IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 342 of 2014

BETWEEN

EQUATOR DISTRIBUTORS.....APPELLANT

AND

JOEL MURIU.....1st RESPONDENT

EVAN KINYANJUI.....2nd RESPONDENT

ASSOCIATED MOTORS LIMITED.....3rd RESPONDENT

AL MALIK BROTHERS LIMITED.....4th RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (A. Aroni J.) dated 30th August 2011 in HCCC No. 2116 of 1999)

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JUDGMENT OF THE COURT

1. The 1st respondent filed a suit against the appellant, 2nd, 3rd and 4th respondents. In the suit, two legal questions arose for determination as follows: Is the seller of a motor vehicle liable for an accident that occurs while the vehicle is being driven by a driver employed by the vendor enroute delivery to the premises of the buyer? Upon sale of a motor vehicle, does the property and risk pass to the purchaser absolving the vendor from any liability for an accident in the course of delivery? These questions are at the centre of this appeal in determining liability between the appellant and the 3rd respondent.

2. The appellant, Equator Distributors Limited, entered into an agreement to purchase a new motor vehicle from ***Associated Motors Limited*** (3rd respondent). Pursuant to the sale agreement, the 3rd respondent sold motor vehicle lorry Registration No. KAL 970G to the appellant. The 3rd respondent's place of business is Nairobi. It was gratuitously agreed between the appellant and the 3rd respondent that the vehicle shall be delivered to the appellant's premises in Voi.

3. On 10th April 1999 the 3rd respondent instructed its driver, the 2nd respondent to drive and deliver the new motor vehicle to the appellant's premises in Voi. In his testimony, the 2nd respondent, ***Evan Kinyanjui***, conceded that on 10th April 1999 while driving the vehicle an accident occurred two kilometres from Makindu between the lorry and a dark combi motor vehicle registration no. KAK 902 Z which was being driven in a zig zag manner. Four people died in the accident among them the driver of motor vehicle registration no. KAK 902 Z.

4. In the Plaint, it was averred that on 10th April 1999, ***Rachael Wangui Muriu*** was traveling as a passenger in motor vehicle registration no. KAK 902Z when the said vehicle collided with lorry registration no.KAL 970G; that the vehicles were negligently driven resulting in the accident. The particulars of negligence were pleaded *to wit* that the vehicles were being driven too fast and at excessive speed in the circumstances; the vehicles were driven without due care and attention; the drivers failed to stop, slow down or swerve in any manner to avoid the accident; and the plaintiff averred *res ipsa loquitor* as well.

5. As a consequence of the road traffic accident, ***Rachael Wangui Muriu*** sustained serious injuries and died. A suit was filed by the 1st respondent ***Joel Muriu*** as administrator of the Estate of the deceased. In the suit, a claim for special and general damages under the Fatal Accidents and Law Reform Acts as well as costs of the suit is made.

6. In his statement of defence, the 2nd respondent admitted that on 10th April 1999, a collision occurred between motor vehicles KAL 970G and KAK 902Z. He was the driver of the motor vehicle registration no. KAL 970G. He denied being negligent and causing the accident. He averred that the accident was caused wholly and solely by the negligence of the driver of motor vehicle KAK 902Z.

7. The appellant, filed a Statement of Claim against the 3rd respondent who was enjoined in the suit as a Third Party. The appellant claimed indemnity and or contribution from the Third Party for any liability and damages entered against it. In its Third Party Claim, the appellant contended that at the time of the accident, motor vehicle registration no. KAL 970 G was being driven by the 2nd respondent who was an employee of the 3rd respondent; the appellant had just purchased the vehicle from the 3rd respondent and the accident occurred when the vehicle was being driven enroute delivery to the appellant; that at the time of the accident, the said vehicle was under full control and management of the 3rd respondent and was being driven by its employee for whom the 3rd respondent was vicariously liable.

8. The 3rd respondent in its Statement of Defence denied liability for indemnity stating that the appellant purchased motor vehicle registration no. KAL 970G whereupon, the property and risk in the said vehicle passed to the appellant in terms of ***Section 20(a)*** of the **Sale of Goods Act, Cap 31** of the **Laws of Kenya.** It contended that the 2nd respondent was not driving the vehicle as its employee, servant or agent, but as an agent of the appellant.

