



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL NO. 538 OF 2012

THE KENYA POWER & LIGHTING CO.LTDAPPELLANT

VERSUS

KENNETH LUGALIA IMBUGUARESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Senior Principal Magistrate, C. Obulutsa in Milimani CMCC No. 1692 of 2008 delivered on 18th September 2012. The respondent herein Kenneth Lugalua Imbugua was the plaintiff in the subordinate court whereas the appellant herein Kenya Power & Lighting Company Limited was the defendant.

2. The respondent sued the applicant vide plaint dated 18th March 2008 claiming for damages for injuries sustained while travelling in the Appellant's car while he was in the cause of his duty as a passenger and that following that accident, he was compensated under the Workmen's Compensation Act. He therefore sought general damages for negligence of the respondent's driver who was the 2nd defendant Mr Raphael Gitau in the manner he drove/ managed and or controlled the accident motor vehicle registration No. KZX 429 along Mirema Road, Nairobi on or about the 20th March 2005.

3. The respondent/defendant filed a defence dated 21st May 2008 admitting at paragraphs 2 and 3 thereof that it owned the accident motor vehicle; and that an accident did occur on the material date and at the time and place stipulated in the plaint.

4. The defendant/ Appellant however contended that at the time of the stated accident, its driver Mr Raphael Gitau had no authority of the Appellant to drive it and that the respondent was travelling in the said accident motor vehicle without the authority of the appellant. Further, that the respondent and the driver of the material accident were on a frolic of their own since the use of the accident motor vehicle was without the authority and consent of the appellant. The appellant also maintained that the journey was unauthorized hence the respondent consented to run the risk involved in such journey. It also denied that it was vicariously liable for the acts of negligence attributed to the driver of the material accident motor vehicle.

5. After hearing the parties, the trial magistrate entered judgment for the respondent/plaintiff. He found that the appellant herein was vicariously liable for the acts of the second defendant/driver of the accident motor vehicle and awarded respondent kshs 700,000 General damages, special damages as

pleaded and costs of the suit.

6. The appellant was aggrieved by the judgment of the trial court and lodged this appeal vide a Memorandum of Appeal dated 16th October 2012 setting out three grounds of Appeal namely:-

- 1) That the learned magistrate erred in failing to hold that the respondent and the second defendant were on a frolic of their own.
- 2) That the Learned magistrate erred in failing to hold that the appellant was not vicariously liable for the acts of negligence of the second defendant.
- 3) That the award of kshs 700,000 as general damages is excessive for the injuries sustained by the respondent.

7. The appeal was admitted to hearing on 7th October 2015 and directions were given on 11th December 2015. Both parties' advocates agreed to have the appeal canvassed by way of written submissions which they dutifully filed and exchanged.

8. The appellant's submissions were filed on 24th February 2016 by the firm of Hamilton, Harrison & Mathews Advocates whereas the respondent's submissions were filed on 11th March 2016 by the firm of Nelson Kaburu Advocates.

9. In their submissions, the appellants through their advocates urged the appeal by combining grounds 1-2 together and urging ground No. 3 separately.

10. On the question of who bears liability, the appellant submitted that the general rule in vicarious liability is that a master is only liable for the acts of his servants committed during the course of their employment. They cited **Storey V Ashton [1869] L.R. 4 Q B 476** where it was held 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.

11. It was submitted that the determination of whether or not an employee was on a frolic of his own is one of fact. Reliance was placed on **Sotik Tea Highlands Estate V Omayo [2007] e KLR** and **Selle & Another V Associated Motor Boat Company & Others [1968] EA 123** for the proposition that an appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial court's findings of fact if it appears either that he failed to take into account of particular circumstances of probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

12. The appellant's counsel submitted, contending that the evidence adduced at the trial proved that the respondent was not on duty on the material date of the accident and that he and the second defendant, who was the driver, were on a frolic of their own.

13. That the respondent alleged that he had been requested by the 2nd defendant to accompany him in taking a sick colleague to hospital and that before heading there the two went to the second defendant's home where they collected some medicine since the 2nd defendant is alleged to have been unwell. That from the testimony of Lawrence Nganga, the respondent and the 2nd defendant arrived in the morning and were scheduled to attend a private function which meant that the two had their own plans which were not within the scope of their employment.

14. Further, that in any event, the respondent herein was not on duty on the material day and neither was the 2nd defendant authorized to take the respondent's motor vehicle for personal use.

15. It was further submitted that the evidence was clear that the appellant did not require the respondent to pick up or take an employee to hospital hence the journey was completely new and unauthorized by the appellant.

16. For the above reasons, it was submitted that the appellant could not be vicariously liable for the accident and injuries sustained by the respondent. Reliance was placed on **CMC Motors Group Ltd V Rousalis and Another CA 231/2000** where one of the appellant's employees-Clay, took the respondents car for test drive but before returning it to the appellant's workshop went for lunch and after coming out of his home, after lunch, found the car had been stolen. The Court of Appeal overturned the High Court's decision which had found the appellant vicariously liable for Clay's acts.

17. On the second issue of whether the award was excessive for the injuries sustained, it was submitted that the award of damages in the sum of shs 700,000 was excessive in light of the injuries sustained by the respondent and that the trial magistrate failed to consider the appellant's authorities and entirely relied on the respondent's authorities in his decision on quantum of damages. Reliance was placed on **Phillip Muoka V Salim Ahmed (citation not provided) and Kiparen V Attorney General & Another (pages 61-62 and 82-84)** of the record of appeal wherein a sum of shs 300,000 was awarded where allegedly the injuries sustained were similar to the ones suffered by the respondent herein.

