IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller JA, Chesoni & Nyarangi Ag JJA)

CIVIL APPEAL NO. 50 OF 1983

BETWEEN

NDOO T/A NGOMENI BUS SERVICE.....APPELLANT

AND

KAKUZI LTD.....RESPONDENT

(Appeal from the High Court at Nairobi, Hancox J)

JUDGMENT

On Sunday, August 6, 1972, at about 9.30 pm a motor vehicle registration number KMK 48, belonging to the respondent ("the employer") and driven by Henry Ngugi Karuri ("the employee"), who was employed by the respondent as a Horticultural Field Assistant, collided with the appellant's motor bus registration number KMA 995, along the Garissa/Thika Road. The appellant filed an action against the respondent and the driver jointly and severally, for Kshs 26,916/60, being the cost of repairs, interest on the said sum and costs of the suit were also prayed for. The respondent filed a defence in which it admitted being the owner of motor vehicle KMK 48, but denied that Henry was acting as its servant or agent in the course of his employment, and, consequently, it also denied the negligence alleged in the plaint.

The High Court found that when the accident occurred, Henry was not at the time acting within the scope of his employment and hence dismissed the claim of the appellant with costs. The appellant appealed on the following two grounds:

"(1) Having found that the employee of the respondent was on duty at the material time, the learned judge erred in law in finding that his (the said employee's) act in driving the respondent's vehicle was not within the scope of his employment, for the following reasons:

> (a) No evidence was adduced by the respondent to the effect that it's employee could not have, whilst, say, going for his dinner, come on to the main road.
>
> (b) There was no evidence that the employee was aware of any prohibition to drive as alleged;
>
> (c) The employee was not called to give evidence, the onus of proof in such cases being always on the employer;

(2) The learned judge should have, on the evidence, come to the conclusion that the employee was acting

within the scope of his employment."

The only issue is, therefore, whether at the time the appellant's and respondent's motor vehicles collided, the respondent's employee was acting in the course of his employment, as to cause the respondent to be liable for his (driver's) acts.

This is a suit of vicarious liability and in *Launchburry v Morgans* [1971] 2 QB 245 at p 253 Lord Denning MR said, the phrase vicarious liability means:

"that one person takes the place of another so far as liability is concerned."

Though the Court of Appeal decision in that case was reversed by the House of Lords [1973] AC 127, the meaning of that phrase is, in my opinion, still correct. In *Broom v Morgan* [1953] 1 QB 597, it was suggested that:

"the master's liability for the negligence of his servant is not a vicarious liability but a liability of the master himself owing to his failure to have seen that his work was properly and carefully done"

so that, when a master is held liable for the negligence of his servant in driving a motor vehicle, "he is himself under a duty to see that care is exercised in driving of the motor vehicle on his business." Of course, this does not mean that a master, subject to cases of dangerous things and chattels, owes a personal duty to third parties. As said by Lord Pearce in *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 at p 685, the doctrine of vicarious liability has not grown from any very clear, logical or legal principle, but from social convenience and rough justice. I find Lord Scarman's words, in *Rose v Plenty* [1976] 1 WLR 141 at page 147, quite persuasive as to the basis on which an employer is held liable for his employee's tort. His Lordship said:

"the employer (as he understood it) 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 <u>because it is a case in which the employer, having put matters into motion, should be liable, if the motion that he has originated leads to damage to another</u>" (underlining is mine).

What I have outlined above is, in total, the basis of liability. However, as Lord Hodson correctly put it in *Broom v Morgan* supra at p 612, whatever the basis, a master is liable vicariously for the negligent act of the servant done in the course of his employment. Thus, a master is not liable for negligence committed outside the scope of his employment.

"In determining whether or not a servant's wrongful act is done in the course of his employment, it is necessary that a broad view of all the surrounding circumstances should be taken as a whole and not restricted to the particular act which causes damage. There is no simple test which can be applied to cover every set of circumstances, so that, it remains essentially a question of fact for decision in each case"

Charlesworth on Negligence, 6th Edition paragraph 89.

