REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 132 of 2002

MARY WAITHERERO…….....……..APPELLANT

VERSUS

CHELLA KUNANI…….....……1ST RESPONDENT

M. M. BHIMJIANI…….....……..……2ND RESPONDENT

JUDGMENT

The appellant, Mary Waitherero Kayuni filed suit against the respondent seeking to be paid damages on account of injuries she alleged to have sustained on the 8th of July 1999 when she was travelling in motor vehicle registration number KAG 051A (*hereinafter referred to as the said motor vehicle*) driven by the 1st respondent and owned by the 2nd respondent when the said motor vehicle collided with motor vehicle registration number KAH 873S at Salgaa along the Eldoret-Nakuru road. The appellant averred that she was lawfully travelling in the said motor vehicle when it was involved in the said collision. She blamed the said collision on the negligence of the 1st respondent. The respondents filed a defence. They denied that the appellant was a lawful passenger in the said motor vehicle. They further denied that they had been negligent when the said collision occurred. They blamed the driver of motor vehicle registration number KAH 873S for causing the said accident. However the respondents did not apply to enjoin the owners of motor vehicle registration number KAH 873S as a third party in the suit. After hearing the appellant's and the respondents' case, the trial magistrate held the respondents to be substantially liable for the said accident. She however held that the appellant was to bear 40% liability because she was an unlawful passenger in the said motor vehicle. She awarded the appellant general damages of Kshs 400,000/= and special damages of Kshs 2,100/= less contribution of 40%. The appellant was also awarded costs and interest.

The appellant was aggrieved by the decision of the trial magistrate and filed an appeal challenging the said decision. In her memorandum of appeal, the appellant raised two grounds of appeal namely that the trial magistrate erred in finding that the appellant was an unlawful passenger in the said motor vehicle and therefore ought to bear 40% contribution. The appellant was further aggrieved that she had been awarded general damages that were inordinately low which did not reflect the serious nature of the injuries sustained by the appellant.

At the hearing of the appeal, Miss Njoroge Learned Counsel for the appellant submitted that liability ought not to have been apportioned because the appellant had not contributed to the accident that resulted in the injuries that she sustained. She submitted that the respondents had not raised the issue of

contributory negligence in their pleadings and therefore the trial magistrate fell in error when she held that the appellant was to bear 40% liability. She submitted that the respondents had blamed a third party for the said collision but had made a choice not to enjoin the said third party in the proceedings. She submitted that in the absence of pleadings on contributory negligence, liability could not be apportioned between the appellant and the respondent. She further submitted that no evidence was adduced by the respondents that the appellant was in any way to blame for the said accident. She urged this court to allow the appeal.

Mr. Murimi Learned counsel for the respondents opposed the appeal. He submitted that the trial magistrate made the proper decision when she apportioned liability between the appellant and the respondents because it was established that the appellant was unlawful passenger in the said motor vehicle and had therefore assumed the risk when she agreed to be a passenger in the said motor vehicle. He submitted that the appellant had been allowed to be a passenger in the said motor vehicle when the 1st respondent was forced by the police to carry the appellant as a passenger in the said motor vehicle. He submitted that although contributory negligence was not pleaded by the respondents, the evidence adduced by the respondent clearly established that the appellant was an unlawful passenger when the said motor vehicle was involved in the accident. He further submitted that the 1st respondent did not have the authority of the 2nd respondent to carry any passengers in the said motor vehicle and therefore it could not be solely held liable for the injuries that the appellant sustained when the said motor vehicle was involved in the accident. He argued that the appeal filed by the appellant was incompetent because the decree in the record of appeal was not certified by the subordinate court. He urged this court to disallow the appeal.

This being a first appeal, this court will determine the appeal by way of re-hearing and re-evaluating the evidence that was adduced before the trial magistrate's court so as to arrive at an independent decision whether or not to uphold the finding of the trial magistrate. As was held in **Selle & Anor –vs- Associated Motor Boat Company Limited & Others [1968] EA 123** at page 126 by Sir Clement De Lestang VP;

"***An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge's finding of fact if it appears either that he clearly failed on some point to take account of particulars circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholani (1955) 22 EACA 270)."***

In the instant case, the issue for determination by this court is whether the trial magistrate properly apportioned liability as between the appellant and the respondent. It is not disputed that the appellant was a passenger in the 2nd respondent's motor vehicle which the 2nd respondent had not authorised to be used to carry passengers. Whereas the appellant testified that she had paid the fare to the 1st respondent to be allowed to be a passenger in the said motor vehicle, the 1st respondent testified that he was forced to carry the appellant as a passenger in the said motor vehicle by the police who stopped him at a road block. Both the appellant and the 1st respondent testified that at the material time of the accident, there was a strike by the public service vehicles and therefore there was a general lack of public transport.