18. The appellant therefore urged this court to allow the appeal and set aside the judgment of the trial court, with costs to the appellant.

19. In his opposing submissions filed on 11th March 2016, the respondent's counsel Mr Nelson Kaburu submitted that on liability, the test is whether the authority to drive the motor vehicle was given hence the purpose of the journey. That in this case, what mattered was that the employer had an interest in the use of the vehicle at that particular time and that it had authorized its driver the second defendant to drive. The respondent's advocate also posed a question thus: If the driver was not in the course of his employment why was he paid workmen's compensation which is payable for accidents occurring in the course of employment? That by paying workmen's compensation to the respondent, the appellant is deemed to have *ispro facto* admitted, impliedly or expressly that the respondent was injured while at work and therefore the appellant was estopped by that payment and admission, from alleging otherwise. That in addition, the appellant paid all medical bills without doing so on a without prejudice basis and without asserting a Good Samaritan's role.

20. The respondent also raised issue with the appellant leaving out of this appeal its driver who was the second defendant in the subordinate court, which is a fatal omission, it was so submitted. That in any event, there was interlocutory judgment entered against the driver who neither entered appearance nor filed defence and neither did the appellant call him to testify. That the appellant instead called a witness who could not tell whether the driver of the accident motor vehicle had restrictions as to the use of the vehicle or whether the appellant had any standard rules as to the use of its vehicles or restrictions on drivers on how to use or not to use it vehicles. That the applicant's witness admitted that the respondent was a passenger in the accident motor vehicle as an employee of the appellant, and that the appellant's witness also concluded that the "two were on duty officially." That the witness admitted in cross examination that the function the driver was to attend to was for later that day and further confirmed payment of workmen's compensation to the two employees and further, he admitted that the 2nd defendant never stole the vehicle and that an employee has authority to use the vehicle and that a driver can give a lift to a co-worker.

21. Mr Kaburu submitted that the case of **Muwonge V Attorney General** referred to in the subordinate court settled the law in East Africa on vicarious liability than the ancient case of **Storey v Ashton [1869]** relied on by the appellant. That more recently, the Court of Appeal revisited the subject of vicarious liability in **Kenya Horticultural Exporters Ltd V Julius Munguti Maweu [2010] e KLR** where there was no evidence of restriction on the driver by the employer, and that without such evidence, no frolic can be inferred or found. Further that even a frolic would not constitute a defence so long as the employer has an interest in the use of the vehicle on the journey in

question. Those employers must take care to employ disciplined workers. Further reliance was placed on the **Jubilee Insurance Company Ltd V Keemu Musyoka CA 43/1984** where Madan, Kneller and Nyarangi JJA held that an unauthorized way of doing authorized work does not constitute a frolic.

22. In the end, counsel for the respondent summed that the accident was self involved and inference of negligence was made via the doctrine of Res ipsa Loquitur which evidence was not disproved hence full liability attached to the driver and the appellant owner of the motor vehicle and employer of the 2nd defendant driver, against whom interlocutory judgment was entered.

23. On quantum of damages as awarded, it was submitted by Mr Kaburu that the injuries sustained by the respondent were life threatening. He lost a gall bladder and portion of the liver, and that the cases cited had been decided long ago and inflation had taken its toll on the Kenyan shilling. That the respondent suffered 15% permanent incapacity. That the trial court took into account inflation and time lapse since the awards were made in the cited decisions cited by the parties.

24. Further, that it had not been demonstrated that the trial court took into account an irrelevant factor or failed to take into account relevant factors. That assessment of damages involves personal discretion of the trial court and it is not enough for this court to interfere with that discretion on the ground that it would have made a higher or lesser award had it been the one determining the suit. The respondent's counsel urged this court to dismiss the appeal with costs.

Determination.

25. I have carefully considered the record of Appeal, grounds of appeal as well as submissions by learned counsel for the parties to this appeal and the applicable case law.

26. As this is the first appellate court in this matter, I am obliged to re-evaluate and reassess the evidence on record and arrive at my own independent conclusion, bearing in mind that I neither heard nor saw the witnesses as they testified hence I would not be in a position to test their demeanor. These are the established principles applicable in appeals as espoused in section 78 of the Civil Procedure Act and as interpreted in several decisions of the Court of Appeal including the cases of **Selle V Associated Motor Boat Company Ltd [1968] EA 123** and **Abdul Hameed Saif V Ali Mohamed Solan [1955] 22 EACA 270**).

27. In my consideration of this appeal, I shall have regard to the two issues framed by the appellant: that of vicarious liability and that on quantum of damages.

28. Evaluating the evidence on record, the respondent testified as PW1 and stated on oath that he worked with the appellant in 2003 as Workshop Assistant in Ruaraka. That the second defendant Raphael Gitau was also his colleague and working as a driver. That on the material date the second defendant had asked the respondent to accompany him take a colleague to hospital from Mathare North and enroute, the said driver said he wanted to pass by his home first. He drove the motor vehicle KZX 429 belonging to the appellant employer. The guards allowed him out. Along the way, the driver lost control of the vehicle and hit a tree. The respondent was injured in the abdomen and taken to Matter Hospital where part of his liver and gall bladder were removed. He stated that being the appellant company staff, him and the 2nd defendant driver were allowed to board any vehicle. He had not fully healed from the injuries. He produced a medical report prepared by Dr Wokabi, police abstract, demand letter and receipts for payment to Dr Wokabi as exhibits.

