REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL APPEAL 94 OF 2006

TABITHA NDUHI KINYUA……APPELLANT

VERSUS

FRANCIS MUTUA MBUVI……. RESPONDENT

CORNER GARAGE TRANSPORT CO. LTD……2ND RESPONDENT

JUDGMENT

The facts of this case are more or less not in dispute. The 1st respondent Francis Mutua Mbuvi was employed as a driver by the 2nd respondent, Corner Garage Transporters Ltd. The 1st respondent was the driver of motor vehicle registration No. KAG 062D Isuzu lorry which was towing a trailer ZB 8563. It is not disputed that at the material time the lorry was transporting coffee from Kampala to Mombasa on behalf of clients who had hired the 2nd respondent. It is further not disputed that on the 30th April, 2004 while the 1st respondent was driving the said motor vehicle along Eldoret – Nakuru road, he permitted Tabitha Nduhi Kinyua (*the appellant*) to board the said motor vehicle at a place known as Mukinyai. After a few kilometres, the said motor vehicle was involved in an accident with another vehicle as a result of which the appellant sustained serious injuries. The appellant sued the 1st and 2nd respondents before the Chief Magistrate's Court, Nakuru.

After hearing the suit, the Chief Magistrate dismissed the suit against the 2nd respondent. The trial court entered judgment both on liability and quantum against the 1st respondent. At Page 2 of its judgment, the trial Magistrate's Court stated as follows:

"***Though the plaintiff boarded the 2nd defendant's vehicle with express permission of the 1st defendant, it was clear to her that she was boarding a goods ferrying and not a passenger ferrying vehicle. It thus was evident to the plaintiff that the 1st defendant was not employed to carry passengers. The defendant (****acted****) beyond the scope of his employment and for purposes which were not his employer'(s) but his own. He thus is the one who is liable to the plaintiff. I find the 2nd defendant is not vicariously liable to the plaintiff. I thus enter judgment on liability for the plaintiff against the 1st defendant with costs."***

It was this dismissal of the suit against the 2nd respondent that triggered the present appeal. In her memorandum of appeal, the appellant raised six grounds of appeal challenging the

decision of the trial Magistrate in dismissing the suit against the 2nd respondent. The summary of the said grounds are as follows:

The appellant was aggrieved that the trial Magistrate had failed to find the 2nd respondent vicariously liable for the acts of the 1st respondent; she was aggrieved that the trial Magistrate had failed to consider the submissions filed by the appellant in support of her case; she faulted the trial magistrate for failing to find that the 1st respondent had acted with the authority of the 2nd respondent and thus the 2nd respondent should have been held liable for the acts of the 1st respondent; she was aggrieved that the trial Magistrate had failed to put into consideration the fact that the respondents had filed a joint defence and had retained the same advocate. She was finally aggrieved that the trial Magistrate had failed to consider the fact that the 1st respondent was at the time of the accident the authorised agent of the 2nd respondent and was acting within the course of his employment.

At the hearing of the appeal, Mr. Mongeri, counsel for the appellant reiterated the grounds of appeal and submitted the trial Magistrate ought to have found the 2nd respondent vicariously liable for the acts of the 1st respondent because the respondents had filed a joint defence and it was not therefore possible to separate the defence. He submitted the appellant was injured in the accident involving the 2nd respondent's motor vehicle which was being driven by the 1st respondent under the authority of the 2nd respondent. He argued that the 1st respondent was an agent of the 2nd respondent at the time and was driving the said motor vehicle for the benefit of the 2nd respondent. Mr. Mongeri urged this court independently re-evaluate the evidence adduced in the case and reach a determination that the 2nd respondent was vicariously liable for the negligence of the 1st respondent.

Mr. Mongeri took issue with the failure by the trial Magistrate to consider the cases of **Muwonge vs Attorney General of Uganda [1967] E.A. 17** and **Morgans vs Launchbury & Others [1972] 2 All E.R. 606** which the appellant had relied on in support of her submission that the 2nd respondent should be found vicariously liable for the acts of the 1st respondent. He submitted that the correct position in the law is that a master is liable for the acts of his servant even if the servant acted contrary to his employers express instructions. Mr. Mongeri argued that the 1st respondent had acted under the authority of the 2nd respondent even though the 2nd respondent was not aware of it. In support of this argument counsel for the appellant relied on the Court of Appeal decision of **Kibet A. Metto vs Phillip Kihanguru & Another C. A. Civil Appeal No. 120 of 2000 (Nakuru) (*unreported*).** He urged the court to allow the appeal and set aside the decision of the trial Magistrate in which he had found the 2nd respondent not vicariously liable for the acts of the 1st respondent.

