



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL APPEAL 42 OF 2006

LOCHAB BROTHERS LIMITED.....1ST APPELLANT

ELIJAH MAIYO.....2ND APPELLANT

SAIDA LUMATI.....3RD APPELLANT

VERSUS

JOH NDEGWA KARIUKI.....RESPONDENT

JUDGMENT

The Respondent presented a Complaint at the High Court in Nakuru being HCCC No. 176 of 2001. He sued the Appellants for an accident that occurred on 9th December 1998 along Kaptarakwa-Eldoret Road. He averred that the accident occurred due to the negligence of the Appellants or their servants or employees. He suffered injuries and particularized them as severe crush on the left leg below the knee resulting in amputation below knee level. He also suffered cut wound on the forehead. He sought general damages and Kshs. 57,829/= as special damages. The Appellants were served and they entered appearance and filed a defence denying liability and averring that the accident was inevitable and that the Appellant agreed to run the risk. Through an order made on 16th September 2002 Justice S.C. Ondeyo transferred the suit to the Chief Magistrates Court Eldoret for hearing and final determination because the accident occurred along Kaptarakwa -Eldoret Road. The case was heard before Honourable Magistrate F.N. Muchemi who in a judgment delivered on 15th March 2006 entered judgment for the Respondent against the Appellants for Kshs. 780,000/= general damages and Kshs. 48,329/= special damages making a total award of Kshs. 828,329/=.

The Appellants were aggrieved with the judgment and lodged a Memorandum of Appeal contending that:

- 1. The learned trial magistrate erred in law and fact in holding the Appellants liable without any or any sufficient basis in law or fact.**
- 2. The learned trial magistrate erred in law and fact in failing to hold that the Respondent was unauthorized passenger in motor vehicle registration number KNQ 271 and hence the Appellants were not liable.**
- 3. The learned trial magistrate erred in law and fact in failing to apply the doctrine of *volenti non fit injuria* which defence was well founded and properly raised before her.**
- 4. The learned trial magistrate erred in law and in fact in holding the Appellants negligent**

contrary to the evidence on record which did not disclose any negligence by the Appellants.

5. **The learned trial Magistrate erred in law and in fact in failing to hold that the Respondent did not discharge the burden of proof in accordance with Sections 107, 108, 109 and 3(4) of the Evidence Act, Cap 80 Laws of Kenya.**
6. **The learned trial magistrate erred in arriving at a decision contrary to the pleadings filed and the evidence tendered thereby failing to dismiss the claim with costs.**
7. **The learned trial magistrate erred in law and in fact in failing to address all the issues raised in the pleadings, the pleadings, the evidence and the submissions made to the court.**
8. **The learned trial magistrate erred in awarding excessive general damages in any event.**

Consequent the Appellants seek that the judgment of the trial magistrate be set aside and the Respondent's claim be dismissed with costs.

The Appeal was admitted to hearing on 26th February 2008. Oral submissions were made before on 16th December 2008. Counsel for Appellant submitted that Respondent was not an employee of Lochab Bros but of Pan Paper Mills who is not a party to the Appeal. Appellant was contracted by PanPaper to ferry logs from the forests. The Respondent was not an authorized passenger in the Appellants motor vehicle. The Respondent is deemed to have consented to run the risk. *Volenti non fit injuria* applies. In carrying the Respondent the driver of the 1st Appellant acted outside the scope of his authority and the 1st Appellant is not vicariously liable. The vehicle had a clear sign that no passengers allowed. This was admitted by the Respondent himself. He said that he saw the sign and was aware of it. It was submitted that that the Respondent was a trespasser in the Appellant's vehicle. Counsel cited the case of **Shighadai v Kenya Power & Lighting Co. Ltd & Anor (1988) KLR 682**. He submitted that the case supports the position that the 1st Appellant is not liable for injury to unauthorized passengers such as the Respondent. It was submitted that Pan Paper had no authority to allow third parties to use the 1st Appellant motor vehicles. That there was no proof that the 1st Appellant had knowledge and had acquiesced to the disregard of the prohibition. He submitted that Respondent cannot claim against the 1st Appellant and prayed that the appeal be allowed. The question of the 2nd and 3rd Appellants liability was left to the court.

The Appeal was opposed. It was submitted that the 1st Appellant was liable due to the acts of the 2nd and 3rd Appellants who were employees. They were driving vehicles of the 1st Appellant. Counsel referred to **Shighadai case and Mulandi v. Machakos Ranching Co. Ltd**. He submitted that an unlawful act done during the scope of employment binds the master. On grounds 5, 6 and 7 counsel submitted that the learned magistrate set out reasons in the judgment. The Plaintiff testified that he was in the vehicle in the course of his employment and was in the vehicle with the authority of his employer. The 1st Appellant did not testify.

I have considered the submissions of counsel and the appeal seems to turn around on the authority of the Shighadai case as well as the decision in **Mulandi v Machakos Ranching Co.** In the first case Justice Bosire held that a person who boards a motor vehicle where the driver has no instructions to carry him is a trespasser and cannot claim against the owner of the motor vehicle under vicarious liability but his recourse lies against the driver only. In the second case Justice Mwera held that so long as the drivers act is committed in the course of his duty even if he is acting deliberately, wantonly, negligently or criminally or even if he is acting for his own benefit or even if the act is committed contrary to general instructions, the master is liable. In support he relied on the case of **Muwonge v Attorney General [1967] EA 17**. I have considered the two decision and I am of the view that they can be reconciled. In the **Shighadai** case the motor vehicle was in the custody of an agent of the owner. The agent was not employed as a driver. So it could not be contemplated that during the agent's employment he would carry passengers. Carrying of passengers was totally without his scope of employment. In the Mulandi case the

tractor was with a driver. I would ordinarily expect that in the course of driving a driver would give lifts even if he is not authorized to do so.

It is the duty of this court to reevaluate the evidence and test the findings of the trial magistrate of course giving allowance to the fact that the trial magistrate had the benefit of watching the demeanor of witnesses. To determine the scope of authority we have to consider the evidence adduced before the trial court. The Respondent testified as PW3. In his testimony he stated that Elijah Maiyo was the driver of motor vehicle registration No. KNQ 271. Saidi Lumati was driver of motor vehicle KAA 122L both belonging to Lochab Brothers used to deliver logs to Pan Paper Mills. That on 9/12/98 he was on loading duty at Kaptagat Forest. He was working for Pan Paper Mills and used to go to the forest to load logs. On the material day they used Pan Paper vehicle to travel to the forest. Normally they use Pan Paper vehicles or other vehicles contracted by Pan Paper to carry logs. They finished loading vehicles around 3.00pm. The supervisors placed three loaders on each lorry. These lorries belonged to Lochab Brothers. He loaded motor vehicle registration KNQ 271 and sat at the front next to passenger's door. Others sat next to the driver.

On reaching a hill one lorry registration number KAA 122L started retreating. Theirs, KNQ 271 was behind it. The vehicle hit them on the front and all of them who sat in the front were injured. There was a distance of nine metres before the accident. The driver of KAL 122L did not give any warning to their driver. Their driver too did nothing to avoid the accident. On cross examination he stated that he did not have authority from Lochab Brothers to use the vehicle. That he saw sign prohibiting unauthorized passengers. That the driver would have prevented him from entering if he was unauthorized passenger. He stated that Pan Paper Mills authorized them to use the vehicle of Lochab Brothers. In re-examination he clarified that Pan Paper had a contract with Lochab Brothers to use vehicles of Lochab Brothers. The trial magistrate summarized evidence in the following passage:

“The Plaintiff’s employer Pan Paper Ltd had contracted the vehicles of the third Defendant for use in transporting logs. The drivers 1st and 2nd Defendant were employees of the third Defendant. The supervisor of Pan Paper Limited had the control and direction as far as use of the vehicles were concerned. He authorized the Plaintiff and his colleagues to board the two vehicles and to sit in the front next to the driver. The defence argue that the supervisor of Pan Paper had no authority to allow passengers in the third Defendant’s vehicle. The only evidence on record shows the contractor of the vehicle was the special owner of the vehicles in that he was lawfully using them with the permission of the third Defendant. The Plaintiff used the vehicle with the permission of the employer on the material day. For this reason I find that the Plaintiff was a lawful passenger in vehicle registration number KNQ 271 belonging to the third Defendant.”

The third Defendant is the 1st Appellant in this appeal. The evidence on record was that the Respondents employer Panpaper Mills had a contract with Lochab Brothers to use the motor vehicles for purposes of ferrying log from the forest. The 1st Appellant did not call any evidence to refute this contractual position. Counsel for the Appellants submitted that it was not necessary to call evidence because the Respondent had put forward a weak case on the basis of admitting that he had no authority from 1st Appellant to use the vehicles. I do not agree with this convenient position of counsel for Appellants. The record shows that the Respondent stated that he did not have authority of the 1st Appellant but he had authority of his employer. His employer had a contract with Lochab Brothers to use their lorries to ferry logs from the forest. The Lorries while in the field were under control of a supervisor of Pan paper Mills. The fact that the 1st Appellant had not allowed Pan paper to allow its employees to use the vehicles is fact that was peculiarly within the knowledge of the 1st Appellant. It was upon them to lead evidence to this fact. They had not done so. The trial magistrate was justified to make the finding that Pan paper was the special owner because the lorries as I understand the evidence were on a contract of hire to Pan paper.

The existence of a contract is not the same as elaborating terms of the contract. The Respondent testified to the existence of a contract. The terms of the contract would be within the knowledge of the contracting parties. In this case the 1st Appellant and Panpaper. I do not find any ground for disturbing

her finding that the Respondent was a lawful passenger in vehicle registration number KNQ 271. On the other hand even if it is taken for the sake of argument that the Respondent was not lawfully a passenger then I would still hold that the 1st Appellant would be liable under vicarious liability. The 2nd and 3rd Respondents were within their scope of employment. They were employed to drive vehicles that had been hired out to Panpaper. In the course of that employment they exceeded instructions by giving lift to the Respondent. I refer to the Court of Appeal decision in **Muwonge v. Attorney-General of Uganda [1967] EA 17**. In this case the Appellant's father was killed during a riot. The shot which killed him was fired by a policeman who had seen the Appellant run towards a house. The Court concluded that the Appellant was a rioter and, having followed him, fired wantonly into the house not caring whom he killed or injured. At the time, stones were being thrown and shots were being fired nearby. The Acting Chief Justice of Uganda dismissed the suit and on appeal to the Court of Appeal it was held that the firing of the shot was an act done within the exercise of the policeman's duty for which the Government of Uganda was liable as master, even though it was wanton, unlawful and unjustified. Newbold P expressed himself as follows:-

“I think it is dangerous to lay down any general test as to the circumstances in which it can be said that a person is acting within the course of his employment. Each case must depend on its own facts. All that one can say, as I understand the law, is that even if the servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, nevertheless if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable. Dealing with the facts of this case, it seems to me that the sole principle of law which should be applied to determine whether the Attorney-General is responsible for the acts of this policeman is: Were those acts committed in the course of duty of the policeman, no matter whether they were committed contrary to general instructions”.

Counsel for Appellants founded his appeal on the authority of **Shighadai v. Kenya Power** and I think having demonstrated that the authority does not support the 1st Appellant's case there is nothing left to determine in this appeal. Counsel submitted that the appeal of 2nd and 3rd Respondents was left to the court. Liability of the 2nd and 3rd Respondents as drivers of the vehicles was established and there is no ground to interfere with findings of the trial magistrate. I find that grounds 1- 8 of the appeal lack merit and they fail accordingly. The upshot is that this appeal is dismissed with costs to the Respondent. It is so ordered.

Dated AND signed at Nairobi on this 21st day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 19TH day of SEPTEMBER 2012.

F.AZANGALALA
Judge

In the presence of : Mr. Kwambai holding brief for Mr. Nyairo for the Appellant.