29. In cross examination, the respondent stated that he was a camp attendant. That his colleague had asked for company and that it was on a Sunday. He stated that he had recorded his statement with investigations. He stated that his statement stated that the driver had met him at the canteen, but that he had boarded at the Training School. That the driver said he was first going to wash the vehicle which information he may have forgotten to state in his evidence.

30. In re-examination, the respondent stated that the statement was not in his writing. That it was written by the security officer. He confirmed that he boarded the vehicle outside the training school gate.

31. The appellant called DW1 Mr Huba Ngenyi who testified on oath that he worked for Kenya Power and Lighting Company as a Protection Security Officer. That he was ordered by his employer to record a statement which he identified and produced as an exhibit. That the plaintiff/respondent was a passenger in the accident motor vehicle as an employee of the appellant/ 1st defendant. DW1 testified that the driver of the motor vehicle had indicated that he would have a function with the plaintiff. He returned the motor vehicle and fell ill. He then left the training school through a different gate. That the driver told the witness that the accident was caused by a cow as a result of which it hit a tree. He also produced the statement recorded by the plaintiff/respondent herein which gave a different story. He further produced statements made by guards at the gate. The defence witness concluded that the plaintiff and driver were on duty officially.

32. In cross examination, the defence witness denied knowing Mr Muthaiwa. He further stated that there was no record as to how the motor vehicle left the driving school. DW1 confirmed that the driver's statement was that he was to have a function later that day and that he found out that the driver was on duty. He confirmed that the two staff members were paid workmen's compensation and their benefits by Kenya Power and Lighting Company. He stated that the driver did not steal the motor vehicle. He also stated that an employee has authority to use the motor vehicle and that a driver can give a lift to a co-worker.

33. In re-examination, DW1 stated that the driver had admitted that the motor vehicle was not to leave the compound and further stated that leaving the compound should have been through the gate.

34. At the close of the defence case, both parties' advocates filed written submissions. The respondent's counsel filed his submissions on 3rd July 2012.

35. On liability, it was submitted, relying on the **Omron case** on various liabilities that there is a presumption in law that a vehicle is driven for the benefit or gain of the owner. Further reliance was placed on the **Karisa V Solanki [1969] EA 318** case. It was submitted that the plaintiff's testimony that he was on duty on the material day was supported by DW1 who testified that the plaintiff was officially on duty and that the defence did not demonstrate that the plaintiff had breached any of the procedures for use of the company vehicles or what authority he required which he did not get before driving off with the accident motor vehicle. Further, that DW1 had confirmed that a driver could give a lift to a fellow employee hence there was no evidence of breach of any authority or lack of authority.

36. Relying on **Muwonge v Attorney general CA 68/97** it was submitted that in law, an employer is liable even where an employee acts wantonly or in breach of express instructions or even criminally, which decision settles the Kenyan position on the matter. Further, that the accident occurred at 10.00 O'clock and no frolic was proved since the driver was to attend a function later in the day not that morning. Further, it was submitted that workmens compensation paid to the two workers was only payable to employees who are injured while engaged upon their work hence the appellant herein was vicariously liable.

37. On damages, the plaintiff proposed shs 700,000 on account of the serious injuries sustained by the plaintiff and relied on 4 decisions wherein damages awarded ranged between 200,000- 350,000 . Those decisions were 1994-1994 decisions.

38. In rejoinder submission, it was submitted on behalf of the appellant herein who was the 1st defendant that since the evidence was clear that the driver and the plaintiff were on their own frolic, the appellant was not vicariously liable for the acts of negligence of the second defendant (driver) and hence the appellant was not liable to compensate the respondent for the injuries sustained in the accident. Reliance was placed on **CMC Motors Group Ltd V Rousalis and Another [2000] LLR 2375** whose facts were said to be similar to those of the present case. In that regard, it was contended that the detour by the 2nd defendant to his house was a frolic of his own as he was not on the first

defendant's/appellants' business, and neither was the plaintiff herein engaged in the business of the appellant when he was to be found in the accident motor vehicle at that material time.

39. The defence counsel maintained that the decisions relied on by the plaintiff showed that for vicarious liability to attach, the driver of the motor vehicle has to be seen to have been driving the motor vehicle for the joint benefit of himself and the owner and that the **Karisa V Solanki (supra)** case supported that position; that the appellant had adduced evidence unlike the defendants in the Karisa case, to show that the accident motor vehicle was not, at the material time, being used for the benefit of the appellant herein at all. That going to the house to collect medicine and the plaintiff's accompanying the driver to hospital was also a frolic thereby rebutting the presumption as required by **Karisa V Solanki case (supra)**.

40. On damages payable, the appellant submitted in the subordinate court that should the court find the appellant liable, then general damages awardable would not exceed shs 300,000. Reliance was placed on **Jared Wayodi V Frank Nzioka Kalla and Kiparen V Attorney General & Another [1997]**. In the said decision, general damages awarded was shs 160,000 and shs 300,000/- for injuries sustained, which injuries were said to be comparable to the ones sustained by the respondent herein. It was also contended that the authorities relied on by the plaintiff referred to more serious injuries than those suffered by the plaintiff.

41. The trial magistrate, Honourable Obulutsa upon hearing both parties and considering their submissions, observed that although the appellant herein had through its witness DW1 claimed that the vehicle had left the premises/training college in unclear circumstances and that the second defendant was an unauthorized driver, that that evidence was unsupported and that it did not controvert the plaintiff's evidence that the driver asked the respondent/plaintiff to escort the driver take a colleague, Mr Mutheu to hospital. Further, that the appellant did not call Mutheu to dispose the plaintiff's claim.

