REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 85 OF 2015

HYSAL HARDWARE LIMITED.....1ST APPELLANT

VICTORY CONSTRUCTION LIMITED.....2ND APPELLANT

VERSUS

JONES KIMUYU JULIUS.....RESPONDENT

(An Appeal from the judgment of Senior Resident Magistrate, Tawa by W.K. Cheruiyot on 23rd April, 2015 in SRMC No. 185 of 2014)

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JUDGMENT OF THE COURT

1. The present appeal emanate from a claim founded on Tort which was lodged by the respondent against the appellants in the Senior Resident Magistrate's Court at Tawa vide a plaint dated **13th August, 2014** in suit No. SRMCC No. 185 of 2014.

2. Brief background of the matter is that the plaintiff herein filed suit against the defendants praying for both special and general damages for injuries allegedly sustained as a result of a Road Traffic Accident (RTA) that occurred on 9th February, 2013 along Tawa-Kikima road involving motor vehicle registration number KAQ 341P where the plaintiff is alleged to have been on board as a fare paying passenger. The defendants filed a joint defence denying the occurrence of the accident and denying liability for it. The plaintiff testified and called one other witness, a doctor who examined him. The defendants called one witness.

3. The plaintiff herein who works at Mbooni Boys Secondary School was allegedly travelling to Tawa when while at the bus stage near the school gate sported the defendant's motor vehicle, a canter and stopped it. It is alleged that the plaintiff asked the driver if he could ferry him to Tawa and that the driver agreed and asked him to pay Kshs. 200 which he duly paid and was asked to join other passengers at the back of the open canter which he did. While the vehicle was driving downhill, the driver was unable to negotiate a corner causing the vehicle to plunge into a bush and the passengers sustained injuries including the plaintiff/respondent hence this suit.

4. After the trial, the trial court entered judgment against the appellants on liability holding that the appellant was vicariously liable for the negligence of the driver of motor vehicle registration KAQ 341P who had acted outside the scope of his authority by giving the respondent a lift in the appellant's motor vehicle. On that basis the court then proceeded to award the respondent a sum of Kshs. 600,000/= based on the injuries which are stated in the judgment.

5. The appellants, being dissatisfied with the said judgment on liability and quantum filed the current appeal, raising several grounds of appeal, and issues for determination.

6. With the leave of the court parties filed submissions to the appeal which the court has considered.

7. This being the first appeal it is the duty of this court to re-evaluate the evidence and to reach its own conclusion on the matter.

8. From the record of appeal and the Supplementary record of appeal, and from the submissions of the parties, there are several issues raised, but which in my view are not necessary for the determination of the matter before the court. The only issue for determination is whether or not the appellants were vicariously liable for the mistakes of the driver of motor vehicle registration No. KAQ 341P as was held by the trial court. This issue has been canvassed in several other cases in this court and in the Court of Appeal. Mine is just an emphasis, that a driver of a motor vehicle acting illegally, and without the authority of his or her employer, cannot have his mistakes attributable to his emp0loyer.

9. In otherwords, the principle of vicarious liability cannot be used to sanitize illegal actions of an employee. A driver is an employee. He is obligated to observe instructions given to him by his employer. When he purports to act outside those instructions, he must be personally held liable, without attributing his mistakes to his employer. In the current appeal, it is clear that the respondent sought a lift in the said motor vehicle, which vehicle was not a PSV for the purposes of carrying passengers. The respondent was well aware of this fact when he applied for a lift. This can only mean that the respondent volunteered to any result which could foreseably come out of the said lift. This concept is commonly called *Volenti Non Fit Injuria.* In this case, the respondent is deemed to have accepted the principle of *Volenti Non Fit Injuria* and so also the accident which caused him the said injuries.

19. On whether the appellants are liable for the acts and negligence of the driver on that material date and time, the plaintiff stated in oral evidence that it was 6.30p.m and there were no matatus at that time. He added that the vehicle was not a matatu, but he asked the driver to give him a lift home, and the driver who then agreed to do so upon payment of Kshs. 200/-.

11. The issue was settled in the ***Tabitha Nduhi case*** where the Court cited ***Ormond & Another vs. Crossville Motor Services Ltd & Another 1953 (2) AER 753 CA***, where Lord Denning stated:

> ***"The Law puts a special responsibility on the owner of the vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third party to be used for purposes in which the owner has no interest or concern."***

12. In legal writing, ***Charlesworth and Percy on Negligence*** at 2-226 on page 163 have the following to say on emp0loye's disobedience of employers order;

> ***"The fact that an employee disobeys the order of his employer does not necessarily mean that he is acting outside the course of his employment. A distinction needs to be drawn between an order that limits the scope of employment and an order that limits the method of performing the duties of the employee, the disobedience to which does not mean that employee is outside his employment. For example, an order that a van driver shall not allow any person to travel in his van, notice of which is displayed on the van, is an order limiting the scope of the employee's employment, with the result that a breach of the order involves the employer in no liability."***

13. The matter is settled in a case with similar facts, ***Mary Waitherero vs Chella Kimani & Another [2006] eKLR***, where Kimaru J cited ***Marsh Vs Mowes [1949] 2kb 208, 125*** as follows:

> ***"On the other hand, if the unauthorized and lawful act of the servant is not connected with the***

authorized act as to be a mode of doing it but it is an independent act, the master is not responsible, for such a case the servant is not acting in the course of the employment but has gone outside it."

14. For the foregoing reasons, the current appeal has merit. The judgment of the lower court was made in grave error. The liability in the said judgment attributed to the appellants was faulty and is hereby set aside.

15. In the upshot, the appeal succeeds with costs to the appellants.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF MARCH, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Court Assistant -Muoti

Counsels absent