9. The 4th respondent, ***Al Malik Brothers Limited***, in its Statement of Defence stated that it is a dealer in motor vehicles and at all material times, it was not the owner of motor vehicle registration no. KAK 902 Z; that it had sold the vehicle to ***Mr. Wilhelmus W. Knipping*** on 27th October 1998 who took ownership and possession of the said vehicle. The 4th respondent averred that it was entitled to indemnity from the said ***Mr. Wilhelmus W. Knipping*** who was sued as ***Willy Knipping***.

10. Upon hearing the parties, the trial court established that indeed a road traffic accident occurred on 10th April 1999 and ***Rachael Wangui Muriu*** sustained serious injuries from which she died. On the issue ownership and liability for motor vehicle KAK 902 Z, the trial court made a finding that the 4th respondent, ***Al Malik Brothers***, had proved in evidence that they had sold motor vehicle KAK 902 Z to ***Mr. Willy Knipping***. The evidence was not controverted and ***Mr. Willy Knipping*** was vicariously liable for negligence of the driver of motor vehicle KAK 902 Z. The said ***Willy Knipping***, despite service of summons, neither entered appearance nor filed defence in the suit.

11. On the issue of causation and responsibility for the accident the trial judge expressed herself as follows:

> ***"…It is not lost that both drivers owed a duty of care to each other and to other road users despite the condition of the road, to drive with care taking into account the state of the road which they appeared not to have done. I will in the circumstances find that this was a case of contributory negligence. On balance of probabilities I find that the plaintiff has proved that the lorry driver bore a larger share of blame and I will accordingly apportion a higher degree on the 2nd defendant at 70% being the driver of lorry motor vehicle registration KAL 970G and 30% against the driver of KAK 902 Z.'*** **(Emphasis supplied)**

12. A critical issue for determination by the trial court was who between 3rd respondent and the appellant should shoulder the 70% liability for the accident caused by the driver of motor vehicle registration no. KAL 970 G. The trial court answered this question by posing who was the owner of the said motor vehicle at the time of the accident. The judge expressed and held as follows:

> ***"There is no dispute between the 1st defendant and the 2nd Third Party that the 1st defendant had purchased motor vehicle registration KAK 902 Z (sic) from the 2nd Third Party at the time of the accident, and that the 2nd defendant was driving the same at the behest of the 2nd Third Party. The question is whether the 1st defendant who had not yet received the said motor vehicle in its possession could be held liable for the said accident. The said vehicle was being driven from Nairobi to the 1st defendant's offices in Voi…...Secondly, there is no doubt that property had passed from the 2nd Third Party to the 1st defendant. Indeed, the vehicle had been transferred and registered in the names of the 1st defendant and its financier. I do agree with the 2nd Third Party, therefore, that by asking its driver, the 2nd defendant, to deliver the vehicle to the 1st defendant, it acted as a gratuitous agent, as property and risk in the said vehicle had passed to the 1st defendant. It cannot be held responsible for the accident. In this regard, I find the 1st defendant liable for the negligence of the 2nd defendant, a driver of the 2nd Third Party a gratuitous agent."***

13. Having determined the issue of liability, the trial court apportioned liability against the driver of KAL 970 G at seventy (70%) per cent and liability for the driver of KAK 902 Z at thirty (30%) per cent. In effect, the appellant's liability was held to be 70%. The total quantum of damages awarded to the appellant was Ksh. 582,575/=.

14. Aggrieved by the apportionment of liability, the appellant filed the instant appeal urging the following abridged grounds in its memorandum:

> *(i) The judge erred in awarding damages under the Law Reform and Fatal Accidents Acts when the 1st respondent plaintiff had not proved he had full grant or limited grant of letters of administration ad litem for the Estate of the deceased.*
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> *(ii) The judge erred in failing to properly evaluate the evidence on record as to how the accident occurred.*
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> *(iii) The learned judge erred in law by basing her finding on vicarious liability on the appellant for the negligence of the 2nd respondent against the weight of evidence.*
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> *(iv) The judge erred and failed to appreciate that at all material times, the 2nd respondent being the driver of motor vehicle KAL 907 G was an employee of Associated Motors Limited and the said Associated Motors should be held vicariously liable for the negligence of the driver.*

(v) The judge erred in failing to appreciate that at all material times the appellant had no control of who was driving motor vehicle KAL 970 G.

