



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

HCCA NO. 234 OF 2013

IRENE SYOKAU.....APPELLANT

V E R S U S

BAYA NYANJE BAYA.....RESPONDENT

(Being an appeal from the Judgment delivered by the Hon. I. M. Kahuya – Ag SRM Kangundo

on 11th November, 2013 in Kangundo Civil Suit No. 48 of 2013)

JUDGMENT

1 In the suit before the lower court, the appellant **IRENE SYOKAU** had sued the Defendant **BAYA NYANJE BAYA** for damages arising out of a road traffic accident which occurred on 16.9.2012 while the Appellant was a passenger in motor vehicle registration No. KAZ 764S. The respondent was sued as the owner of the motor vehicle. The Appellant blamed the accident on the negligent manner that is alleged that the motor vehicle was being driven by the defendant's driver and/or agent.

2 The claim was denied as per the statement of defence dated 24.6.2013. The appellant filed a reply to the written statement of defence. The Great Slenk Agencies had been sued as the 2nd Defendant but the plaintiff filed a notice of withdrawal of the suit against the 2nd defendant.

3 During the hearing of the case before the lower court, the appellant testified (PW 1). Her evidence was that at the material time, one **STEPHEN MUSYOKA** was the one driving the motor vehicle. There were seven people in the motor vehicle among them the appellant who sat at the front passenger seat. The appellant's evidence was that she wore a seat belt. That upon reaching the accident scene the motor vehicle which was being driven at a high speed swerved after the driver stated that he had spotted a child on the road. The motor vehicle rolled several times. The appellant was injured and some of the passengers and the driver died on the spot.

4 The appellant was taken to hospital where she was treated and discharged. The appellant later saw a doctor who examined her and prepared a medical report.

5 PW 1 CPL **LAWRENCE KARISA** blamed the appellant on high speed, over loading and loss of control of the motor vehicle by the driver.

6 On the respondent's side, the Respondent testified (DW 1). His evidence was that the driver of the motor vehicle was a colleague who had borrowed the motor vehicle to attend a wedding. His evidence was that he did not know that the driver was going to ferry passengers. His further evident was that he

had lent the driver the motor vehicle in good faith. The Respondent further stated that he was not the legal owner of the motor vehicle as the same was on hire purchase and he had yet to finished making the payments.

7 At he conclusion of the case, the trial magistrate held that the Defendant was not liable for the accident as the driver's estate was not a party to the suit. The trial magistrate also held that the driver was not the defendant's employee and was not using the motor vehicle for the owners benefit and therefore the Respondent was not vicariously liable. The suit was dismissed. The trial magistrate further held that if the suit had been successful, she would have awarded the Appellant Kshs. 80,000/- as expenses and special damages of Kshs. 9,676/-.

8 The Appellant was dissatisfied with the judgment. The Appellant raised ten (10) grounds of appeal. The appeal was heard by way of written submissions which I have dully considered. In the said submissions, the appellant condensed the grounds to one. That is whether the Respondent was vicariously liable for the negligence of the driver.

9 This being the first appellate court, the court's duty bound to re-evaluate the evidence on record and come to its own finding. **(See Selle -VS-Associated Boat Company Limited (1968) EA 123).**

10 The Respondent's (PW 2) evidence that the driver of the motor vehicle lost control of the motor vehicle due to excessive speed, overloading and loss of control of the motor vehicle was corroborated by thereof the police office who investigated the accident (PW 1). According to PW 1, if the driver was alive, he would have been charged him with the offence of causing death by “careless” driving and overloading the motor vehicle. The evidence of the Respondent (DW1) relates to his having lent the motor vehicle to the driver. The Respondent was not at the scene of the accident. The evidence of PW 1 and PW 2 on the manner in which the accident occurred is uncontroverted. I am satisfied that their evidence established negligence on the part of the driver.

11 It is not in dispute that the Respondent lent the motor vehicle to the driver who he described as a colleague. The motor vehicle was to be used for the purpose of attending a wedding. The Respondent had given the driver permission for the personal use of the motor vehicle. Such personal use included giving his friends a lift like it happened in this case. As stated by the Court of Appeal in the case of **KENYA HORTICULTURAL EXPORTERS LTD. VS. JULIUS MUNGUTI MAWEU (2010) eKLR;**

“The Defendant had authorized the said DOMINIC to have use of the vehicle both for official and personal use.....Permission for personal use included inviting in of his friends into the said vehicle. Once invited in, both the employer who had permitted his employee to have personal use of the vehicle and the said employee assume the duty of care over those passengers to ensure their safe conduct while in the said vehicle.”

12 On whether the personal representatives of the driver ought to have been enjoined in the suit, the owner of the motor vehicle can be held vicariously liable or the negligence of his agent although the servant or agent is not a co-defendant in the suit. **(See for example Jonathan Ngumbao Vs Ouru wa Nwatate & 3 Others - Mombasa Civil Appeal No. 43 of 1987: P.A. Okelo & M. M. Nsereko t/a Kaburu Okelo & Partners VS. Stella Karimi Kobia & 2 Others (2012) e KLR).**

13 I have considered the case of **Tabitha Nduhi Kinyua VS Francis Mutua Mbuvi & Anor (2014) eKLR**. In the said decision, the employee was found to have acted beyond the scope of his employment. The facts in the said decision are distinguishable from the facts of the case at hand where the motor vehicle was lent out to the driver who was out on a social activity which may include inviting friends into the motor vehicle.

14 Having re-evaluated the evidence on record, I am satisfied that the appeal has merits and is allowed. Consequently I enter judgment for the appellant for general damages as assessed by the lower court at Kshs. 80,000/-, Kshs 9,676/- special damages, costs and interest. The appellant shall have the costs

both in the lower court and in the High Court.

Dated, signed and delivered at Machakos this 15th day of December, 2015

B. THURANIRA JADEN

JUDGE