

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAPENGURIA.
CIVIL APPEAL NO. E006 OF 2025

ANTHONY PAPA OTIENG..... APPELLANT

- V E R S U S -

**AHMED KALMEY MUHUMED
RESPONDENT**

J U D G M E N T

By a plaint dated 15/7/2024, the Appellant (plaintiff) instituted a suit against the Respondent (Defendant) seeking the following,

- (1) General damages;**
- (2) Special damages of Kshs.84,700/=**
- (3) Future medical expenses of Kshs.150,000/=**
- (4) Costs of the suit and interest.**

After a full hearing, the trial court delivered its judgment on 24/7/2025 dismissing the appellant's case with costs to the Respondent.

The Appellant being dissatisfied with the said Judgment, preferred this appeal based on the following grounds;

- (1) That the trial magistrate erred by failing to hold the Respondent 100% liable in negligence;**
- (2) That the court erred by holding that the appellant was an unauthorized passenger;**
- (3) That the court erred in failing to evaluate, consider and determine all the issues raised in the pleadings especially as to who was in control of the vehicle;**
- (4) That the court erred in failing to find that the motor vehicle registration Number KDE 794F had been hired to a contractor, hence the driver was within the scope of the employment as he was transporting the contractor's goods at the time of the accident;**
- (5) That the court erred in assessing damages at Kshs.500,000/= as the same was too low compared to the injuries suffered and failed to factor in the rate of inflation.**

The appellant prays that this court do set aside the trial magistrates' decision and the appeal be allowed.

As the first appellate court, its duty is to re-evaluate and re-examine all the evidence tendered before the trial court and arrive at its own findings and conclusions. However, the court keeps in mind the fact that it neither heard nor saw the witnesses testify. The principle was espoused in **Selle -Vs- Motor Boat Co., Limited (1968) I EA 123** and **Abok James Odera T/a A.J. Odera & Associates -Vs- John Patrick Wachira & Company Advocates (2013) eKLR**.

The appellant's case.

The appellant's case was that he was travelling as a lawful passenger in motor vehicle Registration KDE 794F FAW Tipper along Makutano-Lodwar road when at Kamatira area, the driver, an agent negligently drove the said motor vehicle causing it to lose control, veer off the road and overturned as a result of which the appellant sustained grievous injuries. He blamed the accident on the negligence of the defendant, and his driver for inter alia; driving too fast; without due care for the plaintiff's safety or failing to apply brakes; As a result of the accident, he suffered a fractured left femur for which he received treatment.

The Appellant adopted his statement in evidence dated 15/7/2024. He testified as PW3

PW1 Dr. John Chirchir of Kapenguria County Referral Hospital produced the P3 form in respect of the appellant. He examined the appellant, filled the P3 form and found the appellant to have suffered a fractured femur and was referred to Moi Teaching and Referral Hospital for treatment.

PW2 Dr. Edwin Rono a Medical Officer at Moi Teaching and Referral Hospital Eldoret filled the discharge summary in respect of the appellant. He confirmed that the appellant underwent surgery of the femur at the Hospital and produced the invoice/receipt from the said facility of Kshs.78,150/=.

PW4 Dr. F. Sokobe examined the appellant on 8/7/2024 and found that he had fractured left femur. He prepared a medical report and charged Kshs.6000/= (Receipt).

PW5 PC Danson Mulani of Kapenguria police station issued a P3 form to the appellant who had been a passenger in motor vehicle KDE 794F, that was involved in a self-involving accident and the driver died.

Respondent's Case.

The Respondent Ahmed Muhummed testified as DW1. He deals in transport business, Fakah General Business Limited under brand of Ola Energy Company Limited. He adopted his written statement. In his statement of defence, he pleaded that the appellant was not a lawful passenger in the suit vehicle and the defendant company does not allow ferrying of passengers in the subject motor vehicle. He blamed the appellant inter alia for boarding the said vehicle without the consent of the owner or driver; that he boarded the vehicle knowing it was not a public service vehicle. DW1 denied all particulars of negligence attributed to him. He averred that the driver had signed an employment contract that he would not carry unauthorized passengers and that on both the passenger door and driver's door, there was a notice that no unauthorized passengers were allowed.

Appellant's submissions.

Reece Mwani, Counsel for the Appellant filed submissions on two issues, liability and quantum. Counsel submitted that in traffic accidents, the party who caused the accident or contributed to it must be identified and this can only be the Respondent or his driver as the appellant was only a passenger.

He relied on the decisions of **Viviane Anyango Onyango -Vs- Charity Wanjiku (2017) eKLR and West Sugar Company Limited -Vs- Lilian Auma** where courts held that a passenger cannot be held liable when a vehicle he is travelling in causes an accident; that the driver of KDE 794F was an employee of the defendant with the authority to drive the vehicle, and was in the course of his employment; that the Respondent claimed to have a notice on the doors of the vehicle to that effect **“Driver not allowed to carry any unauthorized persons;”**

The appellant (PW4) testified that he had been employed by a contractor to verify the goods on the lorry and DW1 confirmed that a contractor had indeed hired his lorry to transport construction materials from Eldoret to Lodwar; that the goods belonged to the contractor; that the appellant was employed by a contractor in Lodwar and he was therefore an authorized passenger.

It was also submitted that PW5 produced a police abstract confirming occurrence of the accident, the driver died while the appellant was injured; that it is the Respondent’s driver who lost control of the vehicle hence the Respondent was vicariously liable for the servant’s acts of omission. He relied

on two decisions of **Kenya Bus Services Limited -Vs- Dina Kawira Humphrey CA 295/200... (2003) eKLR** and **Kaburu Okole & Partners -V- Stella Karim Kobia (2012) eKLR**. In the latter case, it was held that vicarious liability arises when the tortious act is done in the cause of one's employment or authority.

Counsel urged the court to find that the respondent was 100% liable for the occurrence of the accident.

On quantum Counsel submitted that the appellant suffered a fractured femur as supported by the testimony of the Doctors PW

1,2, and 4. Relying on the decision of **Kenya Enterprises Limited -V- Muchiri CA 84/2017**, he urged that damages are supposed to be reasonable compensation for the injury and loss. He suggested an award of Kshs.1,700,000/= as general damages.

As regards special damages, Counsel urged that receipts had been produced in support of the claim of Kshs.84,700/=; that future medical expenses of Kshs.150,000/= were recommended in the medical report.

Respondent's submissions.

In the Respondent's submissions filed by **Katina Advocates**, the first and third grounds were merged together. They addressed the issue whether the appellant was an unauthorized passenger and whether the driver of the vehicle was acting within the scope of his employment. Counsel adopted the definition of **'unauthorized'** in the Black's Law Dictionary of who as to **"unauthorized passenger"** means, that is a passenger travelling in a vehicle without authority. He further submitted that the appellant pleaded that he was a lawful passenger in the suit vehicle and in cross examination, admitted that the vehicle did not have a yellow line like 'PSV' vehicle that carry passengers and admitted that the vehicle had a notice indicating that no unauthorized passengers were allowed to enter the vehicle, a fact which PW5 also confirmed in his testimony.

It was also submitted that the Respondent in his defence told the court that under the Kenya Transport Safety Act, only certain designated vehicles ferry passengers whereas the subject vehicle was not; that his driver had signed a contract in which he inter alia bound himself not to carry unauthorized

passengers (D.Exh.2); that the Respondent also denied that the appellant was his agent and that the goods being transported belonged to a contractor; that even if there was an extra seat in the lorry, no passenger was allowed and Counsel urged the court to accept the Respondent's version.

Lastly, it was submitted that the appellant adopted his statement in his evidence in Chief and that nowhere did he indicate that he was hired by the contractor of the vehicle and that assertion in his testimony was an afterthought.

Counsel relied on the decision of **Dominic Omondi Otieno - Vs- Transpares (K) Limited and another**, and **Tabitha Nduhi Kinyua -Vs- Francis Mutua Mbuvi (2007) eKLR**.

In ground 1 and 3, it was argued that the Learned Magistrate did not consider all issues raised in the pleadings and evidence in regard to who was in control of the vehicle and as a result, failed to find the Respondent 100% liable for negligence, that the Respondent had demonstrated on a balance of probabilities that the appellant was not his agent and ignored clear instructions on the motor vehicle that no unauthorized passengers were allowed; that the trial court therefore erred.

As regards ground 5, it was urged that since the appellant's case was dismissed the issue of costs had no basis.

Determination:

I have carefully perused the record of appeal, grounds of appeal, the evidence on record and written submissions by both the appellant and Respondent. The two issues that arise for determination are;

1. Liability;

2. Quantum.

Liability: -

This being a civil matter, the burden of proof on a balance of probabilities. The burden rested on the appellant to prove his case on a balance of probabilities.

The appellant's testimony was that he was a passenger in the motor vehicle KDE 794F FAW Tipper at the time it was in a self-involving accident on 5/7/2021. His testimony is corroborated by the testimony of PW5 who produced a police abstract that confirmed the occurrence of the accident whereby the driver died while the appellant sustained grievous injuries.

There is no doubt that the said vehicle was a commercial vehicle, a tipper for carrying goods. It was not a public service vehicle for carrying passengers. Though the appellant described himself as a lawful passenger, the Respondent's case is that he was an unauthorized passenger. Unfortunately, the driver perished in the accident and therefore there is no evidence as to how the Appellant got to be on the vehicle. The dead do not tell tales, If the appellant had been a lawful passenger in the said vehicle, then the case of **Viviane Anyango and West Kenya Sugar Co., Limited (Supra)** would apply. In Viviane case, the court said **"12, It is my very strong view, and supported in numerous court decisions, that a passenger cannot be held liable when a vehicle he is travelling in is involved in an accident"**.

In this case however, the Respondent pleaded that the appellant was an unauthorized passenger meaning that the passenger was travelling in the vehicle without due authority.

In his testimony, the Respondent admitted that indeed he had employed Hosea Kimutai as a driver of the subject vehicle. He produced the letter of employment dated 1/5/2024. Having established a servant /employee relationship, the Respondent

would be liable for the torts or omissions of the driver under the doctrine of vicarious liability.

One of the terms of the contract of employment was that the driver had no authority to carry unauthorized persons or goods and breach of the said terms would result in summary dismissal.

The Respondent also testified that there was notice on the doors of the vehicle to the effect that no unauthorized persons should be carried in the vehicle. The appellant and PW5 confirmed that indeed there were such notices. The Respondent produced a photograph showing the said notice but the said photograph did not include the motor vehicle Registration Number. However, the appellant and PW5 having confirmed seeing the said notices their existence is not in doubt.

In his statement, that was adopted as evidence in Chief, the appellant did not mention who had authorized him to board the said vehicle, whether he was a worker or a fare paying passenger. It was only during the cross examination that he claimed to have had permission to enter the vehicle to confirm the goods.

He later stated that the owner authorized him to enter and confirm materials for construction. Because the Respondent has denied engaging the appellant in any way, if anybody authorized the appellant to confirm the materials aboard the vehicle, then it must have been the contractor. Even then, the appellants instructions seem to have been limited to confirming of the materials on the vehicle but it did not include the appellant travelling on the vehicle. In any event, the appellant's averment that he was authorized to enter the vehicle and confirm the materials thereon came as an afterthought. It was not contained in his statement or evidence in Chief. From, the above assessment of the evidence, my view is that the appellant had no permission or authority to be aboard the Respondents vehicle and by the driver allowing him thereon, the driver was acting on a frolic of his own and was acting beyond the scope of his employment. The Respondents relied on the case of **Tabitha Nduli Kinyua Supra**. In that case the 1st respondent was the driver of the vehicle who acted outside the scope of his employment while the 2nd Respondent was the owner of the vehicle. The court said as follows; -

“It is evident that the 1st respondent acted out of the scope and mandate of his employment. The 2nd respondent’s motor vehicle was not licensed to carry passengers. It was designed to carry goods. The appellant’s legal position when she chose to board the 2nd respondent’s motor vehicle was that of a volunteer. No blame nor liability can attach to the 2nd respondent as a result of the injuries she sustained in the said accident. This court finds no fault with the decision of the trial Magistrate when he held that the 2nd respondent could not, in the circumstances of the case, be held to be liable for the acts of the 1st respondent. The upshot of the above reasons is that the appeal filed by the appellant must fail. It is hereby dismissed with costs.”

The above decision is very relevant to this case.

I totally agree with the findings of the trial magistrate that the appellant was an unauthorized passenger and the respondent cannot be held vicariously liable for the acts of the deceased

driver, who acted outside the scope of his employment against the clear instructions of his employer, the respondent. The appeal lacks merit and is hereby dismissed.

Having dismissed the suit, the trial court went ahead to assess general damages for purposes of award of costs. The court was guided by previous awards for fracture of femur and would have awarded Kshs.500,000/=. Having considered the courts analysis, I find no reason to interfere with the said findings.

In the end, the appeal stands dismissed in its entirety with costs to the Respondent.

Dated, signed and delivered in Kapenguria this 5th day of March, 2026.

HON. R. WENDOH -

JUDGE.

Judgment read in the presence of

Appellant- Mr. Mukhabani

Respondent-Ms. Chebet

Juma/Hellen-Court Assistants

