REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO 110 OF 2016

MWANGI ALEXANDER ..... APPELLANT

VERSUS

FRANCIS KARIUKI WANJA ..... RESPONDENT

JUDGEMENT

1 This appeal arises from the decision of the court below (Hon. Ms Oluoch P.M. Kiambu court). The court found the Appellant's driver to be responsible for the accident which occurred along Kiambu Ruiru road on 3rd June 2011. It involved the Appellant's lorry reg no. KBL 474K.

2 The respondent who was a passenger in the said lorry sustained injuries while the driver died. The court awarded the respondent general damages of Kshs 500,000/- special damages of Kshs 3,000/- together with costs of the suit and interest.

3 Being aggrieved by the decision the Appellant filed this appeal citing the following grounds:

(i) That the learned magistrate erred in law and in fact in failing to hold that the plaintiff had described himself to the police as a turn boy.

(ii) That the learned magistrate erred in law and in fact in finding that in addition to the driver of motor vehicle KBL 474K there was a passenger and a turnboy.

(iii) That the learned magistrate erred in law and in fact in failing to find that the Plaintiff had contradicted himself in stating in his statement that he was an engineer and in his evidence in chief that he was a mechanic that had repaired the defendant's motor vehicle KBl 474K

(iv) That the learned magistrate erred in law and in fact in failing to appreciate that the witness statement is meant to be a concise statement of facts and that by the plaintiff failing to disclose he was allegedly called to repair motor vehicle KBL 474k he was raising a fresh issue at trial that the defendant did not have previous disclosure of.

(v) That the learned magistrate erred in law and in fact in holding that the defence was not confused on whether the plaintiff did for a living and that it was late at the submission state to challenge the contradiction in the Plaintiff's evidence.

(vi) That the learned magistrate erred in law and in fact in interpretation of a mechanic vis a vis an engineer.

(vii) That the learned magistrate erred in law and in fact in failing to hold that the defendant's driver was employed to carry goods and not to carry people and that any act of carrying the plaintiff did not amount to a mode of carrying out his duties by the driver.

(viii) That the learned magistrate erred in law and in fact in arriving at the presumption that motor vehicle KBL 474K had broken down and the plaintiff called to repair it, while there is no evidence to support either the assumption that the plaintiff was called by the defendant's driver of the said motor vehicle broke down.

(ix) That the learned magistrate erred in law and in fact in engaging in conjecture that it was reasonable that the defendant's driver to recall the plaintiff to go from Thika to Gilgil to repair the motor vehicle.

(x) That the learned magistrate erred in law and in fact in holding firstly that in addition to the diver there was a turn boy and the plaintiff, then later holding that the plaintiff was the turn boy.

(xi) That the learned magistrate erred in law and in fact in failing to hold that from the evidence tendered by PC Iddi the plaintiff is

described as a turn boy that would have implied he was an employee of the defendant.

(xii) That the learned magistrate erred in law and in fact in failing to hold that the sign "Driver not authorized to carry unauthorized passenger" was clearly marked on the passenger door of motor vehicle KBL 474K.

(xiii) That the learned magistrate erred in law and in fact in failing to hold that the driver was not allowed to carry unauthorized passenger.

(xiv) That the learned magistrate erred in law and in fact in failing to hold that the direr lacked the authority to permit anyone in to the accident motor vehicle

(xv) That the learned magistrate erred in law and in fact in failing to hold that the carriage of the plaintiff was not an act so connected with the duties of the driver as to form or be regarded as a mode of performing his duties.

(xvi) That the learned magistrate erred in law and I fact in holding that the plaintiff was an authorized passenger because he had done some work on the motor vehicle and was given permission to board it by the driver without any evidence thereof.

4 The appeal was disposed of by way of written submissions. In his submissions C.W. Githae for the appellant submitted that the respondent was not a lawful passenger in the motor vehicle KBL 474K on 3rd June 2011 as per grounds 1, 3, 7-16. He referred to sections of the evidence to support this. He said the vehicle in question was not for the carriage of persons but cargo. Secondly there was a clear print on the passenger door advising against unauthorized passengers.

