



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Peter v Masai Carriers Limited (Civil Appeal E044 of 2024)
[2025] KEHC 11179 (KLR) (29 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL E044 OF 2024
HI ONG'UDI, J
JULY 29, 2025**

BETWEEN

MULANDI PETER APPELLANT

AND

MASAI CARRIERS LIMITED RESPONDENT

*(An Appeal against the Judgment and decree of Hon. Eunice Kelly Aomo
(P.M.) delivered on 7th May, 2024 in Naivasha CMCC E308 of 2022)*

JUDGMENT

1. The appellant was the Plaintiff in the Lower Court. He sued the respondent (defendant) seeking damages (general & special), compensation for diminished earning capacity, future medical expenses plus interest & costs). The particulars were that on 19th December, 2021 the respondent was lawfully and carefully travelling as a passenger on board motor vehicle registration No. KBR 172T/ZE 4146 along Gilgil – Naivasha road when the said motor vehicle being recklessly driven lost control and violently hit the flyover. As a result, the appellant was severely injured.
2. The respondent entered appearance and filed a statement of defence denying the appellant's claims as stated in the plaint. The matter proceeded to full hearing with the appellant calling three (3) witnesses while the respondent called one witness. Thereafter a Judgment dismissing the suit was delivered on 7th May, 2024. The appellant being dissatisfied with the Judgment filed this appeal dated 16th May 2024 on the following grounds:
 - i. The learned trial Magistrate erred in law and in fact in finding that the plaintiff had not proved his case on liability against the defendant.
 - ii. The learned trial Magistrate erred in law and in fact by relying only on insufficient evidence thus dismissing the plaintiff's suit.



- iii. The learned trial Magistrate erred in both law and fact on holding that the defendant cannot be held vicariously liable for the acts of their employee and/or driver.
 - iv. The learned trial Magistrate erred in both law and fact in holding that the plaintiff voluntarily and knowingly assumed the risk while travelling as a passenger on the Defendant's motor vehicle registration number KBR 172T/ZE 4146.
 - v. The learned trial Magistrate erred in law and in fact by misdirecting herself by failing to consider all the submissions made before her by counsel for the plaintiff thereby reaching an erroneous finding on liability.
 - vi. In all the circumstances of the case, finding of the learned trial Magistrate on liability was characterized with misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion thus erroneously proceeded to dismiss the suit in Naivasha – CMCC No. E308 of 2022.
 - vii. The learned trial Magistrate erred in law and in fact by applying a very high standard beyond reasonable doubt instead of on balance of probability hence dismissing the plaintiff's case.
3. A summary of the evidence is that the appellant (PW3) was on 28th April, 2022 at the motor vehicle stage when the respondent's vehicle stopped and the driver asked him to board which he did. He was travelling to Naivasha then to Sudan. He produced the following documents: copy of records for motor vehicle registration number KBR 172T/ZE 4146, demand letter dated 4/4/2022, statutory notice dated 4/4/2022, discharge summary from Nakuru level 5 hospital, Xray/ultra sound request form from Nakuru level 5 hospital, medical imaging request from Nakuru level 5 hospital, P3 form duly filled and receipts for the special damages amounting to Ksh.4,100/= (P Exhibit 2 -8 & 10).
 4. It was his evidence that on the way the vehicle was involved in an accident due to the driver's over speeding and loss of control of the vehicle. As a result, he suffered injuries which have affected his work as a driver with Eden Company earning Ksh.45,000/= per month.
 5. In cross examination he said he was not at a motor vehicle stage for vehicles to Sudan. He identified the vehicle he boarded from the photos availed by the respondent. He said he paid the driver and not the respondent. He did not provide the Court with any documents to confirm his employment and earning Ksh.45,000/= per month.
 6. PW1, Dr Cyprian Okoth Okere, said he last examined the appellant on 7th April, 2022. He produced his report (P Exhibit 9). It showed that the appellant sustained a fracture of the left proximal femur and was in crutches. There was an implant in the leg. He assessed the permanent incapacity to be 40%.
 7. PW2 No. 909581 Corporal Anthony Wainaina produced the police abstract (P Exhibit 1). He was not the investigating officer. He did not have any facts on how the accident occurred.
 8. The respondent called one witness – Japheth Nyamweya Maraga. He produced the Company's Memorandum dated 6th March, 2021. The Memo is on the new company policy on movement of trucks (D Exhibit 1). He also produced 2 photos of motor vehicle registration number KBR172T (D Exhibit 2). He confirmed that Wilfred Mutambo was their driver and he had no authority to carry passengers. That there was a notice on both sides of the truck prohibiting the carrying of fare paying passengers. The Notices were put on the vehicle on 6th March, 2021.
 9. He added that the vehicle in issue was from Kampala to Mombasa not Sudan. He averred that the fare allegedly paid by the appellant was never given to the respondent.



