REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 145 OF 2005

JOACHIM GITONGA…….....……APPELLANT

VERSUS

ELIJAH MUGWANJA CHEGE…….....……1ST RESPONDENT

PETER NDUA GITHUNI

(personal representatives of the estate

of Ruth Wambui Ndua)…….....…….2ND RESPONDENT

JUDGMENET

This appeal arises from the judgment and decree of the Chief Magistrate's court at Nairobi delivered on 15th February 2005 by Mrs C. Meoli Chief Magistrate. The appeal arises from a claim founded in tort which was lodged by the 2ndrespondent, Peter Ndua Githuni, personal representative of the estate of the late Ruth Wambui Ndua, his 17 year old daughter who was involved in an accident on 16th August 1996 and died.

The plaintiff filed proceedings before the Chief Magistrate's Court in Nairobi against the appellant and the 1strespondent for damages.

The suit was heard and judgment delivered on 15th February 2005 against the appellant and the 1st respondent in the sum of Kshs 223,950 with costs and interest. The appellant being dissatisfied with the judgment of Mrs Meoli Chief Magistrate (as she then was) now appeals to this court on the following grounds:-

1. ***That the learned magistrate erred in law and fact in finding that the 1st respondent was at all material times a duly authorized agent of the appellant herein.***

2. ***That the learned magistrate erred in law and fact in finding that the 1st respondent was not capable of being the servant and/ or agent of the appellant herein given the facts of the case.***

3. ***That the learned magistrate erred in law and fact in finding that the appellant was liable for the accident when no evidence was adduced to prove that the appellant was in fact liable for the accident.***

4. ***That the learned magistrate erred in law and fact in believing the testimony of the third party when the said third party was a witness whose credibility was questionable instead of the evidence of the credible witnesses of the defendant.***

5. ***That the learned magistrate erred in law and fact in awarding damages that were excessive in the circumstances.***

The appeal was prosecuted by way of oral submissions on 18th February 2014. Mr Manti, counsel for the appellant submitted that the appeal is challenged on the determination by the trial court that the third party who is also the 1st respondent was an agent of the appellant at the material time of the accident. Counsel told the court that there were proceedings in Muranga court being Muranga Principal Magistrate's Traffic case No. 1666/199.

Counsel for the appellant submitted that the court's observations in the traffic case were that in his defence the 1st respondent herein who was the accused stated that he never drove the vehicle. In other words, that he recanted that testimony. That the 1st respondent stated that the driver of the appellant requested him to drive the car. He stated that the court held that since the 1st respondent was given keys by the appellant's driver that made him liable.

Mr Manti also submitted that the 1st respondent never called any witness to confirm his subsequent testimony; having admitted that he did not even have the statutory mandate to drive that class of motor vehicle. He submitted that the trial magistrate was not persuaded that after the keys were snatched, DW1 could not wrestle the 1st respondent because the vehicle was in motion. Counsel submitted that nobody wrestles a driver when the vehicle is in motion.

Mr Manti further submitted that the evidence on record is that the 1st respondent snatched the key, got onto the truck and drove off as people were loading it. He further submitted that there is no reason why the trial magistrate could not believe the appellant's witnesses which evidence was very consistent as opposed to contradictory evidence of the 1st respondent.

Mr Manti further submitted that the trial magistrate's reasoning was erroneous and it should be disregarded by this court. He further submitted that the appellant had his own employee driver and never expressly or otherwise instructed the 1st respondent to drive his motor vehicle.

The appellant relied on the case of **Morgans v Launchbury (1971) 2 All ER 606**, he submitted that the facts of the case are similar to this case. In the **Morgans v Launchbury** case, a husband voluntarily requested his friend to drive him in his wife's car. It had been agreed with his wife that if he was intoxicated he would get someone else to drive him. An accident occurred and the two died. The other two passengers sued the wife claiming the driver was her agent. The House of Lords declined to accept that position holding that the driver must have driven at the owners request or instructions or a delegated duty by the owner for her to be found vicariously liable for acts of the driver.

