REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 22 OF 2018

VEGPRO (K) LTD ..... APPELLANT

VERSUS

ROSE KERUBO.....1ST RESPONDENT

ERNEST GAKURU MBOI.....2ND RESPONDENT

NG'ENDO ENGINEERS LTD.....3RD RESPONDENT

(Being an appeal from the Judgment of Orenge, SRM delivered on 18th December, 2017 in Nairobi Chief Magistrate's

Court Civil Case Number 4691 of 2012.)

JUDGMENT

1. By an amended plaint dated 25th July, 2013, **Rose Kerubo** (hereafter the Respondent) claiming to have been an employee of **Vegpro (K) Ltd** (hereafter the Appellant) in the material period had sued the said company for damages in respect of injuries she allegedly sustained on 8th May, 2011. She averred that while lawfully aboard motor vehicle registration number **KAY 281 A** owned or hired by the Appellant and/or **Ngendo Engineers Ltd**. (hereafter the 3rd Respondent) and driven at their instance by their employee, servant and/or agent, **Ernest Gakuru Mboi** (2nd Respondent) , the said employee, driver, servant and/or agent so negligently and/or recklessly drove the suit motor vehicle that he caused it to hit speed bumps at high speed, and that the Respondent was thrown off her seat to the floor, as a result of which the she sustained severe bodily injuries.

2. The Appellant filed a statement of defence dated 23rd November, 2012 in which it denied ownership of the accident vehicle and liability for the accident. The other Defendants did not enter appearance, file defence or participate in the trial in which the Respondent and Appellant adduced evidence.

3. It is not quite clear from the judgment, whether the learned trial Magistrate found liability against the Appellant, and the 2nd Respondent and 3rd Respondent jointly and severally but he had proceeded to enter judgment for the Respondent for damages in the sum of Kshs. 802,000/- with costs and interest.

4. The Appellant was aggrieved with the outcome and preferred this appeal on the following grounds in the Memorandum of Appeal:-

> **"1) That the learned Magistrate erred in law and in fact in apportioning liability at 100% against the Appellant and holding the Appellant jointly and severally liable in total disregard of the evidence adduced and the appellants' submissions.**
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> **2) That the learned Magistrate erred in law and in fact in awarding general damages at Kshs. 700,000 which was not pleaded and which award was excessive and unwarranted in light of the evidence adduced.**
>
> **3) That the learned Magistrate erred in law and in fact in awarding future medical expenses at Kshs. 100,000 which award was excessive and unwarranted in light of the evidence adduced.**
>
> **4) That the learned Magistrate erred in law and in fact in awarding the claim of special damages at Kshs. 2,000/- which award was not proved and which award was excessive and unwarranted in light of the evidence adduced.**

5) That the learned Magistrate erred in law in not taking account entirely the written submissions of the appellants.

6) That the learned Magistrate's finding and decision was against the weight of the evidence adduced."

5. On 23rd June, 2020 the court gave directions that the appeal be canvassed by way of written submissions. The parties have duly complied.

6. The crux of the Appellant's submission was that it was not the owner of the accident motor vehicle **KAY 281A** and that it belonged to the 3rd Respondent. Thus, it was contended that the trial court erred in law and fact by finding all the defendants 100% liable jointly and severally. Counsel reiterated the Appellant's case in the lower court to the effect that it was not liable for the actions of the vehicle driver and resultant injuries to the Respondent, by dint of a transport service agreement entered into between the Appellant and the 3rd Respondent for the transport of the Appellant's workers to and from work; that the Respondent had failed to prove on a balance of probabilities, that the Appellant owned motor vehicle registration number **KAY 281A** and was vicariously liable for the actions of the driver**.** Counsel relied on two decisions in support of the submission. These are **Nancy Ayiemba Ngaira v Abdi Ali (Civil Appeal 107 of 2008) [2010] eKLR** and **Gladys Nchororo Mbero [2014] eKLR**.

7. Concerning quantum of damages counsel Counsel submitted that the award by the trial court was inordinately high and was not commensurate to the injuries sustained by the Respondent. He cited the decision in **Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini v A.M Lubia & Olive Lubia [1982-88] 1 KAR** concerning the principles that guide an appellate while considering whether to interfere with an award of damages. Counsel urged that in light of the injuries sustained by the Respondent applying the precedent in **Fast Choice Ltd & Anor v Hellen Nungari Ngure [2011] eKLR** damages to the Respondent should not exceed Kshs. 130,000/-. He submitted that the award in respect of special damages ought to fail as the claim was not proved.

