



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL APPEAL NO. 14 OF 2014**

**THE CHAIRMAN ST. TERESA'S NYANGUSU GIRLS' SEC. SCHOOL.....APPELLANT**

**VERSUS**

**DINAH MONYENYE MICHIKA ..... RESPONDENT**

*(Appeal from the Judgment and Decision in Ogembo SPM Civil Case No. 61 of 2010 (Hon. D.O. Ogola Ag.CM.)*

**JUDGMENT**

1. This appeal arises from the decision and judgment of the Chief Magistrate at Ogembo in **SPMCC No. 61 of 2010**, in which the appellant, **Chairman, St. Teresa's Nyangusu Girls' Secondary School**, was sued for damages by the respondent, **Dinah Monyenye Michika**, who suffered bodily injuries in a road traffic accident involving the appellant's motor vehicle Reg No. KAP 917N in which she and others were travelling as passengers.

2. It was pleaded in the plaint dated 4<sup>th</sup> March 2010, that the accident occurred on the 14<sup>th</sup> February 2010, at around 3.00 am along the Keroka-Nyangusu road near Nyachekei and was caused by the appellant's driver negligent manner of driving, managing and/or controlling the vehicle such that it rolled several times thereby causing injury to the respondent who held the appellant vicariously liable for the negligent acts and/or omissions of its driver.

The respondent therefore prayed for general damages together with costs and interest against the appellant.

3. The appellant's statement of defence dated 12<sup>th</sup> April 2010, was a denial of the allegations made against itself by the respondent and in particular that the respondent was lawfully aboard the material vehicle at the time of the accident.

The appellant contended that the driver of the vehicle was not permitted and/or authorized to drive the vehicle at the material time and was on a frolic of his own such that the appellant could not be held liable for injuries occasioned to the respondent.

The appellant therefore prayed for the dismissal of the respondent's case with costs.

4. At the hearing of the case, the respondent (**PW 1**) testified that on the material date she and others took a sick person to the appellant's school and were given the material vehicle to fuel and use it to take the sick person to hospital. On the way to the hospital, the vehicle moved very fast such that it overturned and rolled. She (PW 1) suffered injuries and was taken to Akeno hospital in Nyachekei. She suffered

injuries to the right hand, left shoulder, head and leg. She produced the necessary treatment notes (P.Ex 2) and the P3 form (P.Ex 3) as well as the medical report (P.Ex 4).

5. The respondent blamed the driver of the vehicle for the accident in that he was at a high speed prior to the accident and was driving in a manner which was careless. She said that they went to the school as there was a clinic which also catered for outsiders but because their sick person could not be treated they were given the vehicle to take her to hospital as it was an emergency case. She (PW 1) indicated that the sick person was suspected to have taken poison.

6. The respondent also indicated that twelve (12) of them had boarded the vehicle which had to be driven fast as it was an emergency case. She knew that the vehicle was moving fast but could not tell the exact speed. It was then that it overturned and rolled. Its driver suffered fatal injuries.

The respondent did not call any witness in support of her evidence with regard to the circumstances leading to the accident.

7. The appellant testified through Reverend Father **Denis Rogena Ondiek (DW 1)**, who stated that on the material 14<sup>th</sup> February 2010, at about 10.00 am, he was awakened by the driver of the material vehicle and informed that a person called Jackline had taken poison and needed to be taken to hospital as an emergency case to save her life. He (DW 1) handed over the keys of the material vehicle to the driver as a charitable gesture to save a life.

8. Later, the priest (DW 1) was informed that the vehicle had been involved in an accident near Nyacheki Market. He proceeded to the scene and found that the vehicle was a wreck but the accident victims including the driver were not there. He then proceeded to Nyacheki District Hospital and found that the driver died in the accident. He later came to learn that the lady said to have taken the poison denied the fact. His understanding when he released the vehicle to the driver was that it was the lady and the driver who were to proceed to hospital. He was not aware of the other people who boarded the vehicle to accompany the lady to hospital. He confirmed that the vehicle belonged to the appellant and that he gave permission to have it released to the driver to undertake the said charitable mission.

9. All the foregoing evidence was considered by the trial court which came to the conclusion that the respondent was authorized to board the vehicle and therefore the appellant was vicariously liable for the negligence of its authorized driver in causing the accident.

The trial court found the appellant to be fully or 100% liable to the respondent who was thereby awarded general damages in the sum of Ksh. 250,000/=.

10. Being aggrieved by that decision, the appellant preferred this appeal on the basis of the grounds in the memorandum of appeal dated 5<sup>th</sup> February 2014. The grounds mainly raise issues regarding the non-joinder of the driver of the vehicle or his estate as a party to the suit, the alleged permission or authority of the appellant allowing the respondent to board the vehicle and the quantum of damages awarded to the respondent vis-a-vis the injuries suffered.