Mr. Musangi for the respondents opposed the appeal. He submitted that at the material time of the accident, the 1st respondent had been specifically assigned to ferry coffee from Kampala to Mombasa and not to ferry passengers. He submitted that the 2nd respondent did not know the circumstances of how and why the appellant came to be in the motor vehicle at the time of the accident. He contended that the 1st respondent had specifically been forbidden from carrying any unauthorised passengers; the 1st respondent had signed an undertaking acknowledging receipt of the said specific instructions. Mr. Musangi argued that the 2nd respondent was not involved in the business of carrying passengers. He contended that the appellant took a risk when she board a motor vehicle which she knew was not a passenger service vehicle (PSV) but a goods vehicle. He relied on the case of **Shighadai vs Kenya Power & Lighting Co. Ltd & Another [1988] KLR 682 where Bosire, J** (*as he was then*) held that an employer was not liable for the negligence of a driver if such a driver acts beyond the scope of his employment and not in furtherance to the owner's business or purpose.

Mr. Musangi submitted that the appellant must establish that the 2nd respondent directly benefited when the 1st respondent ferried her as a passenger. He relied on the decision of **Conway vs George Wimply & Co. Ltd. [1951] 1 AllER 363** where it was held that an employer cannot be liable for the acts of a trespasser in his motor vehicle. He contended that the 1st respondent had acted outside the scope of his employment when he allowed the appellant to board the 2nd respondent's motor vehicle contrary to the express instructions of the 2nd respondent. Mr. Musangi submitted that the 1st respondent's degree of deviation from his scope of employment was such that it could be said that the 1st respondent was engaged in a frolic of his own when he carried the appellant in the said motor vehicle. He further submitted that the 1st respondent had no mandate to give lifts to strangers in the 2nd respondent's motor vehicle. He argued that the 2nd respondent had not benefited at all when the 1st respondent gave the lift to the appellant. He urged the court to put into consideration the issue of liability could not be separated from that of insurance. He submitted that the court should hesitate before extending the duty of care by employers for the acts of employees who act beyond the scope and mandate of their employment. He urged the court to dismiss the appeal with costs.

As the first appellant court, this court is required in law to re-evaluate the evidence adduced before the trial Magistrate's court, reconsider it and reach an independent determination of its own. The appellate court is however required to put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any finding as to the demeanour of witnesses unless such finding on demeanour is inconsistent with the evidence generally (See **Selle vs Associated Motor Boat Co. Ltd [1968] E.A. 123** at Page 126)**.** In the present appeal, the issue for determination by this court is whether the 2nd respondent is vicariously liable for the acts of the 1st respondent. In reaching its decision, this Court will have to consider whether the 1st respondent was acting within the scope and mandate his employment when he gave a lift to the appellant.

As issue which arose in the course of the submissions is whether the fact the respondents filed a joint defence, precludes the 2nd respondent from denying vicarious liability for the acts of the 1st defendant. Messrs. Musangi & Company Advocates filed a joint defence for the respondents. In paragraph 4 of the defence, the respondents pleaded that:

"***The 2nd defendant avers that the plaintiff has not established any cause of action against it as the plaintiff was an unauthorised passenger in its motor vehicle and shall seek to rely on the doctrine of volenti non fit injuria as far as applicable in advancing its defence."***

In law, it is presumed that where parties chose to file joint pleadings, then each of them is deemed to have personally made the averments in the pleadings. This position is supported by the recent Court of Appeal decision of **Research International East Africa Ltd vs Julius Arisi & 213 others C.A Civil Appeal No.321 of 2003 (Nrb) (**Unreported**)** where it was held that joint plaint was valid in so far as each plaintiff swears a separate affidavit verifying the correctness of the averments made in the plaint unless the said plaintiffs have authorised one of them to swear such an affidavit on their behalf. In the present case, it is clear that even though the respondents filed a joint defence, the averments therein in so far as it related to the 2nd respondent were distinguishable and separable. I therefore find no merit with the submission by the appellant that this court ought not to consider the defence of the 2nd respondent as being separate from the defence of the 1st respondent. The averments in the defence shall be considered in so far as it applies to the respondent seeking to rely on it.