10. The appeal was canvassed by way of written submissions.

Appellant's Submissions

11. These were filed by Musili Mbiti Advocates LLP and are dated 15th October, 2024. Counsel has raised two issues for determination. On whether the trial court applied the correct principles of Law and available facts in dismissing the appellant's suit he relied on Section 107(1) of the Evidence Act and referred to the evidence adduced by PW1, PW2 & PW3. He thus submitted that the accident occurred, fare was paid and the appellant suffered injuries. The next issue then is that of the application of the doctrine of "volenti non fit injuria" and that of vicarious liability. Counsel submitted that the issue was dealt with in the case of Paul Muthui Mwavu v Whitestone (K) Ltd [2015] eKLR where the Court of Appeal held as follows:

"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."

12. On vicarious liability counsel submitted that the trial court erred by holding that the respondent was not vicariously liable. That it was not established where the driver was going. Secondly that DW1 did not testify of any authorization to testify on behalf of the respondent. Reference was made to the case of:

Muwonge v Attorney General of Uganda [1967] E.A. 17.

"The test of a master's liability for the acts of his servant does not depend upon whether or not the servant honestly believes that he is executing his master's orders. If that were so the master would never be liable for the criminal act of the servant at any rate when the criminal act is towards benefiting the master himself. I think it is dangerous to lay down any general test as to the circumstances in which it can be said that a person is acting within the course of employment. Each case must depend on its own facts. All that one can say, as I understand the law, is that even if the servant is acting deliberately, wantonly, negligently or criminally, even if he is acting for his own benefit, never the less if what he did was merely a manner of carrying out what he was employed to carry out then his acts are acts for which his master is liable."

13. It was counsel's submission that the appellant proved his case on a balance of probabilities as expected in civil cases. That all the evidence adduced showed that the respondent was wholly to blame for the accident. Reliance was placed on the case of William Kabogo Gitau v George Thuo & 2 others [2010] 1 KLR 526 where Kimaru J (as he then was) stated this;

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."



14. On general damages counsel submitted that the appellant produced all necessary documents to confirm the injuries suffered and the same were not dislodged. Based on the following cases he proposed an award of Ksh.1,700,000/= as opposed to the Ksh.600,000/= proposed by the trial Court. The cases are;
- i. George Mwaniki V Ibero Ltd & another 2014 eKLR where an award of Ksh.2,000,000/= was made by H.P.G. Waweru J.
 - ii. Mashra Ltd V Omar Mwakoro Makenge [2018] Civil Appeal No. 9 of 2017, where an award of Ksh.1,200,000/= was made by L. Kimaru J (as he then was).
 - iii. Mt Longonot Medical Services Limited & another V Andaso Kitonyo Kinyenze [2017] eKLR where an award of Ksh.1,000,000/= was made by C. Meoli J.

He thus urged the Court to give the appellant a fair and reasonable compensation.

Respondent's Submissions

15. The same were filed by Muchiri & Co. Advocates and are dated 18th November, 2024. Counsel gave a brief background of the facts. On the applicable principle on appeal he cited the case of Mbogo V Shah [1968] EA.
16. It was counsel's contention that the issue of quantum of damages raised by the appellant was never raised as a ground in the appeal and this court should not deal with it.
17. On whether the trial court erred in dismissing the suit counsel submitted that the appellant in his evidence confirmed to the court that it was clearly written on the body of the vehicle that the driver was not allowed to carry unauthorized passengers. Secondly that the beneficiary of the fare he paid was the driver and not the respondent. He further referred to the evidence of the respondent's witness (DW1) where he clearly explained what the vehicle was designed to carry. That the trip to Sudan if any was not authorized as the driver was travelling from Kampala to Mombasa where their offices are based.
18. On the test of vicarious liability counsel referred to the Court of Appeal decision in Tabitha Ndubi Kinyua v Francis Mutua Mbuvi & another [2014] eKLR.

Further reference was made to the case of Martha Shighdai v Kenya Power and Lighting Company Ltd & another [1988] KLR 682 where it was held:

“...an employer cannot be held liable for injuries sustained by persons lifted by its driver unless their presence in the vehicle were reasonably foreseeable or their injuries occurred in the course of the driver's employment”

Also see Conway v George Wimpy & Co. Ltd [1951] 1 AU ER 363.

