**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 11 OF 2014**

**THE CHAIRMAN ST. TERESA'S NYANGUSU GIRLS' SEC. SCHOOL..... APPELLANT**

**VERSUS**

**JACKLINE MONARI……..... RESPONDENT**

***(An appeal from the judgment and decree of Hon. Ogembo Ogola (Senior Principal Magistrate) dated and delivered on the 23rd day of January 2014 in the Original Ogembo PMCC No. 197 of 2010)***

**JUDGMENT**

1. The respondent herein, JACKLINE MONARI, was the plaintiff before the lower court in Ogembo SPMCC 197 of 2010 wherein she had sued the appellant (then the defendant) for damages arising out of the injuries she suffered in a road traffic accident involving the appellant's motor vehicle Reg. NO. KAP 917N (hereinafter "the suit motor vehicle) in which the respondent was travelling as a lawful passenger.

2. In her plaint dated 13th August 2010, the respondent stated that on 14th February 2010 at around 3 a.m., she was travelling in the appellant's motor vehicle which was being driven along Keroka-Nyangusu Road when near Nyacheki area an accident occurred in which she sustained the following injuries:

**a. Multiple bruises on the head-scalp.**

**b. Deep cut wound on the left parietal area**

**c. Multiple bruises on the chest.**

**d. Multiple bruises on the back**

**e. Lacerations on the left elbow.**

3. The respondent attributed the accident to the negligence of the appellant's driver and stated that the appellant was vicariously liable for the said negligence.

4. In its statement of defence filed on 3rd September 2010, the appellant denied all the allegations made by the respondent in the plaint and more specifically denied that the respondent was a lawful passenger in the suit motor vehicle at the time of the accident.

5. The appellant's defence was that its driver was on his own frolics and was not authorized to ferry passengers in the suit motor vehicle at the time of the accident and as such the appellant could not be held liable for the accident. The appellant prayed for the dismissal of the respondent's suit with costs.

6. The case was then listed for hearing in which the respondent presented the testimony of 3 witnesses as follows:

7. PW1 was No. 70035 PC Alfred Komen of Gucha Traffic Base, Ogembo. He produced a police abstract No. S/N901692 in respect to the accident in question. He also produced a duly filled P3 form in respect to one Mary Kemunto Monari who was also a passenger in the suit motor vehicle together with another police abstract no. S/N 901693 as Pexhibit 3.

8. The testimony of PW1 was by consent applied to another related case before the lower court being Ogembo SPMCC 196/2010 that is the subject of a related appeal involving the respondent's minor daughter, Mary Kemunto Monari, being Kisii HCCA No. 12 of 2014.

9. PW2 was Jackson Murauni, a registered clinical officer at Kisii Level 5 Hospital. He produced the respondent's medical report as Pexhibit 5, her discharge summary as Pexhibit 6 and a receipt for Kshs. 300 as Pexhibit 6 (b). He also produced the medical report of Mary Kemunto as exhibit 8.

10. PW3 was Jackline Boyani, the respondent herein. Her testimony was that she fell ill on the night of 14th February 2010 thereby prompting her family members to make arrangements to take her to hospital after which they secured the use of the appellant's suit motor vehicle for purposes of ferrying her to hospital. The vehicle was however involved in an accident while on its way to hospital and as a consequence thereof, she sustained serious injuries for which she was treated at Kisii Level 5 Hospital. She blamed the driver of the suit motor vehicle for driving too fast thereby causing the accident in which her child, one Mary Monari, who had also accompanied her to the hospital, also sustained serious injuries. She produced the discharge summary in respect to the said Mary Monari as Pexhibit9 together with a copy of the records of the motor vehicle registrar showing that the appellant was the registered owner of the suit motor vehicle as Pexhibit 10.

