REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NUMBER 156 OF 2010

ISRAEL MULANDI KISENGI……PLAINTIFF/APPELLANT

VERSUS

1. THE STANDARD LIMITED

2. KASSAM HAULIERS LIMITED

3. HUSSEIN DAIRY LIMITED.....DEFENDANT/RESPONDENT

J U D G M E N T

1. This appeal emanates from the judgment of the Voi Resident Magistrate, Honourable Nyakundi, delivered on 8th July, 2010 in SRMCC 154 of 2008. It concerns an accident that allegedly occurred on 18th November, 2007. The summary of the facts is as follows. On 18th November, 2007, Israel Mulandi Kisengi, the Plaintiff, needed to travel to Mombasa from his rural home in Kambu in Ukambani. At 1.30 a.m. he was on the road waiting, he alleged, for a public service vehicle. Instead, one of the Standard's (1st Defendant's) Newspaper transportation vehicles came along. It was an Isuzu Pick up van Registration Number KAY 040 Z. He allegedly paid the driver Kshs. 450/- and boarded the vehicle. Soon after boarding the rear luggage cabin he fell asleep. He later found himself at Mariakani Hospital undergoing treatment.

2. Whilst he was asleep, an accident had occurred. From other evidence, it was shown that the Standard Pick up van had rammed into the rear of the 3rd Defendant's trailer Registration Number ZB 8924, which was being towed by the 2nd Defendant's lorry Registration Number KAV 040Z. Police witnesses later confirmed the nature of the accident and a doctor confirmed the nature of the injuries sustained by

the Plaintiff. The 2nd Defendant's lorry driver confirmed that, whilst driving, he had felt the trailer shake. He stopped to check. He found the Standard Pick up van had collided into, and was stuck under, the rear of the trailer. The driver and two passengers in the front passenger cabin were found dead.

3. The plaintiff sued the defendants seeking damages for injuries sustained. He pleaded *Res Ispa loquitor*. All defendants denied liability. The 2nd and 3rd Defendants blamed the 1st Defendant for causing the accident. The 1st Defendant denied liability arguing that the Plaintiff was an unauthorised or unlawful passenger since the Standard van had several notices with the warning:

"No unauthorised passengers;"

The 1st Defendant pointed out that the drivers were under express instructions not to carry goods and passengers without express instructions of the company. They pleaded*volenti non fit injuria.* **"**

4. The learned Honourable Magistrate found the accident was caused by the negligence of the 1st Defendant's driver. He found no evidence to enable him determine the liability of the 2nd and 3rd Defendant. He determined they had not contributed to the damage, injuries and loss suffered by Plaintiff. As for the 1st Defendants, he found the driver went beyond the scope of his duty as an employee and contravened both the Motor Vehicles (Third Party Risks) Act, Chapter 405, and the 1st Defendant's express instructions. Thus, he argued, the 1st Defendant was not vicariously liable. The learned Magistrate dismissed the suit against all defendants, but properly found that, had the Plaintiff proved his case, he would have awarded him damages as follows:

General damages of Kshs.430,000/=, less 20% (Kshs. 86,000/=) contributory negligence by Plaintiff, plus proved Special damages of Kshs. 16,190/= giving a total award of Kshs. 360,190/=.

5. The Plaintiff has appealed against the whole judgment of the learned Honourable L. Nyakundi. There are fourteen grounds of appeal which can be reduced into six(6) categories as follows:

a) Whether the Appellant was an unlawful passenger (grounds 1, 7, and 9)

b) Whether there was contributory negligence by any Respondent (grounds 2, 3, and 4)

c) Whether the estate of 1st Respondent's driver should have been made personally liable (ground 5)

d) Whether 1st Respondent was vicariously liable (ground 6 and 10)

e) Failure by Magistrate to appreciate authorities and submissions (grounds 11 and 12)

f) The contradiction of wholly blaming 1st Respondent for Appellant's injuries yet dismissing suit against 1st Respondent whilst apportioning some Appellant on (18 grounds and 13).