42. In addition, the trial magistrate found that no gate records or guards were available to testify to the fact that the driver left the college without authority. Finally, the trial magistrate wondered aloud as to why the hospital bills for the plaintiff as well as workmen's compensation were settled by the appellant if the vehicle was not authorized to leave the appellant's premises as claimed.

43. The trial magistrate compared the two cases cited, that of **CMC Motors Ltd V Rousalis & Another (supra)** and **Karisa V Solanki (supra)** as well as **Muwonge V Attorney General (supra)** and concluded that on a balance of probabilities, the plaintiff had established negligence on the part of the driver and the appellant herein as employee and owner of the motor vehicle was vicariously liable. He awarded the plaintiff shs 700,000 relying on all the four cases cited by the plaintiff which he compared with the two cases cited by the appellant herein, taking into account the injuries sustained, and inflation from the time those decisions were made. He also awarded shs 2000/-special damages pleaded and proved, together with costs and interest

44. It is that judgment that provoked this appeal as discussed herein above.

DETERMINATION

45. Having carefully considered the grounds of appeal as presented and argued for and against by both parties in their written submissions, I have also given equal consideration to the evidence adduced in the lower court and the findings and decision of the trial court. In my humble view, the main issues for determination in this appeal are:

- i. Whether the appellant was vicariously liable for the material accident for acts of its driver wherein the respondent was injured
- ii. What damages are awardable having regard to the injuries sustained by the respondent?

iii. What orders should this court make?

iv. Who should bear the costs of this suit?

46. On the first issue of whether the appellant was vicariously liable for the acts of its driver, the second defendant, it was submitted by the appellant that the 2nd defendant who was the driver of the appellant was on his own frolic and that neither was the respondent authorized to ride in the accident motor vehicle being driven at that time by the 2nd defendant hence vicarious liability would not attach to the appellant for the negligent acts of the driver. The case of **CMC Motors Ltd** (supra) was cited to that effect.

47. The respondent maintained that the appellant is liable because there was no evidence that the 2nd defendant was not authorized to use the vehicle. Further, that DW1 admitted in his testimony that the two officers were officially on duty and that the 2nd defendant could give a lift to his workmate the respondent herein.

48. The respondent also maintained that the fact that the appellant paid the injured employees workmen's compensation and even settled their medical bills was a clear admission that the material motor vehicle was on an authorized journey and that the respondent was an authorized passenger therein. Reliance was placed on **Muwonge v Attorney General** (supra) and **Kenya Horticultural Exporters Ltd V Julius Munguti Maweu** (supra) wherein no restrictions were placed on the driver by the employer. It was held that no frolic can be inferred or found. Further, it was submitted that the **Muwonge** case seemed to suggest that even a frolic would not constitute a defence so long as the employer has an interest in the use of the vehicle on the journey in question. Relying on **Jubilee Insurance company Ltd V Keemu Musyoka CA 43/94 CA**, it was contended by the respondent that the position that an authorized way of doing authorized work does not constitute a frolic.

49. The appellant faults the trial magistrate for failing to hold that the appellant was not vicariously liable for acts of the second defendant who was on a frolic of his own.

50. The trial magistrate believed the respondent's evidence and the cases he relied on and found that the respondent was not on a frolic of his own hence the appellant was vicariously liable for the reasons given in the judgment more particularly, that there were no gate records available; no guards were called to testify on the authorization of the vehicle; the second defendant driver was not called to rebut the evidence of the respondent; and more importantly; that the appellant could not have settled the respondent's medical bills and even paid him his full workmen's compensation if the respondent was an unauthorized passenger in the accident motor vehicle, if the second defendant had been on his own frolic or on an unauthorized journey at the time of the accident. The court further dismissed reliance on the case of **Storey V Ashton [1889] LR 4 QB 476** which he stated that it was an old case which had been overtaken by the settled position in Kenya as was decided by the Court of Appeal in **Muwonge V Attorney General** and **Kenya Horticultural Exporters Ltd V Julius Munguti Maweu** as well as the **Jubilee Insurance Company Ltd** case (supra).

51. Therefore on whether the second defendant and respondent were on their own frolic or not as contended by the appellant, the burden of proving that the two employees of the appellant who were using their employer's vehicle were unauthorized at that time, lies with the employer. The Black's Law Dictionary, 9th Edition defines 'frolic' as:

“An employee's significant deviation from the employer's business for personal reasons. A frolic is outside the scope of employment, and thus the employer is not vicariously liable for the employee's actions.”

52. On the other hand, the Free Dictionary.com defines **frolic** to mean:

“Activities performed by an employee during working hours that are not considered to be

in the course of his or her employment, since they are for the employee's personal purposes only."

53. The term '**frolic**' is an expression that has been used in judgments dating more than 200 years, to describe acts which are outside the course of employment and, accordingly, not covered by the vicarious liability of the employer. The case of **Joel V Morison [1834] EW HC KB J 39** concerned the scope of vicarious liability of an employer for the acts of his employee. The facts of that case were that Joel was struck down by a horse and cart, whose driver was Morison's agent. Joel was crossing a street in the city, but the driver's job was simply to travel between Burton Crescent Mews and Finchley. The driver had detoured to visit a friend, when the accident occurred. Morrison argued that he was not liable for Joel's injuries because the agent had strayed off his path. Parke B.J Held:

" If the servants, being on their master's business took a detour to call upon a friend, the master will be responsible.....but if he was going on a frolic of his own.....the master will not be liable."

