REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 55 OF 1986

MARTHA SHIGHADAI .....APPELLANT

VERSUS

KENYA POWER & LIGHTING CO LTD & ANOTHER.....DEFENDANT

JUDGMENT

March 18, 1988, **Bosire J** delivered the following Judgment.

This suit brought by plaint by Martha Shighadai is for special and general damages arising from a motor accident in which she sustained bodily injuries. The defendants named on the plaint dated 30th January, 1986, are the Kenya Power and Lighting Company Limited (under K.P.L), as first defendant and owner of the accident motor vehicle; and Paul Okombo, its driver and an employee of the 1st defendant. He is the second defendant. The accident motor vehicle was a Datsun Pick-up registration number, KTX 992, which had the colours and writings to show that it was owned by the 1st defendant.

The plaintiff, a housewife, but who at the material time of the accident was unmarried, is a resident of Voi town. In November, 1985, and the period immediately prior thereto she was a vegetable and fruits supplier to the Voi Safari Lodge. She used to get her supplies from, among other places, Wundanyi. It was customary for her to travel out to look for vegetables and fruits for her customer, the Voi Safari Lodge.She did not have her own transport and therefore depended on public service vehicles and occasionally lifts extended to her or upon request by her to move out of the back to Voi.

The first defendant is a public corporation, which supplies electricity to consumers of it. In 1985, and several years prior thereto it had in its employment the second defendant, Paul Okombo (Okombo). He joined the company as metre fixer in 1968, but soon thereafter rose to become an installation inspector Grade III. He was attached to the Coast area or region and was usually answerable to the Commercial Engineer of the Region.

In 1982, in the month of July, he was assigned the accident vehicle. He was soon theraftер posted to the Voi Area. Among the duties he was detailed to perform there was the checking of customers' installations, and also to attend to their complaints. He was self driving himself having been specifically authorized in writing to do so. The letter of authority, in pertinent part, read as follows:

> "You are however, reminded that authority to drive company vehicles is granted subject to observance of the conditions stipulated in the company rules defining the driver's responsibility in the use of a company vehicle. Some of these requirements are outlines (I believe he intended outlined) in my circular Ref 72410/ SSG/FM of 24th May, 1982, a

copy of which is attached for rigorous study and adherence."

Among the rules which were drawn to the attention of Okombo was rule 5:8 which read as follows:

"Transporting only authorized persons within the vehicles carrying capacity."

Okombo moved to Voi and for a period of over three years he worked normally and discharged his duties to the satisfaction of his employer, the 1st defendant. He also managed and controlled the motor vehicle assigned to him reasonably. The performance of his work entailed travelling to various places to check on installations and to attend to several complaints and querries from the 1st defendant's customers. Among the places he was regularly visiting was Wundanyi.

It was the plaintiff's evidence that on the several occasions Okombo travelled to, among other places, Wundanyi, he lifted her in the company vehicle. She did not vouchsafe to the court upon what terms the lift was being offered. The plaintiff was emphatic that there was no special relationship between her and Okombo, apart from the fact that at some point in time during his stay at Voi they were neighbours. On many of the trips Okombo made to Wundanyi, with the plaintiff he returned with her on board the same vehicle.

On 5th November, 1985, the day of the accident complained of, Okombo lifted the plaintiff to Wundanyi. By agreement he picked her up, from her sister's residence at Wundanyi, on his way back to Voi. He also lifted other people, six in all, among them a woman by the name Miss Christine Obodu. Obodu and the plaintiff sat in the driver's cabin with Okombo. At Jaso an accident occurred in which the vehicle lost control when negotiating a corner, overturned, and rolled several times into a valley. As a result of all that the occupants of the vehicle sustained severe bodily injuries. They were all initially admitted at Wesu District Hospital. Upon discharge from that hospital the plaintiff continued to attend Voi hospital as an out patient.

As a result of that accident the plaintiff sustained a cut wound on the back, another on the face, lacerations on the right side of the face, bruising and abrasions over the chest wall and a sprain of the lumbo-sacral spine. As a result of the last of those injuries she experiences pains in the lower back and has difficulty in bending. She also complained of frequent headaches particularly when walking in the sun.

In her plaint dated 30th January, 1986, and filed in court on 3rd February, 1986, the plaintiff has averred that the accident in question, which happened along the Wundanyi-Dembwa Road, was caused wholly by the negligence of Okombo in his management and control of the accident vehicle in the course of his employment with the 1st defendant. She therefore prayed for judgment for special and general damages against Okombo, as the driver of the accident vehicle and the 1st defendant, in a vicarious capacity.

