



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Appeal 24 of 2000

NJOKA TANNERS LIMITED.....APPELLANT

VERSUS

CATHERINE KAGWIRIA.....RESPONDENT

J U D G M E N T

The Appeal arises from the Judgment of the **Senior Resident Magistrate K. Ng'eno in Embu R.M.CC No. 141 of 1998** in a running down matter.

The Plaintiff/Respondent had sued the Appellant herein for general and special damages for injuries sustained following a self-involving traffic road accident in the Appellants motor vehicle Registration No. KAC 606 P. According to the Plaintiff/Respondent, the Defendant/Appellant's driver was negligent in his manner of driving and that is why he lost control of the motor vehicle causing it to roll. The particulars of negligence were pleaded as per paragraph 4 of the plaint.

The driver of the motor vehicle was not joined as a party. The Defendant/Appellant was sued in his capacity as the owner of the motor vehicle in question. The claim against him was therefore pegged on vicarious liability.

The defendant denied liability contending that his driver was not authorized to carry any passengers and that as at the time the accident happened, the driver was not acting in the course of his duties that he was vicariously liable for the accident in question.

After hearing the parties, the learned trial magistrate found the defendant's driver having been negligent in his manner of driving. He also found the defendant vicariously liable and entered Judgment in favour of the plaintiff, awarding her Ksh.40,000 as general damages and 420/= as proven special damages.

Being dissatisfied with the said Judgment, the appellant filed this appeal raising 5 grounds as enumerated hereunder

1. ***The learned trial magistrate erred in law and in fact in invoking the doctrine of vicarious liability when the plaintiff did not prove the essential***

ingredients of that doctrine.

2. ***The learned trial magistrate erred in law and in fact in failing to direct his mind on the doctrine of volenti non fit injuria when it was clear from the evidence adduced that the plaintiff freely and voluntarily assumed the risk, with full knowledge of the nature and extent of the risk she ran, by boarding the pick up which she knew was not a public vehicle and impliedly agreed to incur it.***
3. ***The learned trial magistrate erred in law and in fact in failing to consider the proceedings before him as defective since the plaintiff had not joined the estate of the deceased driver as party to the suit.***
4. ***The learned trial magistrate erred in law and in fact in awarding general damages at Ksh.40,000 which were manifestly too high having regard to the nature of the injuries suffered by the respondent.***
5. ***The learned trial magistrate erred in law and in fact in finding that the defendant was 100% liable for the accident, when there was no evidence in the record to support such a finding.***

He has asked this court to allow the appeal and set aside the said Judgment.

In his oral submissions in court counsel for the appellant concentrated his emphasis on grounds 1, 2 and 3.

Particularly on the issue of the non-joinder of driver and on the issue of vicarious liability. He maintained that the driver had been expressly forbidden not to carry any passengers and he could not have been acting as an agent of the defendant. He ought not therefore to have been held vicariously liable for the accident. Indeed, he did not pursue the issue of apportionment of liability or the quantum of damages.

On his part, counsel the Respondent urged this court to dismiss the appeal saying that the driver could not have been enjoined as a party since he had already died as at the time the appeal was filed.

Sadly, neither counsel furnished me with any authorities to buttress their submissions.

The points raised by counsel for the appellant have been decided in many cases before and indeed that law on non-joinder of the driver and also on vicarious liability is settled.

On the issue of the non-joinder of the driver, the court of Appeal has on several occasions held that the same is not fatal.

In the case of **NDUNGU -V- COAST BUS COMPANY LIMITED (2000) 2 EA 462** the court held:-

“ From the authorities (selle and Another -v- Associated motor Boat Co.Ltd and others, Mwonja -V- KAKUZI.) It would appear to us that the mere fact that the driver of an accident motor vehicle is not joined in a damages claim against his employer arising from his driving is not fatal. Liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged on the employee’s liability but to his negligence.

In this case, the appellant’s driver’s negligence was proved on a balance of probabilities. He is said to have been speeding, he hit a pot hole and he lost control of the motor vehicle and rolled on his own. There was no other motor vehicle involved and indeed the plaintiff did not do anything to contribute to the accident. This therefore means that as long as negligence was proved against the driver, then the appellant could be held liable even in the absence of the driver. The proceedings were not therefore defective and ground 3 must therefore fail.

On the argument that the driver was not acting as an agent of the appellant since he was acting against express instructions not to carry passengers, the Court of Appeal in **DRITOO-V- WEST NILE DISTRICT ADMINISTRATION (1968) E.A 428.**

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

In this case, negligence was proved against the driver and so vicarious liability can be inferred as a matter of law.

To sum up this issue on vicarious liability, I will quote the Court of Appeal decision in **GEOFFREY CHEGE NUTHU -VS- M/S ANVERALI AND BROTHERS (Civil Appeal No. 68 of 1997)** where it held;

“ The law is so long as the driver’s act is committed by him 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 his general instructions, the master is liable.”

Need I say more? This places the appellant squarely within the ambit or parameters of vicarious liability. That ground must also fail.

The doctrine of violent non fit injuria does not really apply here since the Respondent though accepting to be carried in the defendant's motor vehicle had not accepted or assumed the risk of being driven recklessly or negligently. I do not find it necessary to delve into the doctrine of violent non fit injuria.

This appeal therefore fails as far as the issue of liability is concerned. On the ground that the award was manifestly excessive, I note that counsel abandoned the same during the hearing. My view would nonetheless have been that the amount of 40,000/= was not manifestly excessive and I would have had no reasons to set it aside or reduce it.

For the foregoing reasons this appeal must fail. I find the same devoid of merit and dismiss it with costs to the Respondent.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 28th day of April 2010.

In presence of:-Mr. Okwaro for Respondent and Mr. Kathungu for Mr. Muriithi for Appellant.