The appellant also relied on the case of **Khayigila v Gigi & Co Ltd (1987) KLR 76 wh**ere the Court of Appeal held that even though the respondent was given the car voluntarily he was not driving it in the performance of the duty delegated to him. The court found the 1st respondent not liable.

In conclusion, the appellant's counsel submitted that if it is true that keys were snatched, then the 1st respondent had no authority at all to drive that vehicle hence no agency relationship between him and the appellant existed. And that even if the keys were voluntarily given to him, as he was not authorized to drive it and without express permission and even without a driving license, liability shifted to the 1st respondent. Mr Manti urged the court to allow the appeal with costs to the appellant and costs of the lower court.

Mr Gichachi, counsel for the 2ndrespondent opposed the appeal. He submitted that the trial court was

correct in arriving at the decision that it did. Counsel submitted on behalf of the 2nd Respondent that the learned magistrate saw and listened to the witnesses who appeared before her. He submitted that the bone of contention is whether the 1st respondent can be said to be the appellant's agent. Mr Gichachi submitted that on the facts before the trial court and evidence before her the 1st respondent was an agent of the appellant.

Mr Gichachi asserted that this court had the benefit of reading the judgment only and not the proceedings hence it cannot tell what the parties testified on. Counsel argued that in the traffic case the 1st respondent denied in his defence that he drove the material motor vehicle and that it was a situation where the accused was not even represented and so he would in his defence give any evidence which would get him off the hook of the charges.

Mr Gichachi submitted that the 1st respondent's denial of being a driver should not be taken as the gospel truth. That the trial magistrate had the benefits of seeing all witnesses who testified before her in the lower court. He submitted that DW2 driver of the Motor vehicle in question could not withstand cross examination. The court observed several contradictions of the appellant's witnesses in their evidence.

Further, it was contended that DW2 testified that there was no struggle to snatch keys from him forcefully, which evidence was contradicted by DW3 who said the keys were forcefully snatched and so is DW4. He submitted that the driver was in the motor vehicle when it was driven away according to his evidence in chief but in cross examination he denied entering the motor vehicle. He stated that he was left standing at the rear of the vehicle. It was further submitted on behalf of the 2nd respondent that the 1st respondent opened up and said that the keys were voluntarily given to him by the driver who said he was tired and he needed to rest. Mr Gichachi submitted that the 1st respondent drove with the permission of the driver of the appellant.

Mr Gichachi also submitted that if the 1st respondent had stolen the car or forcefully snatched the keys from the driver and driven it, he could have been charged under section 65(1) of the Traffic Act. He submitted that what transpired on that day is that the 1st respondent drove the vehicle with the help of the appellant's driver. Mr Gichachi referred the court to the decision in **Morgans v Launchbury (supra).** He submitted that the driver must have been a servant or agent at the time of the accident, and that the court in the above case went ahead further to explain how the agency relationship is established. He submitted that the appellant in this case gave the Motor vehicle to his employee driver and directed him to collect seats from one point to another.

That the driver was in his own cause of employment and allowed the 1st respondent to continue doing the job which he himself was authorized to do by the appellant so to that extend delegated his work to the 1st respondent who continued the duty as if he were the agent of the appellant. Counsel submitted that in the Morgan Case the husband was not an agent of the wife hence he could not pass the agency to another person to drive as he himself was not an agent.

Mr Gichachi also distinguished the case of **Khayigila v Gigi & Co Ltd (supra)** relied on by the appellant. He submitted that the person who gave the Motor vehicle keys to the driver who caused the accident had expressly told him not to use the vehicle elsewhere other than in the garage for spraying and when the person took it away and caused an accident 2km away the owner was found not liable. He submitted that in this case the person who handled the keys was an agent of the owner of the Motor Vehicle. He also distinguished the case of **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another (EA) Court of Appeal No. 186 of 2009.**He stated that in that case the issue involved the driver of the truck in his contract of employment where there was a clause that strictly prohibited him to carry any passenger and although he was in the cause of his duty, he received money to carry a passenger and the court held that he had gone out of the express duties of an agent.