54. In that case, Morrison was found liable for reasons that the doctrine of *respondeat superior* meant that the principal is liable for his agent's negligence only when the agent is acting at the time of the accident in *the "cause of his employment."* Thus, the agent was doing Morison's business and although he went, momentarily out of his master's implied command, the employer was found vicariously liable for acts of its employee/agent.

55. From the above English decision, I find that the test to be applied is whether the tort was so closely connected with the second defendant's employment that it would be fair and just to hold his employer liable for it.

56. Every case, nonetheless, must be determined on its own facts, the particular fact of an incident may thus give rise to a combination of proximity in time and space, and other circumstances might serve to enhance the risk of injury through employment. Case law in the local jurisdiction which decisions are binding on this court, have developed broad factors to be taken into account in deciding such cases thereby widening the scope of vicarious liability. Those factors include:

a. The context and circumstances in which the acts of negligence occurred, since these may establish that the act was incidental to, and therefore within the scope of, employment;

b. The time and place where the acts of negligence took place which, while relevant, may not be conclusive;

c. The fact that the employment provided the employee with the opportunity to perform the acts, although this does not necessarily mean that the acts were within the scope of their employment.

57. Although the appellant submitted relying on **Storey V Ashton [1869] LR 4 QB 476** as well as **CMC Motors Ltd** case which decisions I find support the proposition 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 that where a servant starts of a completely new and unauthorized journey, then no liability will be on the master as the servant will be deemed to have been on a frolic of his own; it will be noted that the **Storey V Ashton** case was decided on 7th May 1069 whereas the **CMC Motors Group Ltd V Starros Rousalis & Another** (supra) case was decided on 9th February 2001.

58. That being the case, and taking into account that the **Kenya Horticultural Exporters Ltd Vs Julius Munguti Maweu** case relied on by the respondent was determined on 26th March 2010, I would in the circumstances find that the decision in the **Kenya Horticultural Exporters Ltd Vs Julius Munguti Maweu** case is more applicable in the circumstances of this case, and proceed to apply it.

59. In the instant appeal and on the facts and evidence available, it is not in doubt that the respondent was an employee of the appellant. It is also not in dispute that the respondent hiked a lift in the accident motor vehicle which was being driven by the second defendant driver, who was the respondent's colleague at work. It is also not in dispute that the said motor vehicle was involved in an accident as described by the respondent, that the 2nd defendant lost control of the motor vehicle and hit a tree as a result of which the respondent was seriously injured.

60. One curious aspect of the judgment of the lower court is that it simply determined that the appellant was vicariously liable for the accident. It never went on to determine the negligence of the 2nd defendant in the manner in which he drove the accident motor vehicle on the material day. This being the first appellate court, I would, pursuant to Section 78 of the Civil Procedure Act, reconsider the evidence and determine whether the 2nd defendant was liable.

61. From the evidence of PW1 who was the plaintiff/respondent herein, which evidence was subjected to cross examination, the 2nd defendant driver lost control of the motor vehicle and hit a tree. No more details are given as to why the driver lost control of the motor vehicle.

62. It is now settled that motor vehicles which are well maintained and well managed or driven do not just get involved in accidents. There must be a cause and in the absence of any evidence to prove otherwise, the driver is deemed to have been negligent. How the accident happened was a matter within the knowledge of the driver of those accident motor vehicle belonging to the appellant herein, as well driven motor vehicles do not just get involved in accidents.(see **Rahab Murage v Attorney General Civil Appeal 179 of [2003] eKLR.**)

63. In this appeal, the driver was sued and particulars of negligence particularized against him. However, he neither entered an appearance nor filed any defence to the suit and ex parte interlocutory judgment in default of defence was entered in favour of the respondent against him. The respondent then proceeded to formally prove his case against the said driver. Curiously, although the said second defendant neither appeared nor filed defence, his handwritten statement which DW1 testified that he was “**compelled by his employer to record**” from the said driver 2nd defendant, was produced in evidence by DW1.

64. In producing that statement made by the 2nd defendant, no basis was laid for its production. Nothing is mentioned on the whereabouts of the 2nd defendant. Was he dead? Was he outside the jurisdiction of the court? Could he not be reached within reasonable time? Was he still in employment of the appellant? Nothing more was said about the 2nd defendant and why his statement concerning the material accident as given by him to his employer was being produced in evidence by another person without calling its maker to be subjected to cross examination.

65. Section 33 of the Evidence Act Cap 80 Laws of Kenya provides for circumstances under which a statement, written, or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible.

66. I have examined the record again and again and I have not seen any of the cases set out in Section 33 of the Evidence Act being applicable to the circumstances of this case where a statement of a person who was a party to the suit was produced by another person without laying a basis for such production.

67. The question is, why did the 2nd defendant not enter an appearance and or file defence to the suit yet his written statement was being used in evidence to prove the innocence of the appellant with regard to liability? I find that although that very statement of the driver 2nd defendant was admitted in evidence without any objection on the part of the respondent being raised, and therefore in the absence of any cross appeal, I will not make any finding on its admissibility or non admissibility at this stage. Nonetheless, it raises an antenna, and this court cannot shy away from categorically

determining whether there was any evidential value attached to such evidence which was purely hearsay evidence, and whose evidential value was watered down by the fact that the maker of the statement was not in court to take an oath and be subjected to the rigours of cross examination, the same way PW1 the respondent herein was.

68. I have re examined the said statement as produced and the handwritten statement of PW1 and it is clear that the two statements were not written by the same person since they are not written in the same handwriting. DW1 stated on oath that he was compelled by his employer to record a statement of the 2nd defendant/driver. The same witness DW1 also produced statements made by two guards at the gate. There is no explanation given why the guards Kennedy Ruto and Kennedy Omasele could not be called to testify and state what they witnessed on the material day. Their evidence was equally hearsay concerning the vehicle movement on Saturday 19th March 2005 and Sunday 20th March 2005 and no basis was laid for the production of those two statements made by the guards, without calling their makers. That evidence too was purely hearsay and of no evidential value.

69. Then there was the annexed document to the two guards' statements showing movement of the accident motor vehicle. The record only shows movement for 17th March 2005 and 18th March 2005 until 19th March 2005. If the accident motor vehicle was driven out of the Training School on 20th March 2005, the question is, why is it that the record for 20th March 2005 was never produced? In the absence of the evidence of any guard manning the entry and exist gates to the effect that the vehicle was not authorized to leave the Training School on that material day, all that was said by DW1 was nothing but hearsay and of no evidential value.

70. Furthermore, I find the recordings in the said vehicle movement register not consistent. For example, there are no signatures of the drivers on 18th and 19th March 2005 whereas there were signatures on 16-17th March 2005. Further, there is an entry for 20th March, 2005 in between 2 consecutive entries made on 19th March 2005 for motor vehicle movement. How could 20th March 2005 come in between 2 entries made on 19th March 2005 for the material motor vehicle KZX 429 leaving at 7.00 hours?

71. No explanation was given by the appellant's witness DW1 for those discrepancies, yet it is the same witness who testified that the 2nd defendant was not authorized to drive out the accident motor vehicle.

72. There is also the second exhibit document which is dated 19th April 2005, a report addressed to the Company Secretary from the Protective Services Officer (Accidents Motor vehicle), a Mr L. Nganga.

73. In that report of findings and recommendations, the author entirely relied on the statements of the driver and PW1 which he found contradictory. L. Nganga states in that report that the driver admitted that the vehicle was not authorized. The statement by Mr L. Nganga who never testified as a witness was reproducing statements of other people who were never called as witnesses. My finding is that it was hearsay and though admitted in evidence, no evidential value or weight attaches to it. Mr L. Nganga was relying on hearsay since at no one point did he say that he is the one who recorded the statements of the persons he was saying 'they said, or 'learnt from.'

74. Further, although DW1 who produced that "*report from the owner of the motor vehicle*" stated that the report does not show when he the (2nd defendant) left the Training School on that material day, he is the same witness who categorically concluded that "*the two were on duty officially.*"

75. In addition, as I have stated above, the exhibit document showing movement of motor vehicles shows that on 20th March 2005 at 7.00 hours, motor vehicle KZX 428 left the school at odometre reading 252613 destined for Mathare and the record shows the journey being '**authorized destination**' and the motor vehicle being driven by Mr Gitau and the gate keeper's signature in duplicate is present. That entry is the one which falls in between the first two entries for 19th March 2005 for the same motor vehicle and the same driver, just like the last three entries for 19th March 2005, in

respect of motor vehicle KAH 908 F driven by Njuguna.

76. With the above revelations, I do not find the vehement and strong submissions by the appellant's advocates material to this appeal. Their submissions are not supported by evidence on record. Submissions, in my view, however super and strong, cannot substitute the evidence adduced by parties on record. In **Douglas Odhiambo Apel & another v Telkom Kenya Limited**[2014]eKLR, the Court of Appeal affirmed the trial Judge's finding that:

“So as things stand, there is no evidence on record upon which I, as a court of law, can undertake an assessment of damages. There are averments in the plaint that the plaintiffs suffered loss and damage. The plaintiffs must place before the court evidence to sustain those averments. Pleadings and written submissions are not evidence.”

77. In other words, submissions on matters of fact must be made with reference to the evidence.

78. Furthermore, on the issue of cross examination of the makers of those statements which were produced without calling their makers, and without laying any basis for production of those written statements, I hasten to add that cross examination is a powerful tool in the hands of an adversary in proceedings. Non grant of an opportunity to cross examine a witness may attract the doctrine of fairness and may be held to be a violation of principles of natural justice (see **Andhra High court in Somagutta Sivankara Reddy And V Palapandha Chinna Gangappa** , citing with approval **K. Raghuram Babu V D.G. of Railway Protection Force, New Delhi** where the Full Bench of Andhra High Court of India was deciding on Section 33 of the Indian Evidence Act 1872 which is similar to our Section 33 of the Kenyan Evidence Act Cap 80 Laws of Kenya. The issues in that case were:

- i. Whether Section 33 of their Evidence Act would apply to the question of admissibility of evidence of a witness who has been examined in chief for being used as evidence in the same proceedings?;
- ii. Whether the fact that the witness whose examination in chief has been recorded was not subjected to cross examination would render the evidence admissible; or
- iii. Whether the fact of the witness having not been cross examined would merely affect the evidential value of the witness.

79. In the **Andhra High court in Somagutta Sivankara Reddy And V Palapandha Chinna Gangappa** case, the witness died after examination in chief. He, therefore, could not be produced for cross examination. The court held that the evidence given by a witness, although he had not been cross examined, may be admissible in evidence. However, weight or probative value attached to such evidence would depend on the circumstances and facts of each case. (**See Food Inspector v James N.T., 1998 cr. LJ 3494, 3497 (Ker).**)

80. However, the court in the same **Somakutta Sivankara** (supra) case held that the evidence would be admissible if the cross examination was avoided or deliberately prevented.