6. The role of this court under Section 78 of Civil Procedure Act on an appeal is to exercise the same powers and perform as nearly as may be the same actions as are conferred and imposed on courts of original jurisdiction in respect of suits instituted therein. In this appeal, I therefore evaluate the evidence adduced, being careful to note that I did not have the benefit of hearing and observing the witnesses as the lower court did.

7. **Whether the Plaintiff was an unlawful passenger (grounds 1, 7 and 9).** In framing these grounds of appeal, the Appellant is in fact seeking the answer to the question whether the 1st Respondent was vicariously liable for the acts of his employee. In other words, if the passenger was authorised to be in the accident vehicle, responsibility lies on the employer. The evidence was undisputed that the accident vehicle belonged to the 1st Respondent; that its deceased driver was the employee of the 1st Respondent; and that the Appellant was in the 1st Respondent's vehicle at the time of the accident.

8. There was also evidence that the vehicle had warning signs written on it to the effect **"No unauthorised passengers."** Further, the 1st Respondent had in place rules governing the conduct of its fleet of vehicles and their drivers, which were brought to the driver's attention.

According to DW1, the transport manager of the 1st Respondent, **"The other passengers in the motor vehicle were not authorised passengers."** He said the employer only came to know that there were non-staff passengers after the accident.

The rules given to all drivers of the 1st Respondent, DEX 1B, provide in Rule 1 as follows:

"1. It is unauthorised to carry cargo or passengers who are not employees of the company."

9. In addition, the evidence of the Appellant in cross examination was that the 1st Respondent's vehicle

was a pick up with a closed body, it had no seats at the back, and he had sat on luggage in the luggage cabin. The 1st Respondents' witness said the vehicles are designed to carry luggage in the back cabin and passengers in the front cabin. It can therefore be properly said that, since the Appellant was in the vehicle at the time of the accident, and it was not designed to carry passengers and nor was the driver authorized to carry passengers the 1st Respondent's driver disobeyed his employer's orders. **Charlesworth and Percy on Negligence** at 2-226 on page 163 have the following to say on employee's disobedience of employers order:

"The fact that an employee disobeys the orders of his employer does not necessarily mean that he is acting outside the course of his employment. A distinction needs to be drawn between an order that limits the scope of employment and an order that limits the method of performing the duties of the employee, the disobedience to which does not mean that employee is outside his employment. For example, an order that a van driver shall not allow any person to travel in his van, notice of which is displayed on the van, is an order limiting the scope of the employee's employment, with the result that a breach of the order involves the employer in no liability."

One of the cases cited in respect of the example above is **Conway vs George Wimpey and Company Limited** (Number 2) [1951] 2 KB 266.

In that case, the Defendant was a contractor engaged at airport providing lorries for transport. Each of the Defendants drivers were prohibited from giving a lift to anyone other than their own employees. The Plaintiff was carried in one such lorry and, when alighting, was injured, and sued for damages. It was held that the Plaintiff, when on the lorry was, as against the Defendant company, a trespasser, for he was not riding at the invitation or with the licence, actual a constructive, of the Defendant company. Asquith L.J. aptly stated:

"The act of the driver giving a lift to the Plaintiff was outside the scope of his employment. It was not merely a wrongful mode of performing on act of the class which the driver was employed to perform, but was the performance of an act which he was not employed to perform."

10. In the case before us, the facts are clear that the driver was the 1st Respondent's employee. He was carrying out the work for which he was employed, that is driving the vehicle on his employer's business from Nairobi to Mombasa, for delivery of newspapers there. His instructions as driver were to deliver newspapers and included that he should carry only employees of the employer. His employer, the 1st Respondent, indeed made it difficult for him to disobey this instruction by designing the vehicle in such a way that it could safely only carry one passenger at the front cabin of the vehicle. The rear cabin was designed to carry only luggage. This was the sum of the evidence given by the 1st Respndent's Transport Manager. In this way, the driver, was limited in both the scope and method of doing his work.

