REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 153 OF 2017

DOMINIC NDUNDA MUTISO...........................1ST APPELLANT

JULIANA MUNYIVA KIWIA............................2ND APPELLANT

VERSUS

TRANSALLIED LIMITED....................................RESPONDENT

(An appeal from the Judgment and decree of Honourable Kahuya I. M (Mrs.) SRM dated 2nd November, 2017 in Machakos Chief Magistrate Civil Suit Number 427 of 2015)

BETWEEN

DOMINIC NDUNDA MUTISO.............................1ST PLAINTIFF

JULIANA MUNYIVA KIWIA..............................2ND PLAINTIFF

(Both suing as representatives and Administrators of the estate of JONATHAN WANJOHI MUTISO)

VERSUS

NICHOLAS WANJOHI MUTURI....................1ST DEFENDANT

TRANSALLIED LIMITED...............................2ND DEFENDANT

JUDGEMENT

1. The appellants herein, in their capacity as legal representatives and administrators of the Estate of **Jonathan Kiwia Mutiso** (Deceased), by way of a plaint filed dated 12th May, 2010 sued the Respondents herein seeking general damages, special damages in the sum of Kshs 71,830.00, costs of the suit and interests arising out of a road traffic accident that it was alleged occurred on 16th August, 2015.

2. According to the plaint, on that day, the deceased was a passenger in Motor Vehicle registration number KBJ 825N owned by the 2nd Respondent which was being driven along Mombasa-Nairobi Highway at about 1.30pm when the 1st Respondent, acting as the 2nd Respondent's driver, agent, servant and/or employee, so negligently, carelessly and/or recklessly managed and/or controlled the said vehicle that it was involved in an accident near Kyulu Gate resulting into the deceased sustaining fatal injuries.

3. The appellant pleaded the particulars of negligence, particulars pursuant to statute and special damages in the Plaint and the aforesaid reliefs.

4. In his defence, the 2nd Respondent admitted paragraphs 1, 2 and 3 of the Plaint. Paragraph 3 was where the Appellants pleaded that the said vehicle was being driven, managed and/or controlled by the 1st Defendant as the 2nd Respondent's driver, agent and servant and/or employee. The defence proceeded to deny the occurrence of the accident, the fact of the deceased being a passenger in the said vehicle, the

particulars of negligence, statutory particulars and particulars of the special damages pleaded and prayed that the suit be dismissed with costs.

5. PW1, **Dominic Ndunda Mutiso**, testified that together with the 2nd Appellant, who was the deceased's wife, they were granted limited letters of administration of the estate of the deceased. On 10th September, 2010 he was informed by the 2nd Appellant that the deceased had been involved in an accident and had been taken to Makindu Hospital. He proceeded to Makindu and was informed that the deceased had passed away on the way to the Hospital. According to his information the accident was self-involving and the vehicle involved in the accident was motor vehicle reg. no. KBJ 825N. It was his evidence that the deceased and the 2nd Appellant were married under the Kamba Customary Law and traditions and had four children listed in the plaint but one **Dominic Kiio Kiwia** passed away several years before.

6. It was his evidence that the deceased was trained in animal health and was in the veterinary services earning Kshs 200,000.00. It was his evidence that the family spent Kshs 71,080.00 in funeral expenses. Upon conducting a search, it was discovered that the said vehicle was owned by the 2nd Respondent and was being driven by the 1st Defendant whom PW1 learnt had since passed. He therefore prayed that the suit be allowed as prayed.

7. In cross-examination, PW1 stated that he was unaware if the accident vehicle was a public service vehicle or not.

8. PW2, **Juliana Munyiva Kiwia**, testified that the deceased was aged 45 years and was the sole breadwinner and was earning not less than Kshs 200,000.00 per month since PW2 was assisting the deceased and was privy to that information. It was her evidence that the deceased used to give her not less than Kshs 60,000.00 per month for domestic use. Following the death of the deceased, PW2 was however unable to run the shop since she was not a trained animal health expert. She therefore prayed for the orders sought in the plaint. In cross-examination she stated that she did not talk to the deceased before he passed away and she was unaware if the vehicle was a public service vehicle.