Mr Gichachi submitted that in this case there is no evidence that the driver was restricted not to allow any other person to drive the vehicle. He further submitted that even where the employee does something

contrary to what the employer allowed him to do sometimes the employer would be held liable. He further contended that the acts of the 1st respondent were connected to those which the appellant's driver would do.

I have carefully perused the record including the lower court pleadings and the ruling. I have also carefully considered the grounds of appeal, and the main issues raised in this appeal are:

1. ***Whether the trial magistrate erred in finding that the 1st respondent was an agent of the appellant and that therefore the appellant was vicariously liable for the actions of the 1st respondent.***

2. ***Whether the 2nd respondent was entitled to damages awarded by the trial magistrate.***

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence before it and arrive at its own independent conclusion. This principle of law was well settled in the case of **Selle – V – Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that,

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

And in the case of **Mbogo v Shah & Another (1968) EA 93**,the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

The evidence before the court is that, the 2nd respondent who testified as PW1 received a report in the evening that his daughter had been involved in an accident on her way to work along Muranga/Kangema Road near the water supply. He went to the accident scene and found the body of the deceased lying beside a blue Isuzu lorry registration number KRV 440. PW1 took the body to the mortuary and then organized the burial of the deceased. He testified that he knew the owner of the lorry which hit his daughter; he was a business man in Muranga town. He also told the court that the driver of the lorry was charged in Muranga Court in Traffic Case No.1666/96 with Causing Death by Dangerous Driving of a motor vehicle that he was not authorized to drive. The plaintiff also testified that his daughter was employed as a house help for Kshs 1200 per month. During cross examination PW1 told the court that he did not find the owner or the driver at the accident scene but he knew the owner.

Justus Guthera Mwangi *testified as PW2. He told the court that he was also injured in that accident. He stated that the lorry came from the opposite direction, left the road and it hit him and run over the deceased. He sustained injuries on his leg. He also testified that he knew the owner of the Motor vehicle, but that he did not know the driver. He further stated that a man by the name of Elijah Mugwanja Chege was charged in before Muranga Law court and PW2 was called as a witness. That the said Elijah Mugwanja Chege was convicted and fined.*

The appellant testified as DW1*. He admitted that the motor vehicle KRV 440 belonged to him. He told the court that he had a driver by the name David Matimu Wanjigi. A man by the name Martin*

Mugwanja, a son of his late friend Maina Mugwanja borrowed the Motor Vehicle to carry seats and tents for an event to celebrate the death anniversary of his late friend Maina Mugwanja. He gave him the vehicle as well as his driver and two other persons to assist in loading and unloading the seats. The appellant told the court that he then instructed Mr Martin Mugwanja to look for a person to drive the Motor vehicle and he gave Elijah Mugwanja, the 1st respondent his cousin to lead the team. He testified that he was later called to the police station where his driver and the 1st respondent were put in custody.

The appellant's driver was later released but the 1st respondent was charged. In cross examination he told the court that his driver informed him how the 1st respondent came to drive the motor vehicle. He stated that the 1st respondent snatched the key from the driver and drove off the vehicle. He testified that he did not authorize the 1st respondent to drive the vehicle.

David Matimu Wanjigi, *testified as DW2, he told the court that the 1st respondent snatched him the keys of the vehicle and went to drive off. He stated that he could not struggle with him because he did not want to cause an accident. He further testified that the 1st respondent was drunk; he had taken two beers before. He further stated that the accident occurred because the 1st respondent drove fast then veered off the road.*

The 1st respondent was the third party *in the proceedings in the court below. He testified that he knew the appellant. That they went to the appellant and they were given the vehicle. He stated that the driver of the vehicle gave him the keys and requested him to drive the vehicle since he was tired. The 1st respondent drove the vehicle on the road which was full of potholes and the accident was caused by the girl who was trying to cross the road and she then retreated back.*

The lower court after analyzing the evidence held that the actions of the 1st defendant were authorized by the appellant and that he was therefore liable for the accident.

