**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 185 OF 2015**

**SWAN CARRIERS LIMITED.....APPELLANT**

**VERSUS**

**BONIFACE MOSETI OYARO.....RESPONDENT**

**(Being an appeal from the judgment of Hon. J.M. Njoroge (SPM) delivered on 7th December, 2015 in Kisii Civil Suit No. 214 of 2013)**

**JUDGMENT**

1. The respondent sued the appellant for special and general damages following an accident that occurred on 3rd March 2012. He was travelling in the appellant's motor vehicle registration number KAU 504K/ZC7811 Mercedes Benz Tanker when it lost control and overturned occasioning him severe injuries. The trial court apportioned liability at 80:20 in favour of the respondent and awarded him a sum of Kshs. 1,200,000/= less contribution.

2. The appellant, being dissatisfied with that decision has filed this appeal based on the following grounds;

i. The learned magistrate erred in law and in fact in failing to consider or appreciate the merits of the appellant's case;

ii. The learned magistrate erred in law and in fact in failing to find that the respondent was an unlawful and unauthorized passenger in the appellant's motor vehicle registration number KAU 504K/ZC7881;

iii. The learned magistrate erred in law and in fact in finding that the respondent was a lawful and authorised passenger in the appellant's motor vehicle registration number KAU 504K/ZC7881;

iv. The learned magistrate erred in law and in fact in finding that the respondent had proved his case on a balance of probability;

v. The learned magistrate erred in law and in fact in apportioning liability at 80:20 in favour of the respondent in spite of the fact that the respondent was the author of his own misfortune and was solely to blame;

vi. The learned magistrate erred in law and in fact by failing to consider or in misapprehending the appellant's defence of *volenti non fit injuria*;

vii.The learned magistrate erred in law and in fact in finding that the respondent was a truthful and reliable witness is inspite of untruths and contradictions in the respondent's testimony;

viii. The learned magistrate erred in law and in fact in awarding an amount of general damages that was manifestly excessive in the circumstances;

ix. The learned magistrate erred in law and in fact in awarding special damages that had neither been specifically pleaded nor strictly proved; and

x. The learned magistrate erred in law and in fact in awarding damages that had not been pleaded and that are unknown in law.

3. The parties argued the appeal by way of written submissions. Counsel for the appellant in written submissions dated 21st January, 2019 argued that there were material inconsistencies in the respondent's testimony. He contended that the respondent was an unauthorised passenger and had therefore accepted risk and waived his right of action. Counsel also faulted the trial court's decision on the grounds that

the court had awarded the respondent general damages yet he had only pleaded for damages for loss of consortium and that the award was in any case excessive. It was also submitted that there was no proof of loss of consortium and special damages had similarly not been proved.

4. The respondent's counsel in submissions dated 29th January, 2018 countered that the respondent was lawfully on board the vehicle as he had been approached by the appellant's driver to repair the vehicle. Counsel submitted that the appellant had not called evidence to rebut the respondent's evidence and therefore the appeal was unmerited.

5. This being a first appeal, the court is required to analyse and re-assess the evidence on record and reach its own conclusions taking into account the fact that it neither saw nor heard the witnesses testify *(see **Selle v Associated Motor Boat Co. [1968] EA 123**)*.

6. The respondent was the sole witness in support of his case. He testified that he was a trained mechanic and that on the material day while at Keumbu stage, he was requested by the vehicle's crew to accompany them to Kisii town to buy spares for the vehicle which had a mechanical problem. He denied seeing a notice prohibiting them carrying of unauthorised passengers. He testified that as they were travelling, the driver lost control of the vehicle and had an accident. He sustained injuries as a result including a spinal cord injury and testified that he also became impotent at the young age of 28 years.

7. On its part, the appellant called two witnesses. Leonard Juma Miduda (DW1) testified that he was a motor vehicle inspector and transport officer for the appellant. He admitted that the appellant was the owner of motor vehicle registration number KAU 504K/ZC7881. He stated that it had employed Joseph Yimbo Odewa to drive the vehicle. He told the court that the appellant did not allow its drivers to carry unauthorized passengers and goods and stated that its vehicles had stickers containing this prohibition. He also testified that its drivers did not procure mechanics as the appellant had mechanics of its own and in this case, the driver had not reported any mechanical defects.

8. P.C. Samuel Opiyo (DW 2) who was attached to Kisii Traffic base at the time, produced the respondent's recorded statement. On cross examination he admitted that the vehicle had a mechanical problem before the accident occurred.

9. Having considered the memorandum and record of appeal as well as the parties' submissions, the issues arising for determination in this appeal are summarized as follows:

i. Whether the respondent was an untruthful and contradictory witness;

ii. Whether the appellant was liable for the respondent's injuries;

iii. Whether the award of general damages was excessive and the special damages awarded were not specifically pleaded and proved.

10. Before addressing the above issues, it is worth noting the facts that are not in dispute. The fact that the appellant was at the material time the beneficial and registered owner of KAU 504K/ZC7811 Mercedes Benz Tanker is not contested. It is also not in dispute that the vehicle was involved in an accident on 3rd March 2012 and that the respondent was on board the vehicle and sustained injuries as a result.

11. The appellant contends that the respondent was an untruthful and contradictory witness as when he first testified, he indicated that he had been given a lift by the driver of the vehicle to assist him get bananas  High School. The respondent's account then changed when he was recalled and he testified that he was a mechanic and had been asked by the driver to accompany him and assist him in repairing the vehicle. The appellant argued that these contradictions were material and illustrated the respondent's untruthfulness.

12. I note from the record that the appellant made an application dated 7th May 2015 to *inter alia* have the matter start *de novo* after the respondent had given his initial testimony. The trial court agreed to have the matter start afresh at the appellant's behest. The position of the Court of Appeal in the case of ***Nation Media Group Limited v Busia Teachers Co-operative Credit and Savings Society Limited & another Civil Appeal 209 of 2005 [2010] eKLR*** was that;"*Hearing of the suit "de novo" means a new hearing, conducted as if the original hearing had not taken place."*

13. The appellant had the option of testing the respondent's earlier assertions in cross examination when the matter started afresh but failed to do so. The appellant did not disclose the instructions it had given to its driver prior to the accident and cannot assert that the respondent's testimony that he was assisting the driver obtain bananas was untrue. Hence the trial court cannot be faulted for basing its decision on the respondent's latter testimony.

14. The next question for determination is whether the respondent was an unlawful passenger and therefore the author of his own misfortune. DW 1 testified that the appellant strictly forbade the ferrying of unauthorised persons and goods in the respondent's vehicles. He produced the driver's employment records to prove that the prohibition was an express term of the driver's employment and also testified that a sticker containing the warning was affixed on the appellant's vehicles.

15. The appellant relied on the cases of ***Tabitha Nduhi Kinyua v  & Anor[2014]eKLR*** and ***Israel Mulandi Kisengivs the Standard Limited & others [2012]eKLR*** where the courts held that the appellant could not be held liable where the driver had acted outside the scope of his employment by ferrying unauthorised passengers.

16. In the case of ***Tabitha Nduhi Kinyua (supra)***, the Court of Appeal held that the driver was acting for his own benefit when he offered a lift to the appellant in consideration for a fee. In ***Israel Mulandi Kisengi (supra)*** the appellant boarded the rear cabin of a vehicle used to transport newspaper. The court found that the invitation to carry persons who were not employees in a vehicle specifically designed not to carry passengers could not be an act in the course of employment or with the consent of the employer or for the purposes of the employer. The court held that in taking the risk, the appellant, consented to waiving his right of action against the Respondents.

17. On the other hand, the respondent testified that he was approached by the driver of the tanker to help him repair the vehicle which had a mechanical problem. His testimony was corroborated by that of DW 2 who stated that the vehicle had mechanical defects prior to the accident. The respondent cited the case of ***Minister of Police versus Rabie (1986) (1) SA 117 (A) 134***, where it was held that if there is a close link between the servant's act for his own interest and for the interest of the master, the master may yet be liable. The respondent also relied on the case of ***Mary Waitherero vs Chella Kimani and another (2006) eKLR*** where the court held that a master is liable for acts which he has not authorized provided that they are so connected with the acts which he has authorized that they be regarded as modes although improper modes of doing them.

18. As already stated, the appellant in this case did not lead evidence on the instructions or itinerary given to its driver. It is not known what goods the appellant's driver was transporting, from where and to what destination. However, it is not in doubt that the subject vehicle was a cargo truck. The respondent readily admitted that the vehicle was not a public service vehicle but testified that he was invited on board to assist the driver repair the vehicle. Unlike the cases of ***Tabitha Nduhi Kinyua*** and ***Israel Mulandi Kisengi*** where the drivers were engaged in frolics of their own, in this case I agree with the trial court's finding that the driver was acting in furtherance of the appellant's business when he allowed the respondent to board the vehicle as the repair of the vehicle was meant to benefit his employee, the appellant. DW 1 testified that drivers could not procure mechanics because the appellant had its own mechanics. However, the driver being an employee of the appellant, he had the appellant's authority to use the vehicle in the performance of duties delegated to him. As long as the driver was acting in the course of his duty, even when conducting his business in improper modes, the appellant remained vicariously liable for his actions. (See ***Minister of Police -vs- Rabie, 1986 (1) SA 117 (A)*** and ***Geoffrey Chege Nuthu v M/s Anverali & Brothers Civil Appeal No. 68 of 1997)***

19. The other question that arises is whether the respondent waived his right of action against the appellant by boarding the subject vehicle when he knew it had a mechanical defect. The appellant raised the defence of *volenti non fit injuria* and relied on the case of ***Israel Mulandi Kisengi (supra)*** where the court held that where it is clear that one knew that he was taking a risk he waived his right of action when he took that risk regardless.

20. The defence of *volenti non fit injuria* was defined by Wills J. *in* ***Osborne vs The London and North Western Railway Company(1888) 21 Q.B.D 220*** as follows:

> "If the defendants desire to succeed on the ground that the maxim "volenti non fit injuria" is app1icable 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".

21. On this issue, the Court of Appeal in ***Paul Muthui Mwavu v Whitestone (K) Ltd [2015] eKLR*** held as follows;

> In her judgment, the learned Judge applied the doctrine of volenti non fit injuria, however, no such defence was raised by the respondent. In our view, as long as the driver of the Land Rover was ready and willing to give the passengers a lift; and there being no warning that the driver could not carry passengers; and the driver having the authority to use the vehicle in the performance of a task or duty delegated by the owner of the vehicle; the owner of the vehicle remained liable, and such was the case with the respondent.

22. In **United Millers Limited & another v John Mangoro Njogu Civil Appeal No. 118 of 2011 [2016] eKLR** the court held;

> *The max*im volenti non fit injuria does not mean that a person assents to a risk merely because he knows of it. This point was driven home by the House of Lords in the case of Smith vs Baker.
>
> I take the view that a person who asks for a lift like in the present case cannot be said to have consented to the risk of an accident or consented to negligence. In my view, the driver owed him a duty of care the moment he agreed to give him the lift and the defence of voluntary assumption of risk cannot apply.

23. The respondent voluntarily boarded the vehicle despite knowing it was faulty, however, it is my considered view that the driver could not escape liability as he had asked the respondent to board the vehicle. The respondent acquired some liability for his injuries but the driver was more liable as he bore the duty of care to the respondent and those on board the vehicle to drive it carefully especially bearing in mind that it had a mechanical problem. The appellant also had a duty to maintain its vehicles in good condition. I therefore find no reason to interfere with the trial court apportionment of liability at 80:20 in favour of the respondent.

24. The appellant also appealed against the award on quantum stating that it was excessive. An appellate court will not ordinarily interfere with an award of damages unless it can be shown that the trial court, in awarding damages, took into consideration an irrelevant fact or the sum awarded is inordinately low or too high that it must be a wholly erroneous estimate of the damage, or it should be established that a wrong principle of law was applied (see *Butt v Khan* **[1981] KLR 349).**

25. The appellant argued that the respondent did not pray for general damages. However, both parties placed before the court evidence relating to the injuries suffered by the respondent and also took up the issue in their written submissions. The trial court was therefore within its prerogative to award general damages for injuries suffered as the issue had been placed before the court for determination.

26. The general method of approach in assessing damages was set out in **Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004]eKLR** as follows:

> Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.

27. In **Mbaka Nguru and Another v James George Rakwar NRB CA Civil Appeal No. 133 of 1998 [1998]eKLR** the Court of Appeal stated that:

> The award must however reflect the trend of previous, recent, and comparable awards. Considering the authorities cited and also considering all other relevant factors this court has to take into account, and keeping in mind that the award should fairly compensate the injured within Kenyan conditions.

28. The particulars of the respondent's injuries were listed in his plaint as follows:

i. Cut wound on the posterity

ii. Fracture of the spinal cord [cervical 3]

iii. Bruises on the face

iv. Weakness of the upper and lower limbs

v. Quadriparesis

vi. Urethral injury

vii. Cervical collar displacement

viii. Severe headache

29. Both parties agreed to have the reports of Dr. Ogando Zoga and Dr. Z. Gaya admitted as evidence by consent. The respondent was examined by Dr. Ogando Zoga on 9th March 2013, 1 year after the accident. The doctor concluded that the spinal injuries had not recovered and had caused the respondent erectile dysfunction which was unlikely to recover. He observed that the respondent had suffered a fracture to the Ischir bone and injury to the urethral which would need an operation to repair at Kshs. 120,000/=.In his opinion, the respondent would also need long term physiotherapy for the spinal injury.

30. Dr. Z. Gaya examined the respondent on 26th November 2014. The respondent was at the time complaining of pains in the neck, inability to do manual work due to body weakness, failure to attain and felt cold at night especially when it rained. The doctor's prognosis and opinion was that the fracture of C3 resulted into cervical paraestheisa which he was gradually recovering from because the power to his limbs had gradually returned. The doctor could not however confirm the loss of erection. He stated that the respondent would develop early post traumatic osteoarthritis of the cervical spine. He assessed the degree of permanent disability at 15%.

31. Before the trial court, the appellant proposed Kshs. 500,000/=. It relied on the case of ***John Kamore & Another v Simon Irungu Ngugi Civil Appeal No. 113 of 2013 [2014] eKLR*** where the High Court in 2014 upheld an award of Kshs. 500,000/= for the respondent who had suffered a blunt injury to the head, fracture to the cervical spine and blunt injury to the left lower limb with reduced muscle power. On his part the respondent proposed a sum of Kshs. 1,000,000/= for general damages and a sum of Kshs. 1,500,000/= for loss of consortium but did not aid the trial court with any authorities to support these proposals.

32. The trial court appears to have been guided by the case of ***John Kamore & Another v Simon Irungu Ngugi (supra)*** where the injuries were similar to those suffered by the respondent in this case. The court also factored in inflatory trends to reach an award of Kshs. 600,000/= which I find was sufficient compensation for the injuries suffered.

33. As for loss of consortium, the appellant contended that the same had not been proved. Dr. Gaya in his medical report indicated that it was not possible to confirm whether the respondent was suffering from loss of erection whereas Dr. Ogando stated that the respondent's spinal injuries had led to erectile dysfunction.

34. In ***Best v Samuel Fox & Company Ltd [1951] 2 KB 639*** cited with approval in ***Chege Kimotho & Others V Vesters & Another [1988]KLR 48***the Court of Appeal stated that:

> **"**Companionship, love, affection, comfort, mutual services, sexual intercourse – all belong to the married state."

35. The Court further held that the claim for loss of consortium claim can only be made to a spouse of a person who has suffered serious personal injuries which have affected his abilities to provide consortium. Simply put, a claim for loss of consortium is only payable to a spouse of the injured person and not to the injured. The respondent was therefore not entitled to damages for loss of consortium and the trial court erred in awarding the same. The respondent also failed to prove special damages which must not only be pleaded but must also be strictly proved.

36. For the above reasons, I affirm the trial court's finding on liability and set aside the award of Kshs. 1,200,000/- as general damages. I substitute the same with an award of Kshs. 600,000/-.

37. As the appeal has only been partially successful, I make no order as to costs.

**Dated**, **signed** and **delivered** at Kisii on **3rd** day of **May 2019**.

**R.E. OUGO**

**JUDGE**

**In the presence of;**

**Mr. Godia h/b Mr. Gathu For the Appellant**

**Mr. Wesonga h/b for the For the Respondent**

**Rael Court Clerk**