9. PW3, **IP Koech**, based at Traffic Base, Mtito Andei Police Station, testified that on 10th September, 2009, a self-involving fatal road accident was reported at the station at 1.30am involving motor vehicle reg. no. KBJ 825N Nissan X-trail driven by **Nichiolas Wanjohi**, then deceased, who lost control of the said vehicle which rolled severally. According to him the vehicle had 6 passengers one of whom succumbed to the injuries

10. On behalf of the defence, DW1, **Mary Mukami Mwangi**, testified that she was a director of the Respondent and they were in the business of purchasing motor vehicles and selling them on behalf of their clients. According to her, KG vehicles are used to transport other motor vehicles and there is a special handle on them. She confirmed that motor vehicle reg, no. KBJ 825 N was registered under the Respondent's name. Her evidence was however that on 9th September, 2009, the 2nd Defendant/Respondent contracted the 1st Defendant, the late **Nicholas Wanjohi**, who passed away as a result of the said accident, to drive the car from Mombasa to Nairobi and deliver it to the 2nd Defendant's then car yard along Ngong Road and exhibited a copy of the instructions letter. The said vehicle was insured by AMACO. On 10th September, 2009 whilst enroute to Nairobi, the said vehicle was involved in a road accident along Mombasa-Nairobi Highway near Kyulu Gate as a result of which the said driver died on the spot. It was her case that the instructions given to the 1st Defendant were to drive the vehicle to Nairobi and not to carry any passengers. She disclosed that she spoke to the 1st Defendant as he was leaving Mombasa and was made aware that he was not carrying any passengers. She therefore denied that the deceased herein was a passenger in the vehicle hence the Appellants had no valid claim against the 2nd Defendant. She further denied liability as the said driver was not her employee. She therefore prayed that the suit be dismissed with costs.

11. In cross-examination, she stated that she only recognised the said driver but not the other passengers since the vehicle was a private motor vehicle with a carrying capacity of 5 passengers and was written off after the accident. According to her, she was never compensated for the loss. She clarified in re-examination that the letter of contract between her and the deceased driver was clear that he was not to carry passengers and if he did, then she ought not to be liable for his actions.

12. In her judgement, the learned trial magistrate found that the main issue for determination was whether the Respondent was vicariously liable for the acts of the 1st Defendant. She found that both parties were acknowledged that the accident vehicle only had a special transit licence that did not cover third parties and was not a public service vehicle hence it could not be said that the deceased was misled into boarding it. Together with the fact that the written contract between the 1st Defendant and the Respondent was to the effect hat the 1st Defendant was not allowed to carry a third, party, the learned trial magistrate, based on **Securicor kenya Ltd vs. Kyumba Holdings Ltd Civil Appeal No. 73 of 2002**, **Kenya Bus Service Ltd vs. Kawira Civil Appeal No. 295 of 2000**, **Joseph Cosmas Khayigila vs. Gigi & Co. Ltd & Another Civil Appeal No. 119 of 1986** and **Minister of Police vs. Rabie 1986 (1) SA 117 (A)**, found that the 1st Defendant had no authority to offer a lift to the deceased. According to her, since the vehicle was not a public service vehicle it did not matter that there was no notice warning potential passengers on the liability clause. She therefore found that the deceased's ride in the Respondent's vehicle was solely for the benefit of the 1st Defendant hence only he could be found liable for the accident. The learned trial magistrate therefore found the Respondent not liable and proceeded to dismiss the suit with costs and declared the suit against the 1st Defendant as having abated. She however found that had she found the Respondent liable, she would have awarded the Plaintiffs a total sum of Kshs 2,810,682/-.

13. Aggrieved by the said decision, the Appellant herein has preferred this appeal in which the only issue in contention is the finding that the Respondent was not vicariously liable in respect of the said accident.