15. At the hearing of this appeal, learned counsel Mr. F. O. Mege appeared for the appellant; learned counsel Ms R. W. Kuria for the 1st respondent; learned counsel Mr. Zul Mohammed for the 2nd and 3rd respondents and learned counsel Ms Achar Roselinda for the 4th respondent. All counsel filed written submissions and list of authorities.

16. The appellant submitted that the learned judge erred in failing to find that the suit was not competent as the 1st respondent did not have letters of administration to file suit for and on behalf of the Estate of the deceased; that the 1st respondent produced in court letters of a*limited grant ad colligenda bona*whose scope under Section 67 (1) of the Law of Succession Act was limited to collection and preservation of assets and did not grant the holder capacity to sue on behalf of the estate of the deceased. Counsel cited the case of **Hassan A. Dera vs. Soni Fuel Injection Co. Limited, (2002) eKLR** where it was held that *a limited grant of letters of administration ad colligenda bona* did not enable a holder to sue on behalf of a deceased estate; that only a full grant would enable the 1st respondent have *locus* to sue on behalf of the estate of the deceased.

17. On evaluation of the evidence on causation of the accident, the appellant in faulting the trial court submitted that there were material gaps in the 2nd respondents testimony on causation; the 2nd respondent as driver of motor vehicle registration no. KAL 970 G blamed the driver of the other motor

vehicle encroaching onto his lane and indicated the point of impact was on his lane; that there is no evidence on record to support the trial court's conclusion that the driver of the lorry was largely to blame for the accident; in holding the 2nd respondent responsible for 70% liability, the judge erroneously relied on inadmissible and unsubstantiated hearsay sketch map from the police to blame the 2nd respondent.

18. On vicarious liability, it was submitted the trial judge erred in holding the appellant vicariously liable for negligence of the driver employed by the 3rd respondent and further erred in absolving the said respondent from liability. Counsel submitted the trial court erred in pegging liability for the accident to ownership of motor vehicle registration no. KAL 970 G. Counsel cited the decision in **John Nderi Wamugi vs. Ruhesh Okumu Otiangala, Civil Appeal No. 24 of 2015** where this Court stated:

> **"Vicarious liability is not pegged on legal ownership (of a vehicle) but on employer/employee or agent/principal relationship with particular emphasis on who employed and controlled the tortfeasor."**

19. Counsel further cited dicta from **Anyanzwa & 2 others vs. Luigi De Casper & another [1981] eKLR 10** where it was held that vicarious liability depends not on ownership but on the delegation of tasks or duty.

20. In concluding its submissions, the appellant urged us to reaffirm the decision in **John Nderi Wamugi vs. Ruhesh Okumu Otiangala, Civil Appeal No. 24 of 2015** and find that the trial judge erred in absolving 3rd respondent from liability and contributory negligence for the accident.

21. The 2nd and 3rd respondents in their written submissions relied on the provisions of ***Section 30 (1)*** of the **Sale of Goods Act, Cap 31 of the Laws of Kenya.** The Section provides:

> **"Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied between the parties and apart from any such contract, express or implied the place of delivery is the sellers place of business if he has one and if not, his residence…"**

22. Relying on ***Section 30 (1)*** aforestated, the 2nd and 3rd respondents submitted that ownership of motor vehicle KAL 970 G had passed over to the appellant and the moment the vehicle was registered and insured in the appellant's name. Counsel submitted that the appellant did not have a driver and a request was made for the 3rd respondent to deliver the vehicle to the appellant's premises; that as a good gesture, the 3rd respondent tasked its driver the 2nd respondent, to drive the vehicle to Voi and deliver the same to the appellant; that the transaction and transmission of the vehicle to Voi was purely gratuitous and unconnected to the contract for sale of the vehicle. At the time the vehicle was being taken to Voi, the relationship of buyer and seller between the appellant and 3rd respondent did not exist. The 3rd respondent's submitted that its relationship with the appellant was purely one of principal and a gratuitous agent.

23. Counsel cited dicta from **Shiells vs. Blackburne (1789) 1 Hg. BL 159** and **Wilson vs. Brett (1843) II M & W 113** to support the proposition that a gratuitous agent is not liable to his principal for any acts or omission so long as he exercises due care and skill in respect to the principals work as he would have shown in respect of his own. Counsel distinguished **John Nderi Wamugi vs. Ruhesh Okumu Otiangala & others (2015) eKLR** as not relevant because the issue of gratuitous agency did not arise in the case. Based on the foregoing authorities, the respondents submitted that they should be absolved from all liability and be awarded costs of the suit in so far as the 3rd respondent is concerned.

24. The 1st respondent in opposing the appeal focused on the issue that he did not have *locus standi* and letters of administration to file the suit for and on behalf of the estate of the deceased. It was submitted that the *letters of administration ad colligenda bona* issued to the 1st respondent was sufficient to file suit on behalf of the Estate of the deceased. Counsel cited the case of **Martha Ndiro vs. Come Cons Africa Limited [2015] eKLR** this proposition.

25. On the issue of liability, the 1st respondent submitted that the appellant cannot escape vicarious liability on the part of the 2nd respondent; that during hearing, it emerged motor vehicle registration no. KAL 970 G had been

insured and the appellant had received compensation for loss of the vehicle. Counsel urged this Court to uphold the ratio of contributory

negligence apportioned at 70% against the appellant. It was submitted that as the driver of motor vehicle KAK 902 Z was killed in the accident and his side of the story was not available, the trial court did not err in relying on the sketch map drawn by the police to lay greater blame on the driver of KAL 970 G. The sketch showed that motor vehicle KAL 970 G pushed motor vehicle KAK 902 Z out of the road on the latter's side of the road. The sketch supports the trial court's finding that the driver of KAL 970 G was largely to blame for the accident. The 1st respondent urged this Court to uphold computation of damages.

26. On our part, we have considered the written submissions filed by the parties and the authorities cited. This is a first appeal and this Court is empowered to review and analyze the evidence on record and arrive at its independent conclusions. (See **Selle & another vs. Associated Motor Boat Co.Ltd. & others (1968) EA 123**). Sir Kenneth O'Connor of the Court of Appeal for Eastern Africa in **Peters vs. Sunday Post Limited [1958] EA 424** stated as follows:

> **"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."**

27. In the instant appeal, there is no dispute as to the quantum of damages awarded by the trial court. We therefore find, subject to the issue of liability, the damages awarded to the 1st respondent be and is hereby affirmed.

28. The second poignant issue that we must consider upfront is the *locus standi* of the 1st respondent to institute the present suit for and on behalf of the Estate of the deceased. It is the appellant's contention that the 1st respondent has no locus to institute the suit. Conversely, the 1st respondent submitted he had locus bestowed vide the *limited grant of letters of administration ad colligenda bona* limited to the purpose of institution of proceedings. The trial court in considering the issue expressed itself as follows:

> **"The plaintiff produced a grant of letters of administration ad colligenda bona under Section 67 (1) of the Law of Succession Act, as exhibit No. 3. The said grant was issued limited for purposes of instituting these proceedings. I find that the said grant bestowed upon the plaintiff locus standi to file suit and as such, he had the capacity in law to bring this suit for and on behalf of the dependents and the Estate of the deceased."**

29. We have examined the limited grant dated 2nd July 1999 issued in High Court Succession Cause No. 1204 of 1999 with regard to the ***Estate of Rachel Wangui Muriu***. The letters of *administration ad colligenda bona* is a limited grant in favour of ***Mr. Joel Muriu Kamau*** for purposes of instituting proceedings in the suit. Based on this limited grant, we are satisfied that the 1st respondent has legal capacity and locus to institute and maintain the instant proceedings.

30. The next pivotal issue is whether the judge erred in evaluating the evidence on record and in relying upon the alleged hearsay and unsubstantiated sketch map tendered in evidence by a police officer. The trial court discounted the oral testimony of all witnesses and relied on information contained in the police investigation file and more particularly the sketch which gave the point of impact as in the middle of the road and showed that the vehicles ended up on one side of the road. In discounting the testimony of the witnesses, the court correctly held that they were not eye witnesses to the accident. On the part of the 2nd respondent who was the driver of the lorry, the court discounted his testimony on the basis that it left more gaps and did not add up.

31. The issue for us to determine is the probative value of a police sketch map.

A police sketch of a scene of accident depicts the overall layout of the location and the relationship of evidentiary items to the surroundings. A police sketch of the scene of accident is evidence tending to show the relative position of vehicles immediately after the accident and this tend to throw light on the issue of speed and direction of the vehicle movement prior to and at the time of, the accident. (See **People *v.* Benson, 321 Ill. 605, 152 N.E. 514, 46 A.L.R. 1056 (1926); West *v.* Jaloff, 113 Or. 184, 232 P. 642, 36 A.L.R. 1391 (1925).**

32. In the persuasive case of **Francis Mburu Njoroge vs. Republic Nairobi High Court Criminal Appeal No. 1131 of 1986**, the High Court expressed itself as follows:

> **"The authorities would appear to indicate that it is the responsibility of the court to make a finding of point of impact as a fact. Secondly to do that the court has to treat the police officers as experts by establishing their experience in dealing with accidents for a considerable period. Such police officers would only state what they see on arrival at the scene stating where every debris on the road including the position of the vehicles after the impact. The court would then make up its mind as to the point of impact after taking into account all the circumstances of the case including evidence of other witnesses.**
>
> **In the case of Charles Ng'ang'a Muhia -v- Republic,the Court of Appeal said: -**
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> **"Opinion evidence given by police officer relating to the point of impact should never be accepted unless he can show that he has many years' experience in inspecting the scenes of traffic accidents. He should give evidence only of what he saw at the scene on his arrival including every mark on or near the road and every piece of debris leaving it to the court to determine the point of impact".**

33. We have considered the testimony of the 2nd respondent as to how the accident occurred. He testified that he was driving the motor vehicle registration no. KAL 970G when he saw a dark combi being driven in a zig zag manner; he braked and flashed at the other driver and he steered his lorry to the extreme to avoid a head on collision but nevertheless, collision occurred. He denied over speeding. The police sketch shows the point of impact was in the middle of the road.

34. The accident led to loss of life of four persons. This by itself is indicative of imprudent behavior on the part of the drivers of the two

motor vehicles. A motorist must exercise ordinary care and drive at a reasonable speed commensurate with the conditions encountered on the road, which will enable him or her to keep the vehicle under control and avoid injury to others using the highway. Failure to bring a vehicle to a halt in the face of any danger may constitute negligence on the part of the driver. We are satisfied that the trial court did not err in finding the drivers of the two motor vehicles negligent.

35. On probative value to be given to a police sketch map, we are aware that a police sketch map for a road traffic accident is prepared after the event, it is not an eye witness account. However, it carries some probative value. The sketch map is not binding on the trial court and it is upon the court to establish facts from all the evidence on record. A police sketch map is just but an item of evidence to be considered. In this appeal, the appellant has not demonstrated to us that the trial court acted on wrong material in giving credence and weight to the police sketch map. In our view, the map has a probative value as it shows the relative positions of the two motor vehicles immediately after the accident. We find no reason to fault the judge for giving weight to the police sketch map.

36. The final issue for our determination is liability as between the appellant and the 3rd respondent. The trial judge held that the 3rd respondent was not liable for the acts and negligence of the 2nd respondent driver. The court also held the 3rd respondent was a gratuitous agent not liable to the appellant for indemnity or otherwise.

37. We agree with the 3rd respondent's submission that the arrangement to deliver motor vehicle registration KAL 970 G from Nairobi to Voi was not part of the sale agreement between the appellant and 3rd respondent. However, it is important to explain the 3rd respondent's possession of the motor vehicle registration no. KAL 970 G beyond the confines of the sale agreement.

38. In our considered view, the 3rd respondent was an agent of the appellant for purposes of delivery of the lorry motor vehicle registration no. KAL 970 G to Voi. The sale agreement was contractual and governed by the contract between the parties and the Sale of Goods Act. The arrangement to deliver the vehicle is subject to the law of negligence and principal agent or bailor bailee relationship.

39. It is not disputed that the 2nd respondent as driver of the motor vehicle registration no. KAL 970 G was an employee of Athe 3rd respondent. It is also not in dispute that it is the 3rd respondent who instructed the 2nd respondent to drive the lorry to Voi. Even if the relationship between the appellant and 3rd respondent was not contractual, the 3rd respondent owed a duty of care to the appellant to instruct a driver who would exercise due care and skill and not negligent, to deliver the motor vehicle to Voi.

40. The relationship between the appellant and 3rd respondent became one of bailor and bailee and the bailee owes a duty of care to the bailor. It is not sufficient for the 3rd respondent to state it was a gratuitous agent. The 3rd respondent was a bailee of the motor vehicle registration no. KAL 970 G with clear instructions to deliver the vehicle at the appellant's premises in Voi. The basic rule is that the bailee is expected to return to its owner the bailed goods when the bailee's time for possession of them is over, and he is presumed liable if the goods are not returned. We note that the bailee is not an insurer of the goods' safety; liability depends on the circumstances. The 3rd respondent and its employee driver, the 2nd respondent, owed the appellant a duty of ordinary care to safely deliver the vehicle at Voi.

41. There is no absolute rule that a gratuitous agent or gratuitous bailee is not liable to the principal. Even a gratuitous agent can become liable to his principal. The liability of a gratuitous agent is not founded on contract but in tort. One who gratuitously undertakes to conduct a transaction as agent for another and begins to act under the authority conferred is liable in tort for failure to complete the transaction. In addition, there is a general duty on every person not to so conduct oneself in a manner that injures another.

42. In the instant matter, we are of the considered view that the trial court misapprehended the law on vicarious and tortuous liability of a gratuitous agent to the principal. We re-affirm this Court's statement in **John Nderi Wamugi vs. Ruhesh Okumu Otiangala & others (2015) eKLR** that where it was expressed that the reason behind the principle of vicarious liability is to place liability on the party who should in law bear it and to peg it on legal ownership of a motor vehicle to the total exclusion of employer/employee relationship would amount to grave injustice.

43. We are persuaded by and affirm the dicta of this Court in **HCM Anyanzwa & 2 Others vs. Luigi De Casper & Another[1981] KLR 10**, where it was held that *"vicarious liability depends not on ownership but on the delegation of tasks or duty."* In this matter, the learned judge misdirected herself when she addressed herself to the issue of legal ownership of the motor vehicle KAL 970G in determining whether the appellant was vicariously liable for the tort of negligence committed by the second respondent who was an employee of the third respondent. It is the 3rd respondent that had supervisory power over the 2nd respondent who was its driver and not the appellant. The appellant cannot therefore be held to be vicariously liable for the negligence of the 2nd respondent. The appellant's liability, if any, is neither founded on its ownership of the motor vehicle registration no. KAL 907 G nor on the concept of vicarious liability but its liability is based on putting its motor vehicle in possession of the 3rd respondent who ended up engaging a negligent driver. The appellant owed a duty of care to other road users to ensure that whoever has possession and use of its vehicle is not negligent.

44. We note that in the Third Party Claim, the appellant sought indemnity from the 3rd respondent. Having held the relationship between the appellant and the 3rd respondent for purposes of delivery of the motor vehicle was not based on contract and the sale agreement, the words of Bowen L.J. in the **Birmingham and District Land Company vs. London and North Western Railway Company (1887), 34 Ch. 261** at page 274 become relevant. He stated:

> ***"But it is quite clear to my mind that a right to damages, which is all that the Defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.***

45. The appellant is not entitled to indemnity from the 3rd respondent because indemnity is founded on contract and there was no contractual relationship between the parties for purposes of delivery of the motor vehicle to Voi.

46. The upshot of our consideration and evaluation of the evidence and applicable law is that the appellant is not liable for the negligence of the 2nd respondent. Instead, it is the 3rd respondent as employer of the 2nd respondent who is vicariously liable for the negligence of the 2nd respondent. Accordingly, we set aside the finding of the trial court that the appellant is vicariously liable for the negligence of the 2nd respondent. In its place, we make a finding that the 3rd respondent is vicariously liable for the negligence of the 2nd respondent. The appellant as well as the 2nd and 3rd respondents are all liable in contributory negligence to the damages awarded in favour of the Estate of the deceased. Accordingly, we find the appellant as well as the 3rd respondent liable for the 70% contributory negligence as decreed by the trial court. We uphold the total quantum of damages of Ksh.582,575/= as awarded by the trial court.

47. For avoidance of doubt, the decree that flowed from the trial court shall be executed as against the appellant, the 2nd and 3rd respondents, jointly and severally, to the total exclusion of the 4th respondent. The appellant, the 2nd and 3rd respondents to jointly and severally bear the cost of the 1st respondent before the High Court and in this appeal. The appellant, the 2nd and 3rd respondents to proportionately bear one third of the costs and liability in the 70% contributory negligence. The 4th respondent shall bear its own costs at the High Court and in this appeal.

Delivered and delivered at Nairobi this 20th day of December, 2018

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

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

DEPUTY RGISTRAR

J. OTIENO-ODEK

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JUDGE OF APPEAL