN CHEGE NGANGA.....APPELLANT**

**VERSUS**

**BENCHMARK DISTRIBUTORS LIMITED.....RESPONDENT**

**(Being an appeal from the judgement of Hon. Ms. Wambugu (Ag - SRM)**

**at Kithimani *Senior Principal Magistrate Court in SPMCC NO. 118 of 2015***

***delivered on 10th day of May 2018)***

***BETWEEN***

**JOHN CHEGE NGANGA.....PLAINTIFF**

***VERSUS***

**BENCHMARK DISTRIBUTORS LIMITED.....DEFENDANT**

**JUDGEMENT**

1. Vide Memorandum of Appeal dated 22nd of May 2018, the Appellant sought the following orders;

***a) The appeal be allowed;***

***b) The judgement made in Kithimani PMCC No. 118 of 2015 on 16th of May 2018 be set aside and the same be assessed accordingly or be enhanced;***

***c) Judgement be entered in favour of the Appellant against the Respondent and the court assess the damages payable to the Appellant; and***

***d) The costs in this appeal be provided for.***

2. The same has been sought on the grounds that;

***a) That the learned magistrate erred in law and in fact by dismissing the Appellant's suit against the Respondent.***

***b) That the learned magistrate misdirected herself in law and in fact by finding that the Appellant had not proved his case against the Respondent despite the overwhelming evidence led by the Appellant.***

***c) That the learned magistrate erred in law and fact by failing to appreciate that the Respondent was vicariously liable for the actions of its employees.***

***d) That the learned magistrate erred in law and fact by failing to address her mind on the evidence adduced and hence made an erroneous finding.***

***e) That the learned magistrate misdirected herself in law and in fact by placing too much reliance on the Respondent's evidence which was contradictory.***

***f) That the learned magistrate erred in law and in fact by failing to consider the totality of the evidence adduced at trial.***

***g) The trial magistrate erred in law and in fact by failing to consider the parties written submissions.***

3. The genesis of the appeal arises out of a road traffic accident which occurred on or about the 23rd of December 2014 at about 2pm along Matuu-Thika road at Majani area. The Appellant was a passenger in KBK 196J which had mechanical problems that was being driven by the Respondent's employee, servant, agents and/or authorised driver who drove carelessly and negligently causing the metal rod used to tow and that had been connected to and was being towed by motor vehicle registration number KBK 203J to snap and break off. The driver of KBK 203J had crossed to the opposite lane in an attempt to overtake a trailer but there was an oncoming motor vehicle and attempts to get back in line were futile. As a result, both motor vehicles veered off the road and plunged into a stream causing the Appellant to sustain certain injuries being the following;

***a) Bruises on the left chest wall.***

***b) Bruises on the right forearm.***

***c) Laceration on the left lower leg.***

***d) Recurrent chest pains.***

4. The Appellant averred that he was taken to Matuu sub county hospital for treatment where he was treated and discharged. He produced the following documents as exhibits;

***a) P3 form.***

***b) Police abstract.***

***c) Identity card.***

***d) Treatment notes.***

***e) Copy of records for motor vehicle registration number KBK 203J.***

***f) Copy of records for motor vehicle registration number KBK 196J.***

***g) Demand letter.***

5. The Appellant had called one **Peter Mwaniki (Pw1)** who is a clinical officer and who opined that he treated the Appellant who had multiple cut wounds on his left lower limb, bruises on the left side of the chest and left forearm which must have healed. He classified the injuries as soft tissue injuries. He produced the P3 form, the treatment notes, his summons and a receipt in evidence.

6. **PW2 who** was **Stephen Kuria** a police constable from the traffic department of Matuu police station opined that he visited the scene of the accident where he established that the driver of KBK 196J, Danson Kabue, was towing motor vehicle KBK 203J when he lost control and plunged into the river. He produced the police abstract and his summons to attend court. He added that motor vehicle registration number KBK 203J was being driven by one Danson Kabue Ruga (deceased) who worked for the Respondent while KBK 196 J was6 being driven by Simon Mugweru who was also an employee of the Respondent.

7. **PW3, John Chege Nganga** who is the Appellant adopted his statement dated 1st of April 2015 where he admits to being given a lift in KBK 196J which had mechanical problems and was being towed by KBK 2P3J that was being driven by the Respondent's employee, servant, agents and/or authorised driver who drove carelessly and negligently causing the metal rod used to tow and that had been connected to and was being towed by motor vehicle registration number KBK 203J to snap and break off. He added that the driver of KBK 203J had crossed to the opposite lane in an attempt to overtake a trailer but there was an oncoming motor vehicle and attempted to get back in line were futile. As a result, both motor vehicles veered off the road and plunged into a stream. He stated that the motor vehicle was not authorised to carry passengers on cross examination and blamed the driver of KBK 203J and not the driver of the motor vehicle he was in. He further stated that no one stopped him from getting into the motor vehicle. He produced the copy of records for KBK 196J and KBK 203J, Demand letter, certificate of postage, medical report and receipts.

8. The Respondent entered appearance and filed a defence in which it denied the allegations of negligence and instead blamed the Appellant for boarding motor vehicle KBK 196J without the Respondent's authority and despite the clear instructions on the body of the motor vehicle not to carry unauthorised goods and passengers. It invoked the doctrine of *Volenti non fit injuria* and denied vicarious liability. It also prayed for dismissal of the suit with costs.

9. **DW1, Stephen Mugweru Liam** told the court that he was employed as a driver and on the date of the accident 22nd December 2014, he was sent to the Appellant's Kitui branch to deliver a motor vehicle since the branch motor vehicle had broken down and was to be towed to Nairobi for repairs. It was his testimony that the company sent Danson Kabue to Kitui to tow the faulty vehicle. They set off for Nairobi and he gave his friend John Chege Nganga a lift and upon reaching Matuu, they offered a lift to Stephen Kyalo Nduda at Chege's request. Danson Kabue (deceased) managed to swerve the first and second time but the third attempt to swerve back to his lane were futile as he saw an oncoming lorry and he could not get back to his lane. As such they ended up in the river.

He stated that they were taken to Matuu level four hospital by good Samaritans and later to Thika level five by the Respondent who had sent another vehicle from its Thika branch. He admitted that the motor vehicles have warning signs on both sides of the doors and signed a fleet management policy. He produced his clinical report, John Chege's clinical report, driving license, employment letter, fleet management policy and sticker as evidence.

10. **DW2, Leonard Wachira Njagi** who is the operations manager stated that he gave Kabue KBK 203J so as to tow KBK 196J which was assigned to Mugweru to Nairobi. When he received a call about the accident, he says that he called the Thika office and asked them to send a driver to the scene. He also proceeded to the scene where he found police officers, one motor vehicle on the river bank while the other was in the river. He reported to Matuu police station and he later learnt that contrary to the company policy, John Chege and Stephen Kyalo had been given a lift. He opined that the drivers acted outside the company policy as result of which, the Respondent was not liable for their actions. He produced the investigation report and inspection reports of both motor vehicles as evidence.

11. When the appeal came up for hearing, parties agreed to dispose of the same by way of written submissions which were duly filed by the learned counsels for the parties.

12. The Appellant's counsel submitted that the accident was solely caused by the negligence of the Respondent's driver (DW1). He submitted that the Respondent was vicariously liable for the accident. That the Appellant had no control of the motor vehicle and this was even echoed by DW1. He reiterates that Danson Kabui Ruga (deceased) was driving at a high speed and that is why he was unable to control it and this was careless of him. The Appellant then submits that the Respondent's employee did not make any effort to avoid the accident, that if he had stayed in his lane then the accident would not have occurred. Further, that if he did not attempt to overtake at the bridge then the accident would not have occurred. The Appellant then submitted that the defective motor vehicle should have been fastened and the driving done at a slow pace. He concluded by stating that the Respondent failed to prove that the accident occurred as a result of the Appellant's negligence.

13. On quantum, the Appellant submits that he is entitled to general damages of Kenya Shillings three hundred thousand (Kshs. 300,000) and special damages of Kenya Shillings Two Thousand (Kshs 2000).

> *14.* The Appellant relies on ***Securicor Kenya Limited Vs Kyumba holdings limited, Civil appeal no. 73 of 2002, Paul Muthui Mwavu vs Whitestone (K) Limited (2015) eKLR, Joseph Njuguna vs Cyrus Njathi (1991) eKLR, Morgan vs Launchburry & others (1972) All ER 605, P.A Okiro & Another T/A Kaburu Okello and partners Vs Stella Karimi Kobi, Civil Appeal no. 183 of 2003, Joseph Cosmas Khayigala vs Gigi & Company Limited and another Civil Appeal 119 of 1986, Rose vs Plenty &Another 1976 1 ALL ER 97, Muwonge vs Attorney General of Uganda 1967 EA17, Geoffrey Chege Nuthu vs M/s Anverali & brothers civil appeal no 68 of 1997, Abok James Odera T/A Odera & Associates Vs John Patrick Machira T/A Machira & Co Advocates (2013) eKLR, Boniface Waiti & Another vs Michael Kariuki Kamau (2007) eKLR, Ann Mukami Muchiri vs David Kariuki Mundia (2008) eKLR, Felsted Wanjiku Gichu vs Adam a PUBLIC Service and another (2001) eKLR, Christopher M. Mujule vs Alfred Moffat Omundi Muchira & Another(2014) eKLR, John Wainaina Kagwe vs Hussein Dairy Limited (2013) eKLR, Catherine Wanjiru Kingori &3 others vs Gibson Theuri Gichubi (2005) eKLR and HCC Meru Lucy Ntibuka vs Bernard MUtwiri and others (1983) eKLR.***

15. The Respondent submitted that it is not liable for the accident and pleads the doctrine of *volenti non fit injuria* and therefore prays that the suit be dismissed with costs. It relies on the notice that prohibits carrying of unauthorised passengers and the fact that the Appellant was not illiterate and he could read. The Respondent has however, not submitted on the issue of quantum.

16. The Respondent relies on the following cases to support its case; ***Selle vs Associated Motor boat Company Limited (1968) EA 123 , 126, Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through the Attorney General & 5 others (2015) eKLR, Beatrice William Muthoka and Edward Mutisya Muthoka (Both suing as legal representatives of the estate of the late William Muthoka Yumbia (Deceased) vs Agility logistics Limited (2020)eKLR, Khayigila vs Gigi & Company Limited and another (1987) eKLR, Tabitha Nduhi vs Kinyua vs Francis Mutua Mbuvi & another, Israel Mulandi Kisengi vs the standard limited & 2 others (2012) eKLR, Nancy Oseko vs BOG, Maasai Girls High school (2011) eKLR, Jason Singh Rai and 3 others vs Tarlochan Singh Rai and 4 others(2014) and Republic vs Communication Authority of Kenya and another ex party Legal Advice centre aka*** **Kituo Cha sheria (2015) eKLR**.

17. I have perused and taken into great consideration the lower court records, the judgement, the documents filed before this court and the submissions by the counsels together with the vast authorities cited and find the following issues for determination;

> ***a) Whether the doctrine of volenti non fit injuria applies in this case.***
>
> ***b) Whether the Respondent is vicariously liable for the accident.***
>
> ***c) Whether the Appellant is entitled to special and general damages.***
>
> ***d) Who should bear the costs of the appeal?***

18. This being a first appeal, the duty of this court is to re-evaluate the evidence tendered before the lower court and subject it to a fresh

analysis and to come to an independent conclusion as to whether to uphold the judgement of the trial court. This relates to both issues of liability and quantum. The parameters upon which this court can interfere with the finding of the trial court are well established, this being a first appeal. In the case of **Butt V Khan (1981)KLR, 349** the court held as follows:-

> ***The appellate court cannot interfere with the decision of trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at an erroneous conclusion.***

19. Further, in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR,** the Court of Appeal held that :

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297.***

***A. <u>Whether the doctrine of volenti non fit injuria applies to this case</u>***

20. The Respondent pleads the doctrine of volenti non fit injuria as its main defence. That the signs were clear and that it did not owe any duty of care to the Appellant as it only became aware of his presence at the time of the accident. Further, that the driver was not under any instructions to carry any unauthorised passengers. I will first address the issue of the doctrine before I look at the issue of negligence.

v **<u>The doctrine of volenti non fit injuria</u>**

21. The definition of doctrine of volenti non fit injuria has been explained to be where a person voluntarily agrees to undertake the risk of **harm at his own expense.**

22. In the book *Winfield & Jolowicz on Tort* W. V. H, Rogers , Sixteenth Edition, 2002, London Sweet & Maxwell, 2002 at page 855, Paragraph 25 which states that;

> ***the claimant must have information that indicates, at least in a general way, the risk of injury from the defendant's negligence. The mere fact that he is aware that the activity in which he participates carries risks does not mean that he has licensed the defendant to be negligent: knowledge that air craft's sometimes crash does not make out a case of volenti non fit injuria where the claimant has no reason to know of any defect in the plane or the pilot.***

23. In the case of **Smith Vs Baker (1891) AC 325,** the plaintiff was employed by the defendants on the construction of a railway. While he was working, a crane moved rocks over his head. Both he and his employers knew there was a risk of a stone falling on him and he had complained to them about this. A stone fell and injured the plaintiff and he sued his employers for negligence. The employers pleaded *volenti non fit injuria* but this was rejected by the court. Although the plaintiff knew of the risk and continued to work, there was no evidence that he had voluntarily undertaken to run the risk of injury. Merely continuing to work did not indicate *volenti non fit injuria*. In order for *volenti* to operate, the claimant must have knowledge of the existence of the risk and its nature and extent. The test for knowledge is subjective.

24. Scott L.J. in ***Bowater v Rowley Regis Corporation (1944) KB 476*** held that it must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

25. From the record and submissions by the parties, it appears that the Appellant voluntarily boarded the defective motor vehicle that had a clearly written sign that unauthorised passengers like him were not allowed. But the question that begs is whether the Appellant thus voluntarily asked the driver to be negligent. The answer would be negative. The next question of boarding such a vehicle that had mechanical issues goes to show that there was voluntary assumption of risk by the Appellant. This therefore leaves no doubt that the appellant boarded the ill-fated vehicle despite fully knowing that the driver was not authorized to carry unauthorized passengers. Indeed, the appellant knew that the vehicle was involved in towing another that was faulty and that the possibility of hitches on the way was high.

26. On the issue of negligence, the respondent owed no duty of care to the appellant who was an unauthorized driver. The appellant having voluntarily assumed the risk by boarding the vehicle despite knowledge of the respondent's express warning inscribed on the vehicle cannot attribute negligence on the respondent. I am therefore unable to apportion any liability against the respondent.

**B. <u>Whether the Respondent is vicariously liable for the accident</u>**

27. I would commend the parties for the extensive research that has been done in this matter. The issue of this doctrine has been well espoused in the Respondent's submissions and I am inclined to rely on those laid down principles.

28. The Court of Appeal, in the case of **Paul Muthui Mwavu v Whitestone (K) Ltd [2015] eKLR (OKWENGU, MAKHANDIA & SICHALE, JJ.A) held as follows:**

> ***Moreover, even assuming that the issue of vicarious liability was an issue for determination, in the Nuthu case, this Court***

***applied Morgans v Launchbury & Others [1972] 2 ALL E R 607 in which it was stated:***

> ***"In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner…"***

> **[22] In the same Nuthu case the Court restated the law on vicarious liability adopting the statement of Newbold P in Muwonge vs A.G. of Uganda [1967] E A 17 as follows:**

> **"The law, is so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable."**

29. An employer will be held liable for torts committed while an employee is conducting their duties. The Respondent has two witnesses who have stated what they were to do and what happened on the material day. It has been suggested that the Respondent's drivers (agents) acted outside their employment duties.