Okombo was served with summons to enter appearance and the plaint on 17th March, 1986, but failed to enter appearance within the prescribed time. Consequently interlocutory judgment was entered against him on 7th April, 1986, upon application by counsel on record for the plaintiff.

The liability of the 1st defendant being vicarious in the circumstances of this case the question in regard to the negligence of the 2nd defendant does not arise in this judgment. The question which falls squarely for determination, and upon which both counsel appearing in this matter vigorously examined and cross examined witnesses on, is whether Okombo carried home to the 1st defendant his blameworthiness in the accident.

The 1st defendant would not welcome vicarious responsibility for Okombo's negligent driving of the accident motor vehicle on the grounds that he acted outside the scope of his employment in giving a lift to the plaintiff. Upon learning of the accident the 1st defendant cause an investigation of it to be carried out by its accident investigator. Investigation revealed that Okombo had lifted seven people in the vehicle, two of them in the driver's cabin; that contrary to his specific instructions he carried two passengers in the driver's cabin; that because Okombo had carried two passengers in the driver's cabin, they might have

obstructed him in his driving as to have easily lost control; and that the seven passengers were all unauthorized to travel in the vehicle. The last of these forms the crux of the 1st defendant's defence.

The Commercial Engineer, Coast Area, was unamused by the accident report. He immediately addressed a confidential memo to the Personnel Officer, Coast, recommending the immediate termination of Okombo's employment with the 1st defendant. This was done by a letter dated 13th January, 1986, which, in pertinent part, read as follows:

> "Following your involvement in an accident with a company vehicle along Wundanyi/Mwatate Road, in which you had given a lift to seven (7) un-authorised passengers, it has been decided that your services with the company should be terminated with effect from 31st January, 1986."

While all these were going on this suit had not been filed. By 3rd February, 1986, when it was filed Okombo had ceased to be an employee of the 1st defendant.

Lord Justice Denning (as he then was) summed up the liability of an owner of a motor vehicle for the negligence of his driver thus:

> "It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is with the owner's consent, driving the car on the owner's business or for the owner's purposes" *OrMr.od v Crossvile Motor Services* [1953] 2 All ER 753 at p. 754.

Lord Scarman LJ in *Rose v Plenty & Another* [1976] 1 All ER 97, put it differently but the message is basically the same. This is what he said at p.103.

> "But Basically, as I understand it, the employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion should be liable if the motion that he has originated lead to damages to another."

So the first and paramount consideration in cases of this nature is to determine what the owner's driver was employed to do when he committed the tort, in this case the accident in which the plaintiff was injured. The second is whether the tort was committed in the course of that employment.

Okombo, was not employed as a driver. He was assigned the duties of attending to customer's complaints and checking whether their electrical installations were operating effectively. He was provided with a car to facilitate his easy and fast movement in the discharge of that duty. So that when the accident occurred he could be said to have been driving his official vehicle in the course of his employment. Having travelled earlier to Wundanyi, he was expected to return to Voi after finishing his day's round. That is what he was precisely doing when the accident happened. But he had lifted the plaintiff and six other people on his way back. Was he also employed to carry those, among other, passengers? Mr. Juma for the plaintiff submitted in essence that that was not the question to ask, but rather whether or not Okombo had authority to permit the plaintiff into the accident vehicle. Mr. Nanji, appeared to agree, and called evidence to demonstrate Okombo had been specifically prohibited to carry any passengers other than employees of the 1st defendant.

Diplock LJ. did not seem to favour that type of approach. In *Ilkiw v Samuels* [1963] 2 All ER 879 at p 889 he proposed the following approach, which I agree with entirely:

> "....the matter must be looked at broadly, not dissecting the servant's task into its compartment activities –such as driving, loading, sheeting and the like – by asking: What was the job on which he was engaged for his employer? And answering that question as a jury would."

It was not part of Okombo's employment to carry passengers in the accident vehicle. He could only carry those people who were in the employment of the 1st defendant. The lifting of the plaintiff was unauthorized by the 1st defendant. Evidence was led to show he had been specifically prohibited from lifting persons other than employees of the company which the plaintiff was not.

It was urged on behalf on the plaintiff that Okombo had the authority to permit the plaintiff to travel on board the accident vehicle. Okombo could permit anyone he pleased onto the vehicle, but certainly not on the basis of authority from the 1st defendant. He was not allowed to lift non employees of the 1st defendant. Evidence was led to that effect and that was a breach of his contract of employment with the 1st defendant. He was sacked for that. That was because the lifting of the plaintiff was not for the purposes of his employer, the 1st defendant. It was for his own purposes. The situation in this case is not the same as was in the case of *Rose v Plenty and Another* (*Supra*). In that case a milkman employed to go round on a milkfloat delivering milk to his employer's customers, collecting empty bottles and obtaining payment for the milk, invited a boy aged 13, to assist him with the milk rounds in return for payment.

This was contrary to specific prohibition not to carry passengers and not to employ the assistance of any other person. Whilst riding on the milkfloat, the boy was injured when the milkman drove the float negligently. The court of Appeal held by a majority that the instructions affected the milkman's mode of conduct within the scope of his employment and did not limit or define the scope of the employment. Denning M.R. refered with approval the words of Martin B in the case of *Limpus v London General Ominibus Co* (1862) 1 H & C 526, in which he had directed the jury that, if the defendant's driver in that case acted for purposes of his employer, the defendants were liable; but if it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible.

In that case the drivers of Omnibuses were furnished with a card to say that they "must not on any account race with or obstruct another Ominibus...." Nevertheless one of the defendants" Omnibuses did obstruct a rival ominibus and thereby caused an accident in which the plaintiff's horses were injured. The jury found for the plaintiff.

In the instant case Okombo was prohibited from carrying "unauthorized persons." There was no indication who was supposed to give the authority. Judging from the evidence before me it must have been the area commercial engineer. He is the one who had assigned the accident vehicle to Okombo. Even assuming, as Mr. Juma urged, That Okombo could validly authorize persons other than employees of the 1st defendant, his actions could only commit the 1st defendant if the persons lifted were so lifted for the purposes of the 1st defendant, not those of his own. As was stated in the case of *Twime v Beans Express Ltd*. [1946] 1 All ER 202, an employer cannot be held liable for injuries sustained by persons lifted by its driver unless their presence in the vehicle were reasonably forseable or their injuries occurred in the course of the driver's employment.

The situation in this case is analogous to that in *Conway v George Wimply & Co Ltd* [1951] 1 All ER 363. In the case, a lorry driver, employed by a firm of contractors engaged on building work at an aerodrome, was under strict orders to carry employees of the company only to the place of their work on the site. The driver gave a lift to a workman of another company, engaged in sub-contract work on the aerodrome, across the aerodrome.

In dismounting from the lorry the workman was injured. It was held that the lorry driver was acting outside the scope of his employment in carrying the workman and had no authority to do so. The workman was held to be a trespasser. The plaintiff was carried in the accident vehicle contrary to a prohibition not to carry passengers other than company employees. She was also not carried for the purposes of the 1st defendant. In fact in the instant case the plaintiff knew the accident vehicle was not ordinarily used in carrying people for hire or reward. Yet she boarded it. The vehicle had the colours of the 1st defendant which the plaintiff was aware of. She knew it was assigned to Okombo for use in the discharge of duties assigned to him or the defendant. By accepting or requesting to be carried in the accident vehicle she knew she was taking a risk.

A similar situation as this case arose in *Kesi v Sedya* [1973] EA 251. (U). In the case a lorry driver gave a

lift to the plaintiff contrary to express instructions not to carry passengers. His lorry was involved in an accident in which it overturned injuring the plaintiff. It was held that the driver was acting outside the scope of his employment. Consequently the defendant, as owner of the lorry, was not liable for the consequences of the driver's unauthorized actions.

The case Mr. Juma cited to me of *Mwona Ndoo t/a Ngomeni Bus Service v Kakuzi Ltd* Civil Appeal No 17 of 1982, is distinguishable on its own facts. In that case a pic-up driven by the respondent's employee collided with the appellant's bus along the Garissa/Thika road on a Sunday evening. He was employed as a field assistant in the Horticultural section and was on duty that night on the respondent's farm. His duties encompassed checking on the irrigation and watching for any outbreak of fire on the nearby Kakuzi Sisal Estate. A vehicle was provided for his work on the farm and nowhere else. It was not to be for his own purposes without permission, save to take him to his house on the Horticultural section if he worked late. It was held, by a majority of the court, that the driver was acting within the scope of his employment when his vehicle collided with the appellant's bus out of the estate. The employer was held liable merely because the evidence was indeterminate as to whether or not the employee needed to use the Thika/Garisa road to reach the Sisal Estate from the Horticultural Estate. Also that his driving of the vehicle outside the Horticultural Estate was merely a disobedience affecting the limits of his permitted area of driving but was within his employment. In that case the employee had authority to drive the accident pick-up. The accident happened while he was driving that vehicle. He did not give a lift to any person who was injured as a result of that accident. In this case if Okombo had merely collided with another vehicle or knocked down a pedestrian or damaged or injured another's property in the course of driving the vehicle on the material date the 1st defendant would have definitely been liable.

In this instant case the employee was prohibited from carrying passengers other than of a particular class the employees of the 1st defendant. It was not within the scope of his employment to invite non-employees of the 1st defendant onto the vehicle or to permit them to be carried in it.

Mr. Juma also submitted that he 1st defendant was aware Okombo was carrying unauthorized passengers and therefore owed a duty of care to them. With due respect to learned counsel, correspondence was tendered in evidence to show the 1st defendant did not take it kindly when it received information that Okombo was lifting non employees of the company. It warned Okombo through the area commercial engineer not to do so again. A similar issue arose in the case of *Conway v Geroge Wimply & Co Ltd* (*Supra*) Seller J, resolved it as follows:

> "The argument was that the defendants ought to have known what was happening and that the plaintiff and others like him would use the lorries, and, therefore, they owed a duty to such person as those who might reasonably be anticipated by them to be likely to be injured by the negligent driving of their servant: *May (or Bourhill v Young* /1942/2 All ER 396. Such considerations are relevant in considering the duty and obligations of the driver of the vehicle, but, in my view, they are not relevant in considering the responsibility of the defendants. The defendants were clearly under no duty to provide free rides for other contractors' servants or anyone else who happened to be crossing the aerodrome."

I adopt those remarks in the instant case. The 1st defendant could not be expected to owe a duty to all Kenyas, because they have many vehicles scattered all over the country and who are likely to be lifted if their respective drivers are minded to do so. That will be stretching the 1st defendant's duty too far, more particularly when it has specifically prohibited its drivers from carrying people not employed by it.

It is also true to say that absence of a notice on the dashboard of the accident vehicle to the effect that unauthorized persons were not permitted in it, if Okombo's act of lifting the plaintiff fell outside the scope of his employment, will not of itself without more bring within the scope of Okombo's employment the act of lifting the plaintiff.

To my mind Okombo lacked the authority to permit the plaintiff into the accident vehicle. Giving her a lift was not even incidental or connected to his sphere of employment or acts done in pursuance of his employment. In the circumstances it is my judgment that the 1st defendant is not liable to the plaintiff for

the injuries she sustained on the 5th November, 1985, accident. Her suit against it fails and is dismissed with costs to be taxed if not agreed upon.

There is interlocutory judgment on record in favour of the plaintiff against Okombo. I consider it a proper exercise of my judicial jurisdiction to assess damages due and payable to the plaintiff from the defendant. The plaintiff had "two small lacerated wounds and had contusion of chest wall and sprain of lumbo-sacral spine" which have healed. They left some scars which to my observation were not too bad. At the time of her examination on 5th December, 1986, she was still experiencing occasional pain in the chest. The doctor also noted the existence of chronic Lumbo Sacral sprain which was a nuisance to the plaintiff at the time of examination, particularly on movements. It was his professional view that the pain would subside with physiotherapy exercises and short-wave diathermy heat treatment, which the plaintiff did not avail herself to. The explanation which could possibly be true, was that she could not and cannot still afford it. At the time of trial she complained of frequent headachaes and backaches. Headaches were however absent in the doctor's report.

For the foregoing conditions Mr. Juma recommended for guidance two cases: (1) *Walter Allen & 2 others v Karen Ostensson & Another*, Civil Case No NAI HCCC No 1810 of 1978, in which Muli, J awarded Kshs 50,000/= for a whiplass injury and an internally weak spine; (2) *Firozali Noor Mohamed Lalji v Elias Kapombe Toka & Another*, Civil Appeal No 46 of 1980 (C.A – Mombasa). In the case a figure of Kshs 50,000/= was awarded for a back injury which caused weakness and curvature of the spine. There was a likelihood of osteoarthrites setting in. These cases do not provide a good basis for the assessment of what would be a good measure of damages in the instant case. It is in evidence that the plaintiff was not admitted in hospital. She was merely treated and discharged at Weso hospital to attend later at Voi District hospital as an out-patient which is what she did. I could not find a nearer authority to those cited to me by Mr. Juma. I will therefore, do my best to assess what in the circumstances of the case will be a reasonable award.

Apart from the back injury the plaintiff had a chest injury; had lacerations and abrasions on the forehead and the scapular region. All those taken together entitle the plaintiff to a figure of damages, and which I think is reasonable in the circumstances, of Kshs 60,000/= in general damages. In arriving at that figure I have taken into account inflationary trends, and the visible scars which are on her forehead and which are likely to remain there permanently. Accordingly I will give judgment to the plaintiff against the 2nd defendant in the sum of Kshs 60,000/= general damages for pain and suffering, and confirm the judgment for special damages in the sum of Kshs 2,100/=, plus interest and costs on the aggregate figure from the date of the suit.

Dated and delivered at Mombasa this 18th day of **March , 1988**

S.E.O BOSIRE

JUDGE