



**BM Security Limited v Kibira & another (Civil Appeal 12 of 2019)
[2025] KECA 166 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 166 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 12 OF 2019
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
FEBRUARY 7, 2025**

BETWEEN

BM SECURITY LIMITED APPELLANT

AND

JOSEPH MACHARIA KIBIRA 1ST RESPONDENT

ASTARIKO CHARLES AMARIBA 2ND RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Nakuru
(Odero, J.) dated 28th May, 2018 in H.C.CR.A No. 33 of 2016)*

JUDGMENT

1. On 9th January 2012, the 1st respondent was waiting by the stage to board a matatu to Nakuru, when the 2nd respondent, who was driving vehicle registration number KAZ 459 stopped and invited him to come into the vehicle as a passenger. He acceded to the invitation and was informed that he would buy tea as payment.
2. According to the 1st respondent, the vehicle was being driven very fast and it veered off the road and overturned at Elburgon on their way to Nakuru. As a result, he suffered a fracture of the right scapula and sprain of the right shoulder joint. He filed a suit against the 2nd respondent for negligence during the course and scope of his employment with the appellant.
3. In denying the claim, it was contended by the appellant that the 2nd respondent was not acting within the scope of his employment when contrary to the express prohibitions of the appellant and his contract, he had carried the 1st respondent as a passenger in the vehicle. In addition, it alleged that all its company vehicles were branded on all sides with the logo of the company which also stated “no unauthorized passengers in the vehicle”.



4. The appellant further contended that on the material day, the 2nd respondent who was employed as a driver of system alarms, had been tasked with driving the vehicle to respond to an alarm from Safaricom but was sidetracked. Having breached his contract, by carrying unauthorised passengers, the 2nd respondent had been dismissed.
5. The trial Court, after listening to the evidence from both parties, gave judgment in favour of the 1st respondent against the 2nd respondent and absolved the appellant of vicarious liability. The court held that the 2nd respondent acted solely for his own interest and purposes, that the 1st respondent knew the vehicle was not ordinarily used for carrying people for hire and reward and therefore knew he was taking a risk.
6. Being aggrieved, the 1st respondent lodged an appeal in the High Court challenging the judgment of the trial court on the grounds that the trial magistrate erred in absolving the appellant from liability; finding that the 2nd respondent acted outside the scope of his responsibilities and finding that there was an agreement between the appellant and the 2nd respondent forbidding him to carry unauthorized passengers.
7. The learned Judge found there was no clause in the agreement submitted by the appellant barring the driver from carrying passengers, that the appellant had failed to demonstrate that the 2nd respondent was warned against boarding the said- vehicle as no evidence was adduced to prove that the vehicle was branded with words indicating that the driver was not allowed to carry unauthorized passengers and furthermore, even if the agreement between the appellant and 2nd respondent expressly barred him from carrying unauthorized passengers, the agreement was unknown to the 1st respondent .
8. The Learned Judge came to the conclusion that the appellant was vicariously liable for the negligence of the 2nd respondent even if he acted contrary to the appellant's instruction and for his own benefit. The learned Judge accordingly allowed the 1st respondent's appeal.
9. Aggrieved, the appellant has brought the following grounds of appeal before this court:
 - a. The learned Judge erred in law in finding the appellant vicariously liable for the injuries sustained by the 1st respondent notwithstanding the fact that the 2nd respondent in giving a lift to the 1st respondent was acting for his own benefit and outside the scope of his employment
 - b. The learned judge erred in law in finding the appellant vicariously liable notwithstanding the fact that the 1st respondent's presence in the appellant's vehicle was unauthorized and unknown to the appellant
10. When the matter came up before us for hearing, Mr. Ngugi held brief for Mr. Njuguna for the appellant while Mr. Maina held brief for Mr. Kairu for the 1st respondent. There was no appearance for the 2nd respondent who was now acting in person.
11. Counsel for the appellant submitted that the 2nd respondent's act of giving lifts to unauthorized persons cannot be an act in the course of employment. He emphasised that the 2nd respondent was not employed to run a public service vehicle and that vicarious liability cannot exist where the servant's act does not form part of his duty to his employer.
12. Counsel pointed out that the 1st respondent had adequate knowledge that the vehicle was not licensed to operate as a public service vehicle and that he had no basis to assume that a security vehicle could carry passengers at a fee. Reliance was placed on the case of *Shighadai v Kenya Power and Lighting Co. Ltd & Another*, (1988) KLR682, on the submission that in any event, the absence of a notice to the effect that unauthorized persons were not permitted in it would not, of itself, bring the act of lifting



the 1st respondent within the scope of his employment. We were urged to find that the appellant was not vicariously liable for the negligence of the 2nd respondent.

13. Opposing the appeal, counsel for the 1st respondent submitted that the appellant was vicariously liable because it had failed to demonstrate that it warned the 2nd respondent not to carry unauthorised passengers. Citing the reasoning used by Kimaru J (as he was then) in *Mary Waitberero v Chella Kunani & Another* [2006] eKLR, counsel submitted that it is clear that the appellant had authorised the 2nd respondent to drive the said motor vehicle on the material day and even though it was the appellant's case that it did not authorise the 2nd respondent to carry passengers, it was obvious that the 2nd respondent carried passengers in spite of the specific instructions of the appellant and that the 1st respondent was not aware of the instructions given by the appellant. The 2nd respondent therefore did what he was authorised to do but exceeded the appellant's instructions by carrying the 1st respondent as a passenger in the said motor vehicle. Consequently, appellant was vicariously liable in damages to the 1st respondent.
14. We have considered the appeal, the rival submissions and the law. As a second appellate court, our jurisdiction is limited to considering issues of law only (See *Kenya Breweries Ltd. v Godfrey Odoyo* [2010] eKLR).
15. In our view, this appeal turns on the question whether the appellant is vicariously liable or not. It is common ground that the 2nd respondent, was an employee of the appellant at the time of the accident, that he was driving the company car in order to attend to an alarm that had gone off at a client's premises, that he offered the 1st respondent a lift for a fee and that as a result of his negligence, a self-involving accident occurred wherein the 1st respondent was injured and the 2nd respondent charged in court for the offence.
16. The 1st respondent's main assertion is that the appellant is vicariously liable for acts conducted by its employee, the 2nd respondent, who was in the scope of his employment when he gave the 1st respondent a lift and not on a fornic of his own as alleged by the appellant.
17. It is trite law that a master is vicariously liable for the negligence of his servant committed in the course of and within the scope of the servant's employment. See *Joseph Cosmas Khayigila v Gigi & Co.Ltd & Another*, - Civil Appeal No. 119 of 1986) where the court held:

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 performance of the task or duty thereby delegated to him by the owner."

18. Similarly, in *Goh Choon Seng v Lee Kim Soo* [1925] A.C.550, the Privy Council held that an employer is responsible for any damage caused by the negligent act of his servant in the course of performing the duties of his office even if the act incidentally involves a trespass which the employer has not authorised. Lord Phillimore suggested a classification of the possible cases into three categories as follows [at 554]:-

"As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall 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).

2. 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.
 3. 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 and would not have authorized, had he known of it. In these cases the master is, nevertheless, responsible."
19. We pose the question whether the acts or omissions of the 2nd respondent in carrying a passenger without the knowledge and approval of the appellant in itself placed an obligation on the shoulder of the appellant to be liable or responsible for any injuries suffered by a passenger; and whether the conduct of the 2nd respondent was outside the scope of his employment or duty.
20. In determining these questions, this Court in *Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another* [2014] applied a standard test formulated in the South African Case of *Minister of Police v Rabie* 1986(1) SA 117 (A) at 134. The test contains two parts. First, is the subjective test- being the subjective state of mind of the employee which asks the question "did the employee act wrongfully solely for his own purposes?" and second, is the objective test which asks the question- if the employee was pursuing affairs in his own interests, was such deviation connected closely to his employment and the business of the employer? If the employee's unlawful act is not even in the slightest way directed to furthering the employer's business, but his own interests; then the employer is not vicariously liable. We note that the second leg of the test must be looked at depending on the peculiar circumstances and facts of the case.
21. In the instant case, there is no dispute that the 2nd respondent gave a lift for his own benefit in the hopes of enjoying the proverbial "tea". It is therefore preposterous to say that the mere act or omission of being an agent, the master must ipso facto bear responsibility for the wrongful conduct of an employee. Again, it is an error of law and fact to conclude, as per the High Court Judge, that a master is always vicariously liable for the negligence of its employees, no matter whether he acted contrary/outside lawful instructions or for beneficial gain or interest. We think that is an elastic imagination of the law on negligence. This is an appropriate case where the servant was using the master's time and vehicle for his own purposes and personal gain, without the knowledge and permission. In our view there is no difficulty in reaching the conclusion that the appellant cannot be at fault for the illegal transgressions of the servant who exceeded his mandate and jeopardized the interests of the master. It is that simple and straightforward.
22. The 1st respondent has submitted at length about not being privy to the contractual agreement, verbal and oral between the 2nd respondent and the appellant. Again, with respect we do not see the relevance of this point nor does the fact that the instructions were written or oral affect the legal position of the parties. The case of the appellant was and is that the driver was expressly forbidden by them to carry passengers. As rightly pointed out by the 1st respondent, the contract submitted by the appellant only states that the driver is prohibited from allowing a non-authorized person to drive a company vehicle. It does not state that he is prohibited from ferrying passengers. However, the question we must pose is whether there were any factors, by word or conduct that clearly indicated that the 2nd respondent had authority from the appellant to give lifts to strangers. We cannot find any. The admission by the 1st respondent that the vehicle was branded and that he knew it was not a public service vehicle, implies



that the 1st respondent had no reason to believe that 2nd respondent had any authority to give lifts to passengers or that his authority was not limited to carrying the appellant's employees. In any case, if it was contended that the 2nd respondent had ostensible authority to ferry passengers, then the burden of proving the same lay with the 1st respondent.

23. A similar point arose for determination in the case of *Tabitha Ndubi (supra)* and this Court held that even if it were true that the appellant was not able to read the said notice, she ought to have known that the same was not a public service vehicle.
24. Our position therefore is that the driver was, at the time of the accident, performing an act which was clearly forbidden by his employer and could not be regarded as falling within the scope of his employment. In our view, giving a lift to the 1st respondent was entirely the driver's own act. It was not done for the purpose of furthering his employer's interests and was wholly outside the scope of his employment.
25. Having found as above, we find that the appellant was entitled to a finding that the 2nd respondent at the material time was not acting within the scope of his employment and that they were therefore not liable in damages to the 1st respondent for the negligence of the 2nd respondent. In the end, we allow this appeal, set aside the judgment of the learned judge and reinstate the judgment of the trial magistrate. The 1st respondent shall pay the costs of this appeal to the appellant.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF FEBRUARY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J.MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIARB., FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed DEPUTY REGISTRAR

