**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. 137 'A' OF 2015**

***(Appeal originating from the Judgment of Hon. L.GICHEHA CM AT Nakuru in civil case Number 1123 of 2014)***

**JOSEPH MACHARIA KIBIRA.....APPELLANT**

**=VERSUS=**

**ASTARIKO CHARLES AMARIBA.....1ST RESPONDENT**

**B.M SECURITY LIMITED.....2ND RESPONDENT**

**J U D G M E NT**

## INTRODUCTION

The Appellant filed civil suit no.1123 of 2014 seeking general and special damages against the 1st and 2nd Respondents who were driver and owner respectively of motor vehicle registration number KAZ 459V respectively. The claim arose from an accident, which occurred on 9 th January 2012. The trial magistrate found the 1st defendant liable and dismissed the claim against 2nd respondent.

On quantum, the trial magistrate entered judgment for plaintiff against the 1st defendant for kshs 309,800 plus costs and interest.

Being aggrieved by the decision, the Appellant filed this appeal citing the following grounds:

1. That the trial magistrate erred in fact and law by absolving the 2nd defendant from liability.

2. That the trial magistrate erred in fact and law by finding that the 1st Respondent had acted outside scope of his employment and that there was an agreement between 1st and 2nd defendant forbidding 1st defendant from carrying unauthorized passengers

3. That the trial magistrate erred in fact and law by disregarding plaintiff's evidence and submissions.

Parties herein proceeded by way of written submissions

## APPELLANT'S SUBMISSIONS

The appellant submitted that it was not disputed that the 1st respondent who was employee of the 2nd respondent offered to carry the appellant in motor vehicle registration number KAZ 459V and that the accident which occurred was self-involving.

The appellant's argument is that the 2nd respondent's witness failed to prove that the 1st respondent was not allowed to carry passengers; that the 2nd respondent failed produce photographs of the vehicle showing it was branded with words "no unauthorized passengers".

The appellant urged the court to find the 2nd respondent 100% liable on ground that the 1st respondent was its employee. He cited **Nakuru Civil Appeal No.132 of 2002 Mary Waitherero Vs Chella Kunani & Another** where the court held that the appellant being a passenger was not aware that the 2nd respondent was not authorized to carry her.

## 2ND RESPONDENTS SUBMISSION'S

In response the respondent submitted that it was an implied term of the contract between the 1st and 2nd respondent that he would only carry

authorized passengers.

2nd respondent further submitted that the said terms and conditions of employment between 1st and 2nd respondent were outlined in the driver's agreement dated 21st September 2011.

That the presence of the appellant in the subject vehicle was unknown to the 2nd respondent.

That there was no benefit accruing to the 2nd respondent from the arrangement between 1st and 2nd respondents. He cited the case of ***Israel Mulandi Kisengi Vs The Standard Limited & Others [2012] eKLR*** where the court of appeal held that carrying persons who are not employees and more so in a cabin not designed to carry passengers could not be an act in the course of employment. The Court's finding was that, the employer could not be held liable for unauthorized actions of a driver.

Counsel Further submitted that in ***Tabitha Nduhi Kinyua Vs Francis Mutua Mbuvi & Another [2007] eKLR*** where the court of Appeal held that the vehicle was licensed to carry good not passengers and the 2nd respondent could not be held liable for injuries sustained in the accident.

The 2nd respondent argued that the 2nd defendants core business is provision of security and by carrying passengers, the driver acted without instructions and outside the scope of his employment.

**ANALYSIS AND DETERMINATION**

I have considered arguments by parties herein. I have also perused proceedings before the trial court.

This being the first appellate court, I am obligated to re-evaluate evidence adduced before the trial court and arrive at an independent determination.

It is not disputed that the the appellant was carried as a passenger in the 2nd respondent's motor vehicle registration number KAZ 459V; it is not also disputed that the vehicle was involved in an accident on 9th January 2012.

