



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 51 OF 2019

BEATRICE WILLIAM MUTHOKA AND EDWARD MUTISYA MUTHOKA (Both suing as Legal Representatives of the Estate of the late

WILLIAM MUTHOKA YUMBIA (DECEASED) APPELLANTS

VERSUS

AGILITY LOGISTICS LIMITED RESPONDENT

(Being an Appeal from the Judgment of the Honourable N. C. Adalo Senior Resident Magistrate in Mariakani Civil case No.265 of 2016 delivered on the 2nd July 2019)

Coram: Hon. Justice R. Nyakundi

Munyithya, Mutugi, Umara & Muzna Advocates for the appellant

Kioko, Munyithya & Ngugi Advocates for the respondent

JUDGMENT

The appeal before me is against the Judgment of the **Honourable N. C. Adalo (SRM)** delivered on the 2nd July 2019 where the appellants' suit was dismissed with costs to the respondent.

Aggrieved by the Judgment, the appellants filed a memorandum of appeal on the 22nd of July 2019 and filed on the 5th of November 2019. The grounds of appeals are that: -

- 1) The Learned Magistrate erred in law and fact by failing to make a finding that the defence witness testimony was hearsay evidence as he had not adduced evidence to prove that he was an employee of the defendant at the time of the accident.***
- 2) The Learned Magistrate erred in law and in fact by making a finding that there was a warning sign of "No unauthorized passengers" on the defendant's motor vehicle KBH 897V-ZD 1597 since no evidence was adduced by the defendant on the same.***
- 3) The Learned Magistrate erred in law and in fact by making a finding that liability cannot attach upon the defendant motor vehicle because it was not a Public Service Vehicle.***
- 4) The Learned Magistrate erred in law and in fact by making a finding that the defendant is not vicariously liable for the acts of its driver and or employee.***
- 5) The Learned Magistrate erred both in law in reaching conclusions which were not supported by any evidence and by construing facts by making assumptions.***
- 6) The Learned Magistrate erred in law and in fact by failing to consider the evidence submissions and authorities by the plaintiff.***
- 7) The Learned Magistrate erred in law and in fact to critically analyze the evidence together with the issues before the court***

and thereby arriving at a wrong decision.

The appellants in their grounds of appeal urge this court to set aside that Judgment. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions.

This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified (**See Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123**). The parties filed written submissions.

Brief facts of the Case

The appellants commenced this suit vide the Plaint dated the 20th of June 2016 and filed on the same date, where they sought for Judgment against the defendant for damages arising out of the death of the deceased herein who died on the 20th of June 2013 while aboard the defendant's truck/trailer (a commercial motor vehicle) which lost control and rolled and as a result the deceased sustained fatal injuries. The defendant was the beneficial and registered owner of Motor vehicle Registration Number KBH 897V Trailer No. ZD 1597, which was driven by the defendant's authorized driver, servant and or agent. The deceased was survived by a wife and five (5) children.

The defendant responded that the deceased was an unlawful and unauthorized passenger in the said motor vehicle a fact which was well within his acknowledge, knew that the defendant's motor vehicle was not a Passenger Service Vehicle, authored his own misfortune by acting unreasonably and boarding a vehicle that was not a Passenger Service Vehicle and ignored the strict instructions written conspicuously on the defendant's motor vehicle warning that no unauthorized passengers are allowed inside this motor vehicle.

The matter was set down for hearing and preceded on the 16th of February 2019.