11. What about the situation of the Appellant? During his examination in chief, the Appellant said he was waiting for a public service vehicle. But he boarded the 1st Respondent's vehicle at 1.30 a.m. as a passenger. He alleged that he paid Kshs. 450/- and was not given a ticket. In cross examination, he said he was a lawful passenger because he paid. In his own words, he said:

"I was on the road waiting for a PSV (Public Service Vehicle) to take me to Mombasa… The motor vehicle was a pick-up with a closed body… the front seat was full. I boarded at the back. There were no seats but there was some luggage on which I sat. The vehicle was not a matatu…"

The Appellant was out on the road at 1.30a.m. He was waiting for a public service vehicle. That is either a taxi, a bus or a matatu. What came was a vehicle which carried luggage. It was not a *matatu*. In fact, it had no seats where he boarded, only luggage.

12. In **Mary Waitherero vs Chella Kimani and Another** [2006] e KLR, **Kimaru, J** cited **Marsh vs Mowes** [1949] 2kb 208, 125 as follows:

*"**It is well settled law that a master is liable even for acts which he has not authorised provided that they so connected with the acts which he has authorized that they may be regarded as modes, although improper modes of doing them. On the other hand, if the unauthorised and lawful act of the servant is not so connected with the authorized act as to be a mode of doing it but is an independent act, the master is not responsible, for in such a case the servant is not acting in the course of the employment but has gone outside it."***

The lower court in **Mary witherero's** case had found contribution by the Plaintiff. Here, the lower court did not find contribution, instead it found that there was a breach of the Insurance (Motor Vehicle Third Party) Act Chapter 405.

But it is essential to analyse the acts of the driver. Were his acts *so connected* with the acts he was authorised to do, as to be regarded as a mode of doing that which he was authorised to do? I think not.

13. In **Shighadai vs Kenya Power & Lighting Company Limited and Another** [1988] KLR, the 1st Defendant (Power Company) availed its car to the second Defendant for his use in performance of his duties as its employee. One of the rules brought to his attention was that he was only authorised to transport persons duly authorised. On the material day, he gave a lift to seven persons including the Plaintiff when the car had an accident. The Plaintiff sued. The court (Bosire, J as he then was) held:

"….the owner of a vehicle is liable not only for the negligence of a driver if that driver is his servant acting in the course of his employment but also if the driver in his agent, that is to say if the driver is, with the owner's consent, driving the car on the owners business for the owners purposes.

The court there found that:

"It was not part of the second Defendant's employment to carry passengers in the vehicle. He could carry those people who were in the employment of the first Defendant. The lifting of the Plaintiff was not authorized by the first Defendant and it was not done for the purposes of his employer, the first Defendant, but for his own purposes

The Plaintiff knew that the vehicle was not ordinarily used for carrying people for hire or reward and by accepting to be carried in it, she knew that she was taking a risk. The first Defendant did not give a duty of care to persons who, like the Plaintiff, were carried in its vehicles as unauthorized passengers."

14. The court, in the **Shighadai** case, cited with approval the dictum of Lord Justice Denning (as he then was) in **Ormond vs Crossville Motors Service [1953** 2 All ER 753 where he summed up the liability of the owner of a motor vehicle for the negligence of his driver thus:

"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if that driver is his agent, that is to say, if the driver is with the owner's consent, driving the car on the owner's business or for the owners purposes."

Bosire J, summed up as follows in the **Shighadai case**:

"It was not part of OKombo's (the driver's) employment to carry passengers in the accident vehicle. He could carry those people who were in the employment of the 1st Defendant. The lifting of the Plaintiff was unauthorised by the 1st Defendant……

Okombo could permit anyone he pleased onto the vehicle, but certainly not on the basis of authority from the 1st Defendant. He was not allowed to lift non employees of the 1st Defendant. He was sacked for that."

15. In the case before us, irrespective of whether the lift was gratuitous or was paid, the invitation to carry persons who were not employees, and for that matter to carry them in the back cabin which was specifically designed not to carry passengers, cannot be an act in the course of employment, or with the consent of the employer, or for the purposes of the employer, or as agent of the employer. In those circumstances, the employer could not be liable for the unauthorised action of its driver. I therefore, agree with the learned Magistrate that the employer was not vicariously liable, for the reasons stated herein.

16. **Whether there was contributory negligence by any of the parties (grounds 2, 3 and 4).**

The honourable Magistrate found that there was no contribution by the 2nd and 3rd Respondents to the damages suffered by the Plaintiff/Appellant; that the Appellant contributed to the injuries he sustained and voluntarily assumed the risk by boarding a vehicle which was not meant to carry passengers.

17. The 2nd Respondent's driver was Kombo Kibwana DW2. He said that while driving the lorry he heard the trailer shake and so stopped and went out to check. He found the 1st Respondent's vehicle had rammed into the trailer. In cross examination, he said he did not see the 1st Respondent's vehicle in the side mirrors; that there was no way he could avoid the accident. He was not driving fast.

18. I find that there is no direct evidence of any negligence of the part of the 2nd Respondent's driver. The Plaint suggests he should have braked and slowed down. If he had done so, the Standard van driven by 1st Respondent's driver would merely have rammed in harder or sooner. It was at night, and swerving the lorry would logically also not have helped prevent the accident. The mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence. There would be negligence on his part if there was evidence that the back lights on the trailer were not working, or that the reflectors were not reflecting for the 1st Respondent's driver to see, or that the lorry was exhausting with smoke so heavily as to impair visibility. There was no such evidence.

19. If there was any negligence on the part of the 2nd Respondent's driver, I find it to be wholly negligible. I would say it was, if at all, for failing to see the 1st Respondent's vehicle in sufficient time to avoid the said collision, by say, putting on his hazard signals. But I think that would be to stretch the foresight of the 2nd "Respondent's driver to extraordinary precaution.

As for the 3rd Respondent, as the owner of the trailer, the Plaintiff's particulars of negligence are similar to those alleged against the 2nd Respondent. The 3rd Respondent was however, not involved in the accident. So, uninvolved, that the only witness who could speak for them was the 2nd Respondent's driver who towed their trailer. It was not alleged that the trailer broke off its tow-pin and suddenly stopped, endangering the 1st Respondent's approach, or that its lights or reflectors were not working. I find, as did the learned Honourable Magistrate, that there was no contributory negligence on the part of the 3rd Respondent.

20. Did the Appellant contribute to the injuries he sustained?

On this point, I find that the learned Magistrate was wrong in finding that the Appellant contributed to his injuries.

Whether or not he was an unlawful passenger cannot lead to a finding that he actively contributed to his injuries. The Respondents all pleaded *"volenti non fit injuria."* That is, that the Appellant agreed to run the risk of harm, and therefore, cannot recover. The classical requirements of the *volenti* maxim involve two questions: First, whether the Plaintiff agreed to the breach of duty of care which was owed to him by

the Defendants; and second, whether the Plaintiff had consented to waive his right of action against the Defendants in respect of that breach.

21. The evidence on record is that the Plaintiff entered a vehicle that was not a *matatu* or PSV (Public Service Vehicle), which is what he was waiting for. It had no seats at the back, therefore, no seat belts; that he did not read the notices on the door of the vehicle, and that he sat amongst some luggage. None of the evidence here confirms that the Appellant agreed to a breach of a duty of care owed to him by the Respondents. It is clear, however, that he knew he was taking a risk not associated with carriage in a public service vehicle, such as he was waiting for. As such I am compelled to agree with the honourable Magistrate that he, at least, knowing the risk he took, consented to waive his right of action against the Respondents.

