IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A.)

CIVIL APPEAL NO. 413 OF 2017

BETWEEN

THE BOARD OF GOVERNORS ST. MARY'S SCHOOL.....APPELLANT

AND

BOLI FESTUS ANDREW SIO.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Aburili, J.) delivered on 14th September, 2016

in

HC. C.C. No. 1085 of 2006)

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JUDGMENT OF THE COURT

It was a non-contested fact in the suit before the trial court being the High Court of Nairobi, that the appellant, **The Board of Governors, St. Mary's School,** hired a bus registration number **KAJ 881P** to transport pupils and staff on a trip to Mombasa which took place on the 16th November, 2000. The said bus was provided by its owner with a driver. The owner of the bus is not named anywhere in the proceedings and although the driver is named neither the owner of the bus nor the driver were sued.

The respondent, **Boli Festus Andrew Sio,** a teacher at the school was one of the staff members who undertook the trip.

It was alleged that on the way back from Mombasa on 21st November, 2000 at a place near Makindu along Mombasa - Nairobi highway the bus was carelessly driven and/or controlled that it hit a depression on the road where the plaintiff was thrown to the roof of the bus and he sustained serious injuries. It was claimed therefore, that the appellant did not provide a safe means of transport and his servant or agent drove and managed the said vehicle in a careless and dangerous manner thereby subjecting the respondent to serious injuries which rendered the respondent incapable of performing his duties. Particulars of breach of contractual obligations on the part of the appellant's agent were given in the plaint as: the agent of the appellant driving the motor vehicle too fast in the circumstances; failing to have any sufficient regard for the safety of passengers in the bus; failing to slow down, brake in time or to swerve to avoid the depression; driving without due care and attention; failing to observe the highway code and causing the said accident.

Particulars of breach of contractual obligations by the appellant were given as failing to instruct its driver or agent to drive carefully; failing to provide any and/or adequate supervision; failing to provide a safe means of transport and providing a vehicle without safety belts.

Particulars of injuries suffered by the respondent were set out in the plaint.

It was alleged in the plaint that the driver of the bus was hired by the appellant for purposes of the trip and that at all material times the said driver was acting as an agent and/or employee of the appellant and the appellant was thus vicariously liable for the negligence of the driver; further that the respondent was the appellant's teacher who was to retire at the age of 60 years and that he had been retired from work on health grounds and thereby lost 8 years of gainful employment. The respondent therefore claimed general and special damages from the appellant and loss of future earnings at the rate of Kshs.86,475 per month for a period of 8 years. Special damages were also claimed.

The appellant denied the claim in a statement of defence filed in court. Occurrence of the accident was denied by the appellant stating that the respondent had not reported any accident to it at all. It was stated in the defence that it was the policy of the appellant that any injury to staff or student must be reported to it and that vicarious liability could not apply in the circumstances. Specifially it was stated in the defence:

> ***"That the defendant is not vicariously liable (sic) for the act of negligence, if any, of the owner, driver, servant and/or agent of Motor Vehicle Registration Number KAJ 881P and puts the plaintiff to strict proof thereof."***

It was further stated in the defence that if any accident had occurred it had occurred outside the respondent's scope of employment and, further, that there was in existence a policy of insurance covering students and staff and if any accident had occurred the respondent would have been covered by that policy for any injuries suffered had the report of the accident been made. At paragraph 5 (f) and 6 of the defence:

> ***"(f) That it is the Defendant's contention that the plaintiff should have sued the said owner/driver agent and or servant of the Motor Vehicle Registration Number KAJ 881P or the insurer thereof and not the defendant herein since there is no agency relationship between the defendant herein and the said owner driver agent and or servant.***
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> ***6. In further response to paragraph 8 of the plaint the defendant denies the allegations contained therein and further avers that the driver of the Motor Vehicle Registration Number KAJ 881P was not and has never been an agent and/or employee of the Defendant and thus the Defendant is not and cannot be vicariously liable for the negligence of the said driver. Further, it is the Defendant's contention that no accident occured on 21st November, 2000 or at all and thus the issue of negligence and or of vicairous liability does not arise."***

The appellant also took as an issue in the defence that the suit was barred by laws of limitation, it having been filed about 6 years of the alleged occurrence but that issue is now not live because an application to strike out the suit on that ground was filed and in a ruling by Waweru, J. it was held that the suit could be maintained on contract, not on tort, and that ruling was not appealed. Therefore those orders remain.

The suit was heard by **Aburili, J.** who in a judgment delivered on 14th September, 2016 found that the appellant was vicariously liable for the acts of the owner and the driver of the bus and awarded general and special damages to the respondent. It is those orders that have led to this appeal. It is a first appeal from orders of the High Court and we must revisit the record and re-examine the evidence to make our own conclusions on whether the orders made by the trial court should stand.

The respondent testified before the judge and adopted a witness statement that had been filed in court dated 20th July, 2012. In that statement the respondent described how they had gone on a trip appropriately dubbed "Leader Trip" to Mombasa; that the appellant had hired the bus to take students and staff to the said trip; that the bus was driven by one Gideon Kibe; that the group had stayed in Mombasa until 21st November, 2000 when on the way back to Nairobi at a place near Makindu the bus was driven at a high speed and it hit a depressed part of the road and all those in the bus were thrown up from their seats. The bus had no safety belts and the respondent hit his head on the roof of the bus making him feel numb. They proceeded to Nairobi and when they arrived he found that although he could walk the next morning he could not go swimming which was his daily routine as his left leg could not lift. He contacted a medical group called AAR which provided cover for staff and students of the appellant and he was referred to a neurosurgeon who discovered that the respondent had suffered a neck injury. Surgery was recommended which he undertook in 2003 and 2004. His condition had then deteriorated until he could no longer perfom his duties as a teacher and his services were terminated on grounds of redundancy. He blamed the appellant for the mistakes of the driver and condition of the vehicle.

In cross examination the respondent stated that he had filed **Nairobi CMCC No. 3200 of 2007** against the appellant claiming damages for being declared redundant and he had been awarded damages by the Chief Magistrate's Court. He stated that after the accident he reported the same to the Principal of the school and to the Principal of the Junior School where he was the Deputy Principal. These reports were verbal. He did not report the accident to the police.

Dr. David Oluoch Olunya, a **Consultant Neurosurgeon** who taught at Aga Khan University Hospital and at the University of Nairobi testified before the trial judge for the respondent. He produced a medical report showing injuries that the respondent had suffered 14 years earlier. He stated that he first saw the respondent on 20th December, 2000 where he noted he had suffered various injuries. He made various recommedations on how the respondent's injuries should be managed.

Peter Mwendwa Wachira also testified on behalf of the respondent and adopted a witness statement he had filed in court. At the material time he was the Principal of the Junior School of the appellant while the respondent was his deputy. He stated that the respondent had in November, 2000 taken school children on a trip to Mombasa and on their return on 21st November, 2000 the respondent reported that he had been injured. The respondent's health deteriorated and he was relieved of his duties on medical grounds.

On behalf of the appellant **Brother Moses Wafula Baraza** was called as a witness. He was the Principal of the school and Secretary to the Management Board. He had read school records and was familiar with the case. According to him the appellant as a school had systems and procedures to be followed for school trips. He denied that any accident had occurred and stated that there was an insurance cover which would have entitled the respondent to insurance at Shs.5,000,000 thus if the respondent would have been injured he would have been compensated. He confirmed that the respondent had sued the appellant in the said suit CMCC No. 3200 of 2007 and the respondent had been compensated in compliance with the judgment in the case.

There are 7 grounds taken in the Memorandum of Appeal filed on behalf of the appellant by its advocates **Messrs Nyiha Mukoma & Company Advocates**. The judge is faulted for holding that the burden of proving that the respondent had informed the appellant of the accident lay on the appellant. The appellant also takes issue with the holding by the judge that the appellant had failed to prove that the respondent was a staff of the appellant for purposes of invoking a staff medical cover then subsisting whereas the respondent's case was premised on the appellant's contractual duty of care as a employer of the respondent. There is an issue taken on the holding by the judge that

the respondent was entitled to general damages based on the date of retirement and salary and issue is also taken that the judge erred in not deducting the unutilised medical insurance cover of Shs.5,000,000. In ground 6:

> ***"The learned judge erred in law in making a finding that the appellant was vicariously liable for the negligent acts of a third party resulting in the injuries to the respondent whereas the respondent was statute barred from claiming under the law of tort."***

It is also alleged that the judge did not take into account the appellant's submissions and we are asked to allow the appeal and set aside the judgment of the High Court.

The appeal came up for hearing before us on 1st October, 2019 when **Mrs. Wambui Koech**, learned counsel appeared for the appellant while **Mr. Kiwinga**, learned counsel, appeared for the respondent. Both parties had filed written submissions and lists and digests of authorities which we have perused. The two lawyers highlighed their written submissions before us.

We have considered the whole case and this is our view of this appeal.

As we have said whether or not the suit was properly before the court on the issue of limitation is not live because the High Court made a ruling which has not been reviewed or appealed.

The judge who heard the case wrote a fairly lengthy judgment where she found that the appellant was vicariously liable for the acts of the driver of the bus. The judge reviewed various Kenyan cases and outside Kenya in reaching that conclusion. The judge was unimpressed by the appellant's submission that the accident had not been reported to any authority holding that failure to report was of no significance to the case.

On the issue of vicarious liability this is what the judge says at page 167 of the record:

> ***"68. It is true that neither driver nor the owner of the accident motor vehicle were sued. It is also not in dispute that the subject motor vehicle had been hired by the defendant to ferry students and teachers to and from Mombasa on an official school 'Leaders Trip'. PW3 who was the then Principal of the junior school confirmed that positon. The plaintiff's pleadings and testimony however named the driver Gideon Kibe hence its not true to say that the driver's name is unknwon, as alleged by the defendant's counsel.***
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> ***69. Further, although DW1 testified that the school then had 7 motor vehicles/buses, he nonetheless conceded that "The vehicle is alleged to have belonged to St. Mary's School was not ours and the driver was not our driver. The vehicle was hired from outside."***
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> ***70. Contrary to the above statement on oath by the defendant's witness, the the plaintiff never claimed that the subject motor vehicle belonged to the defendant school. He pleaded and maintained in his testimony as corroborated by PW3 that the vehicle had been hired. His complaint was that the defendant hired a motor vehicle that was not in a safe condition for use by staff hence, it failed to provide a safe means of transport thereby in breach of its contractual duty of care owed to its employees while they were engaged upon official duties…"***

We have not found the name of the driver in the plaint at all and it is surprising that the judge made the finding at paragraph 68 of the judgment.

The judge found that the appellant had a duty to provide safe means of transport for staff and students on the trip that it was making to Mombasa.

The central issue that we think we must determine in this appeal is whether the facts before the judge allowed her to reach the conclusion that the appellant was vicariously liable for the acts of the owner or driver of the hired motor vehicle.

It was not disputed by either party before the judge that the bus that was hired to transport students and staff to Mombasa did not belong to the appellant but belonged to a person who was not named in the suit which was filed by the respondent. Although the driver of the bus was named in the witness statement filed by the respondent the driver was not sued and his name does not appear anywhere in the plaint.

Vicarious liability is defined in **Black's Law Dictionary 10th Edition** by **Bryan A. Garner** as **"liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship betwen the two parties – also termed as imputed liability."**

The judge reviewed various cases including the case of **Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123** the facts of which are worth repeating here because they describe the circumstances that vicarious liability applies. The respondents owned and maintained a small fleet of boats for the purpose of carrying passengers from liners anchored offshore to and from the quay. The appellants were passengers conveyed in one of the respondents' boats and while disembarking from a motor boat onto the landing stage the 2nd appellant fell on the quay and sustained serious injuries necessitating the abandonment of the liner cruise in which they were participating. The actual running of the boats was entrusted by the respondents to a number of boat men who managed themselves by means of a management committee of five men whom they themselves appointed. The respondents were holders of the licences for the boats issued under the Port Rules of Zanzibar and they received 60% of the gross takings from the hirings, out of which they paid for the licences and upkeep and running expenses of the boats. The remaining 40% was shared by the management committee and the crews. The appellants alleged that the 2nd appellant's injuries were caused when she was pulled out of the boat by one of the boat men. The appeal was against

findings by the trial judge that the boat man was neither a servant nor agent of the respondents but an independent contractor for whose tort they were not answerable, and that the respondents, as common carriers, were not in breach of their contractual duty to carry their passengers without negligence. It was held that where a person delegates a task or duty to another, not a servant to do something for his benefit, or for the joint benefit of himself and the other, whether that other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the perfomance of the task, duty or act. It was further held in the case that the boat men were the agents of the respondents and the service was operated for the joint benefit."

De Lestang, VP, in *obiter dictum* :

> ***"A person employing another is not liable for that others collateral negligence unless the relation of master and servant existed between them at the material time; the existence of the right of control is usually a decisive factor in deciding whether the relationship of master and servant exists."***

What **Selle and Another** (supra) is saying is that a principal will be responsible for the acts of a servant where the servant is carrying out a task on behalf of the principal.

That is not the same when the task involves employment of an independent contactor. This issue is well captured in **Charlesworth on Negligence** 4th Edition, Sweet and Maxwell. On the subject of

> "independent contractors" the learned author declares that an employer is not liable for the negligence of an independent contractor or his servant in the execution of his contract. He says:
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> ***"Unquestioningly, no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servant commits some casual act of wrong or negligence, the employer is not answerable."***

The author gives the example of a man who has his lorry repaired by competent lorry repairers , or his lift repaired by competent engineers or his premises rewired by experienced electrical contractors - in each of these cases the man is not liable for damage caused by their negligent work. Likewise a building owner who engages an architect whom he reasonably believes to be competent is not in general responsible for the architect's negligence, since he has no control over the manner in which the archtitect does his work.

So the general rule is that an employer who has employed an independent contractor to undertake services or work on his behalf is not responsible for any tort committed by the contract or in the course of his work. The employer is also not liable for the tortious act committed by the contractor's employees.

In the English case of **Pickard v Smith (1861) 10 C.B. (N.S.) 470 Williams, J.** expressed himself as follows on this subject as we have shown in the quote from Charlesworth on Negligence (supra) that a person cannot be liable for an act or breach which is not traceable to him.

This Court in the case of **Lalji Bhimji Sanghani and Another v Chemilabs [1978] 3 eKLR** while dealing with the issue of the negligence of an independent contractor expresses itself thus:

> ***"Even if the plumber, Mr. V.V. Patel, was negligent in the way he dealt with the earlier flood in July or in the manner in which he ordinarily constructed the inspection chamber, he was a competent independent contractor, and a person is not liable for the negligence of an independent contractor (Blake v Woolf [1898] 2 QB 426). In my view the appeal against the finding of neglignence also succeeds."***

There are exceptions to that general rule. An employer is liable for his own act or neglect and accordingly if he contracts with an independent contractor to do an act which he is not entitled to do or to perform a duty which is thrown upon him by law he will be liable for the way in which the contractor has performed the duty. That duty cannot be delegated. If the employer has contracted an independent contractor to do an act which is unlawful or the employer is not entitled to do such as a public or private nuisance or a trespass the employer will in that case be liable if there is resulting damage. If the employer had contracted independent contractor to perform a task which involves special risks of damage the employer then becomes liable for the acts. When the employer is under the absolute duty which attaches ownership of dangerous things he is liable for the resulting damage – see **Clerk and Lindsell on Torts 18th Edition page 249 -259** and **Charlesworth on Negligence 4th Edition page 78-85.**

As we have seen in the case before the learned judge the appellant hired a bus from an unamed person to transport students and staff on a school trip. The respondent sued the appellant but that suit did not include the owner of the bus or the driver. Considering the matter before the trial judge we think that it was wrong to find vicarious or any liability on the part of the appellant where it was shown that the bus hired was provided and managed by an independent person who was not made party to the suit. The person who drove the bus was not an agent of the appellant but was an agent of the owner of the bus. The owner and driver of the bus fell within what we have shown as independent contractor and vicarious liability could not apply or attach in the case. The judge was wrong to find liability on the part of the appellant and this appeal succeeds.

In passing we note that there is evidence on record that the respondent sued the appellant for having been declared redundant and he was awarded damages by a competent court. The judge was wrong to give other awards. The respondent could not turn around to make another claim against the appellant in the suit before the judge.

Having reached these conclusions, we do not have to address the other issues raised in the appeal. The appeal succeeds and we allow it. On

the issue of costs in the circumstances here let each party bear their own.

Dated and delivered at Nairobi this 24th day of January, 2020.

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR