



**Mutua & another v Wainaina t/a Nellies Shuttle /Coaches (Civil Appeal  
685 of 2019) [2024] KEHC 1490 (KLR) (Civ) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1490 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 685 OF 2019**

**JN NJAGI, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**KAVUTHA MUTUA ..... 1<sup>ST</sup> APPELLANT**

**TITUS MUTUA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**WILBERFORCE WAINAINA T/A NELLIES SHUTTLE /  
COACHES ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. L.L.Gicheha,  
CM, in Milimani CMCC No.2324 of 2017 delivered on 22/10/2019)*

**JUDGMENT**

1. The Appellants herein were on the 2nd October 2016 travelling in a motor vehicle registration No. KCB 732T owned by the Respondent from Nairobi to a place called Kiini in Kitui County. Each paid fare of Ksh.400/= and were issued with tickets. On reaching Kitui town the 1<sup>st</sup> respondent's driver/agent/conductor arranged for them to be taken on the onward journey to Kiini by another motor vehicle registration No.KBU 620F. When they reached Kiini, the driver and conductor of the said motor vehicle demanded that they pay fare. That before they could answer them, they viciously attacked them and assaulted them. They sustained various degree of injuries. They made a report at Nzambani Police Station. They were issued with P3 forms and were treated at Kitui General Hospital. Thereafter they were examined by Dr. Wandugu who prepared their medical reports. They later sued the owners of the two motor vehicles in a claim for general general and special damages. The appellants later withdrew the claim against the owner of motor vehicle reg. No.KBU 660 F.
2. The respondent denied the claim on the ground that he came to learn of the matter when he was served with summons to enter appearance. That he learnt from a report made to Nzambani police station



that the complaint of assault was against the driver and conductor of motor vehicle KBU 620F. It was his contention that he was not liable for the assault.

3. Upon hearing the case against the respondent, the trial court held that the respondent was not liable for the injuries as it was not his agents who assaulted the appellants. On assessment of possible damages that the court would have awarded had the case succeeded, the court said that it would have awarded the 1<sup>st</sup> appellant a sum of Ksh.600,000/= in general damages. The trial court however did not suggest any award for the 2<sup>nd</sup> appellant. The appellants were aggrieved by the judgment and lodged this appeal.
4. The appellants raised 17 grounds of appeal which can be condensed to two main grounds, that:
  - (1) The trial court erred on its finding on liability, and that
  - (2) The trial court proposed very low award on the amount it would have awarded the 1<sup>st</sup> appellant had the case succeeded.
5. The appeal was canvassed by way of written submissions.

### **Appellants' Submissions**

6. The advocates for the appellants submitted that the appellants paid fare to the agents of the respondent to ferry them from Nairobi to Kiini in Kitui County. That the respondent had a contractual duty to ensure that the appellants arrived at their destination safely. That it is the agents of the respondent who enlisted the services of motor vehicle reg. No.KBU 620F to take the appellants from Kitui to Kiini. That by so doing the respondent's agents delegated the contract it had with the appellants to motor vehicle KBU 620 F to transport the appellants from Kitui to Kiini for their own benefit. That the acts of the respondent's driver and conductor bound the respondent in negligence and tort. Therefore, that the respondent breached his part of the contract and is liable for the injuries sustained by the appellants. In this respect, the appellants relied on the case of *Selle & another v Associated Motor Boat Co. Ltd & another* (1968) EA 123 where it was held that:

“Where, however a person delegates a task or duty to another not a servant or employs another not a servant to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be.”

7. The appellants submitted that the respondent contracted an independent contractor, motor vehicle reg. No.KBU 620F to perform a duty thrown upon him by the law to perform. That he is liable for the way the agents of the said motor vehicle performed their duty.....CA 413/2017.....
8. The appellants further cited the case of *David Kahari Stephen Muthutheri v Midland Emporium Ltd & others*, Nakuru HCC NO. 210 of 2012, where the court elaborated the relationship between a passenger and owner of a motor vehicle and stated that:

Once a passenger pays fare to the agents of the owner of the vehicle, there is a salient contract that he is expected to be driven safely to his destination. Failure therefore constitutes a breach of such contract and damages would ordinarily ensue for both breach of contract and the tort of negligence...