81. In the present case, the record is clear that there was no evidence that any of the makers of the statements which were admitted in evidence were dead or could not be found. The appellant chose not to lay any basis for the production of statements made by persons other than their makers which as I have stated above, was nothing but hearsay evidence, which did not meet the threshold to be accorded any evidential value. The respondent was not accorded an opportunity to cross examine the makers of those statements which violates the principle of the right to a fair hearing as espoused in Article 50(1) of the Constitution, and which right cannot be limited under Article 25 of the Constitution. That evidence by the defendant/appellant in my humble view ought to have been excluded by the trial magistrate.

82. In the end, I find that there was sufficient evidence adduced by the respondent to prove that the

second defendant was wholly to blame for the occurrence of the accident involving KZX 429 wherein the respondent was a passenger. Section 112 of the Evidence Act places the burden of proof squarely on the 2nd respondent to disprove the allegation that he was liable for the accident. The Section reads:

“112 in civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

83. As I have stated elaborately, there is no reason why the 2nd respondent did not tender evidence to show that the accident did not occur in the manner pleaded and as testified by the respondent, that the driver drove without due care and attention and that he lost control of the motor vehicle and hit a tree.

84. Reverting back to the question of whether or not the appellant was vicariously liable for the negligent acts of the 2nd respondent, **Black’s Law Dictionary 9th Edition** defines vicarious liability 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.”

85. The said Dictionary goes further to explain that:

“the vicarious liability of an employer for torts committed by employees should not be confused with the liability an employer has for his own torts. An employer whose employees commits a tort may be liable in his own right for negligence in hiring or supervising the employee. If in my business I hire a truck driver who has a record of drunk driving and on whom one day I detect the smell of bourbon, I, (along with my employee may be held liable for negligence if his driving causes injury- but that is not “vicarious liability”- I am held liable for my own negligence in hiring that employee or letting him drive after I knew he has been drinking.” Kenneth S. Abraham, the Forms and Functions of Tort Law 166 (2002).

86. It is a well established principle that an employer is vicariously liable for the tortious acts of its employees where there occur *“in the course of employment.”* This principle is enshrined in the common law doctrine known as ***“let the master answer.”***

87. In **Kenya Horticultural Exporters Ltd Vs Julius Munguti Maweu**, (supra) the court was clear that:

“The appellant gave the accident vehicle for use by its driver. If there were any conditions imposed thereof only itself knew them and it was obliged to call evidence on it. The trial judge must have had the foregoing provisions when she held that failure by the appellant to testify was a factor which would lead to an inference of absence of restrictions.”

88. In the instant case, DW1 made it clear in his sworn evidence that the 2nd defendant and respondent were on **“official duty”** on that material day that they were involved in the accident. The defence witness also testified on oath and produced the material motor vehicle movement register showing that on 20th March 2005 the material vehicle left the Training School at 7.00 a.m. to Mathare and that that journey, according to that exhibited document, was **authorized**.

89. There was also undisputed evidence that the appellant settled all the medical bills for the respondent. That the appellant also paid the two injured staff workmen’s compensation is undisputed. Workmen’s compensation is only payable to workers who are injured while on duty and not to those injured while on their own frolics. There is no evidence that the payments for the medical bills and workmen’s compensation were made on a without prejudice basis. It therefore follows that it was upon the appellant

to prove that the driver was not authorized to use the vehicle or that he was authorized but nonetheless went on his own frolics. It was also upon the appellant to prove that the respondent was not authorized to use the subject motor vehicle at that material time. In this case, there was no such evidence adduced by the appellant that the driver was on his own frolics.

90. What the appellant attempted to adduce was evidence that had no probative value as it was no more than statements made by persons who were not called as witnesses without laying any basis for such production and or admissibility. It is for that reason that I find the trial magistrate's findings on the vicarious liability of the appellant was not in error and I therefore affirm those findings that the appellant was vicariously liable for the negligent acts of its driver.

91. I hasten to add that even if the driver did detour when the material accident occurred, that detour or deviation was not significant. It was a minor deviation from the employer's business for personal reasons; which falls within the scope of employment and therefore the employer is still vicariously liable for the employee's actions, unlike a frolic which is an employee's significant deviation from the employee's business for personal reasons, and therefore outside the scope of employment and for which an employer would not be vicariously liable for such an employee's actions. **(See page 515 of Black's Law Dictionary, 9th Edition.**

92. In my humble view, and considering the circumstances in which the acts of negligence occurred, I find that the material accident was incidental to and was within the scope of the driver's employment. Further, the time and place where the acts of negligence took place are relevant and go to show that the driver had not significantly deviated from his employer's employment for personal reasons.

93. In addition, I find that the driver having been authorized to use the motor vehicle on the material day, his employment provided him with an opportunity to perform the negligent acts.

94. Finally, the respondent passenger was not just any other ordinary passenger. He was the appellant's employee and the appellant's witness DW1 acknowledged that the respondent was lawfully on duty when he was injured hence, the payment to him and the driver of their full workmen's compensation and settlement of their medical bills.

95. I am persuaded that the above position settles the issue of whether or not the appellant was vicariously liable for the negligent acts of its driver/agent or servant, which answer in the affirmative.

96. On the second important issue of what damages are awardable to the respondent, having regard to the injuries sustained in the material accident, It is not disputed that as a result of the material accident, the respondent sustained very serious injuries which were described by Dr Wokabi in his medical in his medial report dated 29th January 2008 as follows:

“The medical and clinical evidence indicate that he (the respondent) indeed sustained major life threatening intra- abdominal injuries. The gall bladder and liver were seriously injured. Fortunately, he received prompt surgical intervention and his life was saved. The loss of a large portion of the liver and gall bladder is not going to adversely affect him. The liver when cut off particularly is known to regenerate. One can also live reasonably well without a gall bladder. However, the major abdominal trauma and the subsequent surgery are likely to predispose him to complications of recurrent intestinal obstruction which would be a severe complication. The surgery to the anterior abdominal wall will weaken this wall to an extent that he could develop hernia. He will be advised not to overstrain his abdominal wall lest he develop this complication. Disability that will be associated with this will be approximately 15% (fifteen percent).

