REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 118 OF 2011

United Millers Limited.....…….....1st Appellant

Isaac Mwangi Karanja.....2st Appellant

Versus

John Mangoro Njogu…….……..…….....….....,..…….....Respondent

(An appeal from the Judgment & decree of Hon. Mrs S.M. Muketi, C.M. delivered on 27 July 2011 in Nyeri C.M.C.C. No. 46 of 2010)

JUDGMENT

This is an appeal against the judgement and decree rendered by the Chief Magistrate in CMCC No. 46 of 2010, Nyeri in which the trial court found the appellants 100% liable and awarded the Respondent Ksh. 1,003,000/= being general and special damages plus costs and interests thereon. The claim was for recovery of general and special damages arising from alleged injuries sustained in a road accident that occurred on 9th March 2008 involving the motor vehicle KAV 218 R. The Respondent had sued the second Respondent as the driver of the said vehicle and the first Respondent vicariously as the owner of the said vehicle at the material time.

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.(See ***Stanley Maore -vs- Geoffrey Mwenda[1]*).**

The Respondents were duly served but they did not attend court nor did they file their submissions.

I have carefully considered the pleadings filed in the lower court in including the submissions made in the lower court, the evidence adduced in the lower court and the judgement of the learned magistrate, the grounds of appeal and the appellants submissions and in my view, the following issues fall for determination:-

i. ***Whether the doctrine of volenti non fit injuria applies in this case***
ii. ***Whether the first appellant was vicariously liable for the accident in question.***
iii. ***What is the effect of the Respondents failure to file a reply to defence in the lower court.***
iv. ***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.***

With regard to issue number one, counsel for the appellant submitted that by hiking a lift from the driver, the Respondent was an unlawful passenger and therefore the author of his own misfortune. This bring into sharp focus the doctrine of *volenti non fit injuria*, that is voluntary assumption of risk.The general principles applicable to that defence were stated by the Judicial Committee in *Letang vs Ottawa Electric Railway Company[2]* in the following terms quoted from the judgment of Wills J. in *Osborne vs The London and North Western Railway Company[3]*

"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'

Volenti non fit injuria means that the claimant voluntarily agrees to undertake the legal risk of harm at his own expense. It must be shown that the claimant acted voluntarily in the sense that he could exercise a free choice. The claimant must have had a genuine freedom of choice before the defence can be successfully raised against him. A man cannot be said to be truly willing unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will. This was the holding of Scott L.J. in *Bowater* v *Rowley Regis Corp.**[4]*

Also relevant is the case of *Smith v Baker**[5]* were the plaintiff was employed by the defendants on the construction of a railway. While he was working, a crane moved rocks over his head. Both he and his employers knew there was a risk of a stone falling on him and he had complained to them about this. A stone fell and injured the plaintiff and he sued his employers for negligence. The employers pleaded *volenti non fit injuria* but this was rejected by the court. Although the plaintiff knew of the risk and continued to work, there was no evidence that he had voluntarily undertaken to run the risk of injury. Merely continuing to work did not indicate *volenti non fit injuria*. In order for *volenti* to operate, the claimant must have knowledge of the existence of the risk and its nature and extent. The test for knowledge is subjective. If the claimant should have been aware of the risk but was not, the defence will fail. ***(Smith v Austin Lifts Ltd**[6]*

I find useful guidance in the book *Winfield & Jolowicz on Tort*[7] which authoritatively states that *"the claimant must have information that indicates, at least in a general way, the risk of injury from the defendant's negligence. The mere fact that he is aware that the activity in which he participates carries risks does not mean that he has licensed the defendant to be negligent: knowledge that air craft's sometimes crash does not make out a case of volenti non fit injuria where the claimant has no reason to know of any defect in the plane or the pilot."*

For example, in *Slater vs Clay Cross Co Ltd* [8]where the claimant was lawfully walking along a narrow tunnel on a railway track owned and occupied by the defendants where she was struck and injured by a passing train owing to the negligence of the driver, **Denning LJ** said:-

"It seems to me that when this lady walked in a tunnel, though it may be said that she voluntarily took the risk of danger from the running of the railway in the ordinary and accustomed way, nevertheless she did not take the risk of negligence by the driver."

The maxim *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*.[9]

I take the view that a person who asks for a lift like in the present case cannot be said 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. With respect, I do not agree with the decision relied upon by counsel for the appellant on this point, i.e HCC No. 359 of 1995 and in any event it's not binding on me and that the same is not supported by leading court decisions and books on this point. Thus guided by the above authorities my answer to issue number one is in the negative.

On the issue of vicariously liability, it is important to point out that **Vicarious liability** is a doctrine of tort law that imposes liability on employers for the wrongdoings of their employees. Generally, an employer will be held liable for torts committed while an employee is conducting their duties.[10]

An employer is strictly liable for torts committed by those under his command, when they are found to be his employees. To this end, the courts must find a sufficient relationship to this effect, where issues of vicarious liability are raised. It has been stated judicially that no one test can adequately cover all types

and instances of employment; thus, generally, the tests used and ultimate determination rest upon the individual aspects of each case, looking at all the factors as a whole. In the present case it is not denied that the driver was an employee of the first appellant, but it is important to mention that historical tests centered around finding control between a supposed employer and an employee, in a form of master and servant relationship. The roots for such a test can be found in *Yewens v Noakes*,[11] where 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."

Once it is established that the sufficient relationship of employer and employee exists, it is necessary that the tort be committed in the course of employment.[12] There is no one test which adequately establishes which acts employers are vicariously liable for. Such determinations rest upon precedent, and the facts of each individual case.

The surrounding circumstances of wrongdoings are often important in deciding whether an act is in the course of employment or not. There have been contrasting judgments where employees have given lifts in their vehicles, during hours of employment, as to whether their employers can be vicariously liable. Two similar cases demonstrate this problem. The first, *Conway v George Wimpey & Co Ltd**[13]*involved a driver, who, despite express prohibitions, gave a lift to an employee of another firm, and negligently injured him in an accident.[14] No liability was imposed on the employer, as this was deemed to be an activity outside of the employee's duties. This can be compared to *Rose v Plenty*,[15] where liability was imposed where a small boy was injured in a road accident, while helping a milkman on his rounds. It has been stated that these two decisions are not reconcilable.[16] However, Lord Denning offered some justification in *Rose v Plenty**[17]* for the distinction, stating that the employee, in allowing the boy to assist him, was not acting outside of his employment, but acting in furtherance of it (through the boy assisting his duties).[18]

An employer will only be found liable where the accident occurs during the course of the duties of the employee. Thus, if it is shown that the employee was on a frolic of his own, then, the employer will not be held liable. But if it is shown that the employee was acting during and in the course of his duties, then, the employer will be held liable. In the present 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 Respondent. In *Joel v Morison**[19]* 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."

In this regard, I stand guided by the reasoning **Lord Denning LJ** cited above and hold that the driver was not on a frolic of his own and the fact that he gave the Respondent a lift contrary to his employers instructions is not a ground to exonerate the claimant unless it can be shown that the claimant was made aware and freely consented to the risk. Thus, my answer to issue number two is in the affirmative.

With regard to issue number three on the failure to file a reply to defence, at common law joinder of issue occurs when one party pleads that an allegation is true and the opposing party denies it, such that both parties are accepting that the particular issue is in dispute. The *Black's Law Dictionary* defines a ***"joinder of issue"*** *as the submission of an issue jointly for decision, the acceptance or adoption of a disputed point as the basis of argument in a controversy."*

Discussing the same issue **Gikonyo J** in *Kenya Commercial Bank Limited vs Suntra Investment Bank Limited*[20] had this to say:-

"According to Order 2, rule 12 of the Civil Procedure Rules 2010, a joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue. Where a

plaintiff does not file a reply to defence, there is a joinder of issues on the defence. The way I understand the law is that where an express joinder of issues is filed in the form of a reply to defence, there is joinder of issue on it as the last pleading filed, but any allegation which is excepted from the joinder and is stated to be admitted upon the reply will not benefit from rule 12(1) of Order 2 of the Civil Procedure Rules. Therefore, a reply will operate as joinder of issues on those allegations so expressly stated in the reply, and perhaps, unless I am wrong, those allegations in the defence which are not expressly denied on the reply may be deemed to be admitted. See Order 2, rule 12 of the Civil Procedure Rules 2010....."

I now turn to the question of damages awarded by the lower court. The law on circumstances under which an appellate court would interfere with an award of damages has been reiterated in numerous authorities and in various jurisdictions throughout the world and the general principle is the same. The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd V. Ogboli**[21]* had this to say:-

*"It is settled law that "An Appellate Court will not interfere with an award of general damages by a trial Court unless:- **(a)** where the trial Court acted under a mistake of law; or **(b)** where the trial Court acted in disregard of principles; or **(c)** where the trial Court took into account irrelevant matters or failed to take into account relevant matters: or **(d)** where the trial Court acted under a misapprehension of facts; or **(e)** where injustice would result if the Appellate Court does not interfere; or **(f)** where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage."*

Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. Therefore, as was held in the above cited case, and indeed in numerous authorities in this country, an appellate court will only interfere with the award on general damages on the above cited grounds.

In *Kivati -vs- Coastal Bottlers Ltd*[22] the Court of Appeal had the following to say:-

"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

In *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates**[23]* stated as follows:-

"We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

The Court of appeal proceeded to observe that this is the general principle to be found in *Rook v Rairrie*. [24] This principle was adopted with approval by the Court of Appeal in *Butt v Khan**[25]* where it was held per **Law, JA**:-*"... An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low..."*

It is not in dispute that the deceased sustained serious, these are deep cut wounds on the right foot, deep cut wounds on the ankle right leg, fracture of the right ale ankle and amputation of the left leg below the knee.

I find nothing to show that the award appealed against *is* *inordinately high, or is inordinately low.* Further I find nothing to show that *the estimate is erroneous nor has it been shown that the award is*

based on wrong factors nor has it been demonstrated that the award is founded on wrong principles of law. Accordingly, I find no justifiable basis to warrant this court to interfere with the said award. My answer to issue number four is in the negative.

Having found as herein above stated, I found no merits in the grounds of appeal. The upshot is that I hereby dismiss this appeal with no order as costs to the Respondent since he did not participate in the appeal.

Orders accordingly

Dated at **Nyeri** this **8th** day of **March** 2016

John M. Mativo

Judge

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[1] **Nyeri civil appeal no. 147 of 2002**

[2] {1926} A. C. 725

[3] {1888} 21 QB.D 220 at 224

[4][1944] KB 476.

[5][1891] AC 325

[6] [1959] 1 WLR 100.

[7] W. V. H, Rogers , Sixteenth Edition, 2002, London Sweet & Maxwell, 2002 at page 855, Paragraph 25.11

[8] {1991} 2 Q B 6

[9] {1891} A.C. 325

[10] Deakin, Simon; Johnston, Angus; Markesinis, Basil (2007). Markesinis and Deakin's Tort Law. Oxford University Press. ISBN 0-19-928246-3.

[11] {1880} 6 QBD 530

[12] Johnson v BJW Property Developments Ltd [2002] EWHC 1131

[13] [1951] 2 KB 266

[14] Ibid at page 268

[15] [1976] 1 WLR 141

[16] Cooke, John (2005). Law of Tort. Longman. ISBN 1-4058-1229-X.

[17] Supra

[18] [1976] 1 WLR 141, p.

[19][1834] EWHC KB J39

[20] HCC NO 380 of 2013

[21] {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G) -

[22] Civil Appeal No. 69 of 1984

[23] Court of Appeal, Kisumu, CA No 84 of 2009, Onyango Otieno, Azangalala & Kantai JJA

[24] [1941]1AII E.R. 297

[25] [1981] KLR 349