REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 103 of 1999

SHEIKH SAID TRANSPORTERS..... APPELLANT

-VERSUS-

1. WILSON KATANA

2. ALI MOHAMED ALI……..…….……...RESPONDENTS

(Appeal from a Judgment of the Senior Resident Magistrate's Court at Mombasa in SRMCC 3048 of 1998 dated 14th October, 1999 (BETTY MALOBA-SRM).TAHIR

JUDGMENT

The Appellant Company is engaged in several business interests within the Coast Province and one of them involves purchase of and transportation of raw cotton from Mpeketoni area within Lamu District to Lamu Town. To transport the cotton appellant used his own Lorries one of which is registered as KAG 922B.

On the 27th December 1996 the President was visiting Lamu and it is the defendant's case that it Was requested by the Provincial Administration either through the District Officer or District Commissioner to put a vehicle at their disposal for their use.

The two Respondents were among about 200 people who boarded the lorry KAG 922B to be ferried to the Venue where the President would address them. For ease of Reference I shall refer to *WILSON KATANA* who was the plaintiff in original case *at KATANA* and *ALI MOHAMED Ali* who was the second Defendant and driver of the lorry as simply *ALI KATANA* stated in evidence that he was asked by the driver along with others to board the vehicle which he knew belonged to the Defendant to be taken for the Presidential function. However on cross-examination by Mr. Pandya for the Appellant he said he saw the Chief and the sub-chief sitting at the co-driver's seat and about 200 people were already on board. On further cross-examination by Mr. Mogaka for *AlI,* he said he had been waiting for any vehicle and had been told the lorry was from the office of the District Commissioner, Lamu.

ABDI NGOCHA (PW2) the Chief GIDEWARIOLE Location Lamu District in his evidence in chief stated that he knew the lorry belonged to the Defendant and it was the driver who asked him and others to board. He further said if the lorry had been hired by the Government he would have known through official communication as the Government would normally bring its own vehicles. He further said Ali had said his boss had sent the lorry.

It was the plaintiff's case that after about 12 kilometers the lorry overturned loaded with its human cargo.

He attributed the accident to high speed at a place that had a bend. He and others were then taken by a Government vehicle to Witu hospital where he was treated for injuries suffered. Consequently he filed suit as against the Respondent and its driver ALI alleging negligence and claiming damages arising therein.

OMAR ALI HEMED (DWI) was at the time employed as a manager by the Appellant Company when sometimes in the same month of December 1996 he was requested by the District Officer to provide transportation. He then on 27th December 1996 instructed ALI to take the lorry to District Officers as he did not know the purpose for which the lorry was required. On cross-examination by Mr. Pandya for the driver ALI, he gave the District Officer's name as GUYO and that he had not hired out the motor vehicle but was allowed to give it out during functions.

On his part ALI MOHAMED ALI (DW2) the driver said he had been asked to go to the District officer's office where one Assistant Chief and about 1000 people boarded the lorry and they proceeded to Witu where he picked more people including the Chief. He also said the Chief told him to drive fast as they were late for the function and he had to listen to the chiefs instructions.

On cross-examination by Mr. Ochwa for the then plaintiff Wilson Katana, he said he never saw the District Officer and the manager (DW1) who had given him the instructions never told him to go carry people but to go work for the Assistant chief.

On further cross-examination by Mr. Pandya he said the vehicle had clear writing on that passengers were not allowed. However the sub-chief infomed the Chief of the driver's protests over overloading but the Chief instructed him to carry more people.

At the close of the case the court held the Respondent vicariously liable in negligence which has prompted this Appeal on 7 grounds. The main grounds for consideration are 1,2,4, and 7 which in my opinion form the crucial issues herein and I shall deal with them first and that is,

"Was motor lorry Registration KAG 922B at the material time temporarily loaned the District Administration Lamu at their request? If so, can , the Appellant be held vicariously liable?

I have analysed the evidence on record and it is no doubt that the Chief (PW2) and the then plaintiff KATANA (PW1) boarded the lorry at WITU at which stage the vehicle was already loaded with people including the sub-chief whom the driver had picked up from the office of the District officer. On reaching Witu the driver states that the sub-chief reported to the Chief who was waiting to board with others about his protests that the lorry was overloaded yet more people boarded. It is also in evidence that the chief who along with the assistant chief sat on the co-drivers seat told him to driver fast as they were late for the function. It is further in evidence that the driver said he was following the instructions of the Chief.

The Appellants manager - OMAR ALI HEMED state that he had been requested by District Officer to provide transport but was not told what the lorry he offered was going to transport on the material date. He instructed the driver to drive to the lorry to the office of the District officer's and this was corroborated by the driver.

It is no doubt from the evidence that ALI was driving the Appellant's lorry with its consent and with specific instructions to proceed to the office of the District officer where he was to receive instructions on the nature of work he was to perform *PER MACKINNON L.J. IN THE HEWITT-V-*

BONVIN (1940) KB 188 Said;

" A man may, of course be temporarily employed as a servant without remuneration---But a servant must at the moment of his act be doing work for his employer."

I will therefore answer the first part of the first issue in the affirmative. The lorry Registration Number KAG 922B had been loaned to the Provincial

Administrator to utilise it for purposes of transportation which was not limited to either goods or persons. It was however at all times to be driven by the Appellant's driver who was not being remunerated by the Provincial administration but by the Appellant. The control of the driver and the lorry by the Provincial Administration was therefore limited to what was to be transported and movement of the lorry. Lord Esther M.R. in the case of *DOVOVAN-V-LANG AND ANOTHER 1893IQB Quoted Corkburn* CJ in *ROURKE V WHITE MOSS CALLIERY CO.* 2CPD 205 who said:

"It appears to me that the defendants put the engine and the man Lawrence at Shitte's disposal just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man whom he is lent, although he remains the general servant of the person who lent him"

Just as in the case before the Court the machine and the driver in the *WHITE MOSS COLLIERY* were temporary loaned to a Third party.

Mr. Ochwa submitted that although in his defence the driver, did state that had he been placed under the control of the District Officer who directed him to carry people to Mpeketoni, it was the driver who invited people to board the lorry as directed by his employer and therefore the lorry and driver were still under the Appellant's control. However as I have shown herein before in my evaluation of the evidence on record, the vehicle and driver were for that particular day under the control of the Provincial Administration, be it the Assistant Chief, Chief, District Commissioner, or District Officer. Ochwa referred to the passage in the case *of GEOFREY CHEGE NOTHU VS ANWERALI BROTHERS* C.A. No. 68 (1997 (UR) which quotes per Newbod P. in MUWONGE -VS- A.G. of Uganda (1967) E.A. 170 P.

"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 is he is acting for his own general instructions the Master is liable."

The facts in *the MUWONGE* and *GEOFREY CHEGE'S* cases are different in that at all material times the Motor vehicles and the drivers remained under the control of their employers and the two drivers were acting although wrongly but in the course of their duties to the employer.

It must be shown that the motor vehicle was being driven on the owners business or for owner purposes as summed up in the passage in *OMROD V CROSSVILLE MOTOR SERVICES LTD.* 2 AII E.R 753 at pages 754 and 755 when Denlay L.J. as he then was said:

It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct The owner is liable if the driver is his agent, that is to say, if the driver is with the owner's consent driving the car on the owners business or for owners purpose." (Underlining mine).

In the present case, it is certain that the motor vehicle was at the time not being driven for the owners business or purposes.

At page 755 DENNING L. J. in the Omrod case said:

"The owner only escapes liability when he lends it or hires it to a Third person to be used for purposes in which the owner has no interest or concern" (underlining mine).

On the authorities and on facts of this case, the magistrate's decision, that the Appellant was vicariously liable is incorrect.

The second issue for consideration is whether having found the Appellant was not vicariously liable for his driver's acts of negligence and the facts before the court any reasonable cause of action had been made.

The answer to this based on my findings on issue of liability is that there was no cause of action established as against the appellant.

I will now consider whether the magistrate was wrong in holding that the second Respondent *ALI* was negligent in allowing the lorry to be overloaded and in the management of the vehicle.

The facts show that the driver *ALI* did protest to the sub-chief when the first bunch of people boarded the lorry saying it could only take about 50 people.

It is in evidence that the driver was overruled on this issue after the sub-chief reported to the chief and more people boarded the lorry. The driver in his evidence stated that he had to listen to the Chief's instructions.

I have already found that the driver was under the control and instruction of the Provincial Administration and therefore he had very little or no control at all as to how many people he carried. The cause of the accident was over speeding and overloading all which the driver attributes to his temporary employer's instructions. I however find it difficult to exonerate the driver wholly on issue of over speeding. He knew the vehicle was overloaded and should have been more careful on that issue of controlling the vehicle and to that extend I find he was liable.

I have considered the issue of the medical report by *DR ADEDE* and note that he did state both in the Report in cross-examination that the first Respondent was treated at Mpeketoni Clinic and that he relied on treatment notes from Mpeketoni Clinic and information from the patient to prepare report. The treatment notes from Mpeketoni Clinic were however not produced and instead those of WITU hospital dated 31/12/97 were produced.

In his evidence the first Respondent stated that he was given First Aid at Mpeketoni Clinic and later he attended WITU Health Center and GOMA Medical Clinic at Malindi where he was treated by *DR ADEDE* and he had been admitted at the said Clinic.

MR. MOGAKA submitted that the said medical Report should not have been considered as *DR. ADEDE* did not treat the first Respondent. He referred to the Court of Appeal decision in the case of *THURANIRA KARAURI V AGNES NCHECHE CA192 OF 1996 NYERI (UR)*

In cross-examination *DR. ADEDE* said the following on page 9 of typed proceedings:

"I *ascertained the extent of injury by examining the patient It took 18 months for me to examine the patient. The injury had taken its cause There is a scar on the forehead when there is no fracture it is called soft tissue injury. The patient complained of a chest injury. It was a genuine complains. I did not treat the patient. The patient was an out-patient. He had treatment record They described chest pain and an an accident on the treatment notes. There is no record of any other injuries." (Underlining mine).*

There is clear contradiction on the evidence of the First Respondent and that of the doctor who says he was treated by the Doctor. I have underlined the part of the Doctor's evidence which clearly states that he never treated him and the Respondent had some out-patient treatment record which described chest pain and road accident only. This description fits what is contained in the treatment notes form WITU hospital that give complaint as chest pain.

Yet the Doctor's medical Report describes injuries as cut wound on forehead and Blunt injury to chest and right side back. He further descries the treatment recorded as cleaning, stitching and dressing wounds, liniment massage, painkillers, Antibiotics and Tetanus toxoid. The WITU notes only show some medicine have been given for the chest pain. No mention of wound or stitching is noted.

In my view, there is no evidence to support the contents of the Doctor's Report as not even a P3 report was produced. In the circumstances the award made in respect of pain and sufferings were erroneous and I set aside the same.

The upshot is that the Appeal is allowed. Judgment and decree of the surbordinate Court are set aside. Costs of the Appeal shall be to the Appellant.

DATED AND DELIVERED THIS 26TH DAY OF OCTOBER 2001.

P.M. TUTUI

COMMISSIONER OF ASSIZE MOMBASA