14. In their submissions, the Appellants contended that the defence field was a general denial which did not state that the driver was not authorised to carry passengers. Neither did it allege that the deceased was negligent in boarding the said vehicle. It was submitted that the letter of appointment of the 1st Defendant stated that the driver was to drive the vehicle from Mombasa to Nairobi and the accident occurred in the course of his engagement hence the Respondent was vicariously liable for his acts since there was no evidence that the driver was doing his own business or was on a frolic of his own. It was submitted that the Respondent owned a vehicle which had passenger seats and the deceased had no reason to believe that the vehicle was on transit. In support of their submissions the Appellants relied on **Kisii HCCC No. 380 and 243 of 1998 – Joseph Suri Nyateng'& Another vs. H. P Mashru Ltd [1990] eKLR** and submitted that even if the driver was acting for his own benefit by carrying the deceased and contrary to the general instructions, the respondent is vicariously liable.

15. The Court was therefore urged to allow the appeal and enter judgement for the appellants on quantum as assessed by the lower court with costs both of the trial court and of the appeal.

16. On behalf of the Respondent, it was submitted that it was not in dispute that the driver was indeed the Respondent's employee. However, on the issue of vicarious liability it is the Respondent's submission that it is not liable for the negligence (if any) of the driver. This is because, it is well settled in law that for liability to attach, the employee must have been acting within the course and scope of employment and for the employer's benefit. In support of its submissions the Respondent relied on the case of **Tabitha Nduhi Kinyua vs Francis Mutua Mbuvi & Another Civil Appeal No. 186 of 2009[2014] eKLR**, where the court cited with approval the case of **Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986.**

11. The Respondent submitted that it is not in contention that the driver was the Respondent's agent. However, the Appellants failed to prove that in carrying the deceased, he was doing so within the scope of his employment or that this action was authorized by the Respondent. The Respondent presented evidence demonstrating that its core business was to purchase vehicles for its clients and transport them under special KG- licenses. As such, the driver was not authorized to carry passengers and action of carrying the deceased in the motor vehicle was thus a deviation from the Respondent's nature and scope of work and instructions attendant thereto. The Respondent further demonstrated that the motor vehicle was not a public service vehicle. Apart from giving testimony that the vehicle was a Nissan station wagon. The Respondent's witness went further to produce a copy of the insurance policy and letter of employment to show the purpose and the scope of the driver's employment. This evidence remained uncontroverted and the Respondent's witness proved to be truthful and consistent even upon cross-examination on her testimony.

12. To the Respondent, having demonstrated that the driver in carrying the deceased in the motor vehicle was acting outside the scope of his employment and without authorization, it cannot be held vicariously liable for the acts of the driver and relied on the sentiments of the Court of Appeal in **Vyas Brothers Limited vs. Shadrack Lagat [2016] eKLR** quoted with approval **Shighadai –vs- Kenya Power and Lighting Co. Ltd & Another, (1988) KLR 682**.

13. The Respondent submitted that since the driver having acted outside the scope of his employment and contrary to the express instructions issued to him in offering a lift to the deceased, he did so for his own benefit, the trial Court rightly came to this conclusion and relied on the sentiments of the Court of Appeal in **Tabitha Nduhi Kinyua vs. Francis Mutua Mburi & Another CA 186 of 2009 (2014) eKLR** where the court quoted the House of Lords decision in **Morgans vs. Launchbury & Others**.

14. According to the Respondent, at the material time of the accident, the driver was engaging in an act not authorized by it. This is because the driver was under express instructions to drive the vehicle from Mombasa to Nairobi and not to carry any unauthorized passengers. In support of this contention, the Respondent relied on the Appointment letter issued to the driver exhibited in Court as defence exhibit 2 and contended that the act of the driver offering a lift to the deceased was outside the scope of his employment. It was not amongst the acts he was authorized to perform and neither was it for the Respondent's benefit. The Respondent's witness testified that the deceased was a stranger to it. This is further corroborated by evidence showing that the Respondent is in the business of buying and selling cars while the deceased was a veterinary officer. It was submitted that selling vehicles and veterinary are two distinct and unrelated businesses. This further enforces the fact that the driver in carrying the deceased in the motor vehicle was doing so for his sole benefit. The letter of appointment clearly states that he was not authorized to carry any passengers making his actions beyond the scope of his employment.

15. It was submitted that the trial Magistrate correctly applied her mind to the facts of this case and came to a proper conclusion on this matter. In his regard the Respondent relied on the case of **Tabitha Nduhi Kinyua vs. Francis Mutua Mbuvi & Another [2014] eKLR** and the case of **Shighadai –vs- Kenya Power and lighting Co. Ltd & Another, (1988) KLR 682.**

16. The Respondent submitted that its core business was to import and sell cars on behalf of its clients and not to carry passengers. In support of the above, the Respondent presented in the lower Court a copy of the insurance policy which confirmed that the said motor vehicle was insured as a private car on transit under special KG (Kenya Garage) - number plates. The Respondent submitted that in as much as the vehicle had no notice warning potential passengers on the liability clause, the model of the vehicle was sufficient to bar any arguments to the contrary. While the Respondent agrees that there is no legally prescribed model for public service vehicles, it would like this Court to take judicial notice of the fact that in Kenya, station wagons are not generally used as public service vehicles. It is the Respondent's submission that the trial Court Magistrate was right in her decision when she held that the said motor vehicle was not a Public Service Vehicle hence it could not be said that the deceased was misled into boarding it.

17. According to the Respondent, in the case of **Kenya Power & Lighting Co.Ltd vs. Kenneth Lugalia Imbugua [2016] eKLR** the Court dealt with the question of who bears liability in a master servant relationship. It cited the English case of **Storey vs. Ashton [1869] L.R. 4 QB 476**.

18. It was the Respondent's submission that the act of lifting the deceased was solely for his own benefit and therefore, a frolic of his own. The Respondent is hence not liable for such an action. Further to this, for vicarious liability to attach to the Respondent, the driver ought to have been acting within the scope of his employment. The Respondent's evidence that the driver was acting outside the scope of his employment and without authorization at the time of the accident remained uncontroverted. It is the Respondent's submission that the trial Court rightly applied its mind to the law on vicarious liability and the facts of this case and correctly concluded that only the Respondent's driver could be found liable for the accident

19. In any event and without prejudice to the foregoing, the Respondent submitted that it cannot be held vicariously liable for the acts of the driver for the reason that the Appellants failed to prove their case against the driver in order for the court to hold him liable for the accident and thereby extend the liability to the 2nd Defendant vicariously. The Respondent further submits that the Appellants failed to substitute the deceased driver and their suit against him abated. It is the Respondent's submission that a suit against them for vicarious liability can therefore not stand in such circumstances.

20. The Respondent therefore submitted that the trial Court decision is sound and judgment was entered in favour of the Respondent as the

Appellants failed to prove their claim against it and prayed that this appeal be dismissed with costs.

Determination

21. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."**

22. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

23. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."**

24. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

25. In this appeal, it is clear that the determination of this appeal revolves around the question whether the Respondent was vicariously liable for the actions of the 1st Defendant leading to the occurrence of the accident in which the deceased lost his life. In order to determine that issue, it is necessary to take a sojourn as to what vicarious liability connotes.

26. The doctrine of vicarious liability was dealt with *in extenso* in **Mwona Ndoo vs. Kakuzi Ltd. (1982-1988) 1 KAR 523** where the Court of Appeal expressed itself as hereunder:

> **"The phrase vicarious liability means, 'that one person takes the place of another so far as liability is concerned'…The master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done. So that if a master is held liable for the negligence of his servant in driving a motor vehicle he is himself under a duty to see that care is exercised in driving of the motor vehicle on his business. Of course, this does not mean that a master, subject to cases of dangerous things and chattels owes a personal duty to third parties…The doctrine of vicarious liability has not grown from very clear, logical and legal principle but from social convenience and wrought justice…The employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion, should be liable if the motion that has been originated leads to damage to another…**

Whatever the basis a master is liable vicariously for the negligent act of the servant done in the course of his employment. Thus, a master is not liable for negligence committed outside the scope of his employment…In determining whether or not a servant's wrongful act is done in the course of his employment it is necessary that a broad view of all the surrounding circumstances should be taken as a whole and not restricted to the particular act which causes damage. There is no simple test, which can be applied to cover every set of circumstances, so that it remains essentially a question of fact for decision in each case…The matter must be looked at broadly not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: what was the job on which he was engaged for his employer?...A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form a part of it, and not merely coincident in time with it…It is however essential to remember that the servant's conduct can be within the scope of his employment only if the act is done during his authorised period of service or a period which is not necessarily disconnected from the authorised period…If the servant 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…Whether a detour by the servant is a "frolic of his own" is a question of fact and a matter of degree. When a vehicle belonging to a master is entrusted to the servant to be driven or used in any other way, the master is liable if the servant be negligent while using the vehicle either wholly or partly on the master's business or in the latter's interest but not if he be negligent while using it for any other purposes, even though the servant has the master's permission to use it for those purposes…The true test can be expressed in these words: was the servant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent or even fraudulent or contrary to express orders the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence or permission…But once it is conceded that (i) the servant was doing something in his working hours, (ii) on his employer's premises and (iii) that his act had a close connection with the work which he was employed to do, then the onus (in the sense of evidential burden) shifts to the employer to show that the act was one for which he was not responsible. In other words, it is presumed that the vehicle is being used for his master's purpose if the servant has authority to use it at all."

27. In the same case it was held that:

"Where a servant is using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes the master is not responsible for the servant's actions. Where the servant is employed only to do a particular work or a particular class of work and he does something out of the scope of his employment, again the master is not responsible for any mischief, which he may do to a third party. Where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised, had he known of it, the master is liable…The general principle is that a master is not responsible for a wrongful act done by his servant, unless it is done in the course of his employment. But a master is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they might be regarded as modes – although improper modes – of doing them. In other words, a master is responsible not merely for what he has authorised his servant to do, but also for the way in which he does it. On the other hand if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be the mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it…The fact of each case must be viewed in the light of the foregoing principle and, as usual, it is right to apply some degree of common sense to all this…From the evidence adduced using the vehicle outside the estate was at worst disobedience of the employer's command while doing that which he was employed to do, for he was employed to look after irrigation and check on fire on the employer's estates and to use the moor vehicle in the course of doing so. That disobedience did not absolve the employer from liability for the employee's negligence. It was not established that the employee was on a frolic of his own since there was no evidence as to what he was doing on that road and how far that road was from the estate. Without that evidence the reasonable presumption is that he was on his master's business. The law at present makes the owner of a motor vehicle responsible for the negligence of the person driving it if, but only if, that person is (a) his servant and driving it for and on his employment or (b) his authorised agent driving it for and on his behalf. Mere permission to drive is not enough to create vicarious responsibility for negligence…On the facts of the present case the driver was the respondent's servant and he was driving the respondent's vehicle in the course of his employment though he might have made a detour, which was not in any way so established, while performing his master's business. Therefore the appeal would be allowed, the High Court judgement set aside and judgement given for the appellant."

28. In this case, it is not contested that the 1st Defendant was employed by the Respondent. However, his assignment was to driver the vehicle from Mombasa and to deliver it to the Respondent's customers in Nairobi. He was strictly forbidden to carry any passengers and the vehicle in question is not one that is known to be for use in carrying passengers. **Ouko, J** (as he then was) in **Douglas Mwirigi Francis & 2 Others vs. Andrew Miriti Meru HCCA No. 34 of 2005** expressed himself as hereunder:

"In the instant case, since the appellant was aware of his prohibition from giving lifts to passengers and the presence of a notice on the motor vehicle, his blatant breach of those instructions absolved the 2nd and the 3rd appellants from blame. The 1st appellant was, as it were, on a frolic of his own for personal gain not envisaged by his employers. The motor vehicle in this appeal being a pick-up was not designed for carriage of passengers and there is also the aspect of insurance policies, which are strictly interpreted in terms of the use the motor vehicle is to be put in. The 2nd and 3rd appellants were not liable."