8. The Respondent defended the judgment of the trial court Counsel reiterating that the Respondent was injured while in the course of her employment with the Appellant. In particular, it was emphasized that the accident occurred while the Respondent was aboard a motor vehicle registration number **KAY 281A** provided by the Appellant to ferry its workers and that it was the duty of the Appellant to ensure the safety of its workers.

9. On the issue of ownership of the said vehicle, counsel submitted that the Respondent had adduced evidence, in the form of a police abstract indicating that the Appellant was the owner of the accident vehicle, and that the Respondent was not privy to the transport contract entered into between the Appellant and the 3rd Respondent for provision of transportation services. Thus, it was argued that the trial court's finding on liability was well founded and consistent with the decision of the Court of Appeal on vicarious liability in **Selle –Vs- Associated Motor Boat Co. [1968] EA 123**.

10. On quantum counsel similarly relied on the decision in Kemfro **Africa Limited** and submitted that the Respondent had sustained severe injuries and the award of Kshs. 700,000 for general damages should not be disturbed. Counsel further submitted that the claimants in the authorities relied on by the Appellant sustained less severe injuries in comparison to the Respondent's. Finally, citing **Thomas K. Ngaruiya & 2 Others v David Chepsiror [2012] eKLR** concerning future medical expenses, counsel submitted that the award of Kshs. 100,000/- was properly made and reasonable and should equally not be disturbed.

11. The court has considered the record of appeal and submissions of the parties on this Appeal. In addition, the court has perused the lower court file. This being a first appeal it is the duty of the court to re-evaluate the evidence adduced at the trial and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see and hear the witnesses testify. See **Peters v Sunday Post Ltd [1958] EA 424**; **Selle –Vs- Associated Motor Boat Co. [1968] EA 123, Williams Diamonds Limited v Brown (1970) EA 11**.

12. In **Selle –Vs- Associated Motor Boat Co. [1968] EA 123 the Court of Appeal for Eastern Africa** expressed itself as follows: -

> **"An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

13. Later, in **Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 287** the Court of Appeal stated that: -

> **"A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown to have demonstrably acted on wrong principle in reaching the finding he did."**

14. There is no dispute that the Respondent was involved in an accident on the morning of 8th May, 2011 while travelling in the bus registration no. **KAY 281 A** christened ***"Ngendo Bus"*** while on her way to work. She was at the time an employee of the Appellant and stationed at the airport (presumably Jomo Kenyatta International Airport). There was no dispute that following the accident, the Respondent sustained skeletal and soft tissue injuries. In my considered view, this appeal turns primarily on the question of liability.

15. I find it pertinent to start with a review of the pleadings in the lower court file before considering the evidence. A perusal of the lower

court file reveals that initially, the Respondent sued her employer **Vegpro (K) Ltd** (the Appellant) and one **Ernest Gakuru Mboi** as the 1st and 2nd defendants in her plaint filed on 14/08/2012. At paragraph 4,5, 6 it was pleaded that:

> **"4. At all material times, the plaintiff was the employee of the (sic) while 1st Defendant was the legal owner having hired the Ngenda bus registration number KAY 281 A driven by the 2nd defendant being the driver, employee and/or agent of the 1st defendant.**
>
> **5.On or about 8th May,2011 the plaintiff was a lawful passenger aboard motor vehicle registration number KAY 281A when the bus was so negligently and/or recklessly driven, managed and/or controlled by the 2nd defendant, driver, agent servant and/or employee of the 1st defendant---**
>
> **6.The accident was caused by the negligence of the 2nd defendant being the owner, driver, servant and/or agent of the 1st defendant to which 1st defendant is vicariously held liable."** (sic).

