



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, JJ.A)

CIVIL APPEAL NO. 183 OF 2003

BETWEEN

P.A. OKELO & M.M. NSEREKO t/a KABURU OKELO

& PARTNERSAPPELLANT

AND

STELLA KARIMI KOBIA1ST RESPONDENT

SALAMA CONSTRUCTION COMPANY LTD.....2ND RESPONDENT

JOSEPH MBUGUA KIBUYWA3RD RESPONDENT

(An appeal from a judgment and decree of the High Court of Kenya at Nairobi (Rawal, J.) dated 31st March, 2003

in

H.C.C.C. NO. 3061 OF 1997)

JUDGMENT OF WAKI, J.A

Background

1. On 28th February 1996, the **Government of Kenya** (GoK) signed a contract with **M/s Salama construction Company Ltd.** (Salama) for rehabilitation of 23 Kms of the Makutano-Lokitaung Road in Turkana District (the project). GoK was described therein as the “*Employer*” and Salama as “*the contractor*”. It was further provided that the Engineer for the Project would be the Chief Engineer, (Roads) in the Ministry of Public Works and Housing who in turn appointed the private firm of **M/s Kaburu Okello & Partners**, (“*the appellant*”) Consulting Engineers, (the Resident Engineer) to be the authorised representatives on the ground. The Resident Engineer appointed **John Kobia Muthuri** (“*the deceased*”) a Senior Civil Engineer in the Firm, as their representative and he took charge of the works.

2. The contract between GoK and Salama had an express provision on motor vehicles in **clause 138** which stated as follows:-

“138. Provision of vehicles

From the date of the Engineer’s order to commence work, the Contractor shall provide, for the duration of the Contract, or for such other period as directed by the Engineer, the following type and number of new vehicles for exclusive use by the Engineer’s Representative and his staff.

Such vehicles shall be of such model as commonly used in Kenya and shall be subject to the approval of the Engineer.

- a. **One (1. No.) Station wagon 4 – wheel drive utility vehicles 5 seater, 5No. doors of engine capacity 2500 cc.**
- b. **One (1 No.) 4 wheel drive pick-up type of minimum engine capacity 2500cc.**

The Contractor shall provide the drivers, fuel and maintenance of the vehicles during the Contract period. If for any reason these vehicles cannot be used, the Contractor will supply equivalent replacement.”

Emphasis added.

In accordance with that clause Salama provided two vehicles, among them a Toyota Landcruiser Pickup Registration No. KAG 441 Q which was registered in their name together with the driver, one **Joseph Mbugua Kibuywa** (“*the driver*”) who was supposed to be employed by Salama. We say “supposed” because there was a dispute as to who had employed the driver.

3. On the night of 23rd/ 24th December 1996 (Christmas eve) the driver and the deceased as one of the passengers, were travelling along the Kapenguria/Lodwar Road heading to Kitale, when at a place known as Karas, the driver lost control of the vehicle and overturned, causing fatal injuries on the deceased. The wife and son of the deceased, that is to say **Stella Karimi** and **David Mucui**, respectively (“*the plaintiffs*”) obtained a grant of representation and decided to pursue compensation on behalf of the estate of the deceased. They sued Salama and the driver of the offending motor vehicle for damages under the Fatal Accidents Act and the Law Reform Act.

The Suit

4. In their plaint drawn on 20th November 1997 but filed on 5th December 1997, and amended on 26th June 2002, through M/s Kambuni & Githae Advocates, the plaintiffs pleaded liability against Salama and the driver as follows:-

“4. The First Defendant was at all material times the registered owner of a motor vehicle registration number KAG 441Q Toyota Land Cruiser (hereinafter referred to as the “said Toyota”).

5. The Second Defendant was at all material times the driver of the Toyota as servant and/or agent of the First Defendant and in the course and scope of his employment with the First Defendant and with the latter’s permission and/or authority therefor.

6. On or about the 23rd/24th of December, 1996 at Karas along Kapenguria Lodwar Road, the deceased was lawfully travelling as a passenger in the said Toyota when the second Defendant so negligently drove managed and/or controlled the said Toyota that he caused the same to lose control and overturn resulting in a tragic accident wherein the deceased suffered fatal injuries.

7. The said accident was caused by the sole negligence of the Second Defendant in the driving, managing and/or controlling of the said Toyota.