29. On the same note, **Bosire, J** (as he then was) in **Shighadai vs. Kenya Power & Lighting Co. Ltd & Another [1988] KLR 682** stated as follows:

"The 2nd defendant was not employed as a driver but was assigned the duties of attending to customer's complaints and checking whether their electrical installations were operating effectively. He was provided with a car to facilitate his easy and fast movement in the discharge of that duty. So that when the accident occurred he could be said to have been driving his official vehicle in the course of his employment. He was expected to return the vehicle after finishing the day's round, which was precisely what he was doing but lifted the plaintiff and six other people on his way back…The matter must be looked

broadly, not dissecting the servant's task into its compartment activities – such as driving, loading, sheeting and the like – by asking: what was the job on which he was engaged for his employer and asking it as the jury should…It was not part of the 2nd defendant's employment to carry passengers in the accident vehicle. He could carry those people who were in the employment of the 1st defendant. The lifting of the plaintiff was unauthorised by the 1st defendant and evidence was led to show he had been specifically prohibited from lifting persons other than employees of the company, which the plaintiff was not…If the defendant's driver acts for purposes of his employer, the defendants are liable; but if it is an act of his own, and in order to effect a purpose of his own, the defendants are not responsible…An employer cannot be held liable for injuries sustained by persons lifted by its driver unless their presence in the vehicle were reasonably foreseeable or their injuries occurred in the course of the driver's employment…In the instant case the plaintiff knew the accident vehicle was not ordinarily used in carrying people for hire or reward yet she boarded it. The vehicle had the colours of the 1st defendant, which the plaintiff was aware of and she knew it was assigned to the 2nd defendant for use in discharge of duties assigned to him or the defendant. By accepting or requesting to be carried in the accident vehicle she knew she was taking a risk…The 1st defendant cannot be expected to owe a duty to all Kenyans, because they have many vehicles scattered all over the country and who are likely to be lifted if their respective drivers are minded to do so. That will be stretching the 1st defendant's duty too far, more particularly when it has specifically prohibited its drivers from carrying people not employed by it. It is also true to say that the absence of a notice on the dashboard of the accident vehicle to the effect that unauthorised persons were not permitted in it, if the 2nd defendant's act of lifting the plaintiff fell outside the scope of his employment, will not of itself without more bring within the scope of the 2nd defendant's employment the act of lifting the plaintiff. The 2nd defendant lacked the authority to permit the plaintiff into the accident vehicle as giving her a lift was not even incidental or connected to his sphere of employment or acts done in pursuance of his employment. Therefore the 1st defendant is not liable to the plaintiff for the injuries she sustained in the accident."

30. The Court of Appeal at Nyeri in the case of **Tabitha Nduhi Kinyua vs. Francis Mutua Mbuvi & Another [2014] eKLR** held that: -

> **"We also find that the 1st respondent's action of giving a lift to the appellant was not for the purpose or benefit of the 2nd respondent but for his own benefit. In doing so we concur with the following finds of the High Court:-**
>
> > **'The appellant was aware or ought to have known that the motor vehicle in question was not a public service vehicle (PSV). The 1st respondent did not have authority of the 2nd respondent to carry any passengers. In actual fact, the 1st respondent had been specifically forbidden to carry any passengers. The fare that the appellant paid to the 1st respondent was for the 1st respondent's own benefit and not that of the 2nd respondent.'"**

31. Similarly, in this case, giving lifts to passengers was not within the 1st Defendant's employment. He was contracted to deliver the vehicle to the Respondent's clients and not to carry passengers. The vehicle itself was not an ordinary PSV vehicle. It was not foreseeable on the part of the Respondent that the 1st Defendant would carry passengers therein. Just like **Bosire, J** (as he then was) I find that by accepting or requesting to be carried in the accident vehicle the deceased was taking a risk and the Respondent cannot be expected to owe a duty to all Kenyans, simply because it is in the business of selling cars all over the country who are likely to be lifted if their respective drivers are minded to do so. I agree that that will be stretching the Respondent's duty too far, more particularly when it has specifically prohibited its drivers from carrying people not employed by it. It is therefore true as held in the English case of **Storey vs. Ashton [1869] L.R. 4 QB 476** that: -

> **"…a master is only responsible for the negligence of his servant if the act complained of is done in the course of employment, and where a servant starts on a completely new and unauthorized journey, then no liability will lie on the master as the servant will be deemed to have been on a frolic of his own."**

32. Having considered the decision of the learned trial magistrate, I find no reason to disturb the same. Both on facts and authorities the said decision was based on solid grounds and the law.

33. Consequently, I dismiss this appeal but with no order as to costs.

34. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 28th day of April, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties at 9.15 am having been duly notified through their known email addresses.

CA Josephine