16. In the defence statement filed by 1st defendant (now Appellant) on 23rd November, 2012 the Appellant pleaded inter alia that:

> **"3. The 1st defendant denies the contents alleged in paragraph 4 of the plaint and in particular avers that it was not the registered owner of motor vehicle registration number KAY 281A nor was the 2nd defendant its employee and/or agent or at all and puts the plaintiff to strict proof.**
>
> **4. The 1st defendant avers it is a stranger to the contents as alleged in paragraph 5 of the plaint and further wishes to reiterate that it was not the registered owner of motor vehicle registration number KAY 281 A nor was the 2nd defendant its driver, agent and/or employee as alleged and puts the plaintiff to strict proof.**
>
> **5. The 1st defendant denies being vicariously liable for the acts of the 2nd defendant as alleged and further it denies all the particulars as set out and particularized in paragraph 6 of the plaint and puts the plaintiff to strict proof thereof.**
>
> **The 1st defendant avers that the doctrines of vicarious liability and… are not applicable herein at all….**
>
> **6. Further and without prejudice to the averments contained herein above, the 1st defendant contends that the plaintiff's suit as filed is bad in law, defective, inept and ambiguous as it does not anyhow or sufficiently disclose a reasonable claim or cause of action against the 1st defendant and the 1st defendant shall raise a preliminary objection and apply for the same to be dismissed and/or struck out.... owing to the fact that the subject motor vehicle was the property of an independent contractor namely Ngendo Engineers Limited, and the 1st defendant is not liable at all for the** misfortune if any that befell the plaintiff".

17. The Respondent in her reply to this defence, pleaded inter alia that:

> **"3. The plaintiff further reiterates that the 1st defendant was the beneficial owner of the motor vehicle KAY 281A having hired the same from Ngendo Engineers Ltd to transport its workers.**
>
> **4. The plaintiff refers to paragraph 8 of the defence and reiterates it has made out a good case which raises a reasonable cause of action and denies knowledge of the contract between the 1st defendant and the alleged independent contractor ".** (sic)

18. Subsequent to this reply to defence, the Respondent filed a motion on 15/05/2013 seeking leave to enjoin Messrs **Ngendo Engineers Ltd** as a 3rd defendant. The grounds on the face of the motion indicate that the motion was prompted by the contents of the Appellant's defence statement. In her affidavit sworn in support of the motion the Respondent deposed inter alia that:"

> **"4. THAT at the time of filing suit I did not know the arrangement between my employer** (present Appellant) **and the owner of motor vehicle KAY 281A known as Ngendo Engineers Ltd.**
>
> **5. THAT I have been shown the 1st defendant's defence and the witness statement alleging that the 1st defendant had contracted a third party Ngendo Engineers Ltd to provide transport and it had all responsibilities for any liability arising therefrom.**
>
> **6. THAT I had advise from my advocate… that the said Ngendo Engineers Ltd should be enjoined in this suit as a necessary party so that issues of liability may be settled between the said defendants.**
>
> **7. THAT failure to join the said third party was not deliberate but I was not aware of any contract between my employer and the third party".** (sic)

19. The motion was allowed by consent on 7th June, 2013 following which the amended plaint was filed on 5th August 2013, enjoining **Ngendo Engineers Ltd** as the 3rd Defendant. Paragraphs 4, 5 and 6 of the amended plaint introduced the said 3rd defendant and averred

liability against it and the 2nd and 1st defendant (the Appellant). This is what paragraph 4 stated:

> **"At all material times the plaintiff was the employee of the 1st defendant while 1st defendant was the legal owner having hired the Ngenda bus registration number KAY 281A driven by the 2nd defendant being as the driver, employee and/or agent of the 1st and/or servant of the 3rd defendant.**

20. Paragraph 6 of the amended plaint averred that the ***"1st and 3rd defendants are vicariously held liable"*** for the negligence of the 2nd defendant ***"being the owner, driver, servant and/or agent of the 1st defendant and /or 3rd defendant".***

21. Although summons to enter appearance were issued against the 3rd Defendant (3rd Respondent) the said defendant did not enter appearance or file defence, and the Respondent's advocate filed a request dated 22nd December, 2014 seeking the entry of a default judgment against the said defendant. The request was not acted upon, and endorsed thereon was a handwritten note indicating that the request was not paid for and the same was to be filed away. No judgment was entered against the 3rd Defendant who had allegedly been served by way of registered mail, per the undated affidavit of service attached to the request for judgment. On 9/11/2015 when the matter was listed for pretrial directions before **Chesang R.M**. the court pointed out that the 2nd and 3rd defendants had not been served with the mention notice and stood over the matter generally.

22. What happened subsequently was that the Respondent's advocate on 11th February, 2016 filed a notice of withdrawal of the suit against the 2nd defendant which was dated 23rd November, 2015. Thereafter, the matter proceeded between the Respondent and the 1st defendant (Appellant) only. In these circumstances no judgment could have been properly entered in the final judgment against the 2nd and 3rd defendants.

23. As between the Appellant and the Respondent, the burden of proof lay with the Respondent to establish liability, which was disputed in the pleadings and evidence tendered by the Appellant. Section 107 of the Evidence Act provides that:

> **"(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**
>
> **(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".**

24. The question whether the Appellant was the legal or beneficial owner of the accident vehicle and its driver the Appellant's servant or agent loomed large in the parties' respective pleadings. In her written statement filed together with her plaint the Respondent had asserted that at the time of the accident, she was travelling "***in a bus No. KAY 281A Ngenda bus hired by the company Vegpro (K) Ltd (Appellant"*** also her employer.

25. During her oral testimony, the Respondent stated that she had been picked on the material date by the *"company vehicle"* and proceeded to describe the manner in which accident occurred, stating that the driver was "*over speeding"* at the time. She produced a police abstract on the accident report as **P.Exh. 4**. During cross examination she stated:

> **"The vehicle was for the company. We did a search. The vehicle used to pick us. I don't know if the vehicle was hired. It belonged to Ngendo. I don't know the arrangement between the defendant and Ngendo".**

In re-examination, the Respondent stated that she did not know whether the defendant (Appellant) had a (transport) arrangement with **Ng'endo** and that workers never used to be charged for transport on the bus.

26. The Appellant for its part had filed a written statement through one **John Matanye** , the **Human Resources Officer** who stated that he was the custodian of all employee records and motor vehicle register. He stated that the vehicle **KAY 281A** was not the property of the Appellant as beneficial or registered owners; that the vehicle belonged to **Ngendo Engineer Ltd** who were contracted to provide transport services for the Appellant's staff and that the Appellant had no control over the management or operation of the vehicle as the contractor was solely responsible. He asserted that the driver of the bus Ernest Gakuru (2nd defendant) was not an employee of **Vegpro Kenya Ltd** (Appellant).

27. Pausing there, I notice that the record of appeal is incomplete as it does not contain the typed record of the evidence of the Appellant's witness at the trial, among other documents. Nevertheless, both the handwritten and typed record of the trial is contained in the lower court file. The said record shows that the Appellant's witness **John Matanye** testifying as **DW1** adopted his written statement and asserted that the accident vehicle belonged to Ngendo Engineers Ltd and had been hired from 2008 to ferry the Appellant's workers. He produced an agreement for the transportation of workers between **Ng'endo Engineers Ltd** and the Appellant as **D Exh. 1** and reiterated that the former party was liable. The agreement **D. exhibit 1** is annexed to the witness' written statement.

28. **DW1** stated during cross examination that:

> **"We had an agreement with Ng'endo as at 2011. The workers were not involved. We informed the plaintiff to sue Ng'endo…. We can't pay, the vehicle was not ours. The said Ngendo should pay. The driver was joined in the pleadings. The plaintiff sued the correct party. The 3rd defendant had a contract as at 2013"**

DW1 reiterated these matters in re-examination.

29. By her reply to defence, the Respondent had claimed that the Appellant was the *"beneficial owner of the --- vehicle KAY 281A. having hired"* it from Ng'endo Engineers Ltd. But in the amended plaint she averred that the Appellant was the *"legal owner having hired the Ngenda bus"*. **DW1** confirmed in part by his evidence that the owners of the vehicle were Ngendo Engineers Ltd but asserted that they were independent contractors providing transport services to the Appellant.

30. It appears from the evidence- in- chief and answers in cross examination that the Respondent was abandoning her own pleadings concerning the hiring arrangements between the Appellant and Ngendo and claiming that indeed the vehicle belonged to the Appellant, then changing course to admit that it belonged to Ngendo, and not the Appellant. Which is which?