It was the evidence of **(PW1)** (plaintiff and deceased's Brother), **Edward Mutisya Muthoka**, that the deceased was travelling along the Nairobi-Mombasa Highway at Bonje area on the 20th of June 2013 aboard the Defendant's Motor Vehicle Registration Number KBH 897V Trailer No. ZD 1597 when the accident occurred. It was also his testimony that when he was informed of the said accident he travelled to Mombasa and went to the Coast general Hospital where he witnessed the postmortem of the deceased's remains. He produced the **postmortem report (PE-1)** which confirmed that the deceased had died on the spot. He also stated that the deceased was 54 years old at the time of death and produced the **Certificate of Death (PE-2)** and **Burial Permit (PE-3)**. He stated that the family had spent Kshs.107,090/= as funeral expenses and produced receipts on the same as **PE-4**. It was also his testimony that the deceased had left behind a wife and 5 children who were solely dependent on him and produced **Birth Certificates in a bundle as PE-5** as well as a letter from the **Chief as PE-6**. He stated that the deceased was a driver by profession and that he had worked at Transfar (K) Ltd from December 2009 to April 2011 earning Kshs.18,000/= a month. This was evidence by **PE-7** which were two letters from the aforementioned company. He stated that the police abstract, **MFT-8** had stated that the accident was self-involving and still under investigation. He however blamed the defendant's driver/employee for the accident and produced a motor vehicle search certificate and receipt as evidence of ownership, **PE-9 (a) and (b)**. He also produced the statutory notice and letter of demand **PE-10** and **PE-11** respectively. He also produced letters of administration Ad Litem for the deceased's estate as **PE-12**.

On cross examination **(PW1)** stated that he had visited Mariakani Police Station where the lorry truck had been taken to after the accident and saw that it was written on the door "**no unauthorized passengers**" and that the deceased was not the defendant's employee. He also testified that the truck was not a commercial PSV vehicle and that he was not there at the time when the deceased was boarding the said motor vehicle but that the deceased had died from injuries suffered during the accident and that he was suing the defendant as the employer of the lorry's driver. He further stated that he did not have the deceased's driving license and that the deceased's wife was a farmer and that the children were still in secondary school while others were unemployed. On re-examination he confirmed that he does not know what took place between his brother (deceased) and the lorry driver at the time of boarding and that he did not read the writings on the lorry and that all the children of the deceased had been minors at the time of his demise.

(PW2), P.C Anne Wambui, testified that indeed an accident had occurred on the 20th of June 2016, that it was a self involving accident along the Mombasa-Nairobi Highway at Bonje Area. She confirmed that the Motor Vehicle Registration Number KBH 897V Trailer No. ZD 1597 make Mitsubishi Lorry was the one involved in the accident. And that its driver on the fateful day was a **Mr. Alphan Ireri**. She testified that the driver lost control and veered off the road and landed on a maize plantation and as a result the lorry was extensively damaged and the deceased who was a passenger was trapped in the wreckage and died on the spot. She stated that the driver was rushed to Coast general hospital by well wishers, later he was discharged and taken to Embu and while at his home in Embu he got ill and was admitted for seven days at Embu general Hospital after which he succumbed to the injuries he had sustained in the accident. She produced the police abstract marked **MFI-8** as **PE-8**. On cross examination, **(PW2)** confirmed that she did not participate in the investigations and that she was testifying on behalf of the Investigation Officer, **P.C Celestine** and that the file had been closed. She also stated that an inquest had been ordered by the Director of Public Prosecutions but was conclude on the 30th of December 2015 and no one was found culpable. She further stated that no witness statement was recorded by the driver and she could not tell the circumstances under which the passenger was travelling in the motor vehicle. At this juncture the plaintiff closed their case.

(DW1), Habel Ndune, testified that he was an employee of the defendant at the time of the accident as a verification officer; he produced his work Identity Card. He stated that he currently worked as a transport coordinator. He testified that **Mr. James Gichohi** was the Human Resource Manager at the time of the accident but he had left employment and he adopted his witness statement. He stated that the aforementioned motor vehicle that was involved in the accident was a truck commercial vehicle and it was not allowed to carry any passengers. He stated that when the trucks leave the workshop it leaves with the drivers only and that he does not have loaders or turn boys because the loading and offloading is done by forklifts. He also stated that the defendant has co-drivers and who are given working days off and once released the driver is not allowed to carry any passengers on the way. He also testified that the trucks have a label not to carry any unauthorized passengers. He stated that the deceased was a stranger to the company and had not been authorized to be in the vehicle. He stated that the deceased himself was to blame for the accident.