30. The ultimate test for vicarious liability was discussed in the case of ***Yewens v Noakes*** (1881) 6 QBD 530 where it was stated that *a servant is a person who is subject to the command of his master as to the manner in which he shall do his work.*

31. In the case of ***Joel v Morison*** (1834) EWHC KB J39 it was held that:-

> *"**The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.**"*

32. I am guided by the case of **Rose vs Plenty [1976] 1 WLR 141** where LORD Denning gave a distinction between ***Conway v George Wimpey & Company Limited*** **[1951] 2 KB 266** where a driver, who, despite express prohibitions, gave a lift to an employee of another firm, and negligently injured him in an accident and no liability was imposed on the employer, as this was deemed to be an activity outside of the employee's duties and the Rose'case, it was held that the young boy working by extension and thus in furtherance of the employment duties of carrying milk.

33. Such cases are looked at on a case by case basis and if it is shown that the employee was on a mission of his own escapades outside the scope of employment, then the employer will not be held liable. Lord Denning went on to say that the driver in Rose case was not on a frolic of his own and the fact that he gave the Respondent a lift contrary to his employer's instructions is not a ground to exonerate the claimant unless it can be shown that the claimant was made aware and freely consented to the risk.

34. It then appears that the ultimate test in this case as far as proving that the Appellant was aware of the risk and still voluntarily consented to the risk, then by the Appellant's own admission, he was aware that the motor vehicle he was in had mechanical problems and was being towed.

35. It is not in dispute whether the drivers were the employees of the Respondent, the respondent himself admits to the same in its pleadings. The bigger question is whether the accident occurred while the employees were in their line of duty. I find that in the affirmative. However, the conduct of the drivers went against the express instructions of their employer. The appellant admitted that he was aware that the vehicle was faulty and was being towed and further that he was learned and understood the warnings inscribed on the vehicle that unauthorized passengers were not allowed to be carried. In such circumstances and having found that the appellant voluntarily assumed the risk, then the respondent cannot be held vicariously for the accident and that the appellant should pursue the driver personally. Consequently, I find that the appellant has not established his case on liability against the respondent. I must uphold the decision by the learned trial magistrate.

C. **Whether the Appellant is entitled to special and general damages**.

36. In Simon vs. Mercy Mutitu Njeru [2014] eKLR, the Court of Appeal observed that: -

'The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.

37. It is trite law that special damages must not only be pleaded but must also be strictly proved. The **Court of Appeal in Capital Fish Limited Vs The Kenya Power and Lighting company Limited (2016) eKLR** opined while relying on the case of **Provincial Insurance Company East Africa Limited vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)** that;

> **"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.**

38. Furthermore, In the case of **David Bagine v Martin Bundi (283 of 1996) [1997] eKLR,** the Court of Appeal, referred to the judgment by Lord Goddard CJ in **Bonhan Carter v Hyde Park Hotel Limited [1948] 64 TLR 177),** and again observed that:

> ***"It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."***

39. Having established that liability had not been established, this court still is under obligation to address the issue of quantum. The appellant's counsel submitted that the appellant be awarded general damages of Kshs 300,000/ and special damages of Kshs 2000/ Learned counsel relied on the case of **Catherine Wanjiru Kingori &3 Others- Vs- Gibson Theuri Gichubi (2005) eKLR** where a plaintiff who sustained multiple soft tissue injuries on the left elbow joint, and injuries on both ankles was awarded Kshs 350,000/ as general damages for pain, suffering and loss of amenities. No submission on quantum was filed by the respondent. The appellant herein sustained bruises on the left chest wall, bruises on the right forearm and lacerations on the left lower leg. Looking at the said injuries and the cited authority, I find that the sum of Kshs 300,000/ proposed is reasonable and would have been awarded had the appeal succeeded. On special damages the sum of Kshs 3000/ was pleaded but receipts for 2000/ were produced. I would have awarded the same had the appeal succeeded.

**D. <u>Who should shoulder the costs of this suit</u>**

40. With regards to the costs of the suit, I note that the same is given at the discretion of the court. The conventional rule is that costs follow the event. The appeal was defended by the respondent who deserves to be given costs.

41. In the result, it is my finding that the Appellant's appeal lacks merit. The same is dismissed with costs.

It is so ordered.

**Dated and delivered at Machakos this 23rd day of February, 2021.**

**D. K. Kemei**

**<u>Judge</u>**