PARTICULARS OF NEGLIGENCE

The Defendant was negligent in that he: -

- a. *Drove at a speed which was excessive in the circumstances.*
 - b. *Failed to keep any or any proper lookout or to have any or any sufficient regard for passengers in the said Toyota and more specifically the deceased.*
 - c. *Failed to stop to slow down to serve or in any other way so to manage and control the said Toyota as to avoid the said accident.*
 - d. *Drove recklessly in dire disregard of the safety of the deceased.*
 - e. *Drove in a dangerous manner and contrary to the provisions of the Highway Code and the Traffic Act.*
 - f. *Failed to exercise any or any adequate control over the said Toyota and caused a tragic accident.*
8. *The Plaintiff shall at the hearing hereof rely on the doctrine of 'Res Ipsa Loquitor'.*”

There were other pleadings on special and general damages.

5. The driver did not enter any appearance or file defence and therefore interlocutory judgment was entered against him on 11th February 1999. He had been charged before Kitale court for causing death by dangerous driving, was convicted and jailed for 3 years. In response to the pleading, Salama, through M/s Kembu Gitura & Co. Advocates, filed a defence on 19th February 1998, contending as follows:-

“3. The 1st Defendant only admits paragraph 5 of the Pleint to the extent that the 2nd Defendant was the driver of the material vehicle but denies that he did so as a servant and/or agent of the 1st Defendant or that he did so with the 1st Defendant authority and/or permission.

4. Further, the 1st Defendant shall aver that although the vehicle belonged to itself it was by contract attached to Kaburu Okelo & Partners engineering firm who exercised exclusive control and possession over it, its driver and its movements. The 1st Defendant shall pray for leave to join the stated firm’s proprietors as Third Parties.

5. The 1st Defendant therefore avers that if the 2nd Defendant was negligent in the driving of the vehicle his actions do not attach any vicarious liability to the 1st Defendant but to the intended Third Parties.”

6. Salama subsequently served a third party notice on the Resident Engineer, claiming:

“The Defendant claims against you for indemnity and/or contribution on the grounds that: -

- a. *The accident vehicle at the material time had by contract been seconded to you.*
- b. *The vehicle was at the material time in the exclusive possession and control of yourselves.”*

7. By their defence dated 25th November 1998 and amended in February 2000 the Resident Engineer filed its defence through M/s Hayanga & Co. Advocates stating in part, thus:

“3. With regard to the Third Party Notice, the third Party denies that the accident vehicle belonged to them, was in their firm’s possession and or control at the time of the accident and states that the vehicle was in the possession and control of the defendants. The third Parties further (sic) that

officers were merely passengers in the accidental vehicle.

3. (a) *The Third Party herein avers that the 2nd defendant who was the driver at the time of accident was not its employee and puts the defendants to strict proof thereof.*

3. (b) *The Third Party herein further avers that they were neither party to the contract nor the engineers but the engineer's representative and or acting as agents and/or servants of the Government and are not at all liable to the accident."*

8. All the parties through their respective counsel agreed on 10 issues to be determined at the hearing as follows:

1. *Do the Plaintiffs have capacity to initiate and prosecute the suit as the Administrators of the Estate of the deceased?*
2. *Was the Second Defendant the driver of motor vehicle registration number KAG 441Q as the servant and/or agent of the First Defendant as averred in paragraph 5 of the Plaintiff?*
3. *Was the subject motor vehicle by contract attached to the Third Party and did the latter exercise exclusive control and possession over it, its driver and its movements as averred in paragraph 4 of the First Defendant's Defence?*
4. *Was the subject motor vehicle in the possession and control of the First Defendant, and was the deceased merely a passenger in the said motor vehicle as averred in paragraph 3 of the Third Party's Defence?*
5. *Did the deceased sustain fatal injuries and has the estate of the deceased suffered damage and loss as averred in paragraph 9 of the Plaintiff?*
6. *Is the Estate of the deceased entitled to compensation pursuant to the particulars stated in paragraph 9 and 10 of the Plaintiff?*
7. *Was the Second Defendant charged with the traffic offence of causing death by dangerous driving?*
8. *Was a demand Notice sent to the Defendants?*
9. *Are the Plaintiffs entitled to the reliefs sought?*
10. *Who should pay the costs of this suit?"*

9. The suit was eventually heard before Rawal J. (as she then was) between 28th November 2001 and 6th March 2003, and the judgment was delivered on 31st March, 2003. In her judgment, the learned Judge was of the view that the central issue to determine was who, between Salama and the Resident Engineer, was vicariously liable for the negligent actions of the driver, and she answered that question in favour of Salama and dismissed the suit against it. In her own words she found:

"I have come to the conclusion that the 2nd Defendant was not the servant of the 1st Defendant the contractor and thus it cannot be held vicariously liable for the negligence of the 2nd Defendant. The case against the 1st Defendant thus is dismissed with costs."

10. It was further found that *"the Resident Engineer was not really an employee or servant of either the Employer of the contract (Sic) which is Government of Kenya or the Engineer (Roads) Ministry of Public Works*

and Housing but was an independent contractor of the Employer”. As such, it was the Resident Engineer and not GoK which was the employer of the deceased and who was vicariously liable for the accident.

11. On quantum, the learned judge assessed damages under both the Fatal Accidents Act and Law Reform Act as well as special damages as follows:-

“Loss of Dependency	Kshs. 6,300,000/=
Pain and suffering	Kshs. 50,000/=
Loss of Expectation (fee)	Kshs. 100,000/=
Funeral Expenses	<u>Kshs. 31,136/=</u>
	<u>Ksh. 6,481,136/=</u>

From that amount she ordered a reduction of Kshs.1.2 million paid to the estate of the deceased under an insurance scheme because, in her finding, “no proof was put forth to confirm that the said sum was from a staff insurance scheme.” The Resident Engineer was thus ordered to pay the plaintiffs Shs.5,281,138 together with costs and interest.

The Appeal & Submissions of Counsel

12. The Resident Engineer was aggrieved by that judgment and challenged it in this first appeal on six grounds, as follows:-

- “1. The learned Judge erred in holding that the 3rd Respondent/2nd Defendant was not an employee of the 2nd Respondent/1st Defendant.
2. The learned Judge erred in law and in fact in allowing amendments to the Plaint without having it served upon all the parties to the suit.
3. The learned Judge erred in law and in fact in finding the 3rd Party/appellants vicariously liable for the actions of the 2nd Defendant/3rd Respondent.
4. The learned Judge erred in law and in fact in awarding unproved special damages.
5. The learned Judge erred in law and in fact in awarding damages far in excess of what was comparable and justifiable in the circumstances.
6. The learned Judge erred in law and in fact in applying a multiplier of 15 years in working out the dependency in relation to the John Kobia Muthuri (hereinafter referred to as the deceased).”

Neither Salama nor the driver took part in the appeal; the former despite service of the hearing notice, the latter after his presence was dispensed with under **Rule 77(1)** of the Court of Appeal Rules, and **Sections 3A** and **3 B** of the Appellate Jurisdiction Act.

13. Learned Counsel, Mr. S.K. Ngii, urged the appeal on behalf of the Resident Engineer and submitted, on the first ground, that the finding that the offending driver was not the employee of Salama was contrary to the express terms of the contract between Salama and GoK. He referred to clause 138 of the agreement for that proposition. He further referred to the Plaintiffs’ pleading that the driver was the employee of salama which pleading was never traversed by Salama, as well the evidence on record from the deceased’s wife (PW 1) that she knew the driver was an employee of Salama and used to collect the deceased from his residence in Nairobi. The combined effect of the agreement, the pleadings and the

evidence, he submitted, was that the High Court was wrong, and had no basis for making the finding that the driver was not an employee of Salama.

14. On vicarious liability, under ground 3 of the grounds, Mr. Ngii submitted that it would follow from a finding that the driver was Salama's employee, that Salama was vicariously liable for the driver's actions. In his view, the finding by the High Court that the test applicable would be "*who is in control of the task performed and that it includes the right to control the way in which the act involving negligence was performed*" was an erroneous test. In his submissions, the only control the resident engineer had on the driver was to assign duties and set limits which was the "exclusive use" referred to in clause 138 (supra) but the control did not extend to the manner in which the driver performed his duties. The control was therefore limited to the use of the vehicle and not the method or task of driving which was negligent and of which responsibility continued to repose exclusively on the general employer, Salama. For this proposition, Mr. Ngii relied on the case of ***M. R. V. Churcher vs The Landing & Shipping East Africa Ltd [1957] E A 118*** which followed the English case of ***Mersey Docks and Harbour Board vs Coggins & Griffiths (Liverpool) Ltd & Anor [1946] 2 A11 E R 345***.

15. On grounds 4, 5 and 6, Mr. Ngii submitted that the special damages awarded in the sum of Kshs.20,000/= in respect of funeral expenses were not strictly proved by production of supporting documents and should therefore be disregarded. He further submitted that the use of a multiplier of 15 for a 44 year old to arrive at general damages for loss of dependency was erroneous. He suggested a multiplier of 11 years. His attempt to further submit that the multiplicand of Kshs.35,000/= was unsupported in the pleadings and the evidence, was withdrawn upon discovery that the figure was well supported in the evidence of the deceased's wife and documents from his employer.

Ground 2 relating to amendments to the plaint was also abandoned by Mr. Ngii. He sought an order for reversal of the finding on liability, the setting aside the decree against the resident engineer and an order directing the settlement of the decree by the party liable.

16. Learned counsel, Miss Nekesa Makila represented the deceased's wife who is the 1st respondent in the appeal and opposed the appeal, submitting that deceased had control of the driver despite his employment by Salama, and therefore the actual employer and the person liable for the driver's actions, negligent or not, was the resident engineer. According to Ms. Makila, ownership of the offending motor vehicle alone, did not attach liability, and the crucial determinant was "control". In support of the submission she cited the case of ***Kenya Bus Services Ltd vs Humphrey [2003] KLR 665*** which followed the case of ***Karisa vs Solanki [1969] E A 318*** for the following proposition:

"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 for whose negligence the owner is responsible (see Bernard v Sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

The authority was distinguished by Mr. Ngii for the reasons that the resident engineer was not the owner of the motor vehicle and was not the employer of the driver.

17. As for special damages for funeral expenses, Ms. Makila submitted that the sum of Shs.20,000 was reasonable despite the absence of supporting receipts. She also submitted that there was no reason to disturb the general damages as they were based on factual findings made by the Judge who saw and heard the witnesses and believed their credibility.

She called for dismissal of the appeal by the resident engineer.

The Law and Findings

18. As this is a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my

own conclusions in the matter. It was put more appropriately in **Selle v Associated Motor Boat Co. [1968] E A 123**, thus:

*“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif v Ali Mohamed Sholan** (1955), 22 E. A. C. A. 270.”*

The Court of Appeal, differently constituted, further stated in **Jabane v Olenja [1986] KLR 661** at pg 664, thus:

*“More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses, and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular **Ephantus Mwangi v Duncan Mwangi Wambugu** (1982-88) 1 KAR 278 and **Mwanasokoni v Kenya Bus Services** (1982-88) 1 KAR 870.”*

19. I perceive the substantial question for determination in this appeal to be who, between Salama and the resident engineer was vicariously liable for the actions of the offending driver. It was the same issue which was given primacy by the High Court. There would have been another issue extending to liability of the Government of Kenya (GoK), which was expressed to be the “Employer” in the contract signed with Salama, and therefore the disclosed principal of the resident engineer, but GoK was not made a party nor was the issue raised or argued before us. The finding by the High Court that the resident engineer was an independent contractor was not challenged.

No issue arises as to the liability of the driver for the accident which caused the death of the deceased. As stated earlier, he was subsequently arrested, tried and convicted for the offence of causing death by dangerous driving. Despite service of summons to enter appearance in the subsequent civil suit, the driver did not enter any appearance or file any defence nor did he attend the hearing of the suit. Final judgment against the driver therefore ensued. Similarly, no issue would arise as to vicarious liability as between the deceased and the resident engineer as it is admitted that the deceased was lawfully employed by the resident engineer and was acting in the cause of his duties as such employee.

20. As stated earlier, the High Court found as a fact that the driver was not a servant of Salama and that, therefore, Salama was not vicariously liable for his actions.