In cross examination he stated that he had worked for the company since 2011 and that in 2013 he was an employee of the company. He also stated that he had not brought any letter from the company to show that he was their employee at that time but he could avail the evidence if given time. He stated that **Mr. Gichohi** was present at the time of the accident. He also stated that he had not brought any evidence to show that their trucks have stickers warning passengers or unauthorized passengers. He agreed that the deceased was in the motor vehicle at the time of the accident. He stated that the company had not filed any suit against the driver. On re-examination he confirmed that only one person is released with the motor vehicle from the company and that there are stickers on the left side of the windows reading no unauthorized passengers allowed and that the driver of the truck also left the company. The defence closed its case.

The plaintiff submitted that the deceased was a passenger in the said motor vehicle and that the defendant was vicariously liable as the motor vehicle was being driven by its authorized driver and further that an employer-employee relationship had been established. He also submitted that there was no warning against unauthorized passengers affixed on the door of the motor vehicle and that the defendant had failed to prove negligence on the part of the plaintiff. They also submitted that there was no way that the defendant's driver could have carried the deceased to the scene of the accident without his consent and that the defendant should be held 100% liable for the accident. He also submitted that on quantum an award of Kshs.50,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life and Kshs.1,440,000/= for loss of dependency would suffice. They also submitted that they had proved special damages of Kshs.127,090/= .They relied on the cases of **Paul Mwavu v Whitestone (K) Ltd Civil Appeal No. 14 of 2014** where the court quoted the famous case of **Morgans v Launchbury & Others [1972] All ER 607**, **Mwangi Alexander v Francis Kariuki Wanja Civil Appeal No. 110 of 2016**, **Hyder Nthenya Musili & Another v China Wu Yi Ltd & Another (2017)eKLR**, **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 16381 of 1988 and Jacob Ayiga Maruja & Another V Simeon Obayo (2005) eKLR**.

On the part of the defendant, submitted that the deceased was the author of his own misfortune and that the suit should be dismissed as the plaintiffs have no cause of action against them. They submitted that the truck was a commercial vehicle and not a Passenger Service Vehicle and that the deceased was negligent in that he was an unlawful and unauthorized passenger and had ignored the strict instructions written conspicuously on the defendant's motor vehicle warning **no unauthorized passengers are allowed inside this motor vehicle**. They submitted that direct liability had to be established first against the driver but the claim would still have failed for lack of evidence as **(PW1)** did not witness the accident and did not prove negligence against the driver and further the Court while conducting the inquest had failed to establish the culpability of the driver. They assessed damages as follows; loss of dependency Kshs.320,000/=, Kshs.80,000/= for loss of expectation of life and Kshs.20,000/= for pain and suffering. On the special damages they submitted that only Kshs.107,000/= had been proved by the plaintiffs. On liability they submitted that an employer cannot be held responsible for any negligent acts done by the employee outside the scope of his employment.

They relied on the cases of; **Israel Mulandi Kisengi v The Standard Ltd & 2 Others High Court Civil Appela No. 156 of 2010 at Mombasa**, **Conway v George Wimpey & Co. Ltd (Number 2) {1951} 2 KB 266**, **Edwin Chiroto Manderu v Mureithi Charles & Another High Court Civil Appela No. 19 of 2017**, **Paul Kimani Muna v Raphael Ndaiga Gathaiya Nyeri HCCA No. 40 of 2006**, **Shighadai v Kenya power & Lighting Company Ltd & Another [1988] KLR 682**, **Phyllis Wairimu Macharia v Kiru Tea Factory [2016] eKLR**, **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another Court of Appeal Civil Case No. 186 of 2009 at Nyeri [2014] eKLR**, **Grace Kanini Muthini v KBS Ltd & Another HCCC No. 4708 of 1989 [NBI]**, **Albert Odawa v Gichimu Gichenji High court civil Appeal No. 15 of 2003 at Nakuru (2007) eKLR**

Judgment was delivered by the trial court on 2nd of July 2019 dismissing the suit as the plaintiff's had not proven their case on a balance of probability. The Learned Magistrate also stated that had the plaintiff's proven their case she would have awarded as follows;