Upon evaluation of evidence on record and considering arguments by parties herein, I consider the following as issues for determination:-

1. Whether 1st respondent who was the 2nd defendant's driver was authorized to carry passengers and if not whether the 2nd Respondent is vicariously liable for liabilities arising from his action.

2. Whether in determining the issue of vicarious liability, the trial magistrate relied on wrong principles of law.

3. Whether the trial magistrate relied on wrong principles in finding that the 2nd respondent was not vicariously liable for acts of the 1st respondent which resulted to injuries sustained by the appellant

It is not disputed that the 1st respondent carried the appellant as a passenger. DW1 admitted in cross-examination confirmed that the appellant was carried as a passenger and that he was injured in the accident. The question is, did the 1st respondent obtain authority from the 2nd respondent to carry the appellant.

DW1 testified that the vehicle was branded with name of the company and words "No unauthorized passenger". He testified that the 1st respondent was sacked after the accident.

Counsel for the appellant submitted that the evidence on branding of the vehicle was not proved as no picture of the same was produced to confirm that there were such words written on the vehicle.

The respondent relied on the driver's agreement in proving that the driver was not authorized to carry passengers, respondent quoted clause 3 of the agreement.

I have perused the drivers agreement produced in the lower court by DW1 and note that clause state as follows:-

**"I will not permit a non-authorized person to drive a company vehicle under my charge"**

Clause 9 state as follows:-

**"in case of my being involved in an accident, I understand that I am not to admit liability under any circumstance"**

I have not seen any clause that bar the driver from carrying passengers.

DW1 testified that the vehicle is used for security purposes and only employees of the 2nd defendant could be carried in it. He was the appellant expected to know that there was such verbal understanding between the driver and employer not to allow non-employees to board

the vehicle.

Despite saying that the vehicle was branding with word indicated that the driver was not allowed to carry unauthorized passenger no pictures or any other evidence was adduced to prove that. Unless displayed on the vehicle for third party to view and be informed accordingly the appellant herein would not have known the understanding between the 1st and 2nd respondent.

From the foregoing, I find that the 2nd respondent failed to demonstrate that the appellant was warned against boarding the said vehicle.

It is not disputed that the 1st respondent was on duty at the material time.

Having found the above, I proceed to consider whether 1st respondent having carried the appellant as a passenger, the 2nd respondent was vicariously liable for acts of the 1st respondent.

In Malindi **Civil Appeal No 14 of 2014 Mwavu v Whilestone (K) Ltd** the court of Appeal stated as follows:-

> **"Moreover, even assuming that the issue of vicarious liability was an issue for determination, In the Nuthu case, this court applied Morgans v Launchbury & Others [1972] 2 ALL ER 607 in which it was stated:-**
>
> **"in order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was 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 is 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 the performance of the task of duty thereby delegated to him by the owner or 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 if he is acting for his own benefit or even if the act is committed contrary to his general instruction the master is liable…."**

In the instant case, the driver may have acted contrary to instruction given by his employer or contrary to his employer's expectation. He may have acted for his own benefit as appellant testified that driver told him he would buy him tea. The court of appeals finding is that even in such circumstances the master would still be liable.

Further to the above, even if the drivers agreement expressly barred the driver from carrying unauthorized passengers, the agreement between the 1st and 2nd respondents was not known to the appellant neither was there any visible warning against boarding the vehicle.

From the foregoing, I find that the trial magistrate erred in absolving the 2nd respondent from liability. I hereby set aside finding on liability and proceed to find that the 2nd respondent vicariously liable 100% for the injuries sustained by the appellant.

The finding on quantum has not been challenged. I will not disturb the same save to add that judgment is entered for appellant against the 1st and 2nd respondent jointly and severally. Costs of the appeal to the appellant.

**Judgment Dated, signed and delivered at Nakuru this 14th day of February, 2019.**

**……**

**RACHEL NGETICH**

**JUDGE**

**In the presence of:-**

Schola Wangui - Court Assistant

Nancy Njoroge - Counsel for Appellant

No appearance for Respondent