In reaching that conclusion the learned Judge considered the relevant terms of the agreement between GoK and Salama as reproduced above in **Clause 138** that Salama would “*provide drivers, fuel and maintenance of the vehicles during the contract period*”. The insurance of the vehicle and the salary of the driver was paid by Salama. The learned Judge also referred to the recorded evidence which, in relevant parts, she summarized as follows:-

“It has also come out from the evidence produced that the motor vehicle in question was exclusively used by the deceased and the motor vehicle and its driver was under his control and supervision.”

She continued:

“In the present case the 2nd Defendant Joseph Mbugua was hired as a driver by the Resident Engineer from 22nd June, 1996. (D EX. 1) I may state here that at the time of its production the objection was raised that it was sought to be produced by a person other than its author but after its admission no issue was raised on its validity during submissions. No effort to produce the

known handwriting or the signature of the deceased was made.

The said exhibit also shows that the terms of the employment of the 2nd Defendant were also fixed by the Resident Engineer.

The suit vehicle bearing registration no. KAG 441Q a Toyota Land Cruiser was exclusively used by the deceased. This fact has been accepted by all concerned.”

21. In assigning vicarious liability, the learned Judge appreciated, correctly, that it arises “when the tortious act is done in the scope of or during the course of his employment or authority.” She examined the applicable law as stated in the **Churcher case (supra)** and the **Mersey Docks case (supra)** and found that the facts in those cases were dissimilar with the case under consideration and in the end chose to rely on the contract terms between GoK and Salama, stating:

“The contract entered into by the contractor obligates it to provide vehicles and driver to the Engineer as approved by the Engineer, it cannot be assumed with certainty that only the contractor had only right or power to dismiss him. The contention of the plaintiffs witness that he was being driven in and out of his house at Nairobi by the 2nd Defendant does not and cannot vary the terms of the contract which was in writing.”

22. I have considered the pleadings, the evidence on record, the authorities cited and the submissions of counsel. In the end I have come to the conclusion that the finding made by the High Court on the central issue of vicarious liability was erroneous as there was no valid factual basis for the finding. There was particularly no basis for the finding that the deceased, and by extension, the resident engineer, was “in control of the way in which the act involving negligence was performed” and that “the driver, Joseph Mbugua, was hired as a driver by the resident engineer” who was therefore liable for his actions.

23. The finding that the driver was hired by the resident engineer was drawn from the evidence of the main witness for Salama, **Habhayah Sigh Saimbi** (DW 1) that despite the terms of the contract between GOK and Salama, which Salama complied with by providing a motor vehicle and driver for the exclusive use by the resident engineer, the latter rejected the driver, the witness contended, and engaged another one. Vicarious liability for that driver should not therefore be assigned to Salama. The evidence was in form of a copy of a letter dated **23rd June, 1996** purporting to have been written by the resident engineer, the production of which was objected to but the learned Judge admitted it stating:

“Court: It is a letter received by the 1st Defendant and is addressed to it. I am not relying on the veracity of its contents. What I am relying is on its admissibility (sic). I am of an opinion we serve (sic) can be admitted in evidence.”

Neither the original of the letter nor the author thereof were availed for cross-examination. The evidence of Saimbi on this aspect may be reproduced:

“1st Defendant was required to second two vehicles – specification 138 – provision of vehicles – Second vehicle was involved in the accident. We provided under one agreement. It was for the exclusive use of the Resident Engineer. The only control was for maintenance and fuel – for the day-to-day use it was under Resident Engineer. During the first weeks our driver was rejected and their own driver who is 2nd defendant was brought in. We agreed to that suggestion. I produce a letter dated 23rd June, 1996.”

That is the evidence accepted by the High Court to absolve Salama of liability.

24. Now, at no time before that purported letter was there any denial that the offending driver was the employee of Salama. There was a specific averment in the plaint to that effect but no specific traverse to it. The defence was rather that upon compliance with the terms of the contract between itself and GoK, the control of the vehicle and the driver, which Salama had to provide, shifted to the resident engineer. There was no averment in the defence that the resident engineer hired its own driver and consequently

discharged Salama from further responsibility to comply with clause 138 of the contract. Parties are bound by their pleadings. Indeed, even on the evidence of Saimbi, and assuming such evidence was properly admitted, Salama, accepted the hiring of the driver, since, obviously, it could not divest itself from the written terms of the contract with GoK to provide and pay for the driver.

Furthermore, beyond the pleadings, there was no mention of the purported letter in the “*statement of agreed issues*” filed on 11th March, 1999 or the list of documents, contained in the “*Notice to Admit documents*” filed on behalf of Salama on 19th May, 1999. The only two documents sought to be admitted were:

- a. *Original contract between Government of Kenya and the 1s defendant (Salama) dated 28th February, 1996.*
- b. *Copy of letter from 3rd parties (resident engineer) to the 1st defendant (Salama) dated 4th February, 1997.*

The letter dated 23rd June, 1996 did not appear in any other bundle of agreed documents filed by the parties before the hearing.

In summary, the letter dated 23rd June, 1996 on which the learned Judge appeared to place total reliance was, in my view, a mysterious aberration in the record and was of doubtful probative value. At all events, it was of little relevance since Salama admitted complicity in the hiring of the driver. That did not affect the terms of the original written agreement.

In all the circumstances, therefore, the driver was a servant of Salama and he drove the vehicle owned by Salama. The only issue to determine is whether control of the manner of driving or the act involving negligence, as found by the learned Judge, was a proper finding.

25. ***The Churcher case (supra)*** is pertinent in exploring that issue. The facts in that case were that the appellant was injured as a result of a load of bales of sisal surging out of the normal area of the crane due to the sole negligence of the crane driver. The crane driver was in general the servant of East African Railways & Harbours Administration who engaged him, trained him, paid him, and alone had the power to dismiss him. The respondents had hired the crane and the driver from the Administration and the driver reported each morning to work and received instructions from the respondents on where to work. But the driver was in complete control of each load and was not obliged to obey signals to lift or lower unless he was satisfied that the load was in order.

It was held that the respondents were not in such control over the crane driver at the time of the accident as to become liable as employers for his negligence. The court stated as follows: -

“In the instant case it is clear that all control of the crane driver had not passed to the respondents. The respondents had authority to tell the crane driver what to carry and where to carry it and when to lift and when to lower and load. But he was not bound to obey the signals to lift or presumably to lower, unless he considered it safe to do so. Not only was the manipulation of the controls of the crane a matter for the driver himself but he had complete control of the load while it was being lifted. Although the respondents had a limited authority to tell him when the crane should be operated, they clearly had no authority to direct how he should operate it.”

26. That authority applied the dictum in the English case of **Mersey Docks**, (*supra*) where a firm of stevedores had hired from the Mersey Docks & Harbours Board the use of a portable travelling crane together with its driver, to assist in loading a ship lying in the Liverpool docks. There was an agreement providing that the driver so provided shall be the servant of the applicant. The driver was a skilled workman paid by the Board which had the power to dismiss him. The stevedores directed what operations should be executed by him, but they had no authority to direct how he should work the crane. Owing to the negligence of the driver, an accident occurred and the question arose as to whether the

general employer of the driver or the hirer was vicariously liable for the negligence. The Board had argued that the hirer was responsible owing to express terms of their agreement. It was held: -

“(i) the question of liability was not to be determined by any agreement between the general employers and hirers but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver;

(ii) The Board as the general employers of the crane driver, had failed to discharge the burden of proving that the hirers had such control of the workman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give directions as to the manner in which the crane was to be operated. The Board were, therefore, liable for his negligence.”

27. In the Chucher case, the court distinguished the decision in another English case, **Donovan v Lain, Wharton & Down [1893] IQ.B.629** on the basis that in that case the general employer had parted with the power of controlling the driver, both as to the object to be achieved and the method of performance. All control had passed to the temporary master.

28. Applying the principles stated in those authorities, I am of the view that the test of “control” was improperly applied by the High court when it came to the conclusion that the resident engineer had control of the way in which the act involving negligence was done. There is no denial that the resident engineer, through the deceased, took possession of the vehicle owned, and the driver employed, by Salama. Salama had insured the vehicle because its insurable interest in the vehicle and the authorised driver continued. It was part of the contractual duty of Salama to provide those services to the resident engineer. The resident engineer had the authority and liberty to tell the driver generally where to work and when to work during the pendency of the contract, but certainly he had no control over how the driver would execute his skill as such driver. That is the act which was involved in the negligence complained of and particularised in the plaint. The particulars were not denied and were proved against the driver. The onus was on Salama to prove that it had divested itself of both the object to be achieved under the contract but also the method of performing that contract, and that the resident engineer was in control of both. This they failed to do.

In my view, vicarious liability for the actions of the driver continued to operate against Salama and there was no basis for dismissing the suit against it. For those reasons the order of the High Court in that respect must and is hereby set aside.

29. As for the grounds of appeal relating to damages, both special and general, the law is clear. Special damages must not only be specifically pleaded but also strictly proved. The only complaint here is about special damages awarded in respect of funeral expenses which were awarded at Shs.20,000. The amount pleaded for that item was Shs.30,000 but was only partially proved. The reasoning of the High Court in awarding Shs.20,000 was as follows: -

“The specials are strictly proved only to the extent of Kshs.6,566/= in respect of transport and Kshs.4,570/= in respect of costs of probate proceedings. It is claimed that the funeral expense of Kshs.30,000/= as pleaded is reasonable because of the transport of the body from Eldoret to Nairobi and then to Meru. Nobody can dispute that the family had expended on the funeral but in absence of the details of how much was spent by the family and how much was collected, or contributed I shall allow Kshs.20,000.= for such expense.”

I find no serious error in such approach as there could be special circumstances where documents in support of a special claim may be unavailable, yet common sense dictates that the claim was incurred. I do not intend to disturb the claim for specials.

30. On general damages the principle is that this court, in deciding whether it is justified in disturbing

the quantum of damages awarded by the trial court must be satisfied either that the Judge in assessing the damages took into account an irrelevant factor or left out a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages. See **Kemfrom Africa Ltd t/a Meru Express Services (1976) & Another v Lubia & Another [1978] KLR 30**. The challenge by the appellant in this matter is really restricted to the multiplier of 15 which was applied to the proved multiplicand. The learned Judge in choosing the multiplier considered that the deceased was aged 44 years at the time of the accident and could have worked until he reached age 65. The appellant thinks the retirement age ought to be 55 years which normally applied to public servants. I think the short answer ought to be that the deceased was not a public servant and there was evidence from his employer through ***Engineer Pius Alois Okello*** (T.P.W) that he would have worked in the firm upto the age of 65 years, all other things being equal. I find no basis for interfering with the multiplier applied by the trial court.

A sum of Shs.1.2 million which had been paid to the deceased's estate from an insurance scheme was deducted from the quantum of damages assessed. There was no cross appeal on such deduction and no submissions were made before us in respect of the order made by the High Court in that respect. In the circumstances I have no reason to disturb the order.

Conclusion:

31. The appellant has succeeded in respect of the order on liability which in truth ought to have been made against the 2nd respondent, ***Salama Construction Company Ltd***. I set aside the decree of the High court given on 31st March, 2003 and issued on 23rd June, 2003 and substitute therefor an order that the sum of Shs.5,301,362/10 shall be paid by the 2nd respondent in this appeal together with the costs of the suit before the High Court. The suit against the third party is dismissed with costs.

The appellant has failed in the challenge to the assessment of damages. In all the circumstances, therefore, each party shall bear its own costs of this appeal. It is so ordered.

As Onyango Otieno J.A also agreed, the judgment of the court shall be as above.

This Judgment is made under ***rule 31(2)*** of the Court of Appeal Rules 2010.

Dated and delivered at Nairobi this 13th day of July, 2012.

P.N. WAKI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: O'KUBASU, WAKI & ONYANGO OTIENO, J.J.A)

CIVIL APPEAL NO. 183 OF 2003

BETWEEN

P.A. OKELO & M.M. NSEREKO t/a

KABURU OKELO & PARTNERSAPPELLANT

AND

STELLA KARIMI KOBIA 1ST RESPONDENT

SALAMA CONSTRUCTION COMPANY LTD.... 2ND RESPONDENT

JOSEPH MBUGUA KIBUYWA3RD RESPONDENT

*(An appeal from a judgment and decree of the High Court of Kenya at Nairobi (Rawal, J.) dated
31st March, 2003*

in

H.C.C.C. NO. 3061 OF 1997)

JUDGMENT OF ONYANGO OTIENO, J.A.

I have read in draft the judgment of *Waki, J.A.* and I do concur with it fully and have nothing more to add. I would allow the appeal in terms proposed by him.

DATED and DELIVERED at NAIROBI this 13th day of JULY, 2012.

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR