REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 2813 OF 1991

JOHN KIOKO MUSINGI ……..….PLAINTIFF

VERSUS

JACINTA WAMBURA BISLEY ….....….DEFENDANT

JUDGMENT

This suit was filed on behalf of Musingi against the defendant for judgment on liability and resultant damages in that on 1.4.91 one now deceased Mwinzi, drove the defendant's motor vehicle registration No KXG 188 so negligently on the Thika-Garissa Road, that it left the road, rolled and injured the plaintiff while Mwinzi and others died.

The plaintiff is today a paraplegic who will live in the wheel chair for the rest of his life. As a young man of 31 years of age at the time of this accident and a promising University lecturer, he suffered much damage and loss. For this he claimed damages, costs and interest.

In the proceedings and the evidence given in Court the defendant denied liability. She told the Court that Mwinzi had borrowed her car for his own benefit and interest. He had wanted to transport people and/or goats from his home to his parents-in-law. All this had nothing to do with the defendant's interest or benefit because the deceased Mwinzi was not even her employee at all. He worked for a tour company of which the defendant was a partner and that was all. The motor vehicle involved was her own and she used it for personal purposes. Indeed the plaintiff told the Court that Mwinzi who was his relative used the motor vehicle for the reason stated by the defendant. They were on their way back to Nairobi when this accident took place.

Considering the issue of liability first, this suit must and is hereby dismissed. The defendant cannot be vicariously liable for the accident which occurred when Mwinzi was doing what was not connected with her at all. He was not her driver and he was not doing anything for her interest or benefit at all. Moving goats and people to the home of his parents-in-law was wholly for the benefit of Mwinzi. What the defendant had done was simply to allow him to use her motor vehicle in this connection.

Case law is available to support the defendant's position.

In his long judgment in *Nzau Kitaka v Gatere* HCCC 2183/84, the late Justice Rauf enunciated the law as stated in *Summer Singh Bachu v Wainaina & Anor* NAI CA 14/76 to the effect that the authority and consent to use one's motor vehicle is irrelevant when it comes to liability if that motor vehicle is involved in an accident. The issue should be whether or not at the time of the accident it was in the course of business benefiting the motor vehicle owner. Said the judge:

> "Simply put the law is that the principal is not vicariously liable for the tort of the agent unless it was done for his (principal's) benefit." (pp 8).

In a Court of Appeal case *Nakuru Automobile House Ltd v Ziaudin MBA* Civ App No 63 of 1986, the learned Judges of Appeal - Nyarangi, Platt and Gachuhi were agreed in their respective judgments that:

> "… to fix liability on the owner of a car for negligence of its driver, it is necessary to show that either the driver was the owner's servant or that at the material time, he was acting on the owner's behalf as his agent. To establish the agency relationship, it is 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 performance of a task or duty delegated to him by the owner." (as per Nyarangi Judge of Appeal pp 4).

On his part Gachuhi Judge of Appeal said:

> "The basic principle of vicarious liability is that the person who is guilty of an offence for which his employer or the principal would be liable must be in the relationship to act on authority, direct or implied instructions and what is done must be for the benefit or have direct interest of the employer or the principal. Mere authority to do an act which may cause liability for wrong-doing or omission to do will not bind the employer or principal. It must be shown that the person to be charged for that liability is an employee or an agent and not a licencee." (pp 1)

In this *Nakuru Automobile* case some friends/relatives of one of the directors in the appellant company had given a company car to some young men to go and enjoy themselves during a *safari* rally in which one of the company directors was participating. The use of that car there had no benefit to the appellant company. The appeal was allowed and in the course of judgment the case of *Morgans v Launchbury & Ors* [1972] 2 All ER 606.

In this case a husband who was using a wife's car went to a place and let his friend drive him home since he had had more than enough drink. This friend allowed some friends in this car to drop them home. An accident occurred and these friends were injured. They claimed against the car owner (the wife). They succeeded but she appealed successfully arguing that the accident occurred when the car was on no business of her own.

Lord Wilberforce said:

> "For I regard it is as clear that in order to fix vicarious liability on the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability".

And with the foregoing and noting that from the evidence Mwinzi was merely permitted to use the defendant's motor vehicle not for her interest or benefit except his own, the suit is dismissed as said.

Indeed this conclusion is a sad one considering the plaintiff - his age, future, medical condition as a paraplegic and all. Yet he gets nothing and has either to bear his life-long loss himself or move against the estate of the deceased Mwinzi for any relief. Probably it is high time Parliament considered reliefs in such cases based on no-liability claim. But that is not for this Court to pronounce.

As the law is now the plaintiff's suit is dismissed with costs.

Judgment accordingly.

Dated and delivered at Nairobi this 11th day of March, 1993

J.W. MWERA

……

JUDGE