Lord Diplock said, in *Ilkiw v Samuels*, [1963] 1 WLR 991 at page 1004:

"the matter must be looked at broadly not dissecting the servant's task into its component activities – such as driving, loading, sheeting and the like – by asking: what was the job on which he was engaged for his employer?"

I accept what is stated at paragraph 466 of *Salmond on the Law of Torts*, 17th edition that:

"A master is not responsible for the negligence or other wrongful act of his servant simply because it is committed at the time when the servant is engaged on his master's business. It must be committed in the course of that business, so as to form a part of it, and not be merely coincident in time with it."

It is, however, essential to remember that the servant's conduct can be within the scope of his employment only if the act is done during his authorized period of service or a period which is not unreasonably disconnected from the authorized period: *The Law of Torts*, by Street – 3rd edition page 440. In *Joel v Morrison*, (1834) 6C & P 501 at p 503 Parke B, said:

"If he (servant) 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."

Whether a detour by the servant is a "frolic of his own", is a question of fact and a matter of degree. In the present case, it appears to me, that the job on which Henry was engaged for his employers on the material night was to look after the irrigation on the horticultural section and watch for fire on the nearby sisal estate of the respondent employer. At least, that is what Rudolph Robert Graham Adrian, who was the manager of the Horticultural Section of Kakuzi Ltd, told the trial court. Henry was authorized to drive the respondent's motor vehicle for general estate work, but he was not allowed to use the vehicle for his own purpose. The position where a vehicle is entrusted to a servant to be driven or used is as stated at para 91 of *Charlesworth on Negligence* (*ibid*); and it is as follows:

"When a vehicle belonging to the master is entrusted to the servant to be driven or used in any other way, the master is liable if the servant be negligent while using the vehicle either wholly or partly on the master's business or in the latter's interest but not if he be negligent while using it for any other purposes, even though the servant has the master's permission to use it for those purposes."

In *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 WLR 705 at 707 Diplock J (as he then was) said:

"I think that the true test can be expressed in these words: was the (servant) doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent ….. or even fraudulent ….. or contrary to express orders … the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence or permission."

But once it is conceded that:

(a) the servant was doing something in his working hours,

(b) on his employer's premises and

(c) that his act had a close connection with the work which he was employed to do,

then the onus (in the sense of evidential burden) shifts to the employer to show that the act was one for which he was not responsible: *Salmond on the Law of Torts* (*ibid*) para 465. In *Laycock v Grayson* [1939] 55 TLR 698, the court said that it is presumed that the vehicle is being used for his master's purposes if the servant has authority to use it at all.

The accident occurred during Henry's working hours. It occurred on a highway so it was not on the master's premises, but he was to look after irrigation, on one section (horticultural) and watch for fire on another (sisal) and though these two sections were said to be nearby, the court was not told how he got to the sisal section from the horticultural section, and that is, whether he did not have to use the Thika/Garissa Road to do so. The employer did not rebut the presumption that the vehicle was being used for its (employer's) purposes since Henry had authority to use it. Mr Adriani said the employee was not supposed to use the vehicle outside the estate. Even accepting that as express prohibition, using the vehicle along Thika/Garissa Road was, at worst, disobedience of the employer's command while doing that which he (the servant) was employed to do, for he was employed to look after irrigation and check on fire on the employer's estates and to use the motor vehicle in the course of doing so. That disobedience did not absolve the employer from liability, for the employee's negligence. It was not established that the employee was on a frolic of his own, for Mr Adriani said he did not know what Henry was doing on the

Thika/Garissa Road. So, in the absence of evidence that he was doing his own business, the reasonable presumption is that he was on his master's business. As stated by Lord Salmon in *Launchbury v Morgans* [1973]AC 127 at p 148, the law at present makes the owner of a motor vehicle vicariously responsible for the negligence of the person driving it if, but only if, that person is (a) his servant and driving the vehicle in the course of his employment or (b) his authorized agent driving it for and on his behalf. Mere permission to drive is not enough to create vicarious responsibility for negligence. On the facts of the present case, Henry was the respondent's servant and he was driving the respondent's vehicle in the course of his employment though he might have made a detour, which was not in any way so established, while performing his master's business.