97. The appellant contends that the damages of shs 700,000 awarded to the respondent for pain suffering and loss of amenities were excessive for the injuries sustained and that the case of **Kiparen V Attorney General & Another** was more relevant as it is a 1997 case as well as the case of

Phillip Muoka V Salim Ahmed , a 1995. They urged this court to award shs 300,000 in the event that it finds the appellant liable.

98. The respondent's counsel, on the other hand maintained that the cases cited were decided long time ago and inflation had taken its toll on the Kenyan shilling. Considering the injuries sustained by the respondent and the 15% permanent incapacity, counsel urged the court to uphold the award by the trial court since it had not been demonstrated in this appeal that the trial court took into account an irrelevant factor or that it failed to take into account a relevant one. Mr Kaburu also urged this court not to interfere with the trial court's discretionary power of awarding the damages that it did.

99. I have re-examined the submissions made by the parties' advocates on quantum of damages and the authorities relied on. The trial magistrate in awarding shs 700,000/- general damages considered the submissions authorities and proposals put forward by the respective parties' advocates. He considered that the proposal by the appellant was on the lower side and took into account inflation from the time the cited authorities were determined. He accepted the respondent's proposal.

100. The respondent's counsel in the lower court relied on **HCC 229/1988 John Mochi V Mabati Rolling Mills Ltd** where the plaintiff suffered fracture of the pelvis, burns on the left arm and intra abdominal injuries involving rupture of the bladder and injury to the urethra. He had an indwelling catheter. He remained hospitalized for 2 months and complained of impotence, lower back pains and pains in the pelvis, difficulty in passing urine, inability to do heavy manual work and scars on abdomen and left arm. He was awarded shs 350,000 in an undated judgment. He also relied on **Phillip Kioo Muoka Vs Salim R. Ahmed Nairobi HCC 1569/91** decided in 1993 where Githinji J awarded shs 300,000 to the plaintiff who sustained injuries involving major abdominal and chest injuries involving rupture of the spleen, rupture of the diaphragm with subsequent collapse of the lower left of lung. The spleen had to be removed through major operations.

101. In the **Jared Wayodi Elphas V Frank Nzioka Kalla 1993 LLR 7677 (HC)** case, the plaintiff was awarded shs 160,000 for the injuries involving cut wound over the right forehead, deep abrasions behind the left shoulder, abrasion over the right chest wall, head injury resulting in cerebral concussion and injury to the abdomen resulting in a tear in the right lobe of the liver. He was hospitalized for one week and outpatient for 3 months.

102. In **Kiparen V Attorney General 1997-** shs 300,000 general damages were awarded to the plaintiff who sustained among others, laceration of 4cm on the under surface on the right lobe of the liver, a tear through the anterior wall of the first part of the duodenum, leaking bile and a large retro peritoneal haematoma. He was admitted for 3 weeks and went through an operation.

103. In the instant case, the plaintiff was admitted in hospital for one week. His permanent incapacity was assessed at 15%. The authorities cited do not provide the percentage of permanent incapacity, albeit the trial magistrate understated the permanent incapacity to be 10% instead of 15% given by Dr Wokabi.

104. This court from the above assessment finds that no two cases can be the same on the injuries sustained, and that the trial magistrate in assessing damages took into account relevant factors in exercising his discretion. He compared the injuries sustained in the cases cited with those suffered by the respondent. He also considered to time lapse since those decisions were made-between 1993-1997 and the fact that inflation had taken a toll on the Kenyan shilling hence what was awarded in 1997 cannot have the same value as an award made in 2012, a difference of 15 years.

105. The appellant in this appeal has not demonstrated before this court that the award of shs 700,000 made in favour of the respondent was manifestly excessive having regard to the circumstances and injuries sustained by the respondent.

106. An assessment of damages is in the discretion of the trial court and an appellate court must be slow to interfere with an award of damages by the trial court especially where there is no proof that

the trial court made a manifestly excessive or low award or that it took into account irrelevant factors or failed to take into account relevant factors.

107. In this case, I find that there is absolutely no reason why this court should interfere with the award of shs 700,000/- made by the trial court. Accordingly, I uphold that award and dismiss the ground of appeal challenging an award of general damages of shs 700,000 in favour of the respondent.

108. On special damages, the respondent had pleaded shs 2,200/- being shs 200/- charges for police abstract and shs 2,000/- for medical report. He however only produced a receipt for shs 2,000/- for medical report by Dr Wokabi which the trial magistrate correctly awarded him as he strictly proved what he had specifically pleaded. He is awarded shs 2,000/- as pleaded and proved.

109. In the end, I find that this appeal fails on all the three grounds of appeal as set out in the Memorandum of Appeal dated 16th October 2012 and I dismiss the appeal. I uphold the decision and decree of the trial court and award costs of this appeal to the respondent.

Dated, signed and delivered in open court at Nairobi this 27th day of July 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss Kariuki holding brief for Makori for the Appellant

Miss Rose Ndinda-clerical staff from the firm of Nelson Kaburu-who says that Mr Kaburu is away in Machakos and that she had been trying to get an advocate to hold their brief in vain

CA: Adline

R.E. ABURILI

JUDGE

27th day of July 2016.