31. The Respondent's **P.Exh. 4** is the police abstract dated 5/04/2012. It states that the owner of motor vehicle KAY 281A was **Vegpro (K) Ltd** (the Appellant). The Respondent had possession of this document at the time of filing suit, when she averred that the vehicle was *hired* from Ngendo Ltd. She admitted under cross examination that she and her advocates conducted a search on the vehicle but did not produce it. Her evidence was challenged by the Appellant and put to doubt by her own prevarication on the issue. In this context, the better evidence to prove ownership by the Appellant would have been a copy of records, if indeed that was the Respondent's case. The Court of Appeal stated in the case of **Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another, (2010) eKLR that:**

> **"Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary".**

See also **Jared Magwaro Bundi & Another vs. Primarosa Flowers Ltd (2018) eKLR.**

32. However, as can be seen from the earlier review of pleadings, it was never the Respondent's' case that the Appellant was the registered owner of the accident vehicle. Her assertions to that effect during the trial were contrary to her pleadings and should not have been allowed as evidence. Parties are bound by their pleadings and cannot be allowed to recalibrate their pleaded case at the trial as appears to have happened in this case. That is the dicta in **Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91; Galaxy Paints Company Ltd V. Falcon Guards Ltd (2000) eKLR**; and **Gandy Vs. Caspair [1956] EACA 139.** In **Associated Electrical Industries Ltd V. William Okoth (2004) eKLR, Visram J**. (as he was) stated:

> **"I entirely agree with the Appellant's submissions that parties are bound by their pleadings. The Respondents have plead one thing and sought to prove another. In such a situation the defendant/appellant was highly prejudiced. It sought to defend the case against it as stated in the plaint. And the case stated in the plaint was never proved".**

33. The Respondent having acknowledged by her pleadings that indeed the accident vehicle had been "hired" from its owner Ng'endo Engineers Ltd and having sued but failed to conclusively pursue the entry of judgment against them could not change her case at the trial to impute ownership on the Appellant. But in the alternative, did the Respondent prove that the accident bus hired from Ng'endo was beneficially owned and in the control by the Appellant? In the case of **Muhambi Koja v. Said Mbwana Abdi [2015] eKLR** where plaintiff had pleaded beneficial ownership by the defendant of the accident vehicle, the Court of Appeal stated on appeal that:

> **"The Appellant having pleaded in the amended plaint that the Respondent was an "insured and/or beneficial owner" of the vehicle was bound by the rules of evidence, to prove the deposition to show for instance, that the Respondent was the insured of policy No..... for the period 20th day, 2004, to 19th May, 2005 as shown in the abstract report. Both courts below did not address how beneficial ownership is obtained.**
>
> ***Black's Law Dictionary 9th Edition* defines a beneficial owner as one who enjoys, uses and manages property as of right, and can convey it to others; an equitable ownership. None of this applied to the Respondent without evidence."**

34. The Respondent in this case did not by her evidence- in -chief tender any evidence to support the alleged beneficial ownership of the accident vehicle by the Appellant. Indeed, she seemed to assert legal ownership by producing the police abstract showing the Appellant as the owner of the vehicle. In cross- examination, she could not decide whether the vehicle belonged to the Appellant to Ngendo or was hired, stating, contrary to her pleadings that she did not know *"the arrangement between the defendant and Ngendo"*. By its pleadings and evidence, the Appellant denied that it was a beneficial or registered owner of the accident vehicle and asserted that they had contracted an independent contractor, namely, Ng'endo Engineers Ltd the owners of the vehicle, to provide transport services to staff of the Appellant; that the Appellant had no control over the operation of the vehicle; and further that the driver of the accident vehicle was not an employee of the Appellant. **DW1,** produced an agreement between the two parties for the supply of transport services. While it is true that the agreement was for a period prior to the date of the accident, **DW1** asserted that the parties were in a similar arrangement at the material time.