9. The appellants submitted that they were assaulted by the driver and conductor of the second motor vehicle over fare that they had paid to the agents of the respondent. That the agents of the respondent



did not make arrangements on fare when they put them in the second vehicle and due to that default they were assaulted in a demand for fare. The respondent was therefore liable for the injuries.

### **Respondent's submissions**

10. The respondent submitted that the appellants admit that their assailants were the driver and conductor of Motor vehicle KBU620F which belonged to the 2<sup>nd</sup> defendant whom they withdrew the case against and not the respondent or his employees. That it therefore begs a question as to why the case was brought against the respondent where no nexus can be drawn between him and the 2<sup>nd</sup> defendant and his employees.
11. The respondent submitted that the only claim the appellants have against the respondent is that his vehicle did not get them to their final destination. However, that the agents of the respondent did not abandon the appellants at Kitui but transferred them to another motor vehicle to take them to their destination. That the appellants did not resist the transfer as they did not demand their fare back for them to take another motor vehicle.
12. It was submitted that the assailants were not employees of the respondent and as such the respondent cannot be held vicariously liable for their actions. The respondent in this respect relied on the Court of Appeal decision in *Khayigila v Gigi & Co. Ltd & another* (1987) KLR 76 where it was held that:

What is the true legal basis of liability? On this, the common law has been settled for years. The most recent authoritative pronouncement of the basis of liability, is the unanimous decision of the House of Lords. *Morgans v Launchbury and Others* [1971] 2 All ER 606. It was there held that:

“In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner’s servant, or that 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 or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”

13. Additionally, it was submitted that the duty owed by an employer to persons who may be injured by the negligent driving or any other acts and omissions of his servant is limited to those which can reasonably be anticipated as being possible subjects of injury. That the chasm between the respondent and the appellants is remote and cannot be directly inferred.

### **Analysis and Determination**

14. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. 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 necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular 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."

15. The appellants brought suit against the respondent while contending that he was vicariously liable for their assault by the driver and conductor of motor vehicle reg. No. KBU 620F as the said persons were engaged as agents of the respondent by the workers of the respondent to take the appellants from Kitui town to their final destination at Kiini. The issue for determination is whether the driver and conductor of motor vehicle reg. No.KBU 620F were agents of the respondent when they were engaged by the workers of the respondent to ferry the appellants from Kitui town to their final destination and if so whether the respondent was vicariously liable for the assault of the appellants by the workers of the said motor vehicle.
16. The burden of proof in a civil case is on a balance of probabilities. It was therefore the duty of the appellants to prove that the workers of the motor vehicle KBU 620 F were agents of the respondent when they were engaged to ferry the appellants to Kiini from Kitui. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. The relevant sections of the [Evidence Act](#) provide as follows:

107

- "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.<sup>108</sup> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 112

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

17. The above sections were considered by the Court of Appeal in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* (2005) 1 EA 334 in which it was held that:

As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the [Evidence Act](#) Cap 80...

There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...

18. The appellants testified that they boarded the respondent's motor vehicle in Nairobi to be taken to Kiini in Kitui County. That they paid fare of Ksh.400/= each and were issued with tickets that they produced in court. They further testified that on reaching Kitui town the workers/agents of the respondent transferred them to another motor vehicle, reg. No.KBU 620F to take them to Kiini. They were not asked to pay any other fare as they had paid the full fare from Nairobi to Kiini.



19. The respondent testified in the case but did not call any witness. The receipts that the appellants produced in the case were printed “Nellies Shuttle” which the respondent admitted was his trade name. Though the respondent in his evidence denied that the receipts produced in court were issued from his vehicle, he did not produce his receipt books to discount that the receipts were issued from his receipt books. The receipts had serial numbers. It was therefore possible to tell whether they were from his receipt books or not. The burden of proof had shifted to the respondent to demonstrate that the receipts were not issued from his books. Failure to produce the receipt books meant that he did not discount the evidence that the receipts were issued from his vehicle.
20. More so the respondent did not call his driver and conductor to deny whether they ferried the appellants from Nairobi on the material day and transferred them to another vehicle upon reaching Kitui. The tickets were written “KIINI”, meaning that that was the destination of the appellants. In the absence of the evidence of the respondent’s driver and conductor, the evidence of the appellants on that issue remained uncontroverted and unchallenged. I therefore find that the appellants were on the material day carried in the respondent’s public motor vehicle and paid the full fare from Nairobi to Kiini in Kitui County. I find that upon reaching Kitui the agents of the respondent transferred them to motor vehicle reg.No.KBU 620F to take them to Kiini without requiring them to pay any extra fare as they had paid the full fare from Nairobi to Kiini. The question then is whether the driver and conductor of the said motor vehicle were acting as agents of the respondent when they offered to ferry the appellants from Kitui to Kiini.
21. In their book, Bowstead & Reynolds on Agency, as cited in Commissioner of Domestic Taxes v W. E. C. Lines (K) Limited (Tax Appeal E084 of 2020) [2022] KEHC 57 (KLR) (Commercial and Tax) (31 January 2022) (Judgment), the learned authors define the term ‘agency’ as:

.....the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.
22. It is trite that an agency relationship can be created in several ways and can also be construed from the conduct of the parties. According to Halsbury’s Law of England 4<sup>th</sup> Edition Volume 1(2) para 19 and 20 a principal agency relationship is created by the express or implied agreement of principal and agent or by ratification by the principal of the agent’s acts done on his behalf. Express agency is created where the principal or some person authorized by him, expressly appoints the agent whether by deed, by writing under hand or orally. An implied agency arises from the conduct or situation of parties.
23. In this matter the workers of motor vehicle KBU 620F agreed to ferry the appellants from Kitui town to Kiini on behalf of the respondent’s motor vehicle and on terms agreed between them and the workers of the respondent. I therefore find that there was implied agency arising from the conduct of the parties. The owner of motor vehicle KBU 620F represented by its workers was the agent while the owner of motor vehicle KCB 732T, the respondent, was the principal.
24. Having found that there was agency relationship between the two vehicles, I have to interrogate whether the respondent was vicariously liable over the assault of the appellants by the driver and conductor of motor vehicle KBU 620F.



25. The trial magistrate in her judgment found that the respondent could not be liable for the assault as it is not his workers who assaulted the appellants. The court held that it is driver/ conductor of motor vehicle reg. No KBU 620F who were liable for the assault but the claim against them was withdrawn.
26. Vicarious liability is defined in Black's Law Dictionary 10<sup>th</sup> Edition by Bryan A. Garner as:
- “Liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties – also termed as imputed liability.”
27. The Halsbury's Laws of England Vol. 1 (2017) at Paragraph 165 provides the following guidance on the general liability of an agent for a wrongful act:
- “Any agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorized or ratified by the principal, unless it was deprived of its wrongful character. It is immaterial that the agent did the act innocently and without knowledge that it was wrongful except in case where actual malice is essential to constitute the wrong.”
28. In this case the respondent had no control over how the workers of motor vehicle KBU 620 F conducted their work. Their control lay with their employer. In my view, the workers of KBU 620F were in the same position as that of independent contractors for which the respondent could not be liable for any misconduct on their part. In Charlesworth on Negligence, 4th Edition, Sweet and Maxwell states that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. He says:
- “Unquestioningly, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable.”
29. The general rule is that vicarious liability has no place in criminal law as criminal responsibility is personal in nature - see *Tile And Carpet Centre Limited v Kenya Commercial Bank Limited & 2 others* [2020] eKLR. There are however exemptions to this general rule. It was for the appellant to prove that the respondent did not fall within the exemption, which they did not do.
30. In *Board of Governors St. Mary's School v Boli Festus Andrew Sio* [2020] eKLR the Court of Appeal cited the English case of *Pickard v Smith* (1861) 10 C.B. (N.S.) 470 where Williams, J. stated that a person cannot be liable for an act or breach which is not traceable to him. In the instant case it is the employer of the workers who assaulted the appellants who was liable for the assault and not the respondent. In the premises I agree with the trial court that the respondent was not vicariously liable for the assault committed to the appellants by the conductor and driver of motor vehicle registration No. KBU 620F.
31. The upshot is that the appeal herein is lacking in merit. Consequently, the same is dismissed with costs to the respondent.
32. Had the appeal succeeded, I would have awarded the 1<sup>st</sup> appellant Ksh.400,000/= in general damages for pain and suffering, having suffered fractures of both wrists. As for the 2<sup>nd</sup> appellant he sustained



chest pain, pain on the left upper aspect of the hand and generalized body pains. I would have awarded him Ksh.70,000/= in general damages. Otherwise the appeal is dismissed as stated above.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024**

**J. N. NJAGI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of:**

No appearance for Appellants

No appearance for Respondent

Court Assistant - Amina.