Special damages	Kshs. 107,000.00
Pain and Suffering	Kshs. 40,000.00
Loss of Dependency	Kshs. 1,059,405.00
Loss of expectation of life	<u>Kshs. 100,000.00</u>
TOTAL	<u>Kshs.1,306,495.00</u>

The Appellant's Submissions

The appellants through their advocate **Mr. Simon Mutugi**, submitted that the trial court had erred in allowing the testimony of **(DW1)** which amounted to hearsay as he had adopted the statement of one **James Gichuhi**. They submitted that **(DW1)** did not tender evidence in the form of either a letter of offer or a contract of service to show that he was an employee of the defendant. For this submission they relied on section 63 of the evidence act which provides that oral evidence must be direct evidence. They also relied on the case of **Prime Bank Ltd v Esige [2005] eKLR**. They submitted that had the court considered this it would have reached a totally different conclusion that **(DW1's)** evidence was hearsay and therefore inadmissible.

Secondly, they submitted that no exhibit was produced to support the respondent's case that there was a warning sign on the motor vehicle that no unauthorized persons were allowed on the said motor vehicle. They submitted that the defendant/respondent had failed to discharge his duty under Section 107 of the Evidence Act. They submitted that the trial court relied exclusively on the evidence of **(PW1)** that he had seen the sign on the truck. Whereas **(PW1)** had contradicted himself on the same and as such could not be relied upon. They submitted that without the warning sign being produced in court the mere admission of its existence by **(PW1)** and **(DW1)** does not amount to it being proved. For this they cited the case of **Kenneth Nyaga v Austin Kiguta & 2 Others [2015] eKLR** and **Grace Kanini Muthini v KBS Ltd & Another HCCC No. 4708 of 1989 [NBI]**.

They submitted that the respondent failed to prove that at the time of boarding the said motor vehicle the deceased had knowledge that he

was doing so at his own risk but opted to do so regardless. They submitted that they were aggrieved that the court despite the lack of evidence it upheld a defence of *volenti non fit injuria* against the plaintiff's case. They cited the case of **United Millers Limited & Another v John Mangoro Njogu [2016] eKLR**. They urged this court to interfere with the Learned Magistrate's judgment and hold that the sign with the words "**no authorized passengers**" was not proved.

They further submitted that there is no general rule that vicarious liability cannot be attributed where the motor vehicle is not a Passenger Service Vehicle. They submitted that the evidentiary burden of proof was not discharged by the defence and **(PW1's)** testimony cannot be solely relied upon since it contains two statements which are contradictory. They submitted that it is an uncontested fact that the deceased was on board the motor vehicle and had sat on the co-driver's seat on the fateful day and that neither the driver nor the deceased are in a position to tell the court what actually transpired before the deceased boarded the said vehicle. They stated that the trial Court's finding that the driver was on a frolic of his own is not based on evidence adduced at trial and further that the driver was travelling in the general direction of Mombasa in the course of his duties when the accident occurred. They submitted that no contributory negligence could be attributed to the deceased since he was a mere passenger.

Finally they submitted that the appellant had proved its case on a balance of probabilities and that they were agreeable on the quantum arrived at by the trial court. They thus urged this court to exercise justice and set aside the Judgment of the trial court and substitute the same with its own Judgment and the costs of these proceedings be borne by the respondent. They also relied on the case of **Leonard Mwashumba & Another v Auto Selection (K) Ltd & Another [2009] eKLR**, **Morgans v Launchbury & Others [1972] All ER 607**, **Israel Mulandi Kisengi v The Standard Ltd & 2 Others High Court Civil Appela No. 156 of 2010 at Mombasa**, **Edwin Chiroto Manderu v Mureithi Charles & Another High Court Civil Appeal No. 19 of 2017**, **Paul Kimani Muna v Raphael Ndaiga Gathaiya Nyeri HCCA No. 40 of 2006**, **Shighadai v Kenya power & Lighting Company Ltd & Another [1988] KLR 682**, **Phyllis Wairimu Macharia v Kiru tea Factory [2016] eKLR**,

The Respondent's Submissions

The respondent through their advocate **Messrs Kioko, Muniyithya, Ngugi & Company advocates**, opposed the appellant's appeal and submitted that the Learned Magistrate did not err in fact or in law in dismissing the suit and were in fact in agreement with the trial court's decision. It was Counsel's submission that all the 7 (seven) grounds of appeal are on the issue of liability and not quantum. They submitted that going by the evidence adduced before the trial Court the plaintiffs did not prove their case against the defendant and it was therefore rightly dismissed.

Counsel submitted that **(DW1)** had carried his work identification card which he produced in court and that it was sufficient proof that he was working for the defendant and that there was no evidence adduced before the trial Court to doubt the evidence. They submitted that had he been a stranger to the defendant the plaintiff would have objected to him being called as a witness but they did not. Further they submitted that his evidence about the defendant's motor vehicle was confirmed by **(PW1)** and **(PW2)** and as such there was no basis to submit that **(DW1's)** testimony was hearsay only because he did not have an appointment letter with him in court.

Further counsel submitted that it was proved on a balance of probabilities that the deceased was an unlawful and unauthorized passenger and knew that the said motor vehicle was not a Passenger Service Vehicle and authored his own misfortune by acting unreasonably and boarding the said motor vehicle ignoring the instructions written conspicuously on the defendant's vehicle warning that "**No unauthorized passengers are allowed inside this motor vehicle**". Counsel further submitted that the deceased was a stranger to the defendant and he boarded the said motor vehicle at his own risk. They submitted that the deceased knew or ought to have known that the said motor vehicle was not a PSV and he unfortunately assumed the risk. Counsel concluded that the defendant did not owe the deceased a duty of care. Counsel contended that vicarious liability only applied to cases where the employer has authorized or requested the act. Counsel also submitted that **Mr. Gichohi** could not be summoned to give evidence as he had left the defendant's employment and the plaintiff's counsel had had no problem with that and as such were now raising it as an afterthought. He submitted that **(DW1)** was cross examined to test his evidence. He argued and further submitted that **(PW1)** confirmed that the vehicle had a warning sticker and that the deceased being a driver himself must have know that the motor vehicle was not a PSV.

He cited and relied on the cases of **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another Court of Appeal Civil Case No. 186 of 2009 at Nyeri [2014] eKLR**, **Conway v George Wimpey & Co. Ltd (Number 2) {1951} 2 KB 266**, **Morgans v Launchbury & Others [1972] All ER 607**, **Israel Mulandi Kisengi v The Standard Ltd & 2 Others High Court Civil Appela No. 156 of 2010 at Mombasa**, **Edwin Chiroto Manderu v Mureithi Charles & Another High Court Civil Appeal No. 19 of 2017**, **Paul Kimani Muna v Raphael Ndaiga Gathaiya Nyeri HCCA No. 40 of 2006**, **Shighadai v Kenya power & Lighting Company Ltd & Another [1988] KLR 682**, **Phyllis Wairimu Macharia v Kiru tea Factory [2016] eKLR**.

Issues for determination

The discretionary jurisdiction of the first appellate court being judicial is to be exercised on the basis of evidence and sound legal principles. **(See the case of Shah, Paul v E. A. Cargo Handling Services Ltd 1974 EA 75)**.

I stand by the Court of Appeal for East Africa in **Peters –vs- Sunday Post Limited [1958] EA 424** where **Sir Kenneth O'Connor** stated as follows:-

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following issues for determination by this court in my view:

- a) *Whether the doctrine of volenti non fit injuria applies in this case;*
- b) *Whether the Respondent was vicariously liable for the accident in question*
- c) *Whether or not there are any grounds to warrant this court to interfere, set aside or vary the award of damages made by the lower court.*