35. The onus lay on the Respondent to prove the alleged beneficial ownership of the vehicle by the Appellant. She did not, while **DW1** showed that the Appellant had engaged Ngendo Ltd. as an independent contractor to offer transport services to workers. The judgment of the lower court appears to gloss over the contested issue of ownership of the accident vehicle and to erroneously suggest the participation of all the defendants named in the suit, but it is not clear exactly which of these defendants was found liable. The trial court stated:

> **"The Respondent was a passenger in the defendant motor vehicle and therefore the 3rd defendant driver was primarily 100% responsible for his safety and the safety of the rest of the passengers. I will find that the defendants (..)100% to blame jointly and severally for the accident".** (sic)

36. The trial court did not address the issue of the ownership whether actual possessory or equitable (beneficial) of the accident vehicle by the Appellant, which had also been emphasized by the Appellant in submissions, citing the decision of **Ojwang J (as he then was) in Nancy Ayiemba Ngaira V. Abdi Ali [2010] eKLR**. In that case the learned Judge stated:

> **"There is no doubt that the registration certificate obtained from the Registrar of Motor Vehicles will show the name of the registered owner of the motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other person may be the *defacto* owners of the motor vehicle and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership".**

See also **Muhambi Koja**'s case.

37. Similarly, in this case, the Respondent's pleaded case related to such alternative (beneficial or possessory) ownership by the Appellant of the accident vehicle. However, not an iota of evidence was led to support this contention. As observed in **Muhambi Koja**'s case the Respondent herein could have brought evidence that the Appellant was the insured in the policy cited in the police abstract.

38. Secondly, and related to the foregoing, there was no evidence whatsoever adduced by the Respondent that the driver of the accident vehicle, was an employee of the Appellant. The Respondent having sued him initially and pleaded negligence against him later withdrew her case against him. **DW1** asserted that the said driver was not an employee of the Appellant. How could vicarious liability attach upon the Appellant in the circumstances? The evidence of **DW1** that the vehicles providing transport services to the Appellant's workers were under the control/operation of the independent contractor was not controverted. The Respondent having been put to strict proof in joinder of these issues ought to have furnished proof of the employee/agent relationship alleged between the Appellant and the erstwhile 2nd defendant.

39. On this appeal, in defending the finding of liability in the lower court, the Respondent cited the case of **Daniel Kaluu Kieti V. Mutuvi Ali Nyalo & Another [2016] eKLR.** The authority was relied upon for the application therein of the Court of Appeal decision in **Selle & Another V. Associated Motor Boat Ltd and Others [1968] EA 123** and to urge a hitherto un-pleaded case that the Appellant failed to ensure the safety of its worker the Respondent in the course of her duties and that the Appellant was liable whether or not it had contracted the services of transportation of its workers to a third party.

40. The Court of Appeal recently explained the rationale and application of the **Selle** decision in **Board of Governors St Mary's School V. Boli Festus Andrew Sio [2020] eKLR.** The facts of this latter case compare well with the instant one. The Respondent was an employee of the appellant, who with other teachers and pupils of St. Mary's School had travelled in a bus hired by their employer, the appellant, on a trip to Mombasa. An accident occurred during the trip, and the respondent sustained injuries. The bus had a driver provided by the owner, but none of them were sued. The suit against St. Mary's School was heard in the High court by **Aburili J**. and determined in the Respondent's favour.

41. The issue of vicarious liability of the driver of the bus was at the heart of the appeal. The Court of Appeal stated:

> **"The central issue that we think we must determine in this appeal is whether the facts before the judge allowed her to reach the conclusion that the Appellant was vicariously liable for the acts of the owner or driver of the hired motor vehicle. It was not disputed by either party before the judge that the bus that was hired to transport students and staff to Mombasa did not belong to the Appellant but belonged to a person who was not named in the suit… by the Respondent. Although the driver of the bus was named in the witness statement filed by the Respondent the driver was not sued and his name does not appear anywhere in the plaint.**
>
> **Vicarious liability is defined in Black's Law Dictionary 10th Edition by Bryan A. Garner as "liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties -also termed as imputed liability".**

42. The Court of Appeal then restated the facts pertaining to **Selle'**s case which had been relied on in the judgment appealed from. The Court restated the holding in **Selle**'s case to be that where a party delegates a task or duty to another, not a servant, to do something *for his benefit or for the benefit of himself and the other*, whether that other person be called an agent or independent contractor, the employer is liable for the negligent actions of that other, in the performance of the task, duty or act.