11. At the hearing of the appeal, learned counsel, **MR. Mose**, appeared for the appellant while learned counsel, **MR. Ombati**, appeared for the respondent. Both counsels filed and relied on their written submissions in support of the appeal and in opposition thereto. They also agreed with the approval of the court that the present appeal No. 14 of 2014, be the test suit in related appeals No. 13, 15, 16, 17, 18 and 19 of 2014, so that this judgment may abide in those other appeals.

12. Be that as it may, this court having given due consideration to the appeal in the light of the rival submissions by the parties, was under an obligation to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses (see, **Selle Vs. Associated Motor Boat Company (1968)EA 123**).

13. In that regard, the evidence was herein-above considered and in the opinion of this court, it raised no

substantial dispute that the ill-fated vehicle belonged to the appellant and was involved in the material accident while carrying passengers including the respondent who were accompanying a sick person to hospital, hence had the appellant's implied or express permission or authority to board the vehicle as indicated by the appellant's witness (DW 1).

14. With regard to liability, it was apparent that the driver was at a high speed on the way to the hospital. He was carrying a person who had allegedly taken poison to the hospital in order to save her life. He was made by the people taking the person to hospital to understand that it was a case of emergency. He was thus put under extreme pressure by those people including the respondent to drive fast at a speed which was more than average so that the life of the sick person may be saved. Indeed, the respondent stated in her evidence that the vehicle was moving very fast such that it overturned and rolled. She also indicated that the vehicle had to move fast because it was an emergency. The sick person was actually her sister-in-law and it later turned out that she had actually not taken any poison.

15. Even as the respondent pressurized, or encouraged or prevailed upon the driver to drive fast they had the necessary knowledge that the vehicle was not an ambulance which is well equipped and made to be stable at high speed. Besides, ambulance drivers are trained and would be in a better position to maneuver the vehicle at high speed and safely deliver a patient to hospital. The driver herein was not a trained ambulance driver, his vehicle was not an ambulance, yet the respondent and others expressly or impliedly urged him to drive at a high speed in order to save a life.

16. What was essentially a humanitarian mission being undertaken by the appellant ended up rather tragically with the death of the driver and his passengers suffering bodily injuries. The entire state of affairs was precipitated by the lady called Jackline. She led people to believe that she had taken poison and sparked a panic which led to her being taken to the appellant who provided the vehicle to rush her to hospital and in the process the vehicle was involved in a tragic accident.

17. The evidence strongly indicated that high speed was the major cause of the accident. In normal circumstances it would be easy to blame the driver for recklessness but in this case the circumstances were rather special in that the driver was pressurized by the respondent and others to drive at a high speed and in the process he lost control of the vehicle causing it to overturn and roll. He was thus to blame for the accident but the blame was not his alone and ought to have been shared with the respondent and others in equal proportion. It was the respondent and others including their "patient" who caused the driver to drive at a high speed.

18. This court must therefore find and hereby finds that the respondent and the other passengers in the vehicle contributed to the accident to the extent of 50%. It was thus erroneous for the trial court to place the appellant's liability for the accident at 100%.

19. With regard to quantum of damages, it is notable that the respondent only prayed for general damages which was awarded by the trial court in the sum of Ksh. 250,000/= for pain, suffering and loss of amenities.

The respondent as per the medical report (P.Ex 4) suffered fracture of the right radius ulna, cut wounds on the left shoulder and scalp, bruises and lacerations on the back and deep cut wounds on both legs. She was expected to heal from the injuries without permanent disabilities. The award of kshs. 250,000/= for those injuries was therefore reasonable and adequate. It cannot be described as having been inordinately excessive and is hereby upheld.

20. With regard to non-joinder of the driver or his estate as party to the suit, the omission was not fatal and could not upset the appellant's vicarious liability for the acts and/or omissions of its authorized driver. Indeed, in **Dritoo Vs. West Nile District Administration (1968)EA 428**, it was stated that:-

***“Where it is proved that a car has caused damages by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible”.***

21. In Ndungu Vs. Coast Bus Co. Ltd (2000)2EA 462, it was held by the Court of Appeal that:-

*“It would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim*

*Vicarious liability of the employer is not pegged to the employee’s liability but to his negligence”.*

22. In the upshot, this appeal is allowed only to the extent that the judgment of the trial court on liability be and is hereby set aside and substituted for a finding that liability be apportioned between the appellant and the respondent on a ratio of 50:50%.

The judgment on quantum of damages is hereby sustained with necessary adjustment to the amount due to the respondent from the appellant in view of the aforementioned apportionment of liability. This judgment abides in related appeals No. 13, 15, 16, 17, 18 and 19 of 2014, at the High Court in Kisii.

Each party shall bear own costs of the appeal.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**[Delivered and signed this 26<sup>th</sup> day of May 2016].**