For the above reasons, I would allow the appeal, set aside the High Court judgment and give judgment for the appellant/plaintiff for agreed damages and interest thereon as claimed in the plaint. I would award costs of the appeal and in the High Court to the appellant.

Nyarangi Ag JA. This appeal from the judgment and decree of the High Court at Nairobi, (Hancox J as he then was) arises out of an accident on the Garissa/Thika road, which took place on or about August 6, 1972, when the appellant's motor vehicle registration mark KMA 995, was involved in a collision with the respondent's motor vehicle registration mark KMK 48.

The appellant claimed, by his plaint, that the second respondent (who was served but failed to enter appearance as a result of which judgment was entered against him as prayed on the application of the advocate for the plaintiff) was acting as an employee and/or servant and/or agent of the first defendant, in the course of his employment with the first defendant and that the collision was caused by the negligence of the second defendant in the driving, managing and controlling of the vehicle registration mark KMK 48. The particulars of the second defendant's alleged negligence were given and so were the particulars of special damage. In its defence, the first defendant admitted that at the material time, it was the owner of the motor vehicle registration mark KMK 48, but denied that the second defendant was acting as its servant or agent in the course of his employment. The negligence of the second defendant was admitted, subject to the liability of the first defendant and damages were conceded.

Evidence *de bene esse* was given by Adriani, the manager of the Horticultural section of the Kakuzi Ltd, the respondent. Adriani said the second defendant worked under him and that the respondent owned a motor vehicle KMK 48 which was used for general estate work by the second defendant, and another within an area of about 50,000 acres. According to Adriani, the second defendant was not allowed to use the vehicle for his own purpose and that on August 6, 1972, at night, the second defendant was not using the vehicle on the respondent's business.

The second defendant was supposed to be on duty on the Horticultural Section that night, to attend to the irrigation and to watch out for any fire on a nearby sisal estate. The second defendant had access to the keys to the vehicle and Adriani would permit the second defendant to use the vehicle to go to his house within the estate. Cross-examined, Adriani said Kakuzi Estate is a very large estate and that the Horticultural Section is separate from the respondent but adjoins it. It was not the duty of the second defendant to visit other farms although it was not unusual for the second defendant to drive the vehicle on the estate on the respondent's business. Adriani added:

> "I have no idea why he was on the particular road that night."

On all that, Mr Shah submitted that there was no evidence that there was no road between the Horticultural Section and the sisal estate of the respondent nor that the employees had to pass a road to reach their houses.

Mr Shah argued that there was no express prohibition as regards the use of the respondent's vehicle and that the respondent, as employer, could not discharge its burden of proof merely by saying that the second defendant was not on duty. The employer ought to have called the second defendant, who is the only person who knew what he was doing. The issue disclosed by Adriani's evidence was whether the second defendant was at the material time acting in the course of his employment or was on a frolic of his own.

There was evidence that the second defendant was driving his employer's motor vehicle and that he had general authority to use the vehicle in the respondent's business. The presumption to be discharged by the employer on the balance of probabilities was that the second defendant was not acting in the course of his employment at the time he was involved in the motor accident. That is the legal position. It is immaterial whether the acts of the second defendant are negligent or deliberate or vicious or even criminal *Muwonge v Attorney-General of Uganda* [1967] EA page 17. That decision is in line with an extract from *Salmond on Torts*, 13th edition at page 133 which reads:

"The master is exempt only when the servant was exclusively on his own business."

Nor would the employer be absolved from liability even if it was proved that the vehicle was being used to benefit the second defendant and the employer: *Jivandas & Co Ltd v Nakadama* [1972] EA page 489.

According to the evidence of Adriani, the second defendant was expected to do particular work within a particular place. But if while carrying out his duties the second defendant did some wrongful or negligent acts, the employer would be liable even if it were shown that the wrongful or negligent acts were the exact opposite of what the second defendant was required to do: *McKean v Raynor Bros Ltd* [1942] 2 ALL ER 650. See also *Canadian Pacific Railway Co v Lockhart* [1942] 2 ALL ER 465. It is not open to the respondent to deny liability by saying that the second defendant was not acting in the course of his employment. Adriani said he did not know what the second defendant was doing at the material time. The second defendant could have been anywhere within the large estate of the respondent away from the horticultural section and not caring about the fire on the nearby sisal estate. If, notwithstanding failure to carry out the employer's instructions, the second defendant was involved in the motor accident in a negligent manner, the employer would be liable.

There was no evidence on the geography of the material area. No sketch plans or maps of the *locus in quo* were produced. In the absence of that, the employer could not escape liability merely by asserting that the second defendant ought not to have been on the road at the material time. The significant factor is that the second defendant was driving his employer's vehicle, having not been specifically prohibited. Only the

second defendant was in a better position to say if he was doing his employer's work at the time he was involved in the collision, or if he was exclusively doing his own work ie on a frolic of his own. It is risky to lay down a general test as to when it can be held that a person is acting in the course of his master's employment. Every case would turn on its own facts. Mr Couldrey would, no doubt, agree with that.

The respondent's case here is that the second defendant was involved in a collision at the time he was doing that which he had been forbidden to do by his master. But even if the respondent were to prove that by evidence, liability would still attach, because the second defendant could well have been carrying out what he was employed to do, in a different manner: *Namwandu v Attorney-General* [1972] EA page 108 at p109. A similar view was expressed in the case of *Kay v ITW Ltd* [1963] ALL ER 22.

Mr Couldrey relied to a large extent on the decision in *Sanderson v Collins* [1904] 1 KBD 628, and submitted that the respondent had dislodged the burden of proof placed on him. With great respect to Mr Couldrey, the decision in that case turned entirely on the fact that the coachmen of the defendant, without the defendant's knowledge, took the plaintiff's carriage out <u>for his own purpose</u> (the underlining is mine) and so the defendant was not liable for his coachmen's injury.

Apply the decided cases and the general principles of the law and the result is that the respondent did not discharge as required, the burden cast on it. I would allow the appeal, set aside the judgment of the High Court and substitute it by a judgment for the appellant for agreed damages and interest thereon as claimed in the plant. I would award the costs of the appeal to the appellant.

Kneller JA (Dissenting). On Sunday, August 6, 1972, at 9 pm on the public road between Thika and Garissa, an omnibus KMA 995, driven by Kituo, was involved in a collision with a pick-up KMK 48, driven by Karuri (the second defendant in the action). The bus was owned by Ndoo, trading as Ngomeni Bus Service, the plaintiff/appellant, from Kitui. The pick-up was owned by Kakuzi, the

defendant/respondent, a limited liability company with adjoining farms totalling 50,000 acres. At the relevant time, Karuri was employed as a field assistant for one of Kakuzi's farms known as the Horticultural Section. Ndoo alleged in his plaint of June 12, 1975 (about three years after the accident), that the collision was caused by the negligence of Karuri in driving, managing and controlling the pick-up. The particulars included driving it on the highway at night without its lights on, erratically, in a zig-zag manner and causing it to veer over its off-side of its road into that part of the road over which the bus was correctly travelling, all at 9.00 pm on a Sunday. Ndoo incurred a loss of Kshs 26,916/60 in repairing the bus, which he claimed together with costs and interest from Karuri who though served, did not enter appearance and against whom judgment in default was entered on May 14, 1977.

Karuri in turn filed suit against Ndoo and his employee, Kituo, the bus driver, for damages arising out of Kituo's negligence but later, Karuri's advocate withdrew it for reasons which were not vouchsafed to this court. Ndoo in his same claim, which is the basis of this appeal, alleged Kakuzi was also liable because its servant Karuri was driving its pick-up in the course of his employment. Kakuzi, in its written statement of defence of July 18, 1975, denied Karuri was negligent and, if he were, that he was acting within the course of his employment.

On May 25, 1976, by consent of the appellant and respondent, evidence was recorded *de bene esse* from Rudolph Robert Graham Adriani for the respondent. At the trial in the High Court (before Hancox J, as he then was) in Nairobi on May 16, 1981, Kakuzi admitted Karuri had been negligent and the quantum of damages, so the only issue was whether or not the second defendant was acting in the course of his employment or was he engaged on a frolic of his own as in *Storey v Ashton* (LR 4 QB 476), when the collision occurred.

After hearing the submissions of the advocates, the learned judge held that Kakuzi had shown that on the balance of probabilities, Karuri was not acting within the scope of his employment at the time. He was driving the pick-up on that public road that night and not on the estate, which is the only area in which he was authorized to drive it. There was no evidence he had to drive it on the highway to get from one farm to another. He was on a frolic of his own. He gave judgment for Kakuzi and dismissed Ndoo's claim with costs. Ndoo has appealed to this court to set aside the judgment of the High Court and substitute one for him for the agreed damages and interest together with costs on both sums and the costs below and in the appeal. The grounds are that the learned judge erred in law in not reaching the conclusion that on the evidence, the employee was acting within the scope of his employment because the employee was on duty at the material time, he was not called to testify, there was no evidence that he was not on the highway during a minor detour or prohibited by Kakuzi from driving on it. Before turning to the submissions on the law, it is, as usual, important to set out the facts before the judge. They were in the evidence of Adriani whom he believed and whose credibility has not been challenged in the appeal.

Adriani was the overall Administrative General Manager and the manager of the Horticultural Section of Kakuzi estates in 1972. They are, in all, about 50,000 acres in area and beyond Thika, near the junction of the roads to Ol Donyo Sabuk and Muranga. Karuri was one of the field assistants for the horticultural farm. Each had the use of Kakuzi's pickup, KMK 48 for his work on the farm and nowhere else and neither was allowed to use it for his own purpose anywhere, without permission, save to take him to his house on the horticultural farm, if he was on duty late but otherwise, it was parked in an enclosed yard in the horticultural farm. The farm was being irrigated every night in August, 1972, and Karuri was on duty that Sunday and he was supposed to check on the irrigation and watch out for any outbreak of a fire on the nearby Kakuzi Sisal Estate. It was not part of his duty to visit that sisal estate or any other part of the Kakuzi estates. Adriani said in examination-in-chief and in crossexamination that Karuri was not on Kakuzi's business in the pick-up on Sunday August 6, 1972 at 9 pm on the Thika-Garissa road when the accident happened.

Turning to some relevant law, and considering it in chronological order, I begin with the Queens's Bench Division decision in *Coupe Co v Maddick* [1891] 2 QB 413, in which Maddick, a surgeon, who hired a carriage and horse from Coupe Co in Bloomsbury for a year, was held liable as bailee of them, for the injury to both, which occurred when they were run into by a cab 1 1/2 miles from the stable 200 yards away from Maddick's house. Instead of driving both to the stable, the coachman picked up a friend and

drove 1 1/2 miles in the opposite direction. On the way back, about 3/4 of a mile from the stable, the accident happened. The coachman was drunk at the time. The County Court judge held the coachman was not acting in the course of his employment and Cave and Charles JJ, reversed him.

The next one is a Court of Appeal one in *Sanderson v Collins* [1904] 1 KB 628. The facts were these: Collins owned a carriage which he entrusted to Sanderson to repair, and Sanderson lent one of his to Collins to use, while the latter's was being repaired. This was a bailment for mutual consideration and Collins, as bailee, had to use reasonable or ordinary care while it was in his custody. He was driven about in it by the coachman from three to five in the afternoon, on June 30, 1902, and it was then the duty of the coachman to lock it in Collins's coach-house. Instead, the coachman took some friends with him in it, to see the illuminations in Newscastle, they all became drunk and Sanderson's carriage was damaged in a collision with a tram-car so Sanderson sued Collins claiming the costs of repairing it. The County Court judge decided that at the time of the accident, the coachman was not acting within the scope of his employment. This disconnected the act of the servant from his employer, which relieved Collins of liability. The Divisional Court (Lord Alverston CJ, Wills J and Chanell J) reversed him upon the authority of *Coupe Co v Maddick* (*ibid*), but the Court of Appeal distinguished *Coupe Co v Maddick*. Maddick's coachman had authority to drive the coach and horse but instead of doing so in the direction ordered, he did it another, whereas Collins's coachman had no authority to drive Sanderson's coach in any direction. Those two coach and horse authorities are ones in which the plaintiff is the bailor and the defendant master the bailee and the issue was whether the latter was liable for his servant's negligence.

The next is nothing to do with bailment. The plaintiff owned unfenced land and the defendant was a contractor who collected and removed rubbish. He employed 40 carters to do this and they were told to deposit the rubbish on his dump and nowhere else and if they tipped it elsewhere, they would be dismissed. Some of the carters off-loaded it on the plaintiff's land because it was nearer than the defendant's dump, and they were paid for every journey they made. They disregarded his orders, for their own convenience and profit. Neville J posed these questions: was the true character of the acts of the carters, the servants of the defendant, that they were their own acts, and in order to effect a purpose of their own? Or, were they acts done in the course of their employment, obeying the defendant's instructions? He answered these with 'yes' to the first, and 'no' the second. The Court of Appeal (Swinfen-Eady MR, Duke LJ and Eve J) upheld him. The carters did this deliberately of their own choice and to effect a purpose of their own, and in opposition to the express instructions of their employer, who could not therefore be liable for the results. *Joseph Rand Limited v Craig* [1919] Ch 1, 6, 9.

The Privy Council in *Goh Choon Sing v Lee Kim Soo* [1925] 550, 554 summarised other authorities:

" ….. under one of three heads –

(1) The servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head

(2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) come cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorized, had he known of it."

The appellant was held liable because his manager was authorized to burn weeds which he did and through the negligence of the manager, a fire spread to the respondent's land and destroyed his pottery works and this was so even though the fire was kindled not on the appellant's land, but on that of a third party, which was a trespass.

In *Laycock v Grayson & Worton* [1939] 55 TLR 698 Asquith J (as he then was) found that Mrs Laycock established, or it was admitted, first, that Worton, a salesman, was driving a car belonging to his

employer, Grayson, a garage owner and, secondly, that Worton had Grayson's authority to drive that car (on a public road) for some purposes, at any rate. Asquith J held that this raised a presumption that Worton was acting within the scope of his employment at the material time, and the onus shifted to Grayton to prove that Worton was acting outside it. Hancox J followed this, and in my respectful view, he was right to do so.

Asquith J also had this to say, which is pertinent to part of this appeal:

"In a case of this sort, the facts as to the scope of the employment are often within the exclusive knowledge of the employer and his employee. The employee – that is the second defendant, was not called as a witness by the first defendant, and it is a fair assumption that, he would have been called if he had been prepared to testify, and could credibly have testified that he was in fact, exceeding the scope of his employment. Against this consideration there must, of course, be set the reluctance of an employee to make such an admission, but I do not think this goes for much, and I note that, the first defendant retained the second defendant in his employment."

The servant often does not give evidence in these cases: *Kay v ITW Ltd* [1976] 3 All ER 22, 24B. Kakuzi did not call Karuri, it is true, but tried to do so and could not do so, for reasons beyond its control. Kakuzi did not retain Karuri but dismissed him, so in that respect, there is no inference that can be drawn in favour of Ndoo, as Asquith J did, in favour of Mrs Laycock, that the servant was not exceeding the scope of his employment.

The next decade saw a further refinement of what act of a servant is within the course of his employment. It must be one of a class of acts which he is authorized to do. Thus, a handyman carpenter employed at West Toronto was required, in the course of his employment, to take a key to North Toronto. He used his own uninsured car and he injured a child. Twice his employer had told it's employees not to use their own vehicles for the company's work unless they were insured. This was held as a restriction on how the permitted acts were to be performed and a private arrangement between master and servant not affecting third parties. Had the servant been absolutely forbidden to drive a motor car in the course of his employment and told to stick to carpentry, it could be held that his driving of the motor car was outside his employment. *Canadian Pacific Railway v Lockhart* [1942] 2 ALL ER 464, 468 (PC). See, also *McKean v Raynor Brothers Ltd (Nottingham)* [1942] 2 All ER 650 (KBD) Hilbery J where the servant used his private car for the business purpose of the company and it was doubtful that his master would not have authorized him to do so, had he known of it.

Diplock J, however, in *Hilton v Thomas Burton Ltd* [1961] 1 All ER 74, 76 preferred a simple test: was the servant doing something he was employed to do?

"If so", he continued, "however improper the manner in which he was doing it, whether negligent as in *Century Insurance Co Ltd v Northern Ireland Transport Board* [1942] AC 509, or even fraudulent as in *Lloyd v Grace Smith & Co* [1912] AC 716 or contrary to express orders as in *Canadian Pacific Ry Co & Lockhart* [1940] AC 591 the master is liable. If however the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence, or permission."

The House of Lords did not advert to it in *Hamphill v Williams* [1966] 2 Lloyd's Rep 101 (maybe because it was an appeal from the Court of Session) but returned to the principles in *Goh Choon Singh v Lee Kim Soo* (*supra*) and *Canadian Pacific Railway Company v Lockhart* (*supra*). Lord Pearce, in his speech, pointed out that in the 'detour' cases, the dichotomy was between the new journey, unconnected with the master's business, and the detour for the servant's selfish purpose.

Newbold P of the former Court of Appeal for East Africa, in *Muwonge v Attorney-General of Uganda* [1967] EA 17, 18, set out the same test as Diplock J in *Hilton v Burton* (*supra*): were the negligent acts of the servant done in the course of his employment? If so, his master is liable even if the acts of the servant are negligent, deliberate, wanton or criminal. Goudie J did the same (to some extent) in the High Court of Uganda in *Nzarirehe v Kagubaire* [1968] EA 117, 120. Lord Wilberforce, delivering the opinion of the

Privy Council, in *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1981] 3 All ER 65, 69, 70 dealt with the proposition that so long as a servant is doing the acts of the same kind as those which it was within his authority to do, the master is liable and that he is not entitled to show that in fact the servant had no authority to do them and he said:

"This is an extreme proposition and carries the principle of vicarious liability further than it has been carried hitherto. It is necessary, first, to consider whether it is supported by authority. There is no doubt that the proposition contended for is contradicted, as a matter of principle, by that group of cases which is concerned with the use of motor vehicles. These are cases (1) where a servant has, without authority, permitted another person to drive the master's vehicle, (ii) where a servant has, without authority, invited another person on the vehicle, who suffers injury, (iii) where a servant has embarked on an unauthorized detour or as lawyers like to call it, a 'frolic of his own'. These cases have given rise to a number of fine distinctions, the courts in some cases struggling to find liability, in others to avoid it, which it is not profitable here to examine. It remains to be said that whatever exceptions or qualifications may be introduced, the underlying principle remains that a servant, even while performing acts of the class which he was authorized, or employed to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts."

Finally, for there is no profit in dealing with all of the authorities cited, there is the recent decision of this Court at Nakuru: *Tuitoek Cheserem and Alice Kimoi Ngetich v HZ Company Limited* Nakuru Civil Appeal 55 of 1981; in which it was held that Ondieki drove his employer's shoveller along the public highway from Nandi to Mogotio, colliding with seven vehicles and causing the death of two men on the way, was acting within the scope of his employment.

This, at first blush, surprising result was due to the evidence which revealed that Ondieki often drove it on that road between his employer's two quarries, his employer knew he did and he had never told him not to do so. Even so, it was very much a borderline case. So there is no conclusive test in this class of case. The general principle is:

"A master is not responsible for a wrongful act done by his servant, unless it is done in the course of his employment …… But a master is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorized, that they might be regarded as modes – although improper modes – of doing them. In other words, a master is responsible not merely for what he authorized his servant to do, but also for the way in which he does it ….. On the other hand, if the unauthorized and wrongful act of the servant is not so connected with the authorized act as to be mode of doing it, but is an independent act, the master is not responsible, for in such a case, the servant is not acting in the course of his employment, but has gone outside it."

Salmond on Torts (14th) edition 658. This was quoted with approval in *Canadian Pacific Ry Co v Lockhart* [1942] AC 591, 599. Then the facts of each case must be viewed in the light of that principle and, as usual, it is right to apply some degree of common sense to all this: Evershed MR in *London CC v Cattermoles (Garages) Ltd* [1953] 2 All ER 582, 578 (CA).

Returning to this appeal, my view is that conclusive or not, in the end, the test propounded by Diplock J in *Hilton v Thomas Burton* (*supra*) is the right (and the easiest one) to apply:

"was the servant doing something he was employed to do"

and if the servant was driving his master's vehicle then the onus is on the employer to prove the servant was acting outside it. Asquith J, in *Laycock v Grayson & Worton* (*supra*). Ndoo had his judgment against Karuri, who did not appear and was not represented at the hearing, and the only question that remained was whether Ndoo was entitled to judgment against Kakuzi on the principle of *respondeat superior*. These, in my respectful view, are among the correct inferences to be drawn from the primary facts. Kakuzi did not put Karuri there on that road where the accident happened, to drive that pick-up for any purpose. It was not and probably could not be said that it was impossible for him to do his work for Kakuzi without driving it on the Thika-Garissa highway. Karuri was on an adventure of his own; a wholly

unauthorized jaunt and one not incidental to his employment. It was not something he was doing in his master's interest. Unfortunately, I find, I must dissent from the view of my brothers for I have to say I could not find Karuri was acting within the scope of his employment when he was off the estate, during his working hours, not keeping a look out for fires and not checking on the irrigation of the horticultural section. His misconduct, in my view, was gross and extreme and took his act outside the scope of his employment. What he was doing was not even incidental to the work he was employed to do. He was not doing something for the purpose of or in connection with his employer's business. *Kay v ITW Ltd* [1967] 3 All ER 22, 27B, G 29H (CA).

Kakuzi authorized Karuri to drive it's pick-up on its business or to his house only on its horticultural farm. Nowhere else, ever. And yet, Karuri took it out on to a public road (not even the nearby Thika-Muranga or Thika-Ol-Donyo Sabuk public highways) and he was not on Kakuzi's businesses. He broke the connection of service between himself and Kakuzi. Therefore, Kakuzi proved on the balance of probabilities Karuri was doing something with the pick-up he was not employed to do. It discharged the onus of proving Karuri was acting outside the scope of his employment. Returning to the grounds of appeal, I find, with respect, no merit in them. Karuri was shown not to be on a minor detour, but prohibited from driving it off that estate and absent from his duties, though he was not called by Kakuzi because he could not be traced.

This is not the view of the majority of this court, however, so the orders are those proposed by Chesoni Ag JA.

Dated and Delivered at Nairobi this 10th day of May 1984.

AG. A.A.KNELLER

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JUDGE OF APPEAL

AG. Z.R.CHESONI

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

I Certify that this is

a true copy of the original.

DEPUTY REGISTRAR