5 He referred to the case of **Shighadai v KPLC Co Ltd & Anor [1988] KLR 682** in defining who an authorized passenger is where Bosire J (as he then was) stated:

> **"to my mind Okombo (the driver) lacked the authority to permit the plaintiff into the accident vehicle. Giving her a lift was not even incidental or connected to his sphere of employment or acts done in pursuance of his employment. In the circumstances, it is my Judgment that the 1st defendant is not liable to the plaintiff for the injuries she sustained."**

6 He faulted the finding by the trial court to the effect that the **Shighadai case** is distinguishable from the current one because the driver in Shighadai was a salesman and not a driver. To him the issue was not about the job undertaken but who could authorize passengers into a vehicle.

7 He submitted further that the court made a finding on what was not argued when it said the driver may have decided to get his own mechanic. And that the decision was in the interest of the appellant. He said the evidence was that the Appellant had his own mechanics who repaired his vehicle. He did not see the logic of a mechanic coming all the way from Makuyu by public transport when the respondent had mechanics and specialized vehicles to do the repairs.

8 He further submitted that the driver never informed the respondent that the vehicle had a mechanical problem. It was his argument that there was no evidence to show that the Respondent had done some work on the vehicle and was given permission to board by the driver. He cited the case of **Douglas Mwirigi Francis & 2 Others vs Andrew Mwiti HCCA No 34 of 2005 Meru un reported.**

9 Counsel submitted that it was not clear from the evidence of the Respondent and the police officer how many passengers were in that vehicle. He further contends that contrary to the expectations of Order 3 Rule 2(c) Civil Procedure Rules the respondent in his statement did not include everything he stated while in the witness box e.g he never stated in his statement that he was called to repair the motor vehicle, was a mechanic, that he left for Gilgil from Makuyu in the morning or that he was offered a lift by the driver. That in his statement he said he was an Engineer. He submitted that a mechanic cannot pass for an engineer as found by the trial court.

10 The appeal was opposed by the respondents through M/s Shem Kebongo who submitted that the main argument in the appeal is that the respondent was not an authorized passenger. Relying on the case of **Ndoo t/a Ngomeni Bus Service v Kakuzi Ltd [1984] eKLR** he submitted that the driver sought the services of a mechanic when he was stranded and this was in the interest of the respondent. He also cited **Charlesworth & Perey on Negligence at 2-226 on pg 163** which talks of an employee's disobedience of the employer's order.

11 Based on this he submitted that the only remedy was for the court to apportion liability on the issue of contributory negligence. He further submitted that the respondent being a passenger did not contribute to the accident. Counsel while relying on the case of **Butt v Khan [1977] 1KAR** asked this court not to disturb the award for damages but uphold it. He also compared the award in the instant case with that in **Kirinjit Singh Magor v Bonanza Rice Millers Ltd HCC (Nrb) No 373 of 2008** where the plaintiff with almost similar injuries but slightly less serious was awarded Kshs. 2,000,000/- (Two Million).

12 In his evidence the plaintiff who testified as PW1 stated that he was a passenger in the vehicle KBL 474K which he had gone to repair at Gilgil on 2nd June 2011 after being called by the direr. He said the driver had offered him a ride from Gilgil to Thika. He produced several treatment documents, receipts, X-ray, police abstracts, medical reports letters, **(PEXB1-11).**

13 **PW2 Ndiege Iddi** is a traffic police officer who was then attached to Kiambu police station. It was his evidence that the accident involved two vehicles i.e. KL 474K Altros Tunker and KBM 878F Toyota surf. In the KBL was a passenger (respondent) and a turnboy. The driver perished.

14 The Appellant testified as DW1. He said he does transport business. On 3rd June 2011 the vehicle was coming from Kakamega to Thika

and his driver never told him it had broken down. He denied knowing the Respondent. It was his evidence that he only has one mechanic who services his trucks and his deceased brother could not have called a mechanic. He produced photographs with writings showing **" not to allow another passenger"**.

15 He admitted ownership of the vehicle KBL 474K and that it was involved in an accident on 3rd January 2011. He admitted hearing that one Francis had been in the vehicle, though he is not his employee. He denied having been called by his deceased driver.

16 The learned trial magistrate considered all this evidence and came to the conclusion that the appellant was 100% liable and went ahead to award damages hence this appeal.

17 This being a first appeal I have a duty to appreciate the entire evidence subjecting it to a fresh exhaustive scrutiny and arrive at my own independent conclusion. I have to bear in mind that I did not have the opportunity to see or hear the witnesses and I must give an allowance for that. See **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] E.A 123; Peters v Sunday Post Ltd [1958] EA 424; Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No 172 of 2000. (Tunoi, Bosire & Owuor JJA); Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Anor Civil Appeal No 345 of 2000: (Okubasu , Githinji & Waki JJA**).

I should also bear in mind that it is not open to this court to review the findings of the trial court just because it would have found differently had it been hearing the matter for the first time.

18 I have considered the pleadings, evidence on record, grounds of appeal, the submissions and authorities by both counsels. The appellant raised sixteen(16) grounds some of which are repetitive. I have however considered them and the issues I find falling for determination are**:**

(i) Whether the Respondent is bound by his written statement

(ii) Whether the Respondent was a passenger in the vehicle KBL 474K

(iii) If he was a passenger whether he was an authorized one.

(iv) The court's determination depending on the court's findings on issues (ii) and (iii).

19 **Issue No (i)** ***Whether the Respondent is bound by his written statement***

The appellant has submitted that the respondent in his written statement omitted a number of issues which he only testified on in court thus raising contradictions in his evidence. It is true that the Respondent filed a witness statement under order 3 Rule 2(c) Civil Procedure Rules. The record shows that when the Respondent testified he never adopted the said statement as his evidence. Mr Ngechu the appellant's counsel did not raise the issue and did not even cross examine him on the said statement. He only asked him one or two questions based on what he had told the court on oath. The issue of contradictions in the evidence on oath and the statement never arose in his cross examination as the statement was never adopted.

20 The record further shows that when it came to the Appellants turn to testify and being led by Mr. Ngechu he adopted his written statement as his evidence. He was therefore cross examined on both his statement and his evidence on oath. The Appellant cannot therefore dwell so much on the Respondent' statement which was never adopted and which he did not cross examine the witness on.

21 The following is what the record shows in respect to the cross exam of the respondent by Mr. Ngechu:

"I boarded the vehicle in Gilgil. I had gone to repair it. The driver offered to give me a ride to Thika.

Court: shown photographs. This is the vehicle. These are writings on the passenger door. Accident was at around 6.30 a.m. on 3/6/2011. Court shown letter from advocate demand. I cannot read it because I have an eye problem."

I therefore find that the respondent's statement not having been made on oath and not having been formally adopted as his evidence and further not having been cross examined on it can't be binding on him. He is however bound by his testimony on oath in court.

22 **Issue No (ii)** ***Whether the Respondent was a passenger in the vehicle KBL 474K***

The occurrence of the accident involving the motor vehicles registration No. KBL 474K and KBM 878F on 3rd June 2011 is not disputed. Ownership of KBL 474K is also not disputed. What is in dispute is whether the respondent was a passenger in that vehicle or not. The respondent has testified that he was in the said vehicle which was from Kakamega and had developed a fuel problem while in Gilgil. That he was called there.

23 The report to the police on 3rd June 2011 and shows that the respondent was a passenger in the said vehicle. This is buttressed by the evidence of PW2 who is a traffic Police officer in Gilgil. He referred to O.B. No. 6 of 3/06/11 (Police abstract PEXB6). The appellant was not in the vehicle nor at the scene. He cannot therefore confidently deny that the Respondent was in the said vehicle. I find that the Respondent was a passenger in the said vehicle KBL 474K.

24 ***Issue No (iii)***

***If he was a passenger whether he was an authorized one*.**

The Appellant's counsel submitted that the vehicle in issue was for carrying cargo and not passengers. Moreover there was a notice on the passenger door prohibiting un authorized passengers. In response to this Counsel for the respondent submitted that the respondent was called by the appellant's driver to repair the vehicle. Since it was late, he offered him a ride.

25 The Appellant relied on the **Shighadai case** (supra) and **Douglas Mwirigi case** (supra) to buttress the point that the employer was not responsible in this case. The respondent cited the **Ndoo t/a Ngomeni Bus service case** (supra) to argue that the employer was responsible for his employee's wrongful acts within his course of duty. We have more recent decisions on this issue which I wish to explore.