The appellant's contents that he did not authorize the 1st respondent to drive the vehicle.

From the foregoing, the occurrence of the accident is a factor which is not at all or substantially disputed. So is the fact that the 2nd respondent's daughter was occasioned bodily injuries and died as a result of the accident. The basic issue that arose and arises for determination is whether the appellant was and is vicariously liable for acts of the 1st respondent who was not his authorized driver at the time of the material accident.

The doctrine of vicarious liability was defined by the Court of Appeal in **CA 73 OF 2002-NAKURU SECURICOR K LTD V KYUMBA HOLDINGS** wherein the Court of Appeal quoting with approval a passage from Winfield and Jolowicz on Tort 14th Edition as flows:

"the doctrine may be stated as follows:-where A the owner of a vehicle expressly or impliedly requests B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B's negligence in the operation of the vehicle."

The Court in the above case however was categorical that however, the liability placed upon the employer/ master is not an absolute one see **PRITOO V WESNILE DISTRICT ADMINISTRATION, (1968) EA 428**.

The said doctrine was expounded in the case **Morgans v Launchbury (supra)** where the learned judges of appeal stated that,

> ***"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 agency relationship it is necessary to <u>show that the</u>***

driver was using the car at the owners request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner……"

In **Kenya Bus Services Ltd v Dina Kawira Humphrey CIVIL APPEAL NO. 295 OF 2000 [2003] eKLR,** the Court observed thus:

"According to the pleadings, we are concerned here with the master's liability for his servants' torts. In such a case, it is the existence of the relationship of the master and servant which gives rise to vicarious liability – see PRITOO V. WEST NILE DISTRICT ADMINISTRATION[1968] EA 428 at page 435 paragraphs E-F). In KARISA V. SOLANKI [1969] EA 318 the Predecessor of this Court said at page 322 paragraph 9 G.

"Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard v. Sully(1931) 47 T.L.R. 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

The test for establishing whether the owner is vicariously liable for his/her servant's negligence was set out in **Tabitha Nduhi Kinyua v Francis Mutua Mbuvi& another Civil Appeal No. 186 of 2009[2014]eKLR** where the Court Appeal stated:

The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employees in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed……

The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this Court's decision in Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986 as follows:-

In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that 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 was 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 or duty thereby delegated to him by the owner."

In **KABURU OKELO & PARTNERS V STELLA KARIMI KOBIA & 2 OTHERS [2012] eKLR** the Court of Appeal (Appeal from a judgment of the High Court at Nairobi - Rawal J) O'Kubasu, Waki &Onyango Otieno, JJ A July 13, 2012, where the issue for determination was, among others, ***What level of control over the negligent acts of person A would lead to a finding that person B, who is directing person A on the doing of those acts, as being held vicariously liable for the negligence, the Court of Appeal held inter alia, that* :**

"Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority."

In **Anyanzwa& 2 Others – Vs – Lugi De Casper &Another (1981) KLR 10**the court stated inter alia that;

"Vicarious liability depends not on ownership but on the delegation of task or duty."

Applying the principles of law springing from the above cited case, it is not disputed that the accident was

caused by the 1st respondent who was not the designated driver of the vehicle which had been given to the authorize driver to assist the owner's friend ferry seats from places where the 1st respondent would assist point out, to a designated place where the death anniversary ceremony was to be conducted. In his testimony the1st respondent stated that he was requested by the driver of the appellant who said he was tired, to assist in driving the motor vehicle to the next destination, although this version is disputed by the appellant and his witnesses who said the 1st respondent snatched the key from the driver. The said appellant's witnesses were all in unison that the 1st respondent snatched the keys from the appellant's driver and jumped into the vehicle and drove off and about 4 kilometers away, an accident occurred when the said 1st respondent veered off the road and hit the deceased. The 1st respondent admits that he hit the deceased who was about 4 meters away from the tarmac road.

