IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 186 OF 2009

BETWEEN

TABITHA NDUHI KINYUA …………….....………. APPELLANT

AND

FRANCIS MUTUA MBUVI ………………....… 1ST RESPONDENT

CORNER GARAGE TRANSPORT LTD. ….…. 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru

(Kimaru, J.)dated 18th October, 2007

in

H.C.C.A No. 94 of 2006)

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JUDGMENT OF THE COURT

1. The present appeal emanates from a claim founded in Tort which was lodged by the appellant against the 1st and 2nd respondents herein. In a Plaint dated 3rd March, 2004, filed before the Chief Magistrate's Court at Nakuru, the appellant(plaintiff) sued the 1st respondent (1st defendant) and the 2nd respondent (2nd defendant) following a road traffic accident which occurred on 30th April, 2004 at about 9:10 a.m. at Mukinyai along the Eldoret-Nakuru road, involving motor vehicle registration number KAG 062 D/ ZB 8562, Isuzu Semi Trailer and motor vehicle registration number KAQ 951 Q/ ZB 8037, Mercedes Benz Semi Trailer.
2. At the material time motor vehicle registration number KAG 062 D/ ZB 8562, Isuzu Semi Trailer which was owned by the 2nd respondent was being driven by the 1st respondent. The vehicle was en route to Mombasa from Kampala with a consignment of coffee. At Jogoo Training Centre, the 1st respondent offered a lift to the appellant in consideration for a fee. Moments later, while the vehicle was descending down a slope along the Eldoret- Nakuru road, the 1st respondent lost control of the vehicle causing it to ram into the rear of motor vehicle registration number KAQ

951 Q/ ZB 8037, Mercedes Benz Semi Trailer. As a result of the said accident, the appellant sustained serious injuries. Subsequently, the appellant filed a suit seeking *inter alia* special damages to the sum of Kshs. 124,354/=, general damages, costs of the suit and interest; on account of the respondents' negligence.

3. The respondents entered appearance and filed a joint defence; their main line of defence was the doctrine of *volenti non fit injuria* and contributory negligence; with the remainder comprised of general denials to the averments contained in the Plaint. Upon the closure of pleadings, the case was set down for hearing.
4. It was the appellant's case that before the accident she was a business lady; on the material day, she boarded a lorry along the Eldoret-Nakuru road which lost control and rammed into another vehicle. As a result she sustained injuries and was admitted at the Nakuru Provincial General Hospital for three months. She testified that she paid fare to the 1st respondent and did not see any notice on the vehicle that prohibited the 1st respondent from carrying passengers. On behalf of the respondents, only the 2nd respondent's legal officer, Patrick Wambugu Mwangi, gave evidence. He admitted that motor vehicle registration number KAG 062 D/ ZB 8562, Isuzu Semi Trailer belonged to the 2nd respondent and was being driven by the 1st respondent who was an employee of the 2nd respondent. He confirmed that the vehicle was transporting a consignment of coffee from Kampala to Mombasa. Mr. Mwangi testified that the 1st respondent was not authorized to carry unauthorized passengers on the vehicle; the 1st respondent had signed an undertaking to that effect; further there was a notice on the door at the right side of the vehicle indicating that driver was not instructed to carry any unauthorized goods or passengers. He maintained that the 2nd respondent was not privy to the arrangements between the appellant and the 1st respondent. He denied any liability on the part of the 2nd respondent.
5. On 5th July, 2006, the trial court entered judgment in favour of the appellant by awarding her the sum of Kshs. 900,000/= for pain and suffering and a further sum of Kshs. 600,000/= for future medical expenses. The trial court also found that the 1st respondent was 100% liable for the accident; the 2nd respondent was not vicariously liable for the 1st respondent's conduct because he had acted beyond the scope of his employment. Aggrieved by the trial court's findings, the appellant lodged an appeal at the High Court which was dismissed with costs vide a judgment dated 18th October, 2007. It is that decision that has instigated this second appeal based on the following grounds:-

- ***The Superior Court erred in law and in fact in failing to find that the 2nd respondent is vicariously liable for the accident being the owner of motor vehicle registration number KAG 062D Isuzu Lorry towing Trailer ZB 8563.***

- ***The Superior Court erred in law and in fact in failing to find that the accident occurred while the 1st respondent was in the course of his employment with the 2nd respondent thus the 2nd respondent was vicariously liable.***

