



**Ngandu v Kofinaf Company Limited (Civil Appeal 420 of 2018)  
[2022] KECA 1140 (KLR) (21 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1140 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 420 OF 2018  
S OLE KANTAI, HA OMONDI & KI LAIBUTA, JJA  
OCTOBER 21, 2022**

**BETWEEN**

**STEPHEN KANG'ETHE NGANDU ..... APPELLANT**

**AND**

**KOFINAF COMPANY LIMITED ..... RESPONDENT**

*(An appeal against the Judgment and Order of the High Court of Kenya at Nairobi (J. Kamau, J.) dated 16th October, 2018 in HC. CA. No. 73 of 2016)*

**JUDGMENT**

**Judgment of Omondi, JA.**

1. This is a second appeal arising from the judgment and order of the High Court of Kenya at Nairobi (J Kamau, J), dated and delivered on October 16, 2018, in Nairobi HCCA No 73 of 2016.
2. The appellant herein commenced a suit by a plaint dated January 17, 2012 in the Nairobi Chief Magistrate's Court at Milimani Commercial Courts in CMCC No 2277 of 2012 seeking orders for general damages, special damages, costs and interest. The background of the appellant's case stemmed from his claim that, on September 16, 2010 while driving the respondent's tractor within its coffee estate at Ruera in his capacity as an employee, a mower drawn by the tractor cut off its adjuster/setter, causing him to lose control of the tractor, fall off, and get run over by the tractor's rear wheel. He claimed special and general damages for the injuries thereby sustained.
3. The respondent denied that the appellant was its employee; that he drove the tractor without instructions and/or consent of the respondent; and that any resulting injuries occurred while he was on a frolic of his own.
4. In the trial court, it was the appellant's testimony that the transport manager, one Abraham Kahara, often authorized him to drive the tractors whenever the regular drivers were away; that on the material



- day, he was called by the Transport Manager, who asked him to carry a chain to go draw out a tractor that had overturned; that he obliged, but due to the rough road, the tractor lost control and threw him off.
5. The respondent called two witnesses, Michael Nyanginya Odhiambo (DW1), the respondent's driver who testified that, on the material day, he was at work but got an urgent call, and had to leave work earlier than usual; that he left with his key as usual, only to be informed the following day that the tractor had been involved in an accident; and that Peter Kahara (DW2), a security officer with the respondent, who confirmed seeing the appellant drive the subject tractor on the material day, but did not know how he got the ignition key. .
  6. The learned trial magistrate held that, although employed as a spanner boy by the respondent, the respondent had not led any evidence to show that the appellant was not authorized to drive the said tractor; that he got injured while in the course of duty with the respondent; that the evidence that he was authorized by the respondent's manager was not controverted; and that the appellant was minimally responsible for driving in a rough manner. The trial court apportioned liability at 80:20 against the respondent. Accordingly, the appellant was awarded damages of Kshs 562,000/= plus costs of the suit and interest at court rates.
  7. Aggrieved by the judgment, the respondent herein appealed to the High Court on the following grounds, which we take liberty to summarise thus: that The learned trial magistrate erred in finding that the appellant was authorized to drive the tractor in question notwithstanding the fact that he was not licensed to drive tractors; and in apportioning liability while it was apparent that the appellant had voluntarily exposed himself to danger; and that the learned trial magistrate failed to disclose the authorities relied on in assessing general damages.
  8. The respondent cited section 30(1) of the *Traffic Act* (cap 403 ) to support the argument that, at the time of the accident, the appellant was not a licensed driver; that the appellant had no authority to drive the tractor; that he was on a frolic of his own; that one should not benefit from an action that arose out of a breach of statute; that the trial court misdirected itself because, having found that the appellant was a spanner boy, then it was not clear how the respondent could be held liable for acts which the appellant committed outside the scope as his duties; and that the claim was not proved on a balance of probability.
  9. The appellant's argument was that at no point during the trial was it contended that he did not have a driving licence, or had no authority to drive the subject tractor; or that he was on a frolic of his own; that there was no legal requirement for drivers of vehicles on roads other than public roads to have driving licenses, drawing from the definition of "road" in the *Traffic Act*; maintaining that parties are bound by their pleadings, and that an opposing party could only direct its evidence to the issue that has been disclosed in the pleadings.
  10. In its judgment, the High Court found that the only issue that had been placed before it was whether or not the respondent was liable in negligence. Relying on the provisions of section 109 of the *Evidence Act*, which requires that the one who asserts a fact must prove, the learned judge held that the onus was on the appellant to avail the Transport Manager, Abraham Kahara, to corroborate his evidence; that from the definition under section 2 of the *Traffic Act*, the appellant failed to demonstrate that the road he was driving on could not be accessed by the public, which included his colleagues, and intent third parties who were classified as "public" within the meaning of the section 2 of the *Insurance (Motor Vehicles Third Party Risks) Act* (cap 405).
  11. The learned judge found that the appellant did not prove that he sustained injuries in the course of his employment; or that there was any obligation on the part of the respondent to adduce evidence to



- show that the appellant had been authorized to drive tractors by one Abraham Kahara. The appeal was thus allowed with costs, and the decision of the trial court was set aside and substituted for a finding in favour of the respondent.
12. The appellant, being dissatisfied with the entire judgment, filed this appeal raising five (5) grounds, two of which are inter-related. For purposes of clarity, we have summarised them as follows, namely that the learned judge erred by finding that: he sustained injuries whilst he was on a frolic of his own; the appeal was decided on an issue which was not a ground of appeal, and which was not pleaded in the defence; and misapprehended the evidence and failed to apply the correct legal principles, thus arriving at erroneous conclusions.
  13. The appeal was canvassed through written submissions filed by the respective parties with oral highlighting. This is a second appeal, and the mandate of this court has been enunciated in a long line of cases decided by the court - see *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No 127 of 2007, and *Stanley N Muriithi & another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings *inter alia* that, on a second appeal, the court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
  14. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, the main contention was whether the learned judge erred in her application of the law/legal principles and came to a wrong conclusion in her judgment, especially with regard to the negligence claimed by the appellant, and the issue as to whether he had a driving license.
  15. The appellant maintains that he was injured in the course of his employment, contending that his evidence regarding authorization to drive was direct oral evidence, which did not require corroboration under section 63 of the *Evidence Act*, nor was it controverted, by DW1 and DW2 who, in any event, were not present when the appellant started to drive the tractor.
  16. The appellant referred to the definition of the term (frolic” in *Black’s Law Dictionary* (9<sup>th</sup> edition) and argued that no evidence was led to prove that he was doing anything for his personal purpose reason or gain; that he had given a reason for the journey; and that the accident happened within the work place with no detour outside the respondent’s premises. For this submission, he relied on the holding in *Kenya Horticultural Exporters Ltd v Julius Munguto Maweu* [2010] eKLR that even where an employee acts in a criminal manner, the employer is vicariously liable so long as the act was within the course of employment.
  17. The appellant argues that his claim was based on negligence or breach of duty owed to him directly by the respondent, and not on vicarious liability. According to him, it was erroneous for the learned judge to apply the own frolic rationale to an accident occurring in the course of employment. The appellant posits that the respondent’s conduct of completing a workmen’s compensation form defeats all the denials on liability.
  18. In response, and drawing from *Black’s Law Dictionary* (8th Edition) on the definition of the term “frolic” to mean “activities outside the course of employment,” the respondent argues that, in as much as the employer has a duty to take reasonable care of its employees, the employer is only responsible while the employee is engaged in the course of his employment, and that liability will not arise unless the employee was acting in the course of his employment. In support of this submission, reference is



made to *Halsbury's Laws of England*, 4th edition, volume 16, paragraph 562, which sets the extent of the employer's duty as follows:

“The employer is not liable to the employee for damage suffered outside the course of employment.”

19. The respondent contends that in an action for negligence against his employer, the burden of proof rested on the appellant that he sustained his injuries while in the course of the employment as contemplated under sections 107 and 109 of the *Evidence Act*.
20. The respondent contends that, in coming to the foregoing conclusion, the learned judge noted the appellant's concession that, as a spanner boy, his duty was to assist the mechanics; that he was not trained, authorized or licenced to drive tractors, nor did DW1 give him the key to the tractor; and that, in essence, driving tractors was not within the scope of the appellant's duties. Accordingly, the burden rested on him to prove authorization, which otherwise remained a mere allegation; and that his oral evidence was in fact controverted by a statement by the said Abraham Kahara, (contained in the record of appeal), who stated that, although he was the appellant's supervisor, he did not instruct him to drive the subject tractor.
21. As regards the workmen's compensation form referred to by the appellant, the respondent submitted that it is a “notice by employer of an occupational accident/disease of an employee” form to the Directorate of Occupational Safety and Health Services of an accident at the work place, constituting a statutory duty placed upon the employer under the *Work Injury Benefits Act, 2007*; regardless of whether or not the employer is of the opinion that the injury occurred within the course of employment. Accordingly, compliance with the law cannot in any way be construed as an admission of liability.
22. The respondent urged us to uphold the finding that the appellant acted outside the course of his employment, and that the respondent could not be held liable for injuries that ensued from his misconduct. In this regard, the respondent relies on the case of *Attorney General vs Law Society of Kenya & another* [2017] eKLR wherein which held that:

“If an employee is injured through willful misconduct or against the direction of the employer or in the course of committing a criminal act, the employer cannot be held liable and should be free to raise defence of illegality or contributory negligence.”
23. We take note that the learned judge considered whether what the appellant did was within the scope of his employment and the duty owed by the respondent. The High Court observed that the finding by the trial magistrate that the appellant was employed as a spanner boy in the respondent's company, did not answer the question as to how he came to drive the subject tractor on the material date and time; and that the trial magistrate misdirected herself when she stated in the appellant's evidence that it was one Abraham Kahara who allowed him to drive the subject tractor remained uncontroverted.
24. The respondent urged us to hold that the High Court properly found that the burden of proof remained upon the appellant; that the burden to call the supervisor could not have shifted to the respondent; and that if he anticipated encountering difficulties, he should have sought assistance from the court by way of witness summons to ensure the supervisor's attendance. Further, that since the appellant's claim was founded on the tort of negligence, the burden of proof for negligence rested primarily on the claimant as discussed in *Halsbury's Laws of England*, 5<sup>th</sup> edition volume 78 at paragraph 62 and *Winfield and Jolowicz on Tort* 11<sup>th</sup> edition at page 188. The respondent also relied



on the case of *Martin A Waindi v Pharmaceutical Manufacturing Co Ltd & another* [1994] eKLR where this court held that:

“In an action for negligence, as in every other action, the burden of proof falls upon the party alleging it. Hence it was for the appellant to give evidence of facts, on which she based her claim for damages.”

25. In this regard, we find that the learned judge, in her duty to re- evaluate, assess evidence and make her own conclusions as is required of her as the first appellate court, properly considered the legal principles on the burden of proof in a claim alleging negligence, and applied the law as found in sections 107 and 109 of the *Evidence Act*. We note with approval the cases cited of *Martin A Waindi v Pharmaceutical Manufacturing Co Ltd & another* [1994] eKLR (*supra*) and *Attorney General v Law Society of Kenya & another* [2017] eKLR (*supra*).
26. The appellant argues that there was no plea relating to want of a licence in the defence; that the respondent’s plea was on a frolic of his own approach and having no permission to drive, reiterating that parties were bound by their pleadings supported by the case of *IEBC & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. Closely related to this is the appellant’s contention that the High Court addressed issues which were not part of the grounds of appeal.
27. As regards the appellant’s lack of a driving licence, the respondent submits that this was contained in its memorandum of appeal dated February 8, 2016, and also addressed by both parties in their written submissions before the High Court, and so the learned Judge was right to address herself to the issue.
28. In response to the submissions that want of a driving license was not pleaded in the defence, and should not have been considered by the High Court, drawing from the decision in *Odd Jobs vs Mubia* [1970] EA 476 and *Maithene Malindi Enterprises Limited v Kaniki Karisa & 2 others* [2018] eKLR, the respondent argues that a court may determine an issue which has not been pleaded where the issue has been addressed by both parties and has been left for the court to determine.
29. The respondent also contends that the issue of a driving license was raised during the trial in the appellant’s own testimony-in- chief when he admitted that he had no driving license; that, thereafter, he confirmed during cross-examination that he was not trained in driving tractors; and that he did not have a driving license. The respondent submits that both parties addressed the issue in their written submissions, and that the appellant admitted that it addressed the issue in its reply to the respondent’s submissions in the record of appeal.
30. We are thus urged to find that the appellant is estopped from alleging that it did not address the issue it was raised at trial, and left to the court to make a determination but it erred when it failed to address the same. In this regard, the respondent refers to order 42 rule 25 of the *Civil Procedure Rules, 2010* which provides that:

“Where the evidence upon the record is sufficient to enable the court to which the appeal is preferred to pronounce judgment, the court to which the appeal is preferred may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than which the court to which the appeal is preferred proceeds.”

31. In relation to the appellant’s lack of a driving license, we note that the trial court’s rejection that the respondent merely stated that the appellant was not authorized to drive, but did not delve into the consequences of lack of a driving license. Be that as it may, we find that this issue was dealt with satisfactorily by the learned judge in her judgment. Accordingly, we hold the view that given the



circumstances of this particular case, it would be extremely difficult to separate the issue of liability of the appellant and/or the respondent and whether or not the appellant was authorized to drive the subject tractor. Further, whether or not, the appellant was licensed to drive was an issue that came up several times at the trial, and it is not clear why the learned trial magistrate never dealt with the issue which was fundamental to the case. we do not detect any misapprehension of the law or legal principles, and find no axis upon which to interfere with the decision of the High Court.

32. Consequently, we hold that this appeal lacks merit and, accordingly, the same is hereby dismissed with costs to the respondent.

**Judgment of Kantai, JA.**

1. I have had the benefit of seeing in draft the judgment of my learned Sister Omondi, JA and I am in full agreement with it. The High Court properly re-analysed the evidence tendered before the trial court and was right in its finding that the appellant had not proved his case to the required standard. As Laibuta, JA agrees the appeal is dismissed with costs to the respondent.

**Concurring Judgment of Dr KI Laibuta, JA.**

1. I have had the benefit of reading in draft, the judgment of Omondi,
2. JA I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.
3. As Kantai, JA is in agreement, the judgment of Omondi, JA will be the judgment of the court.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