26 The test for establishing whether an employer is vicariously liable for his/her servants negligence was set out by the Court of Appeal in the case of **Joseph Cosmas Khayigila vs Ciigi & Co Ltd & Anor Civil Appeal No 119 of 1986** as follows:

> **"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that 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 was 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 performance of the task or duty thereby delegated to him by the owner."**

27 In **P.A. Okelo & anor t/a Kaburu Okello & Partners vs Stella Karimi Koki & 2 Others Civil Appeal No 183 of 2003** Waki J.A. expressed himself as follows regarding the assignment of vicarious liability:

> **"In assigning vicarious liability the learned Judge appreciated correctly, that it arises when the tortious act is done in the scope or during the course of his employment."**

28 The court of Appeal at Malindi in the case of **Mwavu v Whilestone (K) Ltd Civil Appeal No 14 of 2014** while dealing with the same subject stated thus:

> **"21. 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 ER 607 in which it was stated:-**
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> **"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 of duty thereby delegated to him by the owner or 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 instruction the matter is liable**…..
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> 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] EA 187 as follows."**
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> **"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"…….**
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> 23 **In this case, the driver apparently gave a lift to the appellant and five other persons. Although the respondent's witness alleged that the driver had no authority to carry passengers, there was no notice displayed on the vehicle to warn third parties. It was asserted that the respondent's vehicle having been a land Rover which did not have seats for passengers at the back, it was apparent that it was not intended for passengers. In our view that is an assumption that does not take into account the reality in the rural areas where transportation can be scarce such that people are carried even in open lorries or pick ups. Therefore the fact that the vehicle was a land Rover that had no seats at the back could not be translated to mean that the driver had no authority to carry passengers…….In our view, as long as the driver of the Land Rover was ready and willing to give the passengers a lift, and there being no warning that the driver could not carry passengers; and the driver having the authority to use the vehicle; the owner of the vehicle remained liable and such was the case with the respondent…….**
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> 25 **With respect, the learned Judge erred in ignoring the Nuthu case which was a more recent decision of this court as compared to the Shighadai case which is a high court decision decided ten years before the Nuthu case. Had she applied the law as set out in the Nuthu case she would have come to the conclusion that the respondent was vicariously liable."**

29 In the case before me the Appellant has denied having been informed by the deceased driver of a mechanical problem with his vehicle. Be it as it may the driver perished in the accident and so there is no one to confirm that. The fact is that the respondent was a passenger in the vehicle KBL 474K and he was injured.

30 Following the holdings in the cases cited above it has been established that the late driver (Mr. Nyongonao Kahiru) had the authority of the Appellant to drive the vehicle. He was driving from Kakamega to Thika on the Appellant's instructions. The accident occurred before he reached Thika. It has also been established that there was a notice on the passenger door reading.

"THE DRIVER IS UNDER INSTRUCTIONS NOT TO CARRY UNAUTHORISED PASSENGERS"(DEXB1)"

31 According to the appellant this Notice meant that the driver could not carry any passenger, and it was sufficient warning to third parties. I could agree with him if the Notice read thus:

> **"THE DRIVER IS UNDER INSTRUCTIONS NOT TO CARRY ANY PASSENGERS"** as such a notice would effectively affect all third parties, without any limitation. The respondent has told the court that the deceased driver called him to come and do some repairs on the vehicle. The same driver offered to give him a lift to Thika where he was going since it was late. They then left at 9 p.m. for Thika arriving in the morning. The offer for a ride by the deceased driver to any reasonable person was permissible.

32 The respondent therefore had the permission of the driver to be on the vehicle. This permission was granted by the driver in his normal course of employment. I am persuaded in this by their Lordships finding at para 24 of the Judgment in the **Mwavu v Whitestone (K) Ltd** case (supra). From the general notice displayed on the passenger door there was no way the respondent would have known that the driver was not authorized to give such permission. That is why I found that Notice on the passenger to be wanting for the purpose it was put there.

33 Whether the driver acted deliberately wantonly, negligently or criminally, or even for his own benefit or if the act was committed contrary to his general instructions as in whichever way the master remains liable. Unfortunately in this case the driver is deceased and cannot confirm if he gave the permission as stated by the respondent. However going by the circumstances herein, there was no way the driver would have carried the respondent all the way from Gilgil to the scene if he had not agreed to do so.

34 My finding on this issue is that the respondent was an authorized passenger and the appellant is liable for the acts of his employee the driver.

Issue No. iv

The court's determination depending on the court's findings on issues (ii) and (iii).

35 Having found in favour of the respondent at issues (i)-(iii) it follows that the trial court's finding on vicarious liability is upheld. There is no dispute that respondent suffered injuries as a result of the accident. The appellant did not challenge the decision on quantum and I have no reason to make me interfere with the awards made.

36 In conclusion I find no merit in the appeal which I dismiss with costs to the respondent who also gets the costs at the lower court.

Orders accordingly.

Dated, signed and delivered this 27th day of July 2018 in open court at Kiambu.

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HEDWIG I. ONG'UDI

JUDGE