19. Still on quantum of damages counsel referred to the case of Galaxy Paints Company Limited v Falcon Guards Ltd C.O.A No. 219 of 1998 where the Court of Appeal stated that:
- “Issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial Court by dint of the aforesaid rules may only pronounce Judgment on the issues arising from the pleadings or such issues as the parties have framed for the Court's determination.”
20. He further cited Order 42 (2) of the Civil Procedure Rules, case of Independent Electoral and Boundaries commission & another v Stephen Mule & 3 others [2014] eKLR in support of his argument that parties are bound by their pleadings.



21. However with what he called abundance of caution he still submitted on the said issue of damages arguing that the proposed award by the trial Court was too generous. He proposed an award of Kshs350,000/= upon relying on the following cases among others.
- i. Bhachu Industries Limited v Peter Kariuki Mutura [2015] eKLR where an award of Ksh.300,000/= was made for a fracture on the femur among other injuries.
 - ii. Ibrahim Kalema Lewa v Estelle Company Limited [2016] eKLR where an award of Ksh.300,000/= was made for an intertrochanteric fracture of the left femur.
 - iii. Kenyatta University v Isaac Karumba Nyuthe [2014] eKLR where an award of Ksh.350,000/= was made for a fracture of the femur and other injuries. He thus urged the court to dismiss the appeal with costs.

Analysis & Determination

22. This is a first appeal and this Court is guided on how to deal with it by the principle set out in the case of *Selle & another (Supra)* which stated:

“A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand”

23. Upon considering the record of appeal, the grounds of appeal, submissions by both parties, cited authorities and the Law, I find the main issue for determination to be whether the trial Court erred in dismissing the appellant’s suit.

From the evidence on record there is no dispute to the following;

That the motor vehicle registration No. KBR 172T/ZE 4146 was on 19th December, 2021 involved in an accident along Gilgil – Naivasha road. The said vehicle belongs to the respondent and was driven by its employee. That there are clear Notices on the front and side parts of the vehicle forbidding the carriage of unauthorized passengers on the said vehicle. The appellant was carried as a passenger on the said vehicle, against the respondent’s instructions. The appellant was in the vehicle at the time of occurrence of the accident. The appellant paid the driver fare for carrying him in the vehicle. The money (cash) went to the driver and not the respondent.

24. It is therefore the respondent’s case that when the driver carried the appellant he was going against the employer’s clear instructions as enumerated as the Company’s Policy Memorandum (D Exhibit 1). On the other hand, the appellant argues that the respondent was vicariously liable, for its driver’s actions. What then is vicarious liability? It is a legal principle that makes one party responsible for the actions of another, even if the first party didn’t directly cause the harm.

It is essentially a form of secondary liability, where a person or entity is held liable for the wrongful acts of another due to their relationship such as employer – employee or principal agent.

25. In the present case the driver whose name was given as Wilfred Mutambo was not sued by appellant nor brought on board by the respondent as a 3rd party. The evidence by DW1 is that the driver had clear instructions not to carry unauthorized passengers – see D Exhibit 1.
26. In the case of *Shighadi v KP & LC & another* [1988] KLR 682 which is similar to this one, *Bosire J* (retired) held as follows;



- i. The owner of a vehicle is liable not only for the negligence of a driver, if that driver is his servant acting in the course of his employment, but also if the driver is his agent with the owner's consent driving the car on the owner's business or for the owners purposes (emphasis mine).
 - ii. The first defendant did not owe a duty of care to persons who like the plaintiff were carried in its vehicle as unauthorized passengers (emphasis added).
27. Similarly, in *Khayigila v Gigi & Co. Ltd & another* [1987] KLR 76 (C.O.A Mombasa) held;
 - i. In order to fix liability on the owner of a car for the negligence of its driver it was necessary to show either that the driver was the owners servant, or that at the material time the driver was acting on the owners behalf as his agent.
 - ii. At the time of the accident the 2nd respondent was not using the car at the 1st respondent's request but he was using it furtively against its instructions and therefore no liability attached to the 1st respondent on the well-known principle of respondent superior.
28. A perusal of the Judgment of Hon. Eunice Kelly Aomo reveals a deep reasoning on this matter and reference to decided cases especially at page 62 – 63 of the record of appeal.
29. From the evidence of the appellant and DW1 it is clear that whatever brought the appellant aboard the respondent's vehicle was an unauthorized arrangement between the appellant and the driver. The appellant knew he was dealing with the driver and not the respondent at that level. He even stated that the fare he paid in cash was for the driver and not the respondent. The Notices were clearly on the vehicle and he saw them.
30. I therefore agree with the trial court's finding that the appellant was an unauthorized passenger and so the respondent cannot be responsible for the injuries suffered.
31. The upshot is that the appeal lacks merit and is hereby dismissed with costs.
32. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF JULY, 2025 IN OPEN COURT AT NAKURU.

H.I. ONG'UDI

JUDGE