As regard whether the 1st respondent had the authority of the 2nd respondent when he gave the lift to the appellant, the 2nd respondent established that its core business was to ferry goods and not to carry passengers. The 2nd respondent was not possessed of a PSV Licence. The

2nd respondent established that at the time of the accident, the 1st respondent was under instructions to ferry coffee from Kampala to Mombasa. It was the 2nd respondent's case that the 1st respondent did not have authority to carry any passengers in the course of employment. In support of this contention the 2nd respondent relied on *Defence exhibit No.2* which is a document which was signed by the 1st respondent. In the said document, the 1st respondent gave an undertaking that he would carry no unauthorised passenger in the course of his employment. It is the 2nd respondent's contention that when the 1st respondent gave the lift to the appellant, he (*the 1st respondent*) was engaged on a frolic of his own. On her part, the appellant has insisted that the 1st respondent was acting within the course of his employment and authority of the 2nd respondent when he gave her a lift. She urged the court to find the 2nd respondent vicariously liable for the acts of the 1st respondent.

What is the legal position in respect to the situation that the appellant has found herself in? In **Kibet Arap Metto & Another vs Phillip Kihanguru & 3 Others C. A. Civil Appeal No. 120 of 2000 (Nakuru) (***unreported***)** the Court of Appeal held at page 5 that:

"***We think that*** *Morgan vs Launchbury & Others [1972] 2 AllER 606* ***is in all fours with the matter now before us. In this case the house of Lords held***:-

'*In order to fix liability on the car for the negligence of the driver, it is necessary to show either that the driver was the owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it was necessary to show that the driver was using the car at the owner's request express or implied on in his instructions and was doing so in the performance of his task or duty thereby delegated to him by the owner.*

Simply illustrated, the doctrine enunciated above may be stated as follows: where A, the owner of a vehicle, expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B's negligence in the operation of the vehicle' ."

In the above case, the Court of Appeal held that an owner of a motor would be liable even if he had given a specific instruction to the driver if such duty he was engaged in was for the benefit of the owner. In **Muwonge Vs Attorney General of Uganda [1967] EA 17, Newhold P** held at Page 18 Para H that:

"***The test of a master's liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant at any rate when the criminal act is towards benefiting the master himself. 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 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, never the less 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."***

The Court of Appeal in **Nakuru Automobile House Ltd vs Ziaudin [1987] KLR 317** similarly held that liability could only be fixed on the owner of a motor if it is a established that the driver was acting as the agent of the owner or alternatively he had the owner's express or implied instructions to the performance of the task or duty delegated to him by the owner.

In the present appeal, the appellant testified that she paid the 1st respondent to enable her travel in the said motor vehicle. The appellant was aware or ought to have known that the

motor vehicle in question was not a public service vehicle (PSV). The 1st respondent did not have authority of the 2nd respondent to carry any passengers. In actual fact, the 1st respondent had been specifically forbidden to carry any passengers. The fare that the appellant paid to the 1st respondent was for the 1st respondent's own benefit and not that of the 2nd respondent.

Having carefully re-evaluated the evidence adduced in this case and the rival submissions made, this court is of the view that the appellant did not make out a case that established the 2nd respondent to be vicariously liable for the acts of the 1st respondent in the circumstances that the accident took place. It is evident that the 1st respondent acted out of the scope and mandate of his employment. The 2nd respondent's motor vehicle was not licensed to carry passengers. It was designed to carry goods. The appellant's legal position when she chose to board the 2nd respondent's motor vehicle was that of a volunteer. No blame nor liability can attach to the 2nd respondent as a result of the injuries she sustained in the said accident.

This court finds no fault with the decision of the trial Magistrate when he held that the 2nd respondent could not, in the circumstances of the case, be held to be liable for the acts of the 1st respondent. The upshot of the above reasons is that the appeal filed by the appellant must fail. It is hereby dismissed with costs.

DATED at NAKURU this 18th day of October, 2007

L. KIMARU

JUDGE