22. The next issue is whether the estate of the deceased driver of the 1st Respondent should have been made liable (ground 5)

On this point what the Magistrate said was:

"The driver <u>ought</u> to have personally (sic) liable for the injuries sustained by the Plaintiff and in this case his estate…"

Here, the honourable Magistrate made no finding and held nothing as to liability of the driver or his estate. He was suggesting what he thought might have been the best way to go about the issue of liability had the situation availed itself. That is why he used the word "ought". I, therefore, find nothing appealable on this point.

23. Failure of the honourable Magistrate to appreciate authorities and submissions (grounds 11 and 12).

The honourable Magistrate was referred to the case of **<u>Mary Waitherero.</u>** He relied on a citation from it at pages 4 and 5 of his judgment. It was the only authority cited by the Plaintiff on liability, the others being on the level of damages recoverable. However, the learned Magistrate did not analyse the findings and law there in *vis-a-vis* the facts of this case. He did, however, reach a conclusion on liability with the aid of that authority. There is nothing to show, therefore, that he did not appreciate that authority or the submissions made to him.

24 Whether the learned Magistrate erred in wholly blaming the 1st Respondent's driver for the Appellant's injuries, yet dismissing the suit against the 1st Respondent's whilst apportioning some blame on the Appellant (grounds 8 and 13). I do not agree with the Appellant that there was a logical breakdown and inconsistency in the Hon. Magistrate's finding that the 1st Respondent's driver was wholly responsible for the Appellant's injuries then dismissing the suit against the 1st

Respondent. However, in his apportioning of some blame on the Appellant, I have my misgivings.

25. In his judgment, he says at page 4:

"On the issue of liability and contribution, I find that the accident was caused by the negligence of the 1st defendants driver."

Later, on the same page, the Honourable Magistrate states:

"….in the amended defence, the 1st Defendant pleaded contributory negligence and invoked the doctrine of volenti non fit injuria.

I agree with the 1st Defendant's pleadings that the Plaintiff was negligent to board a motor vehicle that was not fitted with passenger seats or seat belts. Had the motor vehicle been fitted with seat belts, it is unlikely the Plaintiff would have suffered the kind of injuries he sustained….. I therefore find that the Plaintiff actually contributed to the injuries sustained."

26. The Magistrate having found that liability for the accident lay on the 1st Defendant's driver, need not have found that the Appellant/Plaintiff was contributorily negligent. It is correct that the 1st Defendant's amended defence at Paragraph 8 and 10 attributed negligence upon the Appellant, and put forward the defence of *volenti non fit injuria.* However, as I have already stated earlier, that defence could not fully apply in this case for the reasons earlier stated. In defining contributory negligence **Charlesworth and Percy on Negligence** state at page 194 3-04:

"Meaning of contributory negligence:

The expression contributory negligence…. applies wholly to the conduct of the Plaintiff. It means that there has been some act or omission on the Plaintiffs part which has materially contributed the damage…..

27. The honourable Magistrate having found that the Appellant **"contributed to the injuries sustained,"** which is contributory negligence on the part of the Appellant, he did not go on to assess the level of such contribution. Instead, at page 5 of the judgment he seems to have interwined the contributory negligence issue with vicarious liability where he states:

"I cannot hold the 1st Defendant vicariously liable to the injuries sustained when its servant was engaged in an unlawful act. For this reason, I must dismiss the instant suit against the 1st Defendant."

28. The outcome is that the contributory negligence issue is left unfinished, with the effect that the

Appellant was left holding the pan for contributory negligence, but without clarification as to the level of contribution. This is quite unsatisfactory. To be fair, however, in the alternative finding, the honourable Magistrate awarded 20% contributory negligence against the Plaintiff.

However, I do not consider that the outcome of this appeal is affected by the failure of honorable Magistrate to conclude the question of contributory negligence.

29. Accordingly, the upshot of all the foregoing is that, the appeal fails, and it is thereby dismissed, with costs to the Respondents.

Dated and delivered this…23rd .Day of …March, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a) ……

b) ……

c) ……

d) ……..