IN THE COURT OF APPEAL

AT NAKURU

OMOLO, TUNOI & OWUOR JJ A

CIVIL APPEAL NO 120 OF 2000

BETWEEN

METO & ANOTHER.................................APPELLANTS

AND

KIHANGURU & 3 OTHERS........................RESPONDENTS

(An appeal from the judgment and decree of the High Court at Nakuru (Rawal CA) dated August 25, 1999

in

HCCC No 74 of 1995)

****

JUDGMENT OF THE COURT

This is the second appellant's appeal from a decision of the High Court of Kenya at Nakuru, Honourable Rawal, Commissioner of Assize (as she then was), given on 25th August, 1999, whereby she allowed an appeal against the judgment and decree of the Senior Resident Magistrate, Nakuru, and held in lieu thereof that the second appellant was vicariously liable for the negligent acts of the first appellant and that therefore both the appellants were jointly and severally liable for the damages awarded against them in favour of the respondents.

The facts giving rise to the suit the subject matter of the appeal before us are largely not in dispute and are as follows: The second appellant is a company engaged in transport business and owns an Isuzu lorry registration number KWQ 428. The first appellant is its driver. The four respondents are petty retail businessmen engaged mainly in the selling of vegetables, fruits and sugar cane. They purchase these from Suneka market in Kisii and ferry them for sale at Elburgon and Turi areas of Nakuru District.

On 12th July, 1993, the respondents hired the second appellant's lorry to transport their goods from Suneka to Nakuru. They loaded the goods on to the lorry and boarded it. The first and third respondents sat on top of the goods at the back of the lorry while the second and fourth respondents rode in the cabin. At about 9:00 pm at a spot near Turi the lorry hit a deep pot hole, careered off the road, rolled three times and came to a halt in a ditch resting on its side.

The respondents suffered various grave injuries mainly fractures of limbs, bruises, deep cuts and

lacerations. It is the evidence of the first appellant that at that particular stretch of the road, the spot of the accident, it was misty as it had rained and visibility was poor. He admitted that he was driving too fast in the circumstances and that he was negligent. Thus, in essence, he admitted liability for the injuries suffered by the respondents.

In the first appeal before the Superior Court and also in this second appeal the second appellant has vigorously argued that as the first appellant had been specifically instructed not to carry any passengers and as these instructions had been boldly written at a prominent place outside the cabin the respondents as the victims of the tort were trespassers on the lorry and the second appellant is not liable for the injuries suffered by them. Mr. Musangi for the appellants argued that the Hon Commissioner of Assize erred in not finding that the second appellant had sufficiently discharged its burden of proving the presence of the notice to the public prohibiting unauthorised passengers on its lorry. Consequently, Mr Musangi urged that the Hon Commissioner of Assize ought to have held that the second appellant owed no duty of care to the respondents and that the first appellant's tacit and reluctant acquiescence to them did not qualify them as bona fide passengers.

The two Courts below concurrently established the following salient facts. The respondents were not trespassers on the lorry but were hirers who had been permitted thereon by the first appellant. There was no notice or warning whatsoever displayed on any part of the lorry drawing the attention of any intending passengers or hirers to the prohibition to carry any persons on board. The accident occurred whilst the first appellant was transporting the respondent's goods and was doing so in the course of his employment. The driver drove negligently and caused the accident which resulted in the respondents' grave injuries.

This being a second appeal the above findings not being points or matters of law cannot be canvassed before us and we would not be entitled to interfere with them. In this respect, Mr Musangi with due respect, acted properly in not addressing us on them. It must follow, therefore, that grounds 2 and 3 of the memorandum of appeal which challenge the findings of the two Courts below must fail.

During the trial the respondents successfully sought to make the second appellant, as owner of the lorry, vicariously liable for the negligence of the first appellant on the basis that he was acting as its driver, agent and or servant in the course of his duty as the second appellant's employee and that he had its consent and authority to hire out the lorry and put the respondents on board. But Mr Musangi has urged us to hold otherwise and find that the driver did not follow his master's instructions and that the degree and nature of deviation was sufficient to take his actions outside the scope of his employment and therefore sufficient to sustain the assertion that no vicarious liability lay against the second appellant. This is actually the only substantial ground of appeal before us and we shall now endeavour to answer it.

Mr Musangi contended that we follow the dictum in *Twine vs Bean's Express Ltd* [1946] 1 All ER 302. The facts of that case were that under an agreement between B Ltd and the Post Office Savings Bank, B Ltd provided a commercial van and driver for use by the Bank; the driver remaining the servant of B. Ltd. It was further agreed that *B Ltd* accepted no responsibility for injury suffered by persons riding in the van who were not in their employment. They expressly instructed their driver that no one was to be allowed to travel in the van. Owing to the driver's negligence, an accident occurred and Twine who was travelling in the van was fatally wounded. There was at all material times on the dashboard of the van a notice "No unauthorised person is allowed on this vehicle. By Order Beans Express Ltd". On the roof of the van above the driver's seat was another notice stating that the driver had instruction not to allow unauthorised travellers on the van and that in no event would Beans be responsible for damage happening to them. The driver had, on the occasion of a former ride by Twine, told him in substance that he travelled at his own risk. It was held by the Court (House of Lords) that the duty of B Ltd as the driver's employers to take care in driving of the van was only to a person who might reasonably be anticipated by B Ltd as likely to be injured by the negligent driving of the van at the time in question and that in the circumstances of the case, B Ltd could not reasonably anticipate that Twine would be a passenger in the van.

With due respect to Mr Musangi the facts of the above case are distinctly different from those underpinning this appeal. 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

authorised by his employer, the second 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.

We think that *Morgans vs Launchbury and Others* [1972] 2 All ER 606 is in all fours with the matter now before us. In this case the House of Lords held:-

> "In order to fix liability on the owner of a car for the negligence of the driver, it is necessary to show either that the driver was the 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 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 the performance of the task or duty thereby delegated to him by the owner."

Simply illustrated, the doctrine enunciated above may be stated as follow. 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 this case, the driver admitted his negligence. Again, it is not in dispute that he was the second appellant's servant at the material time and was acting on its behalf as its agent and was using the lorry for hire at the owner's express instructions. Even if the second appellant had given to the driver specific instructions, that would simply be a matter between the second appellant and his employee or agent and would in no way affect the second appellant's liability to the respondents. The second appellant must therefore be held vicariously liable for the negligent acts of the first appellant and both the appellants are jointly liable in damages to the respondents. We cannot, in the circumstances, fault the two Courts below.

For these reasons we think that the two courts below were right in their decisions and in the result, this appeal should be dismissed with costs. We so order.

Dated and delivered at Nakuru this 29th day of November , 2002

R.S.C OMOLO

....

JUDGE OF APPEAL

P.K TUNOI

....

JUDGE OF APPEAL

E.OWUOR

....

JUDGE OF APPEAL