- ***The Superior Court erred in law and in fact in failing to find that the appellant was lawfully travelling as a passenger since she was committed by the 1st respondent to travel and that the vehicle was at the time of the accident used for the benefit of the 2nd respondent and was being driven along the permitted road.***

- ***The Superior Court erred in law and in fact in failing to find that failure by the 2nd respondent to call the 1st respondent to give evidence was fatal.***

- ***The Superior Court erred in law and in fact in failing to find that the appellant being an illiterate person was not able to read notice of the vehicle as per the testimony of the defence witness one legal officer.***

- ***The Superior Court erred in law and in fact in failing to find that the 2nd respondent being the***

master is bound by the actions and omissions of the 1st respondent.

- ***The Superior Court erred in law and in fact in failing to consistently apply the principal of uniformity and decision by departing from its own earlier judgment in similar circumstances i.e. Nakuru High Court Civil Appeal No. 132 of 2002.***

- ***The Superior Court erred in law and in fact in failing to find that the 2nd respondent is liable for the negligence of the 1st respondent if committed in the course of his employment and even for acts not authorized.***

6. Mr. Mongeri, learned counsel for the appellant, submitted that there was no dispute that the 1st respondent was an employee of the 2nd respondent and was legally driving the said vehicle on Eldoret- Nakuru road. Hence when the 1st respondent asked the appellant to enter the said vehicle he was acting as an agent of the 2nd respondent. The entry of the appellant in the said vehicle was with the consent of the 2nd appellant. In support of the foregoing submissions, Mr. Mongeri relied on ***Morgans –vs- Launchbury & Others*, (1972) 2 ALL ER 605.** He further submitted that the 2nd respondent failed to call the 1st respondent testify so as to avoid the 1st respondent being questioned on vital issues. He urged this Court to allow the appeal.
7. Mr. Ochang', learned counsel for the respondents, in opposing the appeal, submitted that the 1st respondent was prohibited from carrying unauthorized passengers; the appellant was an unauthorized passenger; the appellant and her goods were not carried for the benefit of the 2nd respondent; the 1st respondent acted beyond the scope of his employment in ferrying the appellant and her goods. Mr. Ochang' argued that the permission given by the 1st respondent did not attach liability to the 2nd respondent. He submitted that the failure to call the 1st respondent to testify was not fatal.
8. We have considered the Record of Appeal, grounds of appeal, submissions by counsel and the law. This being a second appeal and by virtue of ***Section 72(1)*** of the ***Civil Procedure Act*** we are restricted to considering only matters of law. In ***Kenya Breweries Ltd. –vs- Odongo* - Civil Appeal No. 127 of 2007,** Onyango Otieno, J.A held:

    "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court on second appeal, confines itself to matters of law unless it is shown that the two 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."

9. It is not in dispute that the 1st respondent was found to be negligent and 100% liable for the accident. Further, the appellant herein has not appealed against the quantum of damages awarded to her. The main issue that falls for determination is whether the two lower courts erred in finding that the 2nd respondent was not vicariously liable for the 1st respondent's actions. Both lower courts made concurrent findings that the 2nd respondent was not vicariously liable for the 1st respondent's negligence because the 1st respondent acted beyond the scope of his employment. In ***Securicor Kenya Ltd. –vs- Kyumba Holdings Ltd*.,- Civil Appeal No. 73 of 2002,** this Court defined the doctrine of vicarious liability by quoting with approval a passage from ***Winfield and Jolowicz on Tort 14th Ed.:-***

    "The doctrine may be stated as follows:-

    Where A, the owner of a vehicle expressly or impliedly requests or instructs B to drive the vehicle in performance of some task or duty carried out for A, A will be vicariously liable for B's negligence in the operation of the vehicle."

In ***Kenya Bus Service Ltd. –vs- Kawira*- Civil Appeal No. 295 of 2000,** this Court held that the existence

of master/servant relationship gives rise to vicarious liability. The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed.

10. Vicarious liability is not limited to employment relationships. In ***Messina Associated Carriers –vs- Kleinhaus,*** ***[2001] 3 All SA 285 (SCA),*** the Court noted that-

> ***"The law will permit the recovery of damages from one person for delict committed by another where the relationship between them and the interest of the one in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or, … where 'in the eye of the law' the one was in the position of the other's servant."***

However, the liability placed upon the employer/master due to the master/servant relationship is not absolute. In ***Pritoo –vs- West Nile District Administration,*** ***(1968) EA 428,*** it was held,

> ***"Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person whose negligence the owner is responsible." Emphasis added.***

11. The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this Court's decision in ***Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986*** as follows:-

> ***"In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner's servant or that at the material time the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner's request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner."***

See also ***Morgans –vs- Launchbury & Others*** ***(supra)***. Waki, J.A in ***P.A Okelo & Another t/a Kaburu Okello & Partners –vs- Stella Karimi Kobi & 2 Others- Civil Appeal No. 183 of 2003***, expressed himself as follows regarding the assignment of vicarious liability:

> ***"In assigning vicarious liability, the learned Judge appreciated, correctly, that it arises when the tortious act is done in the scope or during the course of his employment."***

In the matter of ***Minister of Police –vs- Rabie,*** ***1986 (1) SA 117 (A),*** the Appellate Division held that the determination of whether an employee acted within the scope of employment incorporates both a subjective and an objective enquiry. At paragraph 134 the Court held as follows:

> ***"It seems clear that an act done by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course and scope of his employment and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention. The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. It may be useful to add that a master is liable even for acts which he has not authorized provided that they are so connected with an act which he has authorized that they may be regarded as modes – although improper modes – of doing them."***

12. It is not in dispute that the 1st respondent was the 2nd respondent's employee; he was authorized to

drive the said vehicle to transport a consignment of coffee from Kampala to Mombasa. The issue in contention is whether in giving a lift to the appellant, the 1st respondent was acting within the scope of his employment and/or with the consent/authority of the 2nd respondent. It was the 2nd respondent's uncontroverted evidence that its core business was to ferry goods and not to carry passengers; it does not have a PSV license. The 2nd respondent established that at the time of the accident, the 1st respondent was under instructions to ferry coffee from Kampala to Mombasa. That he did not have authority to carry any passengers in the course of employment. In support of this contention, the 2nd respondent relied on Defence exhibit No. 2 which is a document which was signed by the 1st respondent. In the said document, the 1st respondent gave an undertaking that he would carry no unauthorized passenger in the course of his employment. It follows therefore, that the 1st respondent had no authority to offer a lift to the appellant as evident from the undertaking that was produced at the trial court. Further, there was a notice on the door at the right hand side of the vehicle indicating that the 1st respondent was not authorized to carry unauthorized passengers and goods. We find that even if it were true that the appellant was not able to read the said notice, she ought to have known that the same was not a public service vehicle.

13. We also find that the 1st respondent's action of giving a lift to the appellant was not for the purpose or benefit of the 2nd respondent but for his own benefit. In doing so we concur with the following finds of the High Court:-

> ***"In the present appeal, the appellant testified that she paid the 1st respondent to enable her travel in the said motor vehicle. The appellant was aware or ought to have known that the motor vehicle in question was not a public service vehicle (PSV). The 1st respondent did not have authority of the 2nd respondent to carry any passengers. In actual fact, the 1st respondent had been specifically forbidden to carry any passengers. The fare that the appellant paid to the 1st respondent was for the 1st respondent's own benefit and not that of the 2nd respondent."***

In ***Shighadai –vs- Kenya Power and lighting Co. Ltd & Another, (1988) KLR682,*** the 2nd defendant being an employee of the 1st defendant company was issued with a motor vehicle for use in the performance of his duties. One of the rules that was brought to the attention of the 2nd defendant was that he was to only transport authorized personnel. On the material day as he was driving back home, the 2nd defendant gave a lift to seven people including the plaintiff who were not employees of the 1st defendant. Unfortunately, the car was involved in an accident occasioning the plaintiff severe injuries. She instituted a suit against the defendants. The High Court (Bosire, J. as he then was) in finding that the 1st defendant company was not liable for the 2nd respondent's negligence held *inter alia:-*

- ***It was not part of the 2nd defendant's employment to carry passengers in the vehicle. He could carry those who were in the employment of the 1st defendant. The lifting of the plaintiff was not authorized by the first defendant and it was done not for purposes of his employer, the 1st defendant, but for his own purpose.***

- ***The plaintiff knew that the vehicle was not ordinarily used for carrying people for hire or reward and by accepting to be carried in it; she knew that she was taking a risk. The 1st defendant did not owe a duty of care to persons who, like the plaintiff, were carried in its vehicles as unauthorized passengers.***

- ***If the 2nd defendant's act of giving the plaintiff a lift fell outside the scope of his employment, the absence of a notice on the vehicle's dashboard to the effect that unauthorized persons were not permitted in it would not, of itself without anymore, bring the act of lifting the plaintiff within the scope of his employment.***

14.In ***Nakuru Automobile House Ltd. –vs- Ziaudin, (1987) KLR 317,*** the appellant company owned a Datsun Saloon car which was for the use by its directors. Just before the 1975 safari rally, the Managing Director of the appellant company lent the car to four persons including one of the directors of the appellant to assist the said director (Ashok) and another person who were taking part in the rally. The said vehicle was involved in a head on collusion with another vehicle. In finding that the appellant company was not vicariously liable Nyarangi, J.A expressed himself as follows:-

> ***"The appellant company was kept out of the decision by the Managing Director to lend the Datsun Saloon to the four. ….Approached in that way, it seems to me that the two directors of the appellant company considered that whether or not the four to whom the Datsun Saloon had been lent enjoyed themselves, the rally was of no concern to the appellant company and consequently the company had nothing to benefit from the use of the Datsun by the four……. The Datsun was not being used wholly or partly for the appellant company's business or purpose; the appellant company could not be liable for any negligence on the part of the driver…….that the Managing Director did not on behalf of the company delegate a task or duty to be performed by Ashok(director) or any of the other three on behalf of the appellant company." Emphasis added.***

Similarly, in ***Ormrod & Another –vs- Crossville Motor Services Ltd & Another 1953 (2) AER 753 CA***, Denning LJ stated:-

> ***"The law puts a special responsibility on the owner of vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third party to be used for purposes in which the owner has no interest or concern."***

See also ***Van Drimmelen and Partners –vs- Gowar and others [2004] 1 All SA 175 (SCA)***.

15. In ***Bezuidenhout NO –vs- Eskom (379/2001) (2002) ZASCA 152; (2003)1ALL SA 411 (SCA),*** the plaintiff instituted the suit on behalf of his minor son, Roux, against Eskom, the defendant company. The defendant company had employed Oelofse to carry out repairs of its electrical equipment; the company gave Oelofse a vehicle to use in his duties. Oelofse was prohibited from giving a lift to any person without permission from his superiors. On the material day, Oelofse gave a lift to Roux; Oelofse fell asleep while driving and the vehicle was involved in accident; the minor suffered severe injuries. The defendant company denied liability on the ground that Oelofse was not at the material time acting within the scope of his employment. The trial court agreed with the defendant company. On appeal the Supreme Court of Appeal, Heher, A. JA. held that when determining the scope of employment one should not look narrowly at the particular act which causes the delict, but rather at the broader scope of which the particular act may represent only a part. The Supreme Court of Appeal further held that Oelofse's employment insofar as it related to the operation of the vehicle required:-

a. ***That the employee did not operate his vehicle while carrying unauthorized passengers; and***

b. ***That he drove his vehicle without negligence.***

The court further held that because the requirement relating to unauthorized passengers created a limitation on the scope of employment, and was not merely an instruction as to the manner of performing the employer's business; the conclusion that the negligent driving of a vehicle carrying a passenger exceeded the bounds of the driver's employment was unavoidable. The giving of the lift was "an act of a class which the driver was not employed to perform at all". Based on the foregoing, we concur with the two lower court's findings that the 1st respondent acted beyond the scope of his employment in offering a lift to the appellant hence the 2nd respondent is not liable for the negligence on the part of the 1st

respondent.

16. At this juncture, we deem it necessary to consider some of the authorities relied on by the parties. In ***Muwonge –vs- A.G Uganda*, (1967) E.A. 18** the appellant instituted a suit seeking *inter alia* damages from the Attorney General for the unlawful killing of his father. A riot had ensued and police officers were sent to disperse the crowd and quell the riot. The police officers were armed with rifles and shot at the crowd. During the chaos the appellant was injured by a bullet and he ran into his house which was nearby. The appellant found his father, the deceased, who ran into another room to get medicine to dress the wound. Apparently, a police man who saw the appellant fleeing followed him to his house and opened fire killing the appellant's father. It was the appellant's case that the Attorney General was liable for the negligence of the said police man. Newbold, P. in finding that the Attorney General liable expressed himself as herein under:-

> ***"It is not in dispute that the principles of law governing the liability of the Attorney General in respect of the acts of a member of the police force are precisely the same as those relating to the position of a master's liability for the acts of his servant. This being so, the legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the course of his employment or, to be more precise in relation to a policeman, within the exercise of his duty. The master remains so liable whether the acts of the servant are negligent or deliberate or wanton or criminal. The test is were the acts done in the course of his employment or, in this case within the exercise of the policeman's duty."***

He went further to state:-

> ***"In those circumstances was the policeman, no matter who he may be, acting in the course of his duty? For my part I have no hesitation whatsoever in saying that he was. What was the nature of the duty which he was sent there to do? It was to quell a riot. What means was he given to perform the duty? A rifle….That does not mean to say that they had full authority to use their rifles in any circumstances. By no means. But it is an indication in that the use of their rifles must have been something which was contemplated by their seniors…. In these circumstances, speaking for myself, I fail to see how it can be suggested that the act of s policeman in using his rifle would not be within the exercise of his duties unless there was clear evidence that the use by an individual policeman of his rifle was a use for his own purpose and unconnected in any way whatsoever with his duties.."***

This case is distinguishable from the matter before us because as illustrated herein above the 1st respondent's action of offering a lift to the appellant was beyond and unconnected to the scope of his employment.

17. The decision of this Court in ***Kibet Arap Meto & Another –vs- Phillip W. Kihanguru & 3 Others* –Civil Appeal No. 120 of 2000** is also distinguishable from this current appeal. In the ***Kibet Arap Meto case,*** the respondents hired the 2nd appellant's lorry to transport their goods from Suneka in Kisii to Nakuru. The respondents loaded their goods and boarded the lorry. The lorry was involved in accident occasioning severe injuries to the respondents. The 2nd appellant denied liability on the ground that the 1st appellant was prohibited from carrying unauthorized passengers. This Court held,

> ***" In our own case, firstly, there was no notice or warning displayed on any part of the lorry that the driver was expressly forbidden to carry any passengers; secondly, the driver was authorized by his employer, the 2nd appellant to ply for transport business and to hire out the lorry to the general public at large, including the respondents' and thirdly, the appellants knew for certain that once the respondents had hired the lorry to ferry their goods they were expected to accompany them on board the lorry to their***

eventual destinations."

In the current appeal the said vehicle was not a public service vehicle and there was a notice indicating that the 1st respondent was prohibited from carrying unauthorized passengers; it was not the 1st respondent's duty and neither was he authorized to ply for transport business or to hire out the vehicle to the general public at large.

18. In ***Morgans –vs- Launchbury & Others,*** ***(supra)***, before their marriage, the husband and wife each had his/her own car. After getting married, the husband sold his car and they both used his wife's car. The husband used the car more frequently. He used to go to work and thereafter he would stay out late and have a drink. After the appellant disclosed her concern to her husband about his drinking habits, he assured her that he would not drive the car while he was drunk. One evening the husband decided to go out drinking and realizing he could not drive he gave the car keys to his friend, Mr. Cawfield to drive him home. Instead of taking the appellant's husband home, Cawfield gave a lift to the respondents and headed to the opposite direction to look for food. Unfortunately, the car was involved in accident causing the death of Mr. Cawfield and the appellant's husband. The respondents sued the appellant on the basis of being the owner of the said car she was vicariously liable for the negligence of Mr. Cawfield. The House of Lords held that the appellant's husband was driving the car to and from work and his drinking sprees on his own benefit and not for the appellant's benefit; at the time of the accident, the car was not being used for the appellant's purpose; the assurance given to the appellant by her husband that he would not drive while drunk did not in any raise a presumption that the appellant gave Mr. Cawfield authority to drive the car. Hence the appellant was not liable for the negligence of Mr. Cawfield. The House of Lords further held,

> ***"The owner ought to pay, it says because he has authorized the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorized or requested the act, or if the actor, is acting wholly for his own purposes. These rules have stood the test of time remarkably well."***

19. Having expressed ourselves as herein above, we find that the appeal lacks merit and is dismissed with costs to the 2nd respondent.

Dated and delivered at Nakuru this 23rd day of October, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

……………………………….

JUDGE OF APPEAL

J. OTIENO-ODEK

……………………………….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR