**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT MERU**

**Civil Appeal 34 of 2005**

**DOUGLAS MWIRIGI FRANCIS ……...……. 1ST APPELLANT**

**HASSAN ABDI WARSAME ……...……. 2ND APPELLANT**

**ABDI HARSH ……..……. 3RD APPELLANT**

**VERSUS**

**ANDREW MIRITI …… RESPONDENT**

**JUDGMENT**

***(An Appeal from a judgment of Mrs. M.S.G Khadambi, SRM Meru delivered on 21st January 2005)***

This is an appeal from the decision of the court below (Mrs. M.S.G. Khadambi, SRM) in which the appellants were found responsible for the accident which occurred along Meru-Maua road on 23rd December 2002 involving motor vehicle Reg. No. KAC 401Y and the respondent. The learned trial magistrate awarded to the respondent Kshs. 150,000 in general damages and Kshs. 7,850/= in special damages.

The appellant being aggrieved by this has brought this appeal relying on four (4) grounds which can be summarized as follows, after one ground was abandoned.

(i) that there was no evidence that the respondent was a passenger, in motor vehicle No. KAC 104Y,

(ii) that liability was not proved,

(iii) that the medical report was irregularly compiled, and

(iv) that the award was too high.

These grounds were canvassed before me on 13th November 2007.

Learned Counsel for the appellant urged the court to reduce the award to Kshs. 60,000/= relying on the following cases:-

***Esther Wairimu Nene V. Antony Maina Ihungo,*** Nairobi HCCC No. 3614 of 1988, where Kshs. 60,000/= was awarded, ***Peter Kimathi Kimani V. Paul Kamau Mwangi & Another*** Nairobi HCCC No. 2919 of 1988 where also Kshs. 60,000/= was awarded in general damages and **Ruth *Mbithe Mutua v. Robert Mutiso Ngundo*** Nairobi HCCC No. 1977 of 1987 where Kshs. 70,000/= was awarded.

The appeal was opposed and counsel for the respondent submitted that there was sufficient evidence that the respondent was a passenger in the motor vehicle in question. He further argued that the award was in consonance with the injuries suffered by the respondent.

I have considered the entire appeal as well as submissions together with authorities cited. I am bound to re-evaluate the evidence on record in order to come to an independent conclusion.

The accident occurred when the 1st applicant who was an employee of the 2nd and 3rd appellants was driving the motor vehicle in issue towards Maua from Meru with destination being Nairobi. A few kilometers from Meru Town at a place called Kaithe the motor vehicle lost control and rolled.

It is the respondent's case that he had boarded the motor vehicle, a pick up, at Makutano in Meru town early in the morning intending to travel to Kangeta. He was to pay Kshs. 50/=. He got at the back of the pick-up with other people. That after they left Meru town they were involved in an accident; he was taken to the hospital and later obtained a P3 form and a police abstract.

Dr. John Macharia examined the respondent on 22nd May 2003 and noted that he had suffered soft tissue injuries as a result of an accident, as follows:-

- cuts on the face and head

- cuts on the hands

- cuts on the lower limbs

In the opinion of the doctor, on examining the respondent, the latter had multiple soft tissue injuries which had healed at the time of examination with the left side of the forehead presenting unsightly scar.

The appellants called four (4) witnesses including the 1st appellant. The 2nd and 3rd appellants did not testify. The 1st appellant admitted that as he drove from Meru he gave a lift to several people who he identified as Kimathi (who sat in the cabin with him), Mbaabu who got on the back of the pick-up, Muriki also joined Mbaabu and Isaiah joined the 1st appellant in the cabin.

When they got near the scene of the accident, some 100m from the scene, he picked another passenger. A person by the name Stephen Kaburu Kobia (the deceased) dashed on to the road to board a matatu on the other side of the road. It was so sudden that the 1st appellant could not avoid the accident. He hit the deceased, lost control and over-turned in a ditch.

Simon Kimathi (DW2) testified that he was a passenger in the motor vehicle and sat in the cabin. His account of the events was that, apart from him, the 1st appellant picked Muriki at Meru Teachers College, another passenger at Runogone and one more at Kiruai.

In cross-examination, he stated that they also picked one more person called Mwongera at Mafuko. He added that the 1st appellant would stop for passengers as they traveled.

DW3 Boniface Mwirigi testified that he boarded the pick-up and sat with Mbaabu at the back. That they stopped at Kiruai and picked Mwithimbu, who sat with them at the back.

DW4, John Kimathi Kirimiti told the court that he too boarded the pick up where he identified the 1st appellant and 2 others in the cabin. He sat at the back with Mbaabu and another man.

There cannot be any dispute from the evidence that there was an accident involving motor vehicle No. KAC 401Y driven at the time by the 1st appellant. There is also uncontroverted evidence from the Registrar of Motor Vehicles that the motor vehicle was registered in the names of the 2nd and 3rd

appellants.

As a result of the accident, one person, a pedestrian, the deceased lost his life while the passengers sustained injuries. The broad issues are whether (i) the respondent was a passenger in the motor vehicle in question, (ii) whether the accident was caused by the negligence of the 1st appellant, (iii) whether the award was excessive and (iv) whether the 2nd and 3rd appellants were vicariously liable.

Regarding the first issue, the respondent maintains, that with the permission of the 1st appellant, he boarded the pick-up at Makutano in Meru Town. He was to pay Kshs. 50/= to go to Kangeta.

The 1st appellant and all his witnesses were categorical that they did not see the respondent. Looking at the evidence in totality I am persuaded that the respondent boarded the motor vehicle with the permission of the 1st appellant at Makutano. The 1st appellant in his own testimony told the trial court that at Makutano too many people boarded the motor vehicle and that nobody got on without his permission. The evidence of all his witnesses was discredited and contradictory. They however confirm that they saw the respondent at the hospital with injuries after the accident. I have no difficulty in concluding from the foregoing that the respondent was an authorized passenger.

The next issue is that of liability. The immediate cause of the accident was the deceased although the respondent did not seem to know this fact. He simply noticed the vehicle overturn. He, however, maintained that the vehicle was traveling at a high speed.

According to the 1st appellant he saw the deceased some 100m ahead trying to cross the road in order to catch a matatu on the other side of the road. Half-way the road the deceased on seeing the 1st appellant's motor vehicle ran back. The 1st appellant swerved to avoid knocking him but hit him and lost control in the process. According to him he was traveling at about 50kmph.

Again taking all this into account, it can be concluded that the 1st appellant was traveling at great speed and failed to slow down on seeing the deceased some 100m away.

Secondly, having noticed a matatu on the other side of the road, he ought to have approached it with caution remembering that passengers may be alighting or boarding with some crossing the road. The road was steep with several bends. This again called for caution and care.

I find that the trial magistrate did not misdirect herself in finding that the 1st appellant was solely to blame for the accident.

Turning to the award of general damages, the respondent relied on two cases, ***Fanny Esilako V. Dorothy Muchene,*** Nbi HCCC No. 642 of 1991 and ***Harrison Peter Ondiek V. Lyons Co. Ltd,*** Nbi HCCC No. 3736 of 1989 and urged the court to award Kshs. 160,000/= as general damages.

I have referred to the three authorities cited by the appellants where the award was between Kshs. 60,000/= and Kshs. 70,000/=. All those cases date back to 1993, over 12 years before the trial court's decision in this appeal. It is a cardinal rule in personal injuries claims that comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct levels of awards in similar cases. See ***Stanley Maore V. Geoffrey Mwenda,*** Civil Appeal No. Nyeri 147 of 2002.

The authorities cited by the appellants, decided over 12 yeas ago cannot be said to be comparable or based on the recent awards. It has also been stated in a long line of decisions that an appellate court will be slow in disturbing a lower court's award. It will only interfere with the award if the trial court took in account an irrelevant factor or omitted to take into account a relevant one or that the amount awarded is so inordinarily low or so inordinarily high that it must be a wholly erroneous estimate of the damage. See ***Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini V.A.M. Lubia and Olive Lubia*** (1982-88) IKAR 727 at page 730. In this appeal, I find no error in the award to warrant my interference.

The final point is the liability of the 2nd and 3rd appellants. The 1st appellant confirmed in his testimony that he was an employee of the 2nd appellant, one of the registered owners of the motor vehicle in question. However, there is also evidence that the motor vehicle was co-owned by the 2nd appellant. Both were therefore the 1st appellant's employers.

Vicarious liability arises from a master and servant relationship in tort, a relationship where the master may be held liable for the servant's torts. The general principle is that a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. The master is, however, liable even for acts which he has not authorized, provided they are connected with acts which he has authorized that they might be regarded as modes, although improper modes, of doing them. See ***Ndoo t/a Ngomeni Bus Service V. Kakuzi Ltd,*** (1984) KLR 554. The Court of Appeal for East Africa in the case of ***Muwonge V. Attorney General of Uganda,*** (1967) EA 17 on page 18, held that:-

"***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."***

That case also held that it would be 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, it was held, must depend on its own facts. Although the 2nd and 3rd appellants did not testify the 1st appellant by his own admission in his evidence stated clearly that there was an inscription on the door of the motor vehicle that read "***No passengers".***

Indeed, he testified that he was not authorized to carry any passengers. He further stated that when people stopped him after fueling at Makutano he advised them that the motor vehicle was not carrying passengers. So why, knowing very well the express restrictions imposed by his employer, did the 1st appellant go against those clear instructions? Can the 2nd and 3rd appellants be held liable for an act they expressly prohibited?

The learned trial magistrate made reference to the case of ***Geoffrey Chege Nuthu V. Anvevell & Brothers,*** Civil Appeal No. 68/97 and was satisfied that the three appellants were jointly and severally liable. It would appear from Old English authorities such as **Twine V. Bean's *Express Ltd*** (1946) I ALL ER and ***Conway V. George Wimpey & Co. Ltd*** (1951) I ALLER 363, that were an act is expressly prohibited by the employer the employer will not be vicariously liable if the employee does the prohibited act and thereby injury arises.

In the latter case, the defendants' lorries had clear notice in the cab to the effect that the driver was under strict orders not to carry passengers other than the employees of the defendants during the course of their employment and that any other person traveling on the vehicle did so at his own risk.

The plaintiff, not an employee of the defendants was given a lift by the driver of one of the defendants' lorries. In dismounting, the plaintiff was injured owing to the driver's negligence and he claimed damages from the defendants for the negligence of their servant.

It was held, applying the ***Twine V. Bean's Express*** case (supra) that the defendants were not liable to the plaintiff who was described as a trespasser. ***Twine V. Bean's Express*** was distinguished in the ***Geoffrey Chege*** case (supra) on two grounds, namely, that it was not binding on the Court of Appeal and secondly that the trial court in ***Geoffrey Chege*** did not make a specific finding that the motor vehicle in question prominently displayed a notice that the driver was instructed not to carry any passengers.

Similarly, in ***Meto & Another V. Kihanguru & 3 others,*** (2002)2 KLR 753 ***Twine v. Bean's Express*** was distinguished from that case because in the former there was no notice or warning displayed on any part of the vehicle that the deriver was forbidden from carrying any passengers, among other reasons.

I have already observed that the question whether an employer will be liable for torts of his employee committed in the course of employment is a question of fact which must be determined on the peculiar facts and circumstances of each case.

Following from what I have stated in the previous paragraphs that the 1st appellant was aware of his prohibition from giving lifts to passengers and the presence of a notice on the motor vehicle, his blatant breach of those instructions absolved the 2nd and 3rd appellants from blame. The 1st appellant was, as it were, on a frolic of his own for personal gain not envisaged by his employers. The motor vehicle in this appeal being a pick-up was not designed for carriage of passengers. There is also the aspect of insurance policies which are strictly interpreted in terms of the use the motor vehicle is to be put into.

For these reasons, I will allow the appeal only to the extent that the trial court erred in finding that the 2nd and 3rd appellants jointly and severally liable with the 1st appellant. The judgment, to that extent, is set aside.

The appeal is otherwise dismissed on the other grounds. Since the 2nd and 3rd appellants have succeeded, they will have costs of this appeal. The respondent too has costs of the appeal as against the 1st appellant.

Dated and delivered at Meru this 27th day of February 2008.

**W. OUKO**

**JUDGE**