11. On cross examination, the respondent stated that she was also known as Jackline Boyani Monari Odhiambo. She also stated that the driver of the suit motor vehicle died in the accident. She denied the allegation that she had taken poison on the fateful night. She stated that a total of 12 people accompanied her to the hospital and were travelling as passengers on the suit motor vehicle when the accident occurred. She added that even though she was being rushed to the hospital as an emergency case, she was subsequently not treated for any ailment apart from the injuries that she had sustained in the accident. The respondent sought damages arising out of the accident for herself and on behalf of her daughter Mary Monari who was the plaintiff in Ogembo SPMCC 496/2010.

12. In its defence, the appellant adopted the evidence tendered in a related case being Ogembo SPMCC 60 of 2010 wherein one Reverend father Dennis Rogena Ondiek had testified as DW1. I have perused the said SPMCC 60 of 2010 and I note that the defence witness testified that on 14th February 2010, at about 10p.m, he was awakened by their driver with disturbing information that one Jackline, the respondent herein, had taken poison and required to be rushed to hospital on an emergency basis whereupon he gave the car keys of the suit motor vehicle in good faith to their driver in order to save the life of the respondent. DW1 later learnt that the suit motor vehicle had been involved in an accident in which many people had been injured. He reiterated that he was not aware, at the time that he released the key to the suit motor vehicle to the driver, that it would be used to ferry many people apart from the respondent. He confirmed that the suit motor vehicle belonged to the appellant.

13. Upon considering the evidence of both the respondent and the appellant, the trial court found that the appellant was solely to blame for the accident and awarded the respondent the sum of Kshs. 150,000/- general damages.

14. Aggrieved by the decision of the trial court, the appellant filed the instant appeal on 5th February 2014 and set down 15 grounds of appeal in which he challenged the trial court's findings on liability, non joinder of the driver of the ill fated motor vehicle and the award of damages to the respondent in the face of evidence that she lied about having taken poison.

15. When the appeal came up before me for hearing on 28th February 2017, the parties informed the court that they had already filed their respective written submissions on appeal which I have carefully perused. Mr. Mose counsel for the appellant then alluded to the fact that the findings in this appeal do apply to the sister appeal No. 12 of 2014 in which the respondent's daughter, Mary Monari is the respondent.

16. I am in agreement with the suggestion of Mr. Mose that the findings in this appeal should apply in the related appeal No. 12 of 2014 for the following reasons:

17. Firstly, the two appeals relate to the same accident in which the respondent herein Jackline Monari was travelling with her minor daughter Mary Kemunto who is the respondent in the related appeal no. 12 of 2014.

18. Secondly, the evidence tendered before the lower court in this appeal is the same evidence that was adopted in appeal No. 12 of 2014.

19. Under the above circumstances it would only be logical that the decision in this appeal applies in the related appeal (12/2014) because of the similarity in the cause of action and the lower court proceedings.

20. This is a first appeal and this court is therefore obligated to reconsider the evidence tendered before the trial court afresh with a view to arriving at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See **Selle vs Associated Motor Boat Company (1968) EA 123).**

21. From the evidence adduced before the lower court, it was not in dispute that the suit motor vehicle belonged to the appellant and that the appellant had voluntarily and on humanitarian grounds released the said motor vehicle to its driver (deceased) for the purposes of ferrying the respondent herein to the hospital. It was also not in dispute that an accident occurred when the motor vehicle rolled as the respondent was being taken to the hospital and as a result the respondent and her child, Mary Monari, sustained injuries.

22. What is in dispute however is whether, in the circumstances surrounding the case, the appellant should be held liable for the accident. The respondent's case was that the suit motor vehicle was being driven at a high speed at the time the accident occurred and according to her, it is the high speed that caused the motor vehicle to roll. On its part, the appellant contended that the respondent was the author of the said accident because she lied about her illness thereby prompting her relatives to seek the emergency services of the suit motor vehicle in the dead of the night. I find that the appellant is justified in its claim that the respondent lied about her illness because when she eventually arrived at the hospital, she was not treated for any other ailment apart from the injuries that she had sustained in the accident. On cross-examination, the respondent could not explain why she was not treated for the initial ailment that caused her relatives to seek the services and use of the appellant's driver and motor vehicle in the first place. The respondent had the following to say on her alleged illness:

> **"I was not treated for the initial ailment. I do not know how the ailment disappeared. I blame the driver because it had been moving too fast. The driver removed the vehicle from its parking because of my emergency. All the 12 got injured. The driver died from the accident."**

23. Having regard to the respondent's testimony as shown in the above extract of her evidence, I find it very unusual and indeed incredible, that she could have been rushed to the hospital in the dead of the night for no ailment at all. The above scenario makes me believe the appellant's contention that the respondent lied that she had taken poison thereby prompting her relatives to seek the appellant's assistance for a vehicle to rush her to hospital. The case at hand was an emergency and obviously, the appellant's driver was under extreme pressure to get the patient to the hospital within the shortest time possible in order to save her life. The nature of the respondent's illness, she must have made everyone to believe, must have been so serious that it could not wait for the break of dawn or for one more minute. To my mind, it matters not whether the respondent had taken poison or was suffering from normal ailment. What matters in this case is that upon reaching the hospital, she was not found to be suffering from any

ailment apart from the injuries she sustained in the accident. It is my finding therefore that either the respondent lied about having taken poison or feigned illness to grab the attention of her relatives or for reasons only best known to her. I find it very disturbing and cruel, that the respondent could put everyone in a panic mode at such an ungodly hour of the night only for it to turn out that she was not ill after all. The respondent's action on the fateful night was either a sick joke or a prank gone awry because she put everyone's life at risk for no apparent reason at all and in the process the life of the one person (driver) who had given up his time to ferry her to hospital was lost. Needless to say, the appellant's vehicle was not an ambulance and his driver not a trained ambulance driver with requisite skills in handling emergencies of this kind.

24. Under normal circumstances, a passenger travelling in a motor vehicle is not expected to be responsible for the manner in which the said motor vehicle is being driven and it is for the reason that courts have held drivers of motor vehicles to be 100% liable in negligence as against their passengers.

25. In the instant case, however, I find that the respondent was largely to blame for the accident in question as she caused the driver to leave the comfort at his home at night and ferry her to hospital for no good reason at all. I find that the circumstances of this case are such that the respondent should be the last person to claim damages against the appellant as to do so will be akin to her dancing on the grave of the kind driver who paid with his life for being sucked into mind games. By extension, it would appear that he respondent took the appellant's generosity for granted. My finding is that the accident would not have happened if the respondent had not lied about her alleged illness.

26. I find that under the above circumstances it was thus erroneous for the trial court to hold the appellant wholly liable for the accident while overlooking the respondent's hidden hand in the chain of events that ended in the tragic accident. My findings would have been different if the respondent alleged illness had been found to be genuine. My position is reinforced by the findings in an earlier judgment delivered by Karanjah J in a related case **No. Kisii HCCA No. 14 of 2014 on 26th May 2016**, the court observed as follows on liability.

> ***"What was essentially a humanitarian mission being undertaken by the appellant ended up rather tragically with the death of the driver and his passengers suffering bodily injuries. The entire state of affairs was precipitated by the lady called Jackline. She led people to believe that she had taken poison and sparked a panic which led to her being taken to the appellant who provided the vehicle to rush her to hospital and in the process the vehicle was involved in a tragic accident.***
>
> ***The evidence strongly indicated that high speed was the major cause of the accident. In normal circumstances it would be easy to blame the driver for recklessness but in this case the circumstances were rather special in that the driver was pressurized by the respondent and others to drive at a high speed and in the process he lost control of the vehicle causing it to overturn and roll. He was thus to blame for the accident but the blame was not his alone and ought to have been shared with the respondent and others in equal proportion. It was the respondent and others including their "patient" who caused the driver to drive at a high speed."***

27. Having found that the appellant was not wholly liable to this particular respondent for the injuries that she sustained in the said accident, the order that commends itself to me is an order to allow this appeal party set aside the lower court's findings on liability at 80% to 20% in favour of the appellant. In the same vein, I find and hold that liability for the respondent in the related case No. Kisii HCCA NO. 12/2014 be shared at 50% to 50% in favour of the respondent therein.

**<u>Quantum</u>**

28. On quantum, both the respondents in this appeal and in the related appeal were each awarded Kshs. 150,000/= general damages and Kshs. 300/= special damages. As I have already noted in this judgment, the respondent herein sustained multiple bruises on the head, chest and back, deep cut wound on the head and lacerations on the left elbow. At the time of the hearing before the trial court she complained of

persistent headaches and had visible scars on the injured areas.

29.The principles to be observed in assessing damages were well stated in the case **of Kemfro Africa Ltd t/a Meru express Service case (supra)** as follows:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal for Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages took into account an irrelevant factor, or left out of account of a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango vs Mnayoka [1961] E.A 705 at p. 709, 713; Lukenya Ranching and farming Co-operatives Society Ltd vs. Kavoloto [1970] E.A. 414, 418, 419. This Court follows the same principles."***

30. In the instant case, the trial court took into account the respondent's injuries and the comparable local authorities in making the award of Kshs. 150,000/= general damages. I find that the trial magistrate adhered to the principles of assessing general damages as explained in the **Kemfro case (supra).**

31. The respondent in the related case on the other hand sustained multiple bruises on the forehead, left leg, knees and bruises on the mid shaft. She also complained of persistent headaches.I find that the award of Kshs. 150,000/= general damages made to each respondent was reasonable and adequate.

**Non joinder of the driver**

32. The appellant's argument was that the failure by the respondent to join the driver of the suit motor vehicle or his estate as a party to the suit meant that the doctrine of vicarious liability could not be applicable to the appellant in this case. The court of appeal has however held that mere failure to enjoin a driver of an accident motor vehicle in a claim for damages against his employer arising from his driving is not fatal as vicarious liability of the employer is not pegged to the employee's liability but to his negligence. See **Ndugu vs Coast Bus Co. Ltd (2000) 2 E.A. 462**.

33. In the celebrated case of **Selle & Another vs Associated Motor Boat (supra)**, the driver of the boat was not made a party to the case and the Court of Appeal held that the owner of the boat was vicariously liable for its driver's negligence.

34. In the instant case, it was not disputed by the appellant that it authorized its driver (deceased) to drive the suit motor vehicle on the night in question and therefore, taking a que from the above cited authorities that highlight the doctrine of vicarious liability, I find that the trial court's decision on vicarious liability was well grounded and I uphold it.

35. In conclusion, I allow the appeal partly on liability as stated hereinabove as follows:

a. For the respondent in this appeal, liability at the ratio of 80% to 20% in favour of the appellant. For clarity's sake, the general damages will thus be subjected to the apportionment of liability thus:

| | |
|---|---|
| General damages: | 150,000/= |
| Special damages: | 300/= |
| Less 80% contribution | 120,240/= |
| Total | **30,060/=** |

b. For the respondent in the related appeal No. 12 of 2014, liability will be at the ratio of 50% to 50% which comes to a total of Kshs. 75,150/=

Made up as follows:

| | |
|---|---|
| General damages | Kshs. 150,000/= |
| Special damages | Kshs. 300/= |
| Less 50% contribution | Kshs. 75,150/= |
| Total | **Kshs. 75,150/=** |

Each party shall bear her/its own costs of the appeal.

36. It is so ordered.

**Dated, signed and delivered in open court this 7th day of June, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of**:

- Mr. Otara for the Appellant
- Mr. Moracha for Nyatundo for the Respondent
- Omwoyo court clerk