I have carefully evaluated the evidence adduced. I have also considered the rival submissions made before me by the parties to this appeal. I have also read the pleadings that were filed by the parties to this appeal. The appellant, in her plaint, pleaded that the respondents were negligent and therefore owed her damages on account of the injuries she sustained when the said motor vehicle was involved in the accident. The respondents denied that the appellant was a lawful passenger in the said motor vehicle. They however did not plead in their defence that the appellant contributed to the said accident. I therefore agree with the submission made by Miss Njoroge that the trial magistrate erred in finding that the

appellant had contributed to the said accident in the absence of any plea by the respondents. A party is bound by its pleadings. Where a party has not pleaded an issue it is not open for such a party to adduce evidence in support of what was not in existence in the pleadings.

Further, I hold that the trial magistrate erred when she held that the appellant was partially liable for the said accident because she was an unlawful passenger in the said motor vehicle. The legal position as regard what happens when an employee commits acts of negligence in circumstances that can be said to be outside the scope of his employment was addressed in the treatise **Charlesworth & Percy on negligence 9th Edition, Sweet & Maxwell London (1997)** at page 153 under paragraph 2-246 and 2-247 where it was stated that;

"*Negligence committed in the course of employee's employment*. ***An employer is liable for the negligence of the employee, if committed in the course of his employment, but is not liable for the negligence, which is committed outside the scope of his employment. As Lynskey J. has stated:***

'***It is well settled law that a master is liable even for acts which he has not authorised provided that they are so connected with the acts which he has authorised that they may rightly 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 authorised 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 (Marsh –vs- Moores [1949]2 KB 208 at 215).'***

An act is done in the course of the employment, not only when the employee is actually doing the work which he is employed to do, but also when the act is an incident in performing something he is employed to do and when he is about business which concerns the employer and the employee. It must follow that, for an employee to be in the course of his employment, he must be doing something which it is his duty to his employer to do, (that is, he must be obliged so to do by the terms of his employment).

An employee does not cease to act in the course of his employment, unless he has plainly gone beyond the bounds. In one sense, it may be said that it is never within the scope of an employee's employment to commit an act of negligence. *'In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.'* ***(per Willes J. in Barwick –vs- English Joint Stock Bank (1867)LR 2 Ex 259 at page 266). If the employee is doing negligently something, which he is employed to do carefully, the negligent act is in course of his employment and the employer is liable."***

In the present appeal it is not denied that the 1st respondent was not authorised by the 2nd respondent to carry passengers in the said motor vehicles. What is however clear is that the 1st respondent was carrying two other passengers when the said motor vehicle was involved in an accident. At the time of the accident, there was a general strike of passenger service vehicles. There was therefore a shortage of public transport. The appellant testified that she stopped the 1st respondent and paid him a fare to transport him from Timboroa to Nakuru. On the other hand, the 1st respondent testified that he was forced by the police to carry the appellant as a passenger. In my view, the evidence of the 1st respondent in that regard was so important that it ought to have been pleaded and particularised as a particulars of negligence against the appellant. As stated earlier in this judgment, the respondents did not make such plea in their written statement of defence. The allegation that the 1st respondent had been forced to carry the appellant as a passenger by the police was therefore an afterthought. The 1st respondent carried the appellant and two other passengers for his own gain. The trial magistrate therefore fell into error when she allowed the said evidence by the 1st respondent to influence her final decision.

It is clear that the 2nd respondent had authorised the 1st respondent to drive the said motor vehicle

along the Eldoret-Nakuru road. It is the 2nd respondent's case that he did not authorise the 1st respondent to carry passengers. However from the evidence adduced, it is clear that the 1st respondent carried passengers in spite of the specific instructions of the 2nd respondent. The appellant was not aware of the instructions that the 1st respondent had been given by the 2nd respondent. The 1st respondent therefore did what he was authorised to do but exceeded the 2nd respondent's instructions by carrying the appellant as a passenger in the said motor vehicle. The 2nd respondent is therefore liable in damages to the 1st respondent.

The upshot of the above reasons is that the appeal filed by the appellant has merit and is hereby allowed. The decision of the trial magistrate's court whereby she apportioned liability as between the appellant and the respondents is set aside and substituted by the decision of this court finding the respondents solely liable in damages for the said injuries that were sustained by the appellant when the said motor vehicle was involved in the accident. As a passenger, the appellant was not in control of the said motor vehicle and was not aware that the 2nd respondent had not authorised the 1st respondent to carry her.

In the circumstances therefore the general damages which was assessed by the subordinate court of Kshs 400,000/= shall be paid to the appellant for pain suffering and loss of amenities. Interest shall be paid from the date of the delivery of the said judgment by the subordinate court. The special damages of Kshs 2,100/= which was proved is awarded to the appellant. The appellant shall have the costs of the suit both in the subordinate court and on this appeal.

It is so ordered.

DATED at NAKURU this 23rd day of June 2006.

L. KIMARU

JUDGE