43. The Court of Appeal proceeded to restate the *obiter dictum* in the **Selle** case by **De Lestang, VP** that:

> **"A person employing another is not liable for that other's collateral negligence unless the relation of master and servant existed between them at the material time; the existence of the right of control is usually a decisive factor in deciding whether the relationship of master and servant exists".**

44. The Court of Appeal then concluded that:

> **"What Selle & Another (supra) is saying is that a principal will be responsible for the acts of a servant where the servant is carrying out a task on behalf of the principal. This is not the same when the task involves employment of an independent contractor.**

This issue is well captured in Charlesworth on Negligence 4th Edition, Sweet and Maxwell.

On the subject "Independent Contractors" the learned author declares that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. He says------- appeal succeeds. "

45. Similarly in this case, the Respondent enjoined the 2nd and 3rd defendants who were the alleged driver and owner of the accident vehicle but subsequently withdrew the case against the former, and never pursued the latter to obtain the entry of judgment against them, proceeding therefore only against the Appellant, who had hired the accident vehicle. There was no evidence that the bus owner and /or driver were operating the bus for the benefit of the Appellant or for the parties' mutual benefit. On the contrary, it was shown that the bus was operated by its owner and driven by his and not the Appellant's employee. The owner was shown to be an independent contractor. Therefore, no vicarious liability could attach against the Appellant for the acts of the driver and or the employer.

46. In the circumstances, the Respondent's case ought to have failed. It appears that the trial court proceeded on the assumption that the 2nd and 3rd defendants were active parties in the suit, and without evidence, proceeded to find the Appellant vicariously liable. Had the trial court correctly appraised itself of the facts of the case and considered the twin issues of the ownership of the accident vehicle and vicarious liability of the Appellants, it would have come to a different conclusion on liability. The findings reached, were against the weight of evidence, and erroneous. They cannot stand and the appeal on liability must succeed. I now turn to the issue of quantum, for completeness.

47. In **Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5** the court held that:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous 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 low".

See also **Kemfro Africa t/a Meru Express Service** and **Another [1982 – 1988] I KLR 727.**

48. Having considered the submissions on quantum and the evidence, and applying the principles enunciated in **Kemfro Africa Limited t/a Meru Express Service and Gathogo Kanini V. A. M. Lubia and Another [1982-88] IKAR 727** this court does not agree with the Appellant's submissions that the award by the trial court was excessive. The Respondent suffered a fracture of the right humerus and patella and suffered morbidity for a considerable period. She endured pain and had metal plates implanted. These remained in place and required surgical removal, portending more pain and suffering. The cost thereof was stated by the doctor to be Kshs. 100,000/-. The case of **Super Foam Ltd V Gladys Subero [2014] eKLR** relied on by the trial court may have reflected more severe injuries, but the authority urged by the Appellant, namely **Fast Choice Ltd v. Hellen Ngure [2011] eKLR** related to less severe injuries than represented in the instant case.

49. The trial court's reliance on the case of **Dennis Nyamueno Openda v. Anarwali & Others Ltd & another [2015] eKLR** may have led to a slightly higher award given that the plaintiff therein suffered more severe injuries. But the final award appears reasonable given inflationary factors, and is consistent with the award in **Philip Kipkorir Cheruiyot v. Nebco Ltd & Lawrence Ajuga Simo (2006) eKLR** where the plaintiff's injuries are comparable to this case being fracture of femur and dislocation of right shoulder and fracture of right humerus. In **Fast Choice** the plaintiff suffered a single fracture of the shaft of the right humerus and soft tissue injuries and was awarded Kshs. 180,000/= in 2011 on appeal. A total award of Kshs. 800,000/= inclusive of future medical expenses in this case cannot be said to be excessive or to represent an erroneous assessment of damages.

50. Had the Respondent succeeded in proving liability against the Appellant, she would have been entitled to an award of Kshs. 800,000/= inclusive of future medical expenses and Kshs. 2,000/= as specials in respect of the cost of the medical report. The total being Kshs. 802,000/= (eight hundred and two thousand). As the appeal has succeeded on liability, the judgment of the lower court is hereby set aside and this court substitutes therefor an order dismissing the Respondent's suit. Parties will bear their own costs, however.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 12TH DAY OF AUGUST 2021.

C.MEOLI

JUDGE

In the presence of:

Ms. Katile h/b for Mr Nyamweya for Appellant

N/A for the Respondent

C/A: Carol