Legal Analysis

(a). *Whether the doctrine of volenti non fit injuria applies in this case;*

The doctrine of *volenti non fit injuria* refers to the voluntary assumption of risk. This means that the deceased voluntarily agrees to undertake the legal risk of harm at his own expense. The deceased must have a genuine freedom of choice which includes full knowledge of the circumstances in which the exercise of choice is conditioned. In the case of **Osborne v The London and North Western Railway Company** [1888] 21 QB. D 220 at 224, Wills J stated that;

“If the defendants desire to succeed on the ground that the maxim volenti non fit injuria is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it”

Further, in order for *volenti* to operate the party must have knowledge of the existence of the risk and its nature and extent. If the party should have been aware of the risk but was not then this defence will fall (See **Smith v Austin Lifts Ltd** [1959] 1 WLR 100). In the circumstances of this case and the evidence before the court it is clear that the deceased had understood that the vehicle he was boarding was not a passenger vehicle. Whether or not the same was marked to warn would be unauthorized persons from boarding it is an entirely different matter. However, in the words of the Court in **Dann v. Hamilton** [1939] 1 KB 509, the plaintiff’s conduct must be shown to be so extreme and glaring, that it was equivalent to intermeddling with an unexploded bomb, or walking on the edge of an unfenced cliff. The defence of *volenti non fit injuria* requires a freely entered and voluntary agreement by the claimant, in full knowledge of the circumstances, to absolve the defendant of all legal consequences of their actions. The general principles applicable to this defence were stated by the Judicial Committee in **Letang vs Ottawa Electric Railway Company** {1926} A. C. 725 in the following terms quoted from the Judgment of **Wills J.** in **Osborne vs The London and North Western Railway Company** {1888} 21 QB.D 220 at 224

"If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is applicable they must obtain a finding of fact that the plaintiff freely and voluntarily with full knowledge of the nature and extent of the risk he ran impliedly agreed to incur it"

It then suffices to say that the requirements of this defence are thus:

1. A voluntary

The agreement must be voluntary and freely entered for the defence of *volenti non fit injuria* to succeed. If the claimant is not in a position to exercise free choice, the defence will not succeed.

2. Agreement

The second requirement for the defence of *volenti non fit injuria* is agreement. The agreement may be express or implied. An example of an express agreement would be where there exists a contractual term or notice. An implied agreement may exist where the claimant's action in the circumstances demonstrates a willingness to accept not only the physical risks but also the legal risks. **Lord Denning** in the case of **Nettleship v Weston** [1971] 3 WLR 370 **Court of Appeal** stated that;

"Knowledge of the risk of injury is not enough. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree expressly or impliedly to waive any claim for any injury that may befall him due to the lack of

reasonable care by the defendant: or more accurately due to the failure by the defendant to measure up to the duty of care which the law requires of him".

3. Made in full knowledge of the nature and extent of the risk.

As such the maxim does not mean that a person assents to a risk merely because he knows of it (**See The House of Lords in the case of Smith vs Baker {1891} A.C. 325**). From the foregoing and guided by the above authorities it is in my opinion clear that the deceased cannot be said to have consented to the risk of an accident or consented to negligence when he asked for the lift from the respondent's employee as the driver owed him a duty of care as such this defence cannot apply. I am not satisfied with regard to the evidence on record that there was a warning label on the said motor vehicle nor that there was any evidence presented before the trial court whether there was a warning label on the side of the said motor vehicle. No such label was presented before the court nor any photographic evidence of the same. Further (**PW1**) had contradicted himself on the same and as such could not be relied upon. Consequently I find that on this issue this defence cannot be relied upon as such it stands to reason that the respondent is then liable for the injuries suffered by the Deceased.

(b). Whether the Respondent was vicariously liable for the accident in question

Vicarious liability imposes liability on employers for the wrongful acts of their employees as such an employer will be held liable for torts committed while an employee is conducting their duties. It is not in contention that the driver of the motor vehicle was in fact an employee of the respondent and evidence has been adduced to that effect. Then it stands to reason that we should interrogate the principles or elements required for this tort to hold. In the case of **Yewens v Noakes {1880} 6 QBD 530 Bramwell LJ** stated that:-

"...a servant is a person who is subject to the command of his master as to the manner in which he shall do his work."

Further, in the case of **Joel v Morison [1834] EWHC KB J39** it was held that:-

"The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

As such it stands to reason that the employer will only be liable when the wrongful act occurs during the course of the duties of the employee. However, if the employee was on a frolic of his own then the employer is not liable. In the instant case, the employee was acting in the course of his duties but in total disregard of his employers express instructions, he gave a lift to the deceased. However, this is not a ground to exonerate the employee unless it can be shown that the deceased was made aware and freely consented to the risk.

*"I think the true test on vicariously liability can best be expressed in these words; was the servant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligence, or even fraudulently, or contrary to the express orders, the master is liable." (See **Launchbury v Morgans {1973} AC 127**)*

The same conclusion was reached in **Bachu v Wainaina (CA No. 14 of 1976 Nakuru Automobile House Ltd v Zavdin CA 63 of 1986)** where the Court observed:

"In order to fix liability on the owner of a car for the negligence of his driver, it was necessary to second 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."

What is important for present purposes is whether the wrongdoing employee's employment did involve his performing intimate tasks and did result in the employee's occupying something akin to master/servant relationship authority, with respect to the claimant.

It is noteworthy that, in addressing the same issue consistent with elemental notions of vicarious liability the Court in **Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co. {1925} SC 79 802**, stated:

"The question is not to be considered merely by applying the test whether the act in itself is one which the servant was authorized or ordered or forbidden to do. The employer has to shoulder responsibility on a wider basis, and he may, and often does, become responsible to third parties for acts which he has expressly or complicityly forbidden the servant to do. – it remains necessary to the master's responsibility that the servant's act be one done within the sphere of his service or the scope of his employment, but it may have this character although it consists in doing something which is the very opposite of which the servant has been intended or ordered to do, and which he does for his own private ends. An honest master does not employ or authorize his servant to commit crimes of dishonesty towards third parties, but nevertheless he may incur liability for a crime of dishonesty committed by the servant if it was committed by him within the field of activities which the employment assigned to him, and that although the crime was committed by the servant solely in pursuant of his own private advantage."

My understanding of this doctrine on vicariously liability is for the claimant to establish the agency relationship between the master and the servant; alongside with the task thereby delegated to him to perform on behalf of the master. Thus in **Basley v Curry {1999} 174 DLR** the Court pronounced itself as follows:

"The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts. It is fair that the person or organization that creates

the enterprise and hence the risk should bear the loss.”

The principles set out in the authorities cited on vicarious liability raises the following questions? Was the driver of the offending motor vehicle engaged on the respondent's business? Or was he acting as a stranger to his contract of employment? Did the respondent's operations of its business and intentional torts of their driver, agent, or servant or employee sufficiently linked to his employment duties to justify imposition of vicarious liability.

In my esteemed evaluation of the evidence the drivers detour in the course of his employment admitted on board the deceased as a lawful passenger and hence the respondent operations exposed him to a very real risk of injury and the loss which accrued cannot be brought within the agent or drivers frolics of his own.

It is not indispute that the respondent was not in the business of carrying fare paying passengers, but this argument is almost tautological. This suggests that whether the negligent act furthers the respondent's aims is more relevant when it points the other way, because one assumes that intentional torts do not further employer's ends; it is only remarkable when the intentional torts do, in fact making imposition of vicarious liability appropriate. By clothing the driver, servant or agent with power of being in control of the aforesaid motor vehicle, the respondent introduced a risk however small but real of its abuse. This in my view the respondent may fairly be held responsible for the misuse of such power done in the course of his duties as delegated in the contract of service. That is what the comparative dictum in **Joan Doe v Bennee {2004} S.C.J. No 17** emphasized that:

“Vicarious liability is based on the rationale that the person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public, effective compensation is a goal. Deterrence is also a consideration. The hope is that holding the employer or principal liable will encourage such persons to take steps reduce the risk of harm in the future.”

In the present appeal, the respondent contend that the natural reading of no authorized passengers is a bar to any claim by a claimant passenger who may find herself or himself on board their respective motor vehicles. It is undisputed that the driver's consent was prerequisite for the deceased to board motor vehicle registration no. KBH 897V – ZD 1597 owned by the respondent.

The core question is whether the agent, driver or servant of the respondent consent to allow the deceased to enter the vehicle as a passenger carried no direct consequences on vicarious liability. With respect to the respondent's defence, the plain language of the purported notice had been circumvented by the clear use of the authority conferred to their agent or driver on the material day. To this end it is not sufficient that the respondent simply embodies the notice ***“no unauthorized passenger”*** at the door of the motor vehicle but it has an obligation to disclose information on substantial harm and exposure of risks involved in taking a ride/lift in such a vehicle. The maxim *‘respondent superior’*, applies to the facts of this case, to wit the master is an culpable for every such wrong of the servant or agent as is committed in the course of the service, though no express command or privity of the master is proved.

Akin to the above principle is the doctrine on the ***“dominant impression test”*** as enunciated by **Wicke** in the text vicarious liability in **Modern South African Law {1997}** points out:

“The relevant method is to weigh the indicia that tend toward the existence of a contract of service against those indicating a contract of a different nature. The Judge follows typological approach, according to which control is not an indispensable requirement of the contract of service but one of a number of indicia, the combination of which may be decisive.”

From the evidence adduced, the respondent failed to show that the act though done in disobedience of his notification, the appellant did nothing to contribute to the assumption of that consequential loss and damage. Further the respondent failed to call their crucial witness claiming that he had left their employment, a fact I find disturbing considering that this was a grave matter where a person had lost their life in the fatal accident.

On the basis of the above assessment of principles of case Law, I find it perfectly in order to hold that the Learned trial Magistrate came to an incorrect conclusion. As I make this decision I bear in mind the principles in **British Fame Owners v Macgregor (owners) {1943} 1 ALL ER 33, Sharns v Sethna {1963} EA 239 – 249** – where both Courts stated that:

“The Law on this is settled that there should be no interference by this Court with the findings of fact about the contribution to an accident by two or more negligent drivers save in circumstances where the individual choice or exercise of discretion is wrong in principle or on occurrence of irrelevant material or factor or misapprehension of the evidence resulting in an erroneous decision.”

In my respectful view that is the position, I take in this appeal on the findings arrived at by the Learned trial Magistrate on vicarious liability and eventual dismissal of the suit.

As regards the ground on quantum, this was not seriously argued but its important to reflect on the principles to be borne in mind as illustrated in the cases of: **H. West & Son v Shephard {1963} 2 A ER 625, Butt v Khan Civil Appeal No. 2 of 1977.**

Accordingly, as regards assessment of damages under the Law Reform Act and Fatal Accidents Act the Learned trial Magistrate was right in applying the various parameters to award damages in favour of the appellant. Indeed, there is hardly any evidence of misdirection adopted by the Learned trial Magistrate to call for interference of the decision by this Court.

I agree with the Learned Magistrate's assessment on quantum of damages and I now set it out as follows:

a) Pain and Suffering	Kshs. 40,000.00
b) Loss of expectation of life	Kshs. 100,000.00
c) Loss of Dependency	Kshs.1,059,405.00
d) Special Damages	<u>Kshs. 107,090.00</u>
TOTAL	<u>Kshs.1,306,495.00</u>

From the findings and conclusions emerging from the foregoing analysis the appellant appeal succeeds by setting aside the Judgment on dismissal of the suit and substituting it with 100% liability against the respondent.

In the current case there was no challenge on quantum but on second evaluation and scrutiny of the evidence, this Court finds no reason to interfere with the exercise of discretion by the Learned trial Magistrate. Costs of the appeal to the appellant. Interim interdict for fifteen (15) days pending each party leave to apply.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF OCTOBER 2020

R. NYAKUNDI

JUDGE

In the presence of

1. Kihara holding brief for Munyithya, Mutugi, Umara & Muzna advocates for the appellant
2. Achieng holding brief for Kioko, Munyithya & Ngugi advocates for the respondent.