The appellant's witness's version of how the 1st respondent got to drive the car is in my view not capable of belief and were, in my view, fabrications in order to shift blame to the 1st respondent. There is no credible evidence that the 1st respondent forcefully snatched the keys from the driver and drove off. If that were the case, nothing stopped the driver from refusing to enter that motor vehicle, cautioning the loaders to avoid entering the vehicle since he was aware that the 1st respondent who had allegedly taken some bottles of beer could be under the influence of alcohol and therefore dangerous in his maneuvers; and or and calling the appellant/owner of the motor vehicle to explain the situation, before the fateful accident. The 1st respondent on the other hand did perjure himself. In the traffic proceedings, he denied ever driving the motor vehicle as alleged while in this case before the subordinate court he changed the story and stated on oath that the driver gave him the keys and requested him to drive since the driver was tired. Such a witness cannot be believed as he testified to his convenience and not to the truth of the matter in question. True evidence is consistent. There can be no reason why a truthful witness would lie in a traffic case and tell the truth in a civil claim. Furthermore, the 1st respondent did not tell the court why he wanted the court to believe him in the civil suit and not to believe his testimony in the traffic proceedings. The idea of getting off the hook only came about in the 1st respondent's advocate's submissions. It was not part of his evidence.

The fact remains that the 1st respondent was not the owner's servant or agent at that material time. In his evidence the appellant stated that the 1st respondent was a cousin to Martin Mugwanja who had requested the for appellant's motor vehicle to transport seats. The 1st respondent was also not using the motor vehicle at the request of the appellant. From the record, there is no evidence to show that the owner requested the 1st respondent to drive the said motor vehicle or that the duty of driving that motor vehicle was delegated to him on that material day. The 1st respondent was among many others who were assisting in collecting and delivering the seats to the venue of the anniversary of the death of the appellant's friend's father. The appellant only delegated the duty of driving the motor vehicle to his driver. A delegate cannot delegate without authority from the delegator. There is no evidence to show that the 1st respondent expressly or by implication received authority from the appellant to drive the said motor vehicle. Even if he was assisting the appellant's driver, the 1st respondent did so at his own risk which risk could not be passed over to the owner of the motor vehicle.

In **BACHU V WAINAINA &ANOTHER [1977-1985] EA 29** it was held that:

> ***" where a person owns a motor vehicle which is driven by another person, even with the permission of the owner, that owner will not be vicariously liable in tort for the negligence of the driver unless it is established that the driver was acting as a servant or agent of the owner, or was using the vehicle for the benefit or for something in which the owner had an interest either alone or jointly with the driver."***

In **KENYA BUS SERVICE LIMITED V HUMPHREY [2003] KLR 605 2 EA 519** the Court of Appeal held that:

"***In a case of a master's liability for his servant's torts, it is the existence of the relationship of master***

and servant which gives rise to vicarious liability. Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger or weaker by the surrounding circumstances and it is both disturbed by the evidence that the car was lent to the river by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the driver and owner."

In this case, I reiterate that there is no evidence that the driver was authorized to give the vehicle to be driven by another driver who was not authorized by the owner of the vehicle, and who did not even possess a driving license for that class of motor vehicle.

Although the appellant allowed his motor vehicle to execute the said duty of ferrying seats meant for a death anniversary for a relative of the 1st respondent, by him giving out his driver without pay was, in my view, an indication that the appellant did not expect any other unauthorized person to drive his vehicle and therefore the appellant cannot be held vicariously liable for acts of a stranger. In **Morgan – Vs – Launchbury (supra)** Lord Wilberforce stated:

> ***"Every man who gives permission for the use of his chattel may be said to have an interest or concern <u>in its being carefully used</u>, and , in most cases if it is a car, to have an interest or concern in the safety of the driver, <u>but it has never been held that mere permission is enough to establish vicarious liability</u>."****(emphasis added).*

From the foregoing, it is my view that the fact that the appellant's driver delegated his duty of driving the appellant's vehicle to the 1st respondent in this case without the authority of the appellant does not turn that other driver to be an agent of the appellant, as was correctly held in **NAKURU AUTOMOBILE HOUSE LTD V ZIAUDIN (1987) KLR, 3, 7**. In that case, the appellant had given his vehicle to his driver to use it as taxi. The driver fell sick and without seeking the authority of the appellant owner, gave the vehicle to another driver. It was involved in an accident. The court held that the appellant had been kept out of the decision by the driver to lend the car to the other driver and as the company had nothing to benefit from the use of the car by the other driver, the appellant company was not vicariously liable for the acts of the other driver.

In my view, the appellant herein had nothing to benefit from the use of the lorry by a driver whom he did not authorize to drive his vehicle, and who was not even licensed to drive that class of motor vehicle as that was too high a risk to undertake since the insurance company would not even take up such a claim and compensate him.

Similarly in **OMROD & ANOTHRR V CROSSVILLE MOTOR SERVICES LTD &ANOTHER, (1953)2AER 753 CA,** Denning L.J stated:

"The law puts special responsibility on the owner of vehicle who allows it to go on the road in charge of someone 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."

In this case, the appellant and the 1st respondent's testimonies were in agreement that the appellant had lend the lorry for use by his friend to ferry seats to a site where his friend's dead father's anniversary was to be held and that his friend was to fuel the vehicle. The appellant gave out his vehicle and driver. The 1st respondent was then to lead the team to the respective venues where the seats were to be picked from.

In the circumstances of this case Iam unable to find that the appellant could have expressly or by implication authorized his driver to delegate the act of driving the vehicle, while in the course of his duties, to another driver, the 1st respondent herein.

For those reasons, I find that the trial court erred in finding that the actions of the appellant's driver in giving the vehicle to a person who was not authorized to drive that vehicle were the actions of the appellant. The 1st respondent was charged and convicted of the offence of driving a motor vehicle that he was not authorized to drive. There is no evidence that the appellant could have permitted a person who had no license to drive his class of vehicle..

It would then be unnecessary delve into the issue of liability of the 1st respondent since it was settled at the trial by the lower court and as he has not appealed against it. I would also not delve into the appropriateness of damages awarded as that issue no longer affects the appellant herein; having found that he was not vicariously liable for unauthorized acts of the 1st respondent.

In the end I find that the appeal has merit and allow it. I set aside the findings and decision of the lower court and substitute that part of the judgment of the lower court affecting the appellant only with an order dismissing the 2ndrespondent's claim against the appellant.

Costs follow the event. They are however in the discretion of the court. In this case, I find that the 1st respondent drove the appellant's motor vehicle without authority and as a result caused an accident leading to an untimely death of the deceased. The deceased's estate has suffered loss which was not anticipated. The 2nd respondent lost his daughter and it would, in my view, be even more painful to penalize him to pay costs of this appeal. He relied on the advice of his counsel to institute suit against a person who, legally, could not be held liable to compensate him for the loss. The 1st respondent on the other hand did not file any appeal challenging the decision of the subordinate court wherein he was found to blame for the accident which led to the demise of the deceased Ruth. That judgment against him and him alone is therefore not disturbed.

Accordingly, I order that the 1st respondent shall pay the costs of this appeal to the appellant and he shall also pay the costs of the lower court to the appellant and the 2nd respondent.

Dated, signed and delivered in open court at Nairobi this 1st day of July, 2015.

R.E.ABURILI

JUDGE

1ST JULY, 2015