**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)**

**CIVIL APPEAL NO. 14 OF 2014**

**BETWEEN**

**PAUL MUTHUI MWAVU……APPELLANT**

**AND**

**WHITESTONE (K) LTD……..……..……RESPONDENT**

*(Being an appeal from the judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 28th February, 2014,*

*in*

*H.C.C.C. No. 12 of 2011)*

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**JUDGMENT OF THE COURT**

[1]***Paul Muthui Mwavu*** who is now the appellant before us was the plaintiff in the Magistrate's Court at Kilifi where he had filed a suit against ***Whitestone (K) Ltd*** who is now the respondent before us. The appellant's suit was for general and special damages arising from personal injuries suffered by him as a result of an accident that was allegedly caused by the negligence of the respondent and/or his authorized driver, servant or agent.

[2]The respondent filed a defence in which it denied the occurrence of the accident and the particulars of negligence pleaded against it. The appellant's suit was heard by a Principal Magistrate who delivered a judgment, in which he found the respondent fully liable for the accident, and assessed a sum of Kshs.350,000/- as general damages and Kshs.2,500/- as special damages.

[3] Being aggrieved, the respondent lodged an appeal in the High Court challenging the judgment of the trial court on several grounds to wit: that the magistrate erred in holding the respondent vicariously liable for the unauthorized acts and/or omission of its driver; that the damages awarded were excessive; and that the learned magistrate failed to consider the evidence adduced, misapprehended the facts and misapplied the law on vicarious liability.

[4] In her judgment, ***Meoli, J***. relying on ***Shighadai v Kenya Power & Lighting Company Ltd & Another [1988] KLR 682*** (Shighadai case), found that the respondent's driver acted contrary to the respondent's instructions by carrying unauthorized passengers including the appellant, and that the

appellant put himself at risk by boarding the respondent's vehicle that was neither a public service vehicle, nor had any passenger seat. The learned Judge therefore allowed the appeal, quashed the conviction, and substituted an order dismissing the respondent's suit.

[5] The appellant has now lodged this second appeal in which he has challenged the judgment of the High Court on four grounds. That is, that the learned Judge erred in law and fact in: failing to uphold and apply the doctrine of *stare decisis*; failing to appreciate that the defendant had not positively pleaded the doctrine of vicarious liability; failing to appreciate the entirety of the evidence on record on the relationship between the respondent, the appellant and the defence witnesses; and failing to appreciate that the respondent's driver was not on a frolic of his own.

[6] The appellant is represented by the firm of Njoroge Mwangi & Co Advocates, whilst the respondent is represented by the firm of Kinyua Muyaa & Co Advocates. Following an agreement between the parties the hearing of the appeal proceeded by way of written submissions that were duly filed by each party, and this court is called upon to determine the appeal based on those submissions.

[7] For the appellant, it is submitted that although the issue of vicarious liability was pleaded in paragraph 4 of the plaint, the respondent did not deny or traverse vicarious liability; that the learned Judge failed to appreciate or apply ***Order 2 Rule 11(3)*** of the Civil Procedure Rules according to which the failure to traverse the issue of vicarious liability amounted to an admission; that the learned Judge improperly applied the defence of *volenti non fit injuria* as this defence was not pleaded; that the learned Judge fell into error by ignoring the doctrine of *stare decisis* and relying on the Shighadai case which was a High Court decision delivered in 1988 instead of the ***Geoffrey Chege Nuthu v M/s Anverali & Brothers Civil Appeal No. 68 of 1997*** (Nuthu case), a Court of Appeal decision delivered in 1998; that it was not in issue that the appellant was aboard the respondent's vehicle at the time of the accident and that in driving the vehicle the driver was acting on the respondent's instructions as he had authority to drive the vehicle to Chonyi; that the duty was on the respondent not only to give instructions to its driver but to make sure that the instructions are obeyed by the driver, and that third parties are visibly warned by a prominent indication on the motor vehicle that the driver had no instructions to carry passengers; that there was no indication of such prohibition on the respondent's vehicle; and thus the appellant had no way of knowing that the driver had no authority to carry him.

[7] For the respondent, it has been submitted that the appeal turns on three questions. Firstly, whether the respondent in its statement of defence sufficiently traversed the applicability of the concept of vicarious liability pleaded in the appellant's plaint; secondly, whether in the circumstances of the case, vicarious liability attaches to the respondent; and thirdly whether the concept of *stare decisis means* a mechanistic approach to precedent such as to bar courts from exercising their constitutional duty to advance and interpret the law.

[8] It is maintained that the respondent sufficiently traversed the appellant's plea on the applicability of vicarious liability; that the same was not only generally denied but also specifically denied with reference to paragraph 4 & 5 of the plaint and the occurrence of the accident and all particulars of negligence denied; that vicarious liability cannot attach on the respondent as it had sent its driver to Chonyi to run an errand in its private Land Rover, and never authorized him to carry passengers for pay or otherwise; that in carrying passengers the driver was on a frolic of his own; that the respondent's motor vehicle was neither a matatu created for the purpose of carrying passengers nor was it put to ordinary human or cargo transport by the owner.

[9] It is argued that when a driver is on a frolic of his own, the issue ceases to be one of negligence but becomes one of his own liability for which his employer cannot be held accountable; and that the respondent was therefore not vicariously liable for the acts of his driver committed without instructions and outside the scope of his or the respondent's ordinary business. The case of Nuthu was distinguished as the motor vehicle in that case was a truck ordinarily put to transport business by the owner. It was pointed out that in the Nuthu case, it was acknowledged that the circumstances of each case were peculiar and to be construed in their individual and independent contest and that the learned Judge having properly analyzed the facts and the law, could not be faulted for failing to follow the Nuthu case that was

distinguishable. Reference was made to the Supreme Court decision ***Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2013] eKLR*** for the proposition that the although the concept of *stare decisis* is a creation of law and good practice, the court ought not to apply such a mechanistic approach to precedent as to occasion a miscarriage of justice or hinder the development of law. The Court was therefore urged to dismiss the appeal.

[10] We have considered this appeal and the rival submissions. As a second appellate court our jurisdiction in considering the appeal is limited to considering issues of law only. In this regard the case of ***Maina v Mugiria, [1983] KLR 78***: is instructive that:

> ***"On a second appeal, only matters of law may be taken. If the High Court upholds a resident magistrate on a question of whether or not he exercised his discretion judicially, the issue as to whether he was right or wrong to do so is a question of law"***

[11] We also keep in mind the provisions of ***Section 72*** of the Civil Procedure Act that states as follows:-

> ***72(1) "except where otherwise expressly provided in this Act or by anyother law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds namely:***
>
> ***(a) the decision being contrary to law or to some usage havingthe force of law;***
>
> ***(b) the decision having failed to determine some material issues of law or usage having the force of law;***
>
> ***(c) a substantive error or defect in the procedure provided by this***
>
> ***Act, or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits."***

[12] We also take note of the holding in ***Mwangi v Wambugu, [1984] KLR 453*** **that:**

> ***"A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

[13] It is evident that this appeal turns on the issue of vicarious liability. Therefore, the first issue that we discern for our consideration is whether this issue of vicarious liability, was properly pleaded and whether it was an issue that arose for determination in the trial court and/or before the learned Judge in the Superior Court. The appellant pleaded the issue of vicarious liability at paragraph 4 and 5 of the plaint as follows:

***" 4. On or about the 27th May, 2010, the plaintiff was lawfully travelling aboard motor vehicle registration number KBC 406M make Land Rover insured and or registered and or beneficially owned by the Defendant, along Kilifi-Mwarakaya road when the same was so negligently driven, managed and or controlled by the authorized driver, servant and or agent that, it failed to climb a hill and reversed, hit a pot hole and fell as a result whereof, the plaintiff sustained serious injuries and has suffered great loss and damages which the defendant is liable and or vicariously liable.***

***Particulars of pain, suffering and injuries***

***-Comminuted fracture of the right distal fibula***

***-Fracture of the right distal tibia at the malleolus***

***-Lateral dislocation of the right ankle joint***

***. closed reduction and below knew POP was applied on the right***

***leg***

***. Walks in aid of crutches***

***5. The plaintiff avers that the said accident was caused by the negligence of the defendant and or his authorized driver, servant and or agent and defendant is liable and or vicariously liable.***

***<u>Particulars of negligence of the defendant and /or his authorized driver, servant and or agent."</u>***

a. ***Driving at a very excessive speed without any regard to the nature of the road and available traffic.***
b. ***Failing to heed the pressure of other road users on the said road.***
c. ***Failing to exercise due care and skills in managing the motor vehicle.***
d. ***Failing to keep any or any proper look out or to have any sufficient regards for other road users.***
e. ***Failing to apply brakes in sufficient time or at all to avoid the said accident.***
f. ***Driving without due care and attention thereby causing the accident.***
g. ***Failing to steer in a clear and proper course.***
h. ***Driving a defective motor vehicle***
i. ***Failing to employ a competent driver.***

[14] In the defence at paragraph 1 there was a general denial of each and every allegations contained in the plaint and at paragraph 4 it was stated as follows:-

***"4. With reference to paragraph 4 and 5 of the plaint, the Defendant denies that an accident occurred on the date and place stated and the Plaintiff is put into strict proof hereof. Consequently, all the particularized allegations of negligence under paragraph 5 of the plaint are denied and the plaintiff is put into strict proof thereof.***

***5. Further to paragraph 4 above, the Defendant denies that the Plaintiff has suffered any injuries, loss and damages and further denies each and every particular of pain, suffering and special damages as particularized in paragraph 4 and 5 of the plaint and the Plaintiff is put into strict proof thereof."***

[15] Therefore, it is evident that the specific denials did not make any specific reference to vicarious liability but only specifically denied the occurrence of the accident and the allegations of negligence. The gravamen of the defence as may be deduced from those pleadings was that no accident occurred, and because there was no accident there was no negligence. Worthy of note is that there was no pleading in the defence that the respondent's driver was on a frolic of his own or that he was not authorized to carry any passengers. It is therefore not surprising that the trial magistrate in his judgment made no specific finding on the issue of vicarious liability as vicarious liability was not an issue that was in contention.

[16] In her judgment, the learned Judge addressed the issue as follows:-

***"4…The appellants complain that the trial magistrate did not address the issue of vicarious liability in his judgment. I have looked at the judgment. The learned trial magistrate appears to have conflated the question of vicarious liability with the finding that the motor vehicle was defective at the time of the accident. He therefore concluded that:-***

*'The conclusive remarks from this piece of evidence is that, DW2 knew the motor vehicle was defective*

*and notwithstanding, he allowed the driver (DW1) to drive it on the road…the plaintiff was a passenger and indeed he was injured in the accident.'*

> ***He proceeded to cite the case of*** *Kenya Bus Services Ltd vs Humphrey [2003] eKLR* ***to bolster his finding that since the vehicle was defective the defendant was 100% liable.***
>
> ***5. I agree with counsel for the appellant that the lower court did not give adequate attention to the question of vicarious liability. The mere fact that the defendant had allowed a defective motor vehicle on the road could not have resulted in the alleged injury to the plaintiff if he was not in the accident vehicle. And this is where the conduct of the driver comes in for examination. Did the circumstances of the accident justify the extension of liability to the owner of the vehicle?***

[17] We have considered the relevant part of the pleadings in the plaint and defence as reproduced above and we are unable to agree with the learned Judge. The plaint made a specific statement at paragraph 4 alleging vicarious liability on the part of the respondent. That statement was reiterated at paragraph 5 and specific particulars of the negligence giving rise to the liability was stated. As already intimated the respondent did not deny the vicarious liability but only denied liability to the extent of the negligence pleaded. This is what the trial magistrate addressed.

[18] Having established that an accident had occurred involving the respondent's motor vehicle, and that the appellant was injured as a result of the said accident, the trial magistrate addressed the particulars of negligence pleaded in the plaint, and came to the conclusion that the same were established. Indeed, much as the respondent specifically denied the particulars of negligence in its statement of defence, the driver who was a witness for the respondent admitted that the motor vehicle had a problem with the cross bearing and that the vehicle started reversing on its own. In light of that evidence, the conclusion of the trial magistrate that the accident was caused by the fact that the motor vehicle was defective, and that DW2 Mwangala Baragwa Mukuna, who authorized the driver to use the vehicle, ought to have known of that defect cannot be faulted.

[19] Indeed, that conclusion is consistent with the statement of ***Lord Scarman LJ*** in ***Rose v Plenty & Another [1976] 1ALL ER 97*** at 103 quoted in the Shaghadai case as follows:

> ***"But basically as I understand it, the employer is made vicariously liable for the tot of his employee not because the employee is an invitee nor because of the authority possessed by the servant, but because it is a case in which the employer having put matters into motion should be liable if the motion that he has originated led to damages or another***."

[20] The learned Judge erred in addressing the conduct of the driver of the respondent's motor vehicle *vis a vis* the respondent as the same was not in issue, the statement of defence not having questioned the driver's authority or the driver's conduct. In this regard, this case was distinguishable from the Shighadai case as the driver in the Shighadai case had specific instructions prohibiting him from carrying passengers other than of a particular class and it was not within the scope of his employment to invite non-employee of the company onto the vehicle or to permit them to be carried in the vehicle. In addition the defendant in the Shighadai case, had specifically denied vicarious responsibility for the driver's negligence on the grounds that the plaintiff was an unauthorized person unlawfully travelling in the defendant's vehicle, and that in carrying the plaintiff the driver had acted outside the scope of his employment. This pleading brought the conduct of the driver into issue.

[21] Moreover, even assuming that the issue of vicarious liability was an issue for determination, in the Nuthu case, this Court applied ***Morgans v Launchbury & Others [1972] 2 ALL E R 607*** in which it was stated:-

> ***" In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or 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 is***

***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 the performance of the task of duty thereby delegated to him by the owner or so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instruction the matter is liable."***

[22] In the same Nuthu case the Court restated the law on vicarious liability adopting the statement of ***Newbold P*** in ***Muwonge vs A.G. of Uganda (1967) EA 17*** as follows:

***"The law is so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable."***

[23] In this case, the driver apparently gave a lift to the appellant and five other persons. Although the respondent's witness alleged that the driver had no authority to carry passengers, there was no notice displayed on the vehicle to warn third parties. It was asserted that the respondent's vehicle having been a Land Rover which did not have seats for passengers at the back, it was apparent that it was not intended for passengers. In our view that is an assumption that does not take into account the reality in the rural areas where transportation can be scarce, such that people are carried even in open lorries or pick-ups. Therefore the fact that the vehicle was a Land Rover that had no seats at the back could not be translated to mean that the driver had no authority to carry passengers.

[24] In her judgment, the learned Judge applied the doctrine of *volenti non fit injuria,* however, no such defence was raised by the respondent. In our view, as long as the driver of the Land Rover was ready and willing to give the passengers a lift; and there being no warning that the driver could not carry passengers; and the driver having the authority to use the vehicle in the performance of a task or duty delegated by the owner of the vehicle; the owner of the vehicle remained liable, and such was the case with the respondent.

[25] With respect, the learned Judge erred in ignoring the Nuthu case which was a more recent decision of this Court as compared to the Shighadai case which was a High Court decision decided ten years before the Nuthu case. Had she applied the law as set out in the Nuthu case she would have come to the conclusion that the respondent was vicariously liable.

[26] As regards the assessment of general damages is an exercise of discretion and as was stated in ***Butt v Khan [1981] KLR 349*** an appellate court will not normally disturb an award of damages, unless it is so inordinately high or low, as to represent an entirely erroneous estimate, or it is demonstrated that the judge proceeded on wrong principles or a misapprehended the evidence in some material particulars. In this case the learned judge was satisfied that the trial magistrate properly exercised his discretion in this regard. We have no reason to fault that conclusion.

[27] For the above reasons we allow this appeal, set aside the judgment of the learned judge and reinstate the judgment of the trial magistrate.

We award costs of this appeal to the appellant.

***Dated and delivered at Malindi this 12th day of March 2015***

**H. M. OKWENGU**

**……**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**……**

**JUDGE OF APPEAL**

**F. SICHALE